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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE 642 OF 2017



**DISCUSSION
DOCUMENT:**
INQUIRY INTO
SUBSCRIPTION TELEVISION
BROADCASTING SERVICES

INVITATION FOR WRITTEN REPRESENTATIONS

In terms of Section 4B of the Independent Communications Authority of South Africa Act (Act No 13 of 2000), interested persons are hereby invited to submit their written representations on the Discussion Document regarding the Inquiry into Subscription Television Broadcasting Services published herewith by the Authority. A copy of the Discussion Document will be made available on the Authority's website at <http://www.icasa.org.za> and in the Authority's Library at No. 164 Katherine Street, Pinmill Farm, (Ground Floor at Block D), Sandton between 09h00 and 16h00, Monday to Friday.

Written representations with regard to the Discussion Document must be submitted to the Authority by no later than **16h00 on 31 October 2017** by post, hand delivery or electronically (in Microsoft Word) and marked specifically for attention: **Refilwe Ramatlo**. Delivery address: **Block A, Pinmill Farm, 164 Katherine Street, Sandton**. Where possible, written representations should also be e-mailed to: subscriptioninquiry@icasa.org.za. Enquiries should be directed to **011 566-3251/3125; between 10h00 and 16h00, Monday to Friday**.

Written representation(s) received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library.

At the request of any person who submits written representations pursuant to this notice, the Authority may determine that such representations or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be allowed to withdraw such representations or portion(s) thereof.



.....
RUBBEN MOHLALOGA
ACTING CHAIRPERSON

DATE: 24/08/2017

List of abbreviations

BT	British Telecommunications
CPE	Customer Premises Equipment
DEOD	Digital Entertainment on Demand
DSAT	Digital Satellite
DTH	Direct To Home
DTT	Digital Terrestrial Transmission
DVB-H	Digital Video Broadcasting- Handheld
EC	European Commission
ECA	Electronic Communications Act
EPG	Electronic Programme Guide
EU	European Union
HHI	Herfindhal-Hirschman Index
IBA	Independent Broadcasting Authority
ICASA	Independent Communication Authority of South Africa
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
SABC	South African Broadcasting Corporation SOC Limited
SACF	South African Communications Forum
SSNIP	Small but Significant Non Transitory Increase in Prices test
TNT	Television Numerique Terrestre
UEFA	Union of European Football Associations

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1. EXECUTIVE SUMMARY

1.1 Introduction

- 1.1.1 This Discussion Document is being published in terms of section 4B of the ICASA Act, read with section 67(4) of the ECA, for the purposes of an inquiry into subscription television broadcasting services in South Africa.
- 1.1.2 On 24 June 2016, the Authority announced that it would conduct an inquiry into the subscription television broadcasting sector. The objective of the inquiry is ultimately to determine whether there are competition issues in the sector, which require action to be taken by the Authority through the imposition of pro-competitive conditions on relevant licensees. 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, promote competition in the ICT sector. Further, 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. Competition matters are specifically regulated under Chapter 10 of the ECA. In terms of section 67(4) of the ECA, the Authority must conduct an inquiry prior to prescribing regulations that define markets and market segments, determine if there is ineffective competition in such markets, and identify licensees with significant market power upon whom appropriate and sufficient pro-competitive licence conditions may be imposed to deal with any identified market failure.
- 1.1.3 In fulfilling its mandate of promoting competition within the ICT sector, the Authority has been collecting evidence, in the form of a questionnaire which stakeholders were invited to complete, conducting one-on-one meetings with certain stakeholders, benchmarking exercises and desktop research, and has been carrying out analysis to gain a preliminary understanding of the operation of subscription television broadcasting services in South Africa and the outcome for consumers.

- 1.1.4 The Authority is publishing this Discussion Document in order to solicit views on its initial analysis and on what it implies for the operation of the subscription television broadcasting sector in South Africa. To the extent necessary, the Authority also seeks, to obtain further information that will assist it in defining the relevant markets and market segments, determining the effectiveness of competition in the defined markets or market segments, identifying licensees with significant market power, and, if needs be, proposing pro-competitive conditions that may be imposed on such licensee/s.
- 1.1.5 The Authority has not yet reached a conclusion on the existence of any competition problems in the context of the subscription television broadcasting sector in South Africa. The Authority will use the responses to this Discussion Document to determine what further steps, if any, should be taken.

1.2 The South African subscription broadcasting sector

- 1.2.1 The broadcasting sector in general has undergone various changes and tremendous growth in terms of the number of licensed operators, revenues and viewers, since the publication of the White Paper on Broadcasting (in 1998) and the commencement of the Broadcasting Act (in 1999) and the ECA (in 2005).
- 1.2.2 In South Africa, there are three subscription television broadcasting service providers:
- 1.2.2.1.1 MultiChoice, which provides: (1) a satellite DTH subscription broadcasting service, which is its DStv service; and (2) a terrestrial subscription broadcasting service, which is its M-Net service.
 - 1.2.2.1.2 StarSat, which provides a satellite direct-to-home subscription broadcasting service; and
 - 1.2.2.1.3 Deukom, which provides a satellite direct-to-home subscription broadcasting service.

- 1.2.3 Broadcasting services in general are being impacted by the advent of the internet and technological advancement.
- 1.2.4 At this stage, there are no DTT providers of subscription television services in South Africa given that the digital migration process is not yet underway. In due course and subsequent to analogue switch-off, the M-Net subscription channel, together with any digital incentive channels M-Net is authorised to provide, will be provided on DTT.
- 1.2.5 In its Position Paper on IPTV and VOD services the Authority regards IPTV services as broadcasting services that require an individual or class broadcasting service licence. Whilst no regulations were prescribed for IPTV services the Authority is not aware of any IPTV subscription television broadcasting services that are currently being provided, where television channels are distributed over an Internet or broadband network.
- 1.2.6 With respect to mobile services, in 2010 the Authority issued spectrum licences to e.tv and Multichoice and for the provision of mobile TV services on the DVB-H technology. Mobile TV Consortium was given trial licences to provide mobile TV services on the DBM technology.
- 1.2.7 Access to broadband and high data costs remain a crucial deterrent to growth of mobile television.
- 1.2.8 OTT services and other premium content is accessible through mobile applications although they are generally accessed by consumers with premium subscriptions.
- 1.2.9 In South Africa subscription television services are primarily accessed on a DTH basis via satellite.
- 1.2.10 The free-to-air providers are the SABC, the public broadcaster which broadcasts three channels, and e.tv which is currently the only commercial free-to-air television broadcasting licensee. These analogue services, like M-Net, will be migrated to DTT pursuant to the digital migration process. The Authority is currently conducting a process to

license additional free-to-air television broadcasters to provide DTT services.

- 1.2.11 Several providers of video on demand services have launched services in South Africa in recent years. These include: Showmax (provided by MultiChoice, which also provides the DStv subscription service), Netflix, Digital Entertainment on Demand (DEOD) and others. Unlike subscription television broadcasting licensees, providers of video on demand services are not licensed in terms of the ECA and are not directly regulated by the Authority.
- 1.2.12 Despite growth in the television sector, and although the Authority has granted additional licences to provide subscription television broadcasting services, these additional licensees have had limited success as yet. The Authority has also received numerous requests to examine the subscription broadcasting sector in relation to its impact on free-to-air broadcasters. Free-to-air channels are accordingly competing for a smaller proportion of total revenue than in other benchmark countries. This may suggest that free-to-air television is less likely to offer a viable alternative to subscription services and to act as a significant constraint on subscription television services in this market.
- 1.2.13 Forthcoming developments which are likely to impact on the television broadcasting sector include:
 - 1.2.13.1 the digital migration process which is expected to increase the range of content and services that are delivered to users on both a free-to-air and subscription basis; and
 - 1.2.13.2 increasing availability of new platforms for the delivery of television content.
- 1.2.14 The subscription tv market remains highly concentrated. Contestability in the market appears to be limited by high barriers to entry, brand loyalty and high customer switching costs, among others.
- 1.2.15 Where there is lack of competition the market is likely to exhibit outcomes such as limited choice, high prices and low quality products.

1.3 Competition in the context of subscription television

1.3.1 The first subscription television broadcasting service in South Africa was launched by Mnet in 1986. Multichoice remained the only subscription television service provider until the launch of TopTV by On-Digital Media (ODM) in 2010 and Deukom TV by Deukom (Pty) Ltd (Deukom) in 2012.

1.3.2 Subscription tv markets are generally driven by access to premium content on an exclusive basis. Whilst exclusive contracts may be necessary in certain instances, they nevertheless may create other challenges in the market such as creating barriers to entry and driving up the price of premium content as well as reinforcing the first mover advantage. This requires a delicate balance to be struck by the Authority when addressing these market outcomes.

1.3.3 The Authority's preliminary identification and definition of the relevant markets that correspond with the value chain of subscription television broadcasting services is as follows.

1.3.4 At the wholesale level for content provision, the Authority proposes to define the following markets:

- (a) a market for the acquisition of first- window subscription television broadcasting premium movies for retail distribution in South Africa;
- (b) a market for the acquisition of premium live soccer matches for retail television distribution in South Africa;
- (c) a market for the acquisition of premium live rugby matches for retail television distribution in South Africa;
- (d) a market for the acquisition of premium live cricket matches for retail television distribution in South Africa;
- (e) a market for the acquisition of other premium content for retail television distribution in South Africa; and
- (f) a market for the acquisition of non-premium content for retail television distribution in South Africa.

1.3.5 At the wholesale level for channel provision, the Authority proposes to define the following markets:

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

1.3.6 At the retail level, the Authority proposes to define the following markets:

- (a) a market for the retail distribution of premium subscription-television channels in South Africa; and
- (b) a market for the retail distribution of basic-tier subscription-television channels in South Africa.

1.3.7 At the technical services level, the Authority proposes to define the following market:

- (a) a market for the wholesale supply of technical services required for operating a subscription-television broadcasting service in South Africa.

1.3.8 In order to determine the effectiveness of competition in these proposed markets, the Authority has considered the provisions in the ECA (including section 67(4A) of the ECA) as well as approaches used in other sectors in South Africa and in other jurisdictions. Having performed a preliminary assessment on the information available, the Authority's initial view is that there is possibly ineffective competition in the markets that have been defined.

1.3.9 The markets are characterised by high barriers to entry in the form of high capital requirements both at start up and during operations at the upstream level. At the retail level consumers face high switching costs coupled with brand loyalty. This requires new entrants to devote a lot of resources to advertising and possibly subsidising consumers in order to gain market share.

1.3.10 With regard to the identification of licensees with significant market power, the Authority considered the factors set out in section 67(5) of the ECA and has

conducted a preliminary analysis of dominance, the control of essential facilities and vertical integration.

1.3.11 In terms of section 67(4) of the ECA, and following this inquiry, the Authority must impose appropriate and sufficient pro-competitive licence conditions on licensees that have been found to possess significant market power in defined markets and market segments where there is ineffective competition. The Authority has considered remedies that have been applied in other jurisdictions and, in the context of this Discussion Document, seeks stakeholders' views on the possible application of these remedies in the South African context. Such remedies include: shortening the duration of long term contracts; imposing rights splitting and rights divestiture; imposing wholesale-must-offer; and requiring set-top box interoperability.

1.4 Submission of comments in response to the Discussion Document

1.4.1 All interested parties are invited to submit written representations on the Authority's initial analysis and on what it implies for the operation of subscription television broadcasting services in South Africa, and to indicate in their written representations whether an opportunity is required to make oral representations to the Authority. The responses that the Authority receives from stakeholders will enable the Authority to make various findings relating to, amongst other things, the relevant market and market segment definitions, whether there is effective competition in those relevant markets and market segments, whether any licensees have significant market power in those markets and market segments where there is ineffective competition, and whether appropriate pro-competitive licence conditions should be imposed on those licensees having significant market power, if any, to remedy the market failure. The Authority's findings will be set out in a Findings Document.

1.4.2 It is important to note that the Authority has not yet reached any final conclusions or views on the definition of any markets or market

segments, whether there is effective competition in those markets or market segments, whether any licensee have significant market power in those markets and market segments, or whether pro-competitive licence conditions should be imposed on any licensee. The Authority will use the responses to the Discussion Document to consider the applicable issues and to decide whether there are issues requiring further action, which may involve the making of regulations in due course.

2. INTRODUCTION

2.1 Legal framework within which this inquiry is conducted

- 2.1.1 The Independent Communications Authority of South Africa (referred to as "ICASA" or "the Authority") has given 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 Act, and commenced an inquiry with preliminary information gathering on a voluntary basis with the publication of a questionnaire for interested stakeholders to complete.
- 2.1.2 With the publication of this Discussion Document, is in terms of section 4B of the ICASA Act, read with section 4C of the ICASA Act and section 67(4) of the ECA. 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.
- 2.1.3 ICASA is an independent regulatory authority, which has been established in terms of the ICASA Act. Section 4 of the ICASA Act sets out the functions of the Authority. 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.."*

- 2.1.4 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. 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 review of the markets and market segments; and (6) provide for monitoring and investigation of anti-competitive behavior 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, the purpose of this Discussion Document is to consult with all interested stakeholders in order to obtain stakeholders' views on the Authority's preliminary views and analysis, and to obtain any further information that will assist the Authority in making findings, which may result in the Authority making regulations in terms of section 67(4) of the ECA, on the following –

- definitions of the relevant markets and market segments in the subscription television broadcasting services sector;
- an assessment of effective competition in the defined market/s or market segments;
- an identification of licensees with significant market power in markets and market segments where there is ineffective competition; and
- the possible imposition of appropriate pro-competitive licence conditions that may be imposed on licensees with significant market power.

2.1.14 The outcome of this Discussion Document, following a period of public consultations, will be a Findings Document that expresses the Authority's view and position on the issues, and the Authority's initial views and analysis, as contained in this Discussion Document. Should it be necessary or warranted, flowing from the 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.

2.1.15 After taking all submissions on the draft regulations into account, the Authority may then publish final regulations under section 67(4) of the ECA, read with section 4 of the ECA, in which (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 behavior in the relevant markets and market segments.

2.2 Process

2.2.1 In terms of its mandate to promote competition in the ICT sector and to ensure fair competition in the broadcasting sector, 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"). 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 licensees have commenced operations. One of the licensees faced sustainability challenges and had to go through a business rescue 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.

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

2.2.3.1 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.

2.2.3.2 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.

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

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

2.2.4 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 only a guide and is 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. The purpose of the Guideline is to provide clarity to

stakeholders and licensees regarding the conduct of market reviews¹, 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.

2.2.5 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. 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).

2.2.6 On 13 July 2016, and in line with this process, a questionnaire was duly published on the Authority's website ("Questionnaire"). 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") providers. A guideline for completing the Questionnaire was also published by the Authority on its website on 13 July 2016. 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.

¹ Market reviews in this context refer to market inquiries and not a market review in terms of section 67(4)(e) of the ECA.

- 2.2.7 On 25 July 2016, the Authority published a media release noting that the submission deadline for queries on the Questionnaire was 27 July 2016 (and not 22 July 2016 as indicated in the Notice).
- 2.2.8 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 Proprietary Limited ("Siyaya") (which submitted responses on 22 July 2016 and on 27 July 2016), MultiChoice South Africa (Pty) Ltd ("MultiChoice"), and e.tv Proprietary Limited ("e.tv"). .
- 2.2.9 On 7 September 2016, and in response to these clarification submissions, the Authority duly published an erratum notice, which also clarified the process for the inquiry, in the *Government Gazette* (the "Erratum Notice"). The purpose of the Erratum Notice was to amend the content of the Notice (in light of various clarification submissions submitted by stakeholders) and to clarify the process to be adopted by the Authority in conducting the inquiry into subscription television broadcasting services. In terms of the Erratum Notice –
- 2.2.9.1 Paragraph 1.3 of the Notice was substituted so as to clarify and expand on the purpose of the inquiry, as follows:
- 2.2.9.2 "The Authority has the responsibility to ensure that all communications and broadcasting service markets 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.
- 2.2.9.3 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."
- 2.2.9.4 The reference to section 4C of the ICASA Act in paragraph 1.4.1 of the Notice was deleted.

- 2.2.9.5 The submission deadline for responses to the Questionnaire was extended to 15 September 2016 (which effectively allowed for a period of at least 45 days for interested persons to submit responses to the Questionnaire from the date of publication of the Notice).
- 2.2.9.6 The Authority noted that the process as set out for the Inquiry was “not a section 4C(1) of the ICASA Act process” (as had been indicated in the Notice), noting further that the process outlined in section 4C(1) of the ICASA Act refers to a process to be determined by the presiding officer at an inquiry scheduled for a specific date.
- 2.2.10 On 7 September 2016, the Authority also issued an amendment to the Questionnaire (by clarifying question 2.2 of Section E of the Questionnaire), and published the final FAQs document which informed the Erratum Notice, on its website. An overview of the FAQs is as follows –
- 2.2.10.1 In response to concerns raised regarding the period of consultation for the Questionnaire, the Authority noted in the final FAQs that it had given stakeholders a shorter period for responses to the Questionnaire as the Questionnaire was intended to form part of the data gathering process preceding the development of a Discussion Document (although stakeholders were, in effect, afforded a 45 day time period within which to respond to the Questionnaire). The Authority noted that formal responses to the Discussion Document would be in accordance with the “legislated timeframes”.
- 2.2.10.2 In response to concerns regarding the Authority not having yet formulated a market definition, the Authority noted that the market definition process would follow the data gathering and analysis process (as the information collected would determine which markets and market segments are relevant), and only finally determined through the Findings Document.
- 2.2.10.3 In response to queries regarding the inclusion of OTT service providers in the scope of the Questionnaire, the Authority noted that the rationale for including OTT service providers is to “determine the

industry's view of the impact of these services despite their limited capability".

2.2.10.4 In response to queries as to whether the Questionnaire would be the only substantial data and information gathering part of the proposed process, or whether further questionnaires would be issued, the Authority noted that the Questionnaire marks the inception of the Authority's information gathering exercise, with other methods including one-on-one meetings and industry research.

2.2.11 For the avoidance of doubt, the Authority notes that the term 'pay-tv market' in the Questionnaire was used in its broad general sense, to refer to subscription television services, and not in its narrow competition policy sense, in which case the term 'relevant product market' would have been used. As such, the Authority would like to clarify that the use of the term 'pay-tv market' in the Questionnaire should not be construed to mean a defined relevant product market. The process of starting to define the relevant market and market segment, and to seek stakeholders' views on the Authority's preliminary analysis of relevant market and market segment definitions, is one of the main purposes of this Discussion Document, among other things.

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

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

2.2.13 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.

- 2.2.14 One-on-one meetings were conducted with the SABC, Telkom and e.tv.
- 2.2.15 The Authority duly considered each of the 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, in developing its preliminary views and analysis, as set out in this Discussion Document.
- 2.2.16 The Discussion Document sets out the Authority's preliminary understanding, analysis and views of subscription television broadcasting services in South Africa, including in respect of the definitions of markets and market segments, the effectiveness of competition in the relevant markets, a determination of licensees with significant market power, and possible appropriate pro-competitive licence conditions that may be imposed. It also provides an explanatory and contextual discussion to the relevant issues in respect of subscription television broadcasting services in South Africa.
- 2.2.17 The Discussion Document seeks stakeholders' views on this initial analysis, and on the implications for the operation of subscription television broadcasting services in South Africa. The responses that the Authority receives from stakeholders will enable the Authority to make various findings relating to, amongst other things, the relevant market and market segment definitions, whether there is effective competition in those relevant markets and market segments, whether any licensees have significant market power in those markets and market segments where there is ineffective competition, and whether appropriate pro-competitive licence conditions should be imposed on those licensees having significant market power, if any, to remedy the market failure. . The Authority's findings will be set out in a Findings Document.

2.2.18 Please note that some of the questions posed in the questionnaire may be repeated in this Discussion Document, or asked in a slightly different manner. The Authority hopes to receive an increased number of responses to the Discussion Document to assist it in properly assessing the relevant issue.

2.2.19 The Authority has not yet reached any final conclusions or views on the definition of any markets or market segments, whether there is effective competition in those markets or market segments, whether any licensee have significant market power in those markets and market segments, or whether pro-competitive licence conditions should be imposed on any licensee. The Authority will use the responses to the Discussion Document to consider the applicable issues and to decide whether there are issues requiring further action, which may involve the making of regulations.

2.3 Confidentiality

2.3.1 Paragraph 1.5 of the Notice provided for confidentiality requests in respect of the stakeholders' submissions in response to the Questionnaire, in terms of section 4D of the ICASA Act.

2.3.2 The Authority received requests for confidentiality from four stakeholders, namely Multichoice, e.tv, SACF and Siyaya, in respect of certain information contained in their respective responses to the Questionnaire. 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 make a determination as to whether or not confidentiality will be granted within 14 days of receiving the information 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.

- 2.3.3 The Authority considered all requests for confidentiality that were made with the submission of the responses to the Questionnaire in line with these requirements and notified each stakeholder who had made such a request of its decision. Where such confidential information was used to formulate an initial view of the Authority, the relevant data was excluded from the Discussion Document, but the insight gained from its analysis has been expressed.

2.4 Concurrent jurisdiction

- 2.4.1 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 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, among other things.
- 2.4.2 The Competition Commission (the "Commission") regulates competition in the South African economy in general and is responsible for investigating, controlling and evaluating restrictive practices, abuses of dominant position, exemptions and mergers.
- 2.4.3 Areas of overlap in responsibilities between the Authority and the Commission are managed through specific sections in the Competition Act 89 of 1998 ("Competition Act"), the ECA and the ICASA Act. The Commission and ICASA 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,

while ICASA will deal with contraventions of electronic communications services and broadcasting services licence conditions and legislation.

2.4.4 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. 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 behavior in the relevant market and market segments.

2.4.5 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 Competition 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 Competition Commission may ask for and receive from the Authority, assistance or advice on relevant proceedings of the Competition Commission.)

2.4.6 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."

2.4.7 The Authority has considered the above sections and is aware of the on-going investigation by the Commission into allegations of abuse of dominance in the subscription television broadcasting sector. The Authority notes that this inquiry is a distinct process from the investigation into specific conduct being 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. 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.

2.4.8 The Authority also signed a Memorandum of Agreement² with the National Consumer Commission (NCC) to coordinate the exercise of jurisdiction on consumer protection matters in the electronic

² http://www.gov.za/sites/www.gov.za/files/38982_gon596.pdf

communications and broadcasting sectors. The Authority will also consult with the NCC as and when necessary during the course of the inquiry.

3. THE SCOPE AND PURPOSE OF THE INQUIRY

3.1 Overview

3.1.1 As stated previously, 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:

"1.2 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 service markets 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 notes 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 appreciates 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 that are required to provide to the Authority.
- 3.1.4 Following from the information gathering exercise and preliminary analysis that the Authority has undertaken, in this Discussion Document the Authority has set out further details of the scope of the inquiry, expanded on the purpose of the inquiry, and set out the revised expected timelines for the inquiry.

3.2 Scope and purpose of the inquiry

- 3.2.1 This inquiry will examine the subscription television broadcasting sector, which encompasses a number of interrelated markets. In this Discussion Document, “subscription television broadcasting services” refers to a broadcasting service provided to a subscriber upon the payment of a fee (as defined in section 1 of the ECA). Subscription television broadcasting services are distinguishable from other commercial television broadcasting services, such as free-to-air television broadcasting services, and from public television broadcasting services and community television broadcasting services.
- 3.2.2 Due to the interrelated aspects of the various markets that comprise the value chain of subscription television broadcasting services, competition in one market will affect competition in another market. This implies that the nature and dynamics of competition and associated matters can only be properly understood by evaluating the dynamics within and relationship between the various markets that comprise the

value chain of subscription television broadcasting services in South Africa. The achievement of the inquiry's objectives thus requires the consideration of a range of markets within the value chain of subscription television broadcasting services, including at the upstream level, the wholesale level, the downstream level, and the technical services level. The Authority's preliminary identification of these markets, and the use of the term "market", in this Discussion Document must be viewed as a preliminary analysis that will be refined during the course of the inquiry as more information becomes available.

3.2.3 The rationale for the inquiry into subscription television broadcasting services has been set out by the Authority previously, namely that 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 services licensees have commenced operations. The Authority has also noted that two of these licensees have faced sustainability challenges while the others have not yet launched services. 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. However, as noted previously in this document, the Authority has not yet reached any conclusions as to whether there are any competition concerns in the identified markets.

3.2.4 The inquiry into subscription television broadcasting services will evaluate 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 new subscribers, and will identify competitive dynamics at play (if any). 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 will provide 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. The various sections of this Discussion Document contain an overview of the Authority's initial observations in respect of subscription television broadcasting services in South Africa. Please note that all statements contained in this Discussion Document are preliminary views only and are subject to review during the inquiry.

3.2.5 As discussed in section 4 below, 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 is 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; and (4) investigate possible interventions in the context of subscription television broadcasting services. For the purposes of section 67(4) of the ECA, this will further enable the Authority to:

- Define 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.

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

3.2.7 The Authority has delineated the current scope of the inquiry as best it can on the basis of the information available to it at this stage, and the questions contained in this Discussion Document should be understood within this context. The preliminary statements in the Discussion Document, and the questions posed in the Discussion Document, in no way imply that any conclusions have been reached; all statements will

be evaluated and tested during the course of the inquiry and will be further informed by the submissions of interested stakeholders.

4. OVERVIEW OF THE SOUTH AFRICAN TELEVISION BROADCASTING SERVICES SECTOR

4.1 Overview

4.1.1 In this section, the Authority provides an overview of the broader television broadcasting sector in South Africa, in order to contextualize the discussion on subscription television broadcasting services. This section covers the policy, legislative and regulatory framework governing the television broadcasting services sector in general, as well as in respect of subscription television broadcasting services. This is followed by an overview of the television broadcasting services sector dynamics and the structure of the television broadcasting services sector.

4.1.2 This section addresses the following:

- Policy, legislative and regulatory framework overview;
- Market overview; and
- Future developments.

4.2 Policy, legislative and regulatory framework overview

4.2.1 Section 192 of the Constitution of the Republic of South Africa, 1996 provides that "National legislation must establish an independent broadcasting authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society".

4.2.2 In 1995, the Independent Broadcasting Authority ("IBA") (the Authority's predecessor) conducted a wide-ranging policy inquiry with regard to various aspects of the regulatory regime in respect of the

broadcasting services sector. Following the inquiry, the IBA drafted a policy document that has colloquially become known as the Triple Inquiry Report. The Triple Inquiry Report focused on, among other things, (1) the role and viability of the public broadcaster, (2) cross-media rules prohibiting cross ownership of broadcasting and public interests, and (3) South African content rules for radio and television. The Triple Inquiry Report was prepared in the context of the IBA Act in terms of which broadcasting services in South Africa were regulated at the time.

4.2.3 Following the Triple Inquiry Report, the Broadcasting Policy Green Paper³ was published as the first part of a consultative process for the formulation of a policy framework for broadcasting.

4.2.4 In 1998, the White Paper on Broadcasting was adopted as the official government policy on broadcasting. The White Paper stated that competition should be allowed in all areas of private radio and television operations and that the licensing conditions should promote competition on an equal footing and remove obstacles to entry.

4.2.5 The Broadcasting Act came into effect on 30 June 1999. The object of the Broadcasting Act, as set out in section 2, is to establish and develop a broadcasting policy in South Africa in the public interest in order to, among other things:

- contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society;
- safeguard, enrich and strengthen the cultural, political, social and economic fabric South Africa;
- encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;
- ensure plurality of news, views and information and provide a wide range of services and specifically for the programming needs in respect of children, women, the youth and the disabled;

³ Broadcasting Policy Green Paper. Available at <http://www.gov.za/documents/broadcasting-policy-green-paper>

- encourage investment in the broadcasting sector;
- ensure fair competition in the broadcasting sector; and
- provide for a three tier system of public, commercial and community broadcasting services.

4.2.6 On 23 April 2004, the Authority published a Discussion Document on the Inquiry Into Subscription Broadcasting ("Subscription Broadcasting Services Discussion Document"). The purpose of the Subscription Broadcasting Services Discussion Document was to generate comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa. The Authority invited interested parties, stakeholders and the public to respond to the issues and questions raised in the Subscription Broadcasting Services Discussion Document by 14 June 2004. The Authority subsequently published its Position Paper on Subscription Broadcasting Services ("Subscription Broadcasting Services Position Paper") which set out the policy and regulatory framework in respect of subscription broadcasting in South Africa, on 1 June 2005.

4.2.7 In the Subscription Broadcasting Services Position Paper, the Authority noted that the ability of subscription broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services.⁴ The Authority noted further that for subscription broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers and that some forms of exclusive arrangements in the broadcasting industry are, therefore, both efficient and desirable. Against this background, the Authority stated in the Subscription Broadcasting Services Position Paper that it had decided not to regulate the exclusive acquisition of programming (other than national sporting events) or programme packaging/tiering, noting that competition issues that arise may be dealt with by way of general competition law.

4.2.8 On 19 July 2006, the ECA came into force. The ECA repealed and replaced the IBA Act and certain provisions of the Broadcasting Act.

⁴ Subscription Broadcasting Services Position Paper, p 72.

Many of the provisions of the IBA Act were re-enacted in Chapter 9 of the ECA. The primary object of the ECA, as stated in section 2, 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, and (2) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services.

4.2.9 In a similar manner to the IBA Act, the ECA provides for three broad categories of broadcasting services: public, commercial and community. For the purposes of the ECA, commercial broadcasting is defined as “a broadcasting service operating for profit or as part of a profit entity but excludes any public broadcasting service”. In terms of the ECA, the broadcasting services operated by the South African Broadcasting Corporation SOC Limited (“SABC”) are public broadcasting services. A community broadcasting service is defined in the ECA to mean a broadcasting service which (1) is fully controlled by a non-profit entity and carried on for non-profit purposes, (2) serves a particular community, (3) encourages members of the community served by it or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service, and (4) may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the above.

4.2.10 Following the publication of the Subscription Broadcasting Services Position Paper and prior to the commencement of the ECA, the Authority commenced a licensing process in respect of commercial satellite and cable subscription broadcasting services. Following this licensing process, the Authority issued licences to provide subscription broadcasting services, in November 2007, to the following five licensees: MultiChoice Africa (Pty) Ltd, On Digital Media (Pty) Ltd, e-SAT (Pty) Ltd, Telkom Media (Pty) Ltd (now Super 5 Media (Pty) Ltd), and Walking on Water Television (Pty) Ltd.

4.2.11 The Authority initiated a further licensing process in respect of individual commercial subscription broadcasting service licences in terms of an invitation to apply published in the *Government Gazette* on 2 February 2012. Following this licensing process, the Authority provisionally issued licences to the following licensees: Close-T Broadcasting Network Holdings (Pty) Ltd, Siyaya Free To Air TV (Pty) Ltd, Kagiso TV, Mindset Media Enterprises (Pty) Ltd, and Mobile TV.

4.2.12 On 20 March 2014, the Authority gave notice of its intention to hold a high level inquiry into the state of competition in the ICT sector. In particular, the Authority noted as follows:

*"On the broadcasting side, attempts to introduce competition in the subscription television environment are clouded by challenges faced by TopTV [i.e. On Digital Media (Pty) Ltd] in attempting market entry in the subscription [television] market, resulting in its entering business rescue... In the free-to-air commercial television market, allegations have been made of unfair competition between subscription TV and free-to-air TV with regard to access to adspend revenue. Concerns have also been raised by the incumbent TV broadcasters about the Authority's plans to introduce new commercial and community TV services during the digital migration process. Consumers locked in Multichoice contracts are confronted by escalating costs with no relief in sight."*⁵

4.2.13 On 15 March 2016, and without reaching any conclusions in respect of the issues raised in the paragraph above, the Authority published its "Report on the state of the ICT sector in South Africa". In this report, the Authority noted that its regulatory mandate over the broadcasting sector extends to and regulates the following⁶:

- Advertising, Infomercial & Programme Sponsorship
- Code of Conduct for Broadcasting
- Digital Migration

⁵ Published under GN 229 in *Government Gazette* 37456 of 20 March 2014, p 4.

⁶ ICASA. Report on the State of the ICT Sector in South Africa. March 2016. p 21.

* Own emphasis

- Internet Protocol Television (IPTV)
- Local Content
- Must Carry
- Ownership & Control
- Party Election Broadcasts, Political Advertisement
- Prescribed Annual Contributions of Licensees
- Self Help Stations
- Sport Broadcasting Rights
- Subscription Broadcasting
- Terrestrial Broadcasting Frequency Plan
- Under-Serviced Areas Definition

4.2.14 Section 60(1) of the ECA prohibits a subscription broadcasting service from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest. Thus free-to-air broadcasters can access sporting events, although coverage might be delayed. ICASA⁷ distinguishes between national sporting events and premium sport. "National sporting events" refers to an event of a national character and in public interest while premium sport refers to the popularity of the sport. Under the Sport Broadcasting Services Regulations, 2010⁸, a subscription broadcaster which has acquired rights to a national sporting event is required to inform free-to-air broadcasters, which may broadcast the event live, delayed live or delayed on payment of a sub-licencing fee. National sporting events are listed in section 5 of the Sport Broadcasting Services Regulations and include major competitions such as the Olympics, Paralympics, Commonwealth Games, All-Africa Games, and cup competitions for rugby, cricket and soccer as well as international boxing federations.

4.2.15 There are currently no regulations for premium sport or premium content in general in South Africa.

⁷ ICASA Findings and Reasons Document on the Sport Broadcasting Services Regulations

⁸ Sport Broadcasting Services Regulations, 2010, Government Gazette No 33079, 7 April 2010

- 4.2.16 The Subscription Broadcasting Services Regulations⁹ provide for the regulation of subscription television with respect to licence charges and fees, procedures and conditions for channel authorisation and ensuring that the largest source of income for subscription broadcasters is not advertising or sponsorship or a combination thereof.
- 4.2.17 Competition matters within the broadcasting sector 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. There are currently no regulations dealing with competition in subscription television broadcasting services.
- 4.2.18 The Minister of Communications in her 2017/18 budget vote speech in May 2017 indicated that the draft White Paper on Audio-Visual and Digital Content for South Africa will be submitted to Cabinet for approval to be gazetted for public comments, after consultation with relevant stakeholders. The Authority will keep track of this process with a view to participating in it.

4.3 Market overview

- 4.3.1 Television broadcasting plays an important role in educating, informing and entertaining audiences. The South African television broadcasting services sector continues to grow as measured by (1) the number of people that have access to television broadcasting services and (2) the revenues earned by broadcasters as a whole. According to the 2011 Census, the proportion of South African households owning radios decreased from 72% in 2001 to 67.5% in 2011 whilst television ownership increased from 52.6% in 2001 to 74.5% of households in 2011, meaning that South Africans now own more television sets than

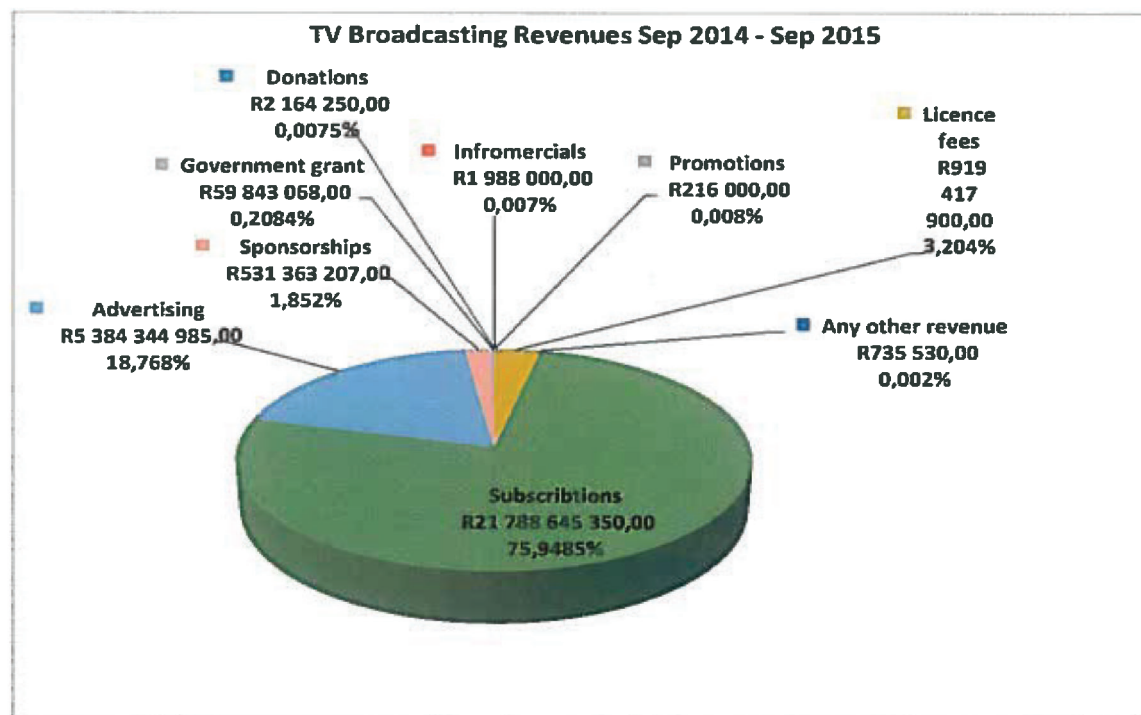
⁹ Government Gazette No 28452, General Notice 152 of 31 January 2006

radios¹⁰. In 2016, there were just over 16 million households in South Africa, of which 80% have access to television¹¹.

4.3.2 The size of the South African television industry measured in terms of revenue from television subscriptions, licence fees, total advertising and other streams is expected to reach R35 billion in 2017¹² from over R28 billion as at the end of September 2015¹³. Advertising revenue alone grew from R6.2 billion in 2008 to R11.3 billion in 2012 and is expected to reach R15 billion in 2017¹⁴.

4.3.3 Figure 1 below provides a breakdown of the broadcasting sector revenue streams for the 12-month period up to 30 September 2015.

FIG 1. TV BROADCASTING REVENUES FOR THE PERIOD ENDED 30 SEPTEMBER 2015



¹⁰Statistics South Africa. Census 2011, available at <http://www.statssa.gov.za/publications/P03014/Po30142011.pdf>

¹¹Statistics South Africa. 2015 General Household Survey. Available at <http://www.statssa.gov.za/publications/P0318/P03182015.pdf>

¹²PWC. South African entertainment and media outlook: 2013-2017

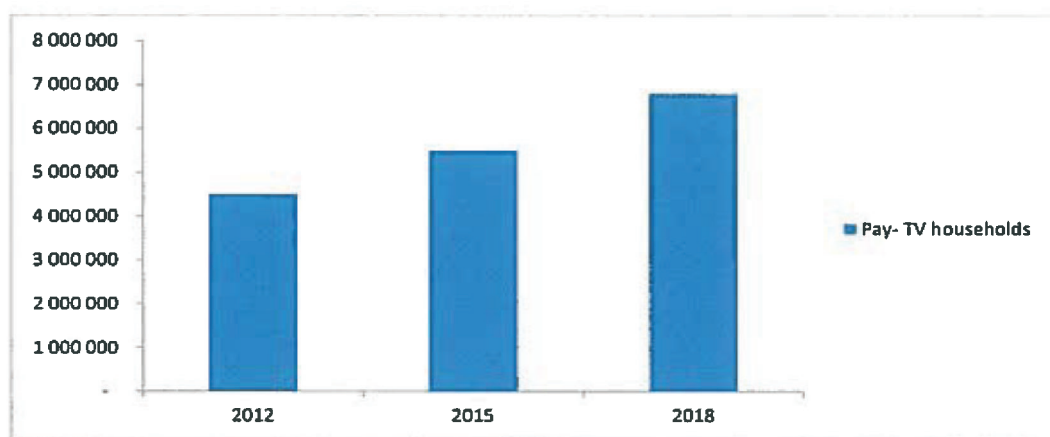
¹³ICASA. Report on the state of the ICT sector in South Africa. March 2016

¹⁴PWC. South African entertainment and media outlook: 2013-2017

Source: ICASA Report on state of ICT sector

- 4.3.4 South Africans can access television services on various platforms including via Internet Protocol television (IPTV), digital satellite (DSAT) and analogue terrestrial network. The country is in the process of transitioning to digital terrestrial transmission (DTT) broadcasting. Subscription television broadcasting services are primarily accessed through DSAT while free-to-air, and one subscription service, is accessed through analogue terrestrial transmission.
- 4.3.5 South Africa has about 80% television penetration. Approximately 6.39 million households subscribed to a subscription television broadcasting service in 2016¹⁵. This figure is expected to grow to about 7 million in 2018 as shown in Figure 2 below. Multichoice has a 98% share of subscription television broadcasting homes¹⁶.

FIGURE 2: SOUTH AFRICAN SUBSCRIPTION TELEVISION BROADCASTING HOUSEHOLDS, 2012-2018



Source: PWC Media Outlook 2015-2019

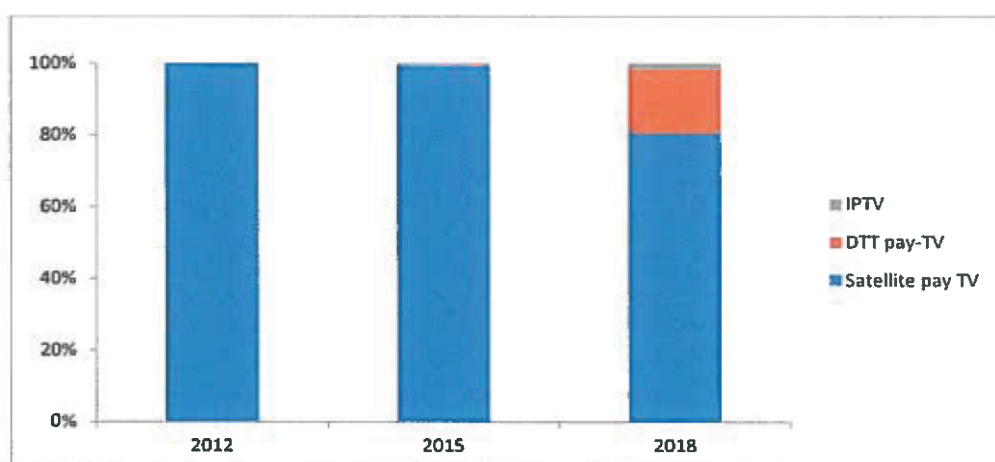
- 4.3.6 Whilst technological advancement has allowed the development of various means of accessing subscription television broadcasting

¹⁵ Rapid TV News www.rapidtvnews.com

¹⁶ Own construction based on 6.3 million subscribers as per Multichoice's March 2017 annual report.

services, satellite remains the dominant platform with a 99.1% share of the subscription television broadcasting market, as depicted in Figure 3 below. Given the challenges surrounding DTT, and despite the optimistic picture in Figure 3 below, satellite subscription television broadcasting services are expected to remain the dominant platform into the foreseeable future, although other platforms might gain market share.

FIGURE 3: SOUTH AFRICAN SUBSCRIPTION TELEVISION BROADCASTING ACCESS¹⁷ METHOD, 2012-2018



Source: PWC Media Outlook 2015-2019

4.3.7 The broadcasting services sector in South Africa is organised into a three-tier system consisting of public, commercial and community broadcasting services. These are discussed next.

4.4 Public television broadcasting

4.4.1 The South African Broadcasting Corporation SOC Limited (SABC) was established as a public broadcaster in terms of the Broadcasting Act (through conversion from the old state broadcaster founded in 1976 in terms of the Broadcasting Act 73 of 1976). The SABC is required to provide public broadcasting services, including content in a range of local languages.

¹⁷ Access method refers to a distribution platform as per ICASA's licence categories.

- 4.4.2 According to e.tv free-to-air television broadcasters in general have been losing viewers over time due to the “must-carry” regulations which in terms of which free-to-air television channels are available on subscription television. As a result, subscription television subscribers do not have to rely on terrestrial television to access good viewing quality television.

4.5 Community television broadcasting

- 4.5.1 Community broadcasting is meant to cater for specific communities, whether based geographically or based on a group of persons or sector of the public having a specific, ascertainable common interest. Community broadcasting is required to be undertaken for non-profit purposes, with the active participation of members of the community in programming activities. The community television broadcasting sector has grown over the years, since the first community television licence was issued to Soweto TV in 2007, followed by Cape Town TV in 2008. There are currently five community television broadcasting licensees, namely Soweto TV, Cape TV, 1KZN TV, Tshwane TV and Trinity Broadcasting Network, and this is expected to grow further in the coming years.

4.6 Commercial television broadcasting

- 4.6.1 Commercial television broadcasting services are divided into free-to-air and subscription broadcasting services.

4.7 Free-to-air television broadcasting

- 4.7.1 A free-to-air broadcasting service is defined in section 1 of the ECA as a service, which is broadcast and capable of being received without the payment of subscription fees.
- 4.7.2 In 1998, etv was issued with the first commercial free-to-air television broadcasting service licence in South Africa. In 2013, Platco Digital, an

e.tv sister company launched a satellite free-to-air offering called OpenView HD (OVHD), with about 25 channels¹⁸.

4.7.3 In 2015, the Authority began a process of licensing new commercial free-to-air television broadcasting services. However, at the end of the process, the Authority rejected all five applications due to their non-compliance with the ITA and the provisions of the ECA. As such, e.tv remains the only commercial free-to-air television broadcasting service licensee in South Africa.

4.7.4 The Authority is currently conducting a process to license further free-to-air broadcasters to launch services on the DTT platform.

4.8 Subscription television broadcasting

4.8.1 Section 1 of the ECA defines a subscription broadcasting service as a broadcasting service provided to a subscriber upon the payment of a fee.

4.8.2 The first subscription television broadcasting service in South Africa was launched by Multichoice, (owned by the country's big four newspaper groups at the time¹⁹) in 1986 and provided terrestrially through Electronic Media Network Limited (M-Net), a single channel dedicated to broadcasting premium movies and television series. The channel also offered a daily one-hour (18h00-19h00), later extended to a two-hour (17h00-19h00) 'open window' period during which M-Net's broadcast could be received by non-subscribers. The 'open window' concept raised competition concerns in the sense that if future subscription television broadcasters were to use technologies other than analogue terrestrial they would not be able to access free-to-air viewers as did M-Net. For this reason the open window was later done away with. In 1995 Multichoice launched the DStv satellite platform service that, at the time, offered a full spectrum programming single premium bouquet of

¹⁸ ICASA figures (compliance reports submitted to icasa??) or as referenced in 18 below - These figures are based on channels authorised by ICASA, some of which may have been discontinued

¹⁹ Section 66 of the ECA does not allow the same company to own a television service and be a major player in the publication of newspapers. Similar restrictions were imposed previously under the IBA Act. Multichoice, which is owned by Naspers, which [has/had] interests in various print media publications was granted an exemption in terms of the IBA Act as it commenced operating prior to the enactment of the IBA Act.

16 channels. Over the years the DStv platform has grown to around 223 channels packaged into 11 bouquets and targeted at different groups of viewers²⁰.

4.8.3 Multichoice remained the only subscription television service provider until the launch of TopTV by On-Digital Media (ODM) in 2010 and Duekom TV by Deukom (Pty) Ltd (Deukom) in 2012.

4.8.4 TopTV was subsequently acquired by StarTimes, and renamed StarSat. StarSat has about 161 channels packaged into five (5) bouquets. StarSat also competes with DStv in other African countries.

4.8.5 Deukom's service is aimed at the German speaking community in South Africa and anyone with an interest in the language. The station has twenty three (23)²¹ channels in a single bouquet.

4.9 Future Developments

Impact of OTT services

4.9.1 South Africa has 25 million internet users and has 46% broadband penetration²². Certain free-to-air and subscription television content can be accessed through the internet on mobile and fixed broadband. Over-the-top (OTT) services have been growing in recent years. A number of OTT providers have launched in South Africa recently, including Showmax (part of Multichoice), Netflix, the US-based on demand service, and DEOD.

4.9.2 OTT services rely on access to high speed, good quality and affordable Internet services. The amount of data needed to stream TV shows and movies is estimated to be one gigabyte (GB) per hour or more²³.

²⁰ These figures are based on channels authorised by ICASA, some of which may have been discontinued

²¹ (25 authorised by ICASA)

²² Source: We are social, January 2015

²³ Screen Africa. Cost of data holding back adoption of Internet TV. Available at http://www.screenafrica.com/page/news/new_med/1659984-Cost-of-data-holding-back-adoption-of-internet-TV#.WVzQQhIDvmQ

- 4.9.3 The average internet connection speed in South Africa was reported at 3.7Mbps towards the end of 2015 with LTE/4G services covering about 53% of the population and 3G services available to 98% of the population²⁴.
- 4.9.4 Apart from the low penetration of LTE services, data costs appear to be a major hindrance to consumers accessing services such as ShowMax²⁵.
- 4.9.5 Given the above, the impact of OTT is expected to remain small but noticeable in the foreseeable future.

4.10 Digital migration

- 4.10.1 South Africa is 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 analogue television broadcasting the regulatory framework is in place in preparation for the migration.
- 4.10.2 In countries that have undergone full digital migration the impact of DTT on the subscription television broadcasting market is varied.
- 4.10.3 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.
- 4.10.4 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

²⁴ ICASA. Report on the state of the ICT sector in South Africa. 15 March 2016.

²⁵ Ibid, 22

constrained and particularly in high definition, making it a less competitive option compared with cable and satellite. There is 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 France's TNT (Télévision Numérique Terrestre) has a limited line-up of subscription channels alongside the free TV offering.

- 4.10.5 Kenya's digital switchover 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.
- 4.10.6 Despite the optimistic projections given in figure 3 above, it is still not clear what the impact of digital migration will be on the subscription television broadcasting market in South Africa.

5. MARKET DEFINITION

5.1 Overview

- 5.1.1 The purpose of this section is to provide the Authority's preliminary views on the definition of the relevant markets in the subscription television broadcasting sector, taking into account section 67(4) of the ECA. In order to arrive at a proposed definition of the relevant market or market segments we consider - first, the theoretical approach to market definition. We then present relevant case law, both local and international as well as any relevant research undertaken in this area. We then analyse the responses received by the Authority to the questionnaire, and finally present the Authority's preliminary views.

5.2 Approach to market definition

- 5.2.1 The approach that the Authority adopts in defining markets is detailed in paragraph 3.2 of the Guideline for Conducting Market Reviews, March 2010.
- 5.2.2 Market definition is the process of identifying sources of competition that are likely to constrain, minimise or discourage the exercise of market power and its impact in the market by a firm producing a particular good or service. Market definition is a means to an end, the end being the identification of impediments to competition. A relevant market is defined from both a product²⁶ and geographic dimension.
- 5.2.3 A relevant product market is a grouping of products that are interchangeable or substitutable. Where a product has close substitutes, it is expected that the firm concerned will be constrained or dissuaded from exercising market power. Market power is generally understood to refer to the ability of a firm, by virtue of its position in the market, to control prices or to exclude competition or to disregard the reaction of its competitors, customers or suppliers to its behaviour in the market²⁷.
- 5.2.4 Market power is a function of the elasticity of demand for a product. The more elastic the demand for a certain product, the more customers will opt away when the product's price increases and the less the ability of a seller to price at above the competitive level. A product that has many close substitutes will tend to have a more price elastic demand than one that has no competing products in the market. Other factors that impact on the elasticity of demand, especially in the context of subscription television broadcasting services include brand loyalty and switching costs. The demand of a service with high levels of brand loyalty will tend to be price inelastic. Similarly, where consumers face high switching costs, such as is the case where they have to buy a new set-top box and satellite dish in order to switch service providers, demand tends to be price inelastic.

²⁶ The term product is used broadly to include service

²⁷ See definition of 'market power' in section 1 of the Competition Act, No 89 of 1998.

- 5.2.5 In order to test for substitutability, it is necessary to consider both demand-side and supply-side factors. These concepts are discussed in the next section.

5.3 Relevant Product Market: Demand-side Substitution

- 5.3.1 A relevant market consists of a group of goods or services that are effective substitutes for each other from a consumer's perspective. Various tools are used to test for substitutability between two or more products, including the 'small-but-significant-non-transitory-increase-in-price' (SSNIP) test, cross-elasticity of demand and critical loss analysis, among others.
- 5.3.2 When applying the SSNIP test it is worth noting that whilst customer reactions to historical price changes can be used to assess substitutability, past price changes could be reflective of changes in cost impacting an entire industry or other industry dynamics and might produce misleading results. Thus consumer reactions to historic price changes may not be reflective of how they would respond to a hypothetical monopolist.
- 5.3.3 Another aspect that also needs to be borne in mind in the context of this inquiry is that broadcasting is a two-sided market, which poses additional complexity to applying the SSNIP test, including:
- 5.3.3.1 indirect network externalities could exist in two-sided markets, thus a question of whether all feedbacks from one side of the market to the other should be taken into account; and
 - 5.3.3.2 how products that are competing on one side of the market and not the other should be dealt with.
- 5.3.4 For example, in the television industry, firms act as platforms and sell two different products to two different groups of buyers, namely advertisers and television viewers. The demand for advertisers in this case depends on demand from viewers. The indirect network that exists is only relevant to advertisers.

5.4 Relevant Product Market: Supply-side Substitution

- 5.4.1 It is not consumers only who matter when defining the relevant product market. Suppliers who are able to switch production in the event of a price increase form an important element of a relevant product market. A firm would lack market power where its competitor/s can respond to a price increase immediately and at least cost. Therefore, market definition should take supply elasticities into account at least to the extent that firms which are already in existence can respond.

5.5 Relevant Geographic Market

- 5.5.1 The question to ask when defining a relevant geographic market is whether a price change in one area substantially affects prices in another area. A relevant geographic area comprises all those areas where the conditions of competition are the same and suppliers pose a competitive constraint on each other. Television services are often supplied within national boundaries. This is because broadcasters buy content rights for a particular territory and are therefore unable to distribute their channels outside. Linguistic differences between countries may also serve to define the television geographic market – consumers tend not to consider broadcasts in a foreign language as a substitute for domestic broadcasts in their own language. Moreover, regulators usually issue licences for national broadcasting.

Q1. Do you agree with the theoretical approach to defining relevant markets and market segments?

Q2. Are there aspects of this market definition theoretical framework that would not apply to subscription television broadcasting services?

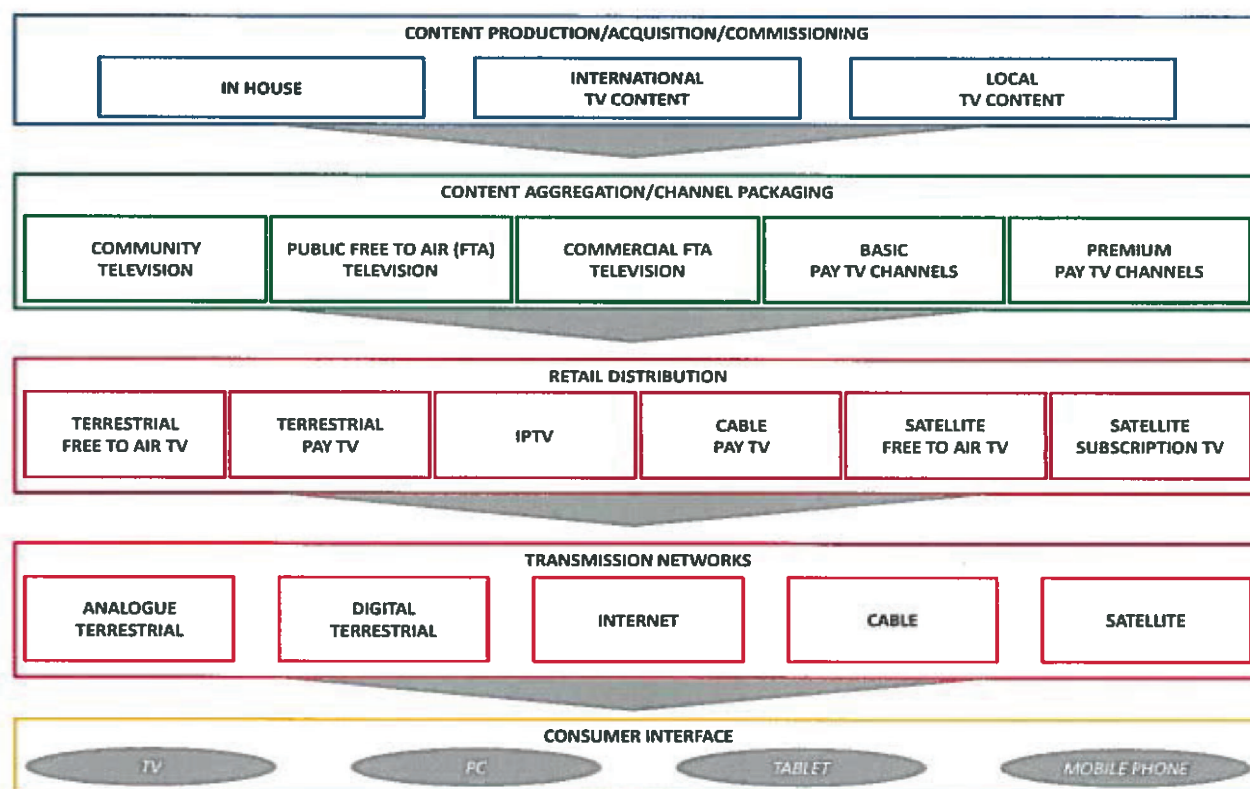
5.6 Market Definition in Subscription Broadcasting

- 5.6.1 The subscription television value chain is utilized as a basis for framing market definition as depicted schematically in Figure 4 below. By and large most stakeholders in their response to the questionnaire,

identified three levels of the broadcasting value chain in its typical traditional sense as being content production, content aggregation/channel packaging and retail distribution. This approach of using the television value chain to market definition has been confirmed in various cases²⁸.

- 5.6.2 What is not shown in the value chain are hardware vendors and technical and support services such as electronic programme guide (EPG) and encryption services. A successful subscription television broadcasting service is dependent on a number of technical services that can be supplied in-house, outsourced through commercial agreements or purchased from independent third parties. The Authority will consider defining a market for technical services.
- 5.6.3 The retail distribution level of the value chain shows the different types of platforms.

²⁸ See for example the News Corp/ BskyB case - Case No COMP/M.5932.

FIGURE 4: TELEVISION BROADCASTING VALUE CHAIN

Source: Own construction

Q3. Do you agree with the approach of using the value chain to identify functional markets?

Q4. If not how would you go about defining the relevant market/s in subscription broadcasting?

5.6.4 The responses to the questionnaire indicate that all broadcasters operate at multiple layers in the supply chain. However the models they employ are varied and include utilizing third parties or internal capacity and capability.

5.6.5 For example:

- The SABC manages a number of functions across the broadcast value chain with the exception of content production - a significant

proportion of its content is produced by independent production companies; and signal distribution (transmission and satellite), which is provided by third parties.

- e.tv is also active on each level of the value chain, however its content production is limited to a few hours of programming per week; and signal distribution is outsourced to Sentech.
- SiyayaTV produces local content and acquires of local and international content; and broadcast engineering, transmission and signal distribution is outsourced to Sentech.
- On the other hand, Multichoice viewed itself as vertically integrated as it plays in each layer of the value chain. Specifically, M-Net creates and produces local content and packages content into channels; acquires and packages different channels to create television bouquets, which are offered to consumers at the retail level. e.g. DStv Compact; signal distribution of MultiChoice's DTH pay TV service is undertaken through Orbicom – a wholly-owned subsidiary; in addition the service is retailed to consumers including marketing and subscriber management services.

5.6.6 The Authority will define the markets starting with the downstream level. Whilst the sequence of defining markets starting either from the upstream or the downstream level may not necessarily change the results of the analysis, the advantage of defining retail markets first is that retail demand can be used to define the corresponding wholesale markets²⁹.

5.7 Downstream retail markets

5.7.1 The retail level of the value chain involves the distribution of channels and bouquets of channels to viewers through various transmission networks, including analogue terrestrial, digital terrestrial, satellite and

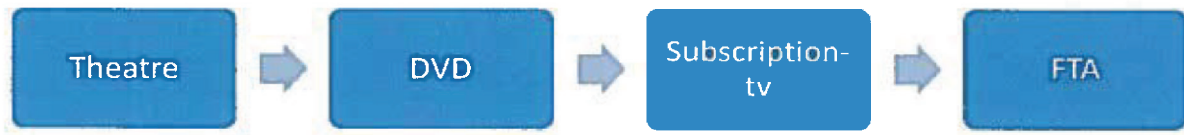
²⁹ European Commission. Media Market Definitions in EC Competition Law – Recent Developments available at http://ec.europa.eu/competition/sectors/media/documents/chapter_1_ec_final.pdf

- internet protocol. Channels are retailed as either free-to-air or through subscription.
- 5.7.2 Market definition at this level is assessed from the viewer's perspective. The first question to pose is whether viewers consider subscription television broadcasting and free-to-air broadcasting services as substitutes.
- 5.7.3 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. As such, we considered the characteristics of subscription and free-to-air television broadcasting services in order to establish whether they are geared towards satisfying similar needs. In South Africa, subscription-tv is accessed through digital satellite whereas free-to-air dominantly uses analogue terrestrial although satellite offerings are now available in the market. This leads to quality differences emanating from the different technologies. Second, subscription-tv is available through subscription whilst free-to-air is free. Third, from a business model perspective subscription-tv is largely driven by premium content whilst free-to-air focuses on other thematic content. Fourth, whereas subscription-tv broadcasters by law have to derive a substantial portion of their revenue from subscriptions, free-to-air broadcasters depend mainly on advertising revenue. Fifth, from a licensing perspective, the Authority issues different licences for subscription-tv and free-to-air services, in line with the Broadcasting Act and the ECA. Sixth, the type of content shown on subscription-tv and free-to-air differs. For instance, movies from Hollywood's six major studios³⁰ 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-tv channels, hence the higher subscription fees for high end bouquets that show such movies. Free-to-air broadcasters cannot compete with subscription-tv broadcasters for such movies because of the terms and conditions surrounding their release. Furthermore, a feature film, documentary or series distribution cycle gives subscription-

³⁰ 20th Century Fox, Warner Bros, Paramount, Sony, Universal and Walt Disney

tv preference over free-to-air television. A typical cycle is illustrated in figure 5 below.

FIG. 5: TYPICAL FEATURE FILM RELEASE CYCLE



- 5.7.4 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. 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 services³¹.
- 5.7.5 As already indicated, in the absence of relevant consumer data to apply the SSNIP and other tests, we sought to establish, through the questionnaire, whether from a supply-side perspective subscription television broadcasters and free-to-air broadcasters view each other as competitors.
- 5.7.6 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 international OTT and video-on-demand service providers. Siyaya on the other hand cites case precedent in the UK and EU to conclude that subscription television broadcasting services are in a separate market from free-to-air services.
- 5.7.7 According to the SABC and e.tv, all channels, both free-to-air and subscription compete with each other for advertisers. However, e.tv

³¹ See figure 2 above

— 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. As such, the price / quality offering of the lower-end subscription television broadcasting packages is likely to be constrained by the free-to-air offering, and vice versa. However, in order for substitution to be effective it must be strong, sufficient and permanent. The Authority will seek to monitor this trend into the future.

5.7.8 In the Newscorp/Telepiu³² 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/BskyB³³ that the retail supply of subscription-tv and free-to-air television constituted separate markets.

5.7.9 Flowing from the above, the Authority proposes for purposes of this inquiry to delineate a market for the retail supply of subscription television services, that is distinct from a market for the retail supply of free-to-air television services.

5.7.10 Within the market for the retail supply of subscription television services it is possible to identify further sub-markets.

5.7.11 Subscription television services in South Africa are supplied through a bouquet of channels, usually starting with a basic package of content, like kids, news, music and a couple of general interest factual channels. There is then a buy-through in order for a subscriber to access other content such as movies and sport. The latter content is viewed as premium content.

5.7.12 Thus we distinguish between premium and non-premium content.

5.7.13 SiyayaTV defines premium content as premium sport, premium movies and original local content (mainly based on the number of TV audiences). Multichoice on the other hand states that defining premium

³² COMP/M.2876 – Newscorp/Telepiu

³³ COMP/M.5932 Newscorp/BskyB

content is a subjective exercise, although the closest one can come to an objective means of distinguishing premium from non-premium content in a particular genre is to consider premium content as content that attracts a higher price (the price paid to the supplier of that content) relative to other content in the same genre. The SABC does not categorise content as premium or non-premium, but rather as mandate or non-mandate. e.tv regards premium content as acquired (rather than commissioned) content that can demand or justify a significantly higher price from channel producers. The SACF considers premium content to be news, sport, music and cultural programmes the majority of South Africans have an interest in to foster national identity. According to Telkom, premium content is content, which has high audience ratings in both its primary market as well as international market.

5.7.14 The following cases and articles shed more light in defining premium content.

- In the *Newscorp/Telepiu*³⁴ case it was held that –
"...premium films and most regular soccer events constitute the essential factor ("the drivers") that leads to consumers to subscribe to a particular pay-TV channel/platform. Although other types of contents are also important in order to complement the bouquet of a pay-tv operator, they are not necessarily "driver type" contents."
- In *British Interactive Broadcasting*³⁵ the European Commission (EC) observed that
"Experience has shown that, to be successful as a pay-television operator, it is essential to include film and sports channels as part of the service. BSkyB has itself identified "movies and sports as key sales drivers".....Pay-television channels composed of recently released films and live exclusive coverage of

³⁴ COMP/M.2876 – Newscorp/Telepiu

³⁵ IV/36.539 – British Interactive Broadcasting/Open

attractive sports events attract the largest viewing figures. The subscriptions to such channels are the most expensive: while thematic or general interest pay-television channels are supplied to customers as part of a package, film and sports channels are charged on an individual basis. For pay-television, the fact that sports and films programmes achieve very high viewing rates is crucial as it is a reflection of viewer's willingness to pay more for sports and films channels."

- 5.7.15 According to the OECD³⁶ the success of entry into television broadcasting is determined by the ability of new broadcasters to gain access to the content that consumers demand, and to differentiate their offering from that of incumbent broadcasters. Nicita and Ramello³⁷ identify recent movies and major sport events as what would generally constitute premium content.
- 5.7.16 Another consideration for premium content is whether the content is included in basic service offerings or not. For example, the DStv's Family bouquet (which is a basic bouquet) does not have a sport channel, other than the sport highlights channel, Blitz and Super Sport 9, which shows junior sporting events. For television series, Mzansi Magic, which airs popular shows such as Date My Family and Our Perfect Wedding, is not available in the basic bouquet. Instead, a channel called Mzansi Wethu is provided in the basic bouquet, which would usually show the previous seasons of these popular shows. Therefore, to access sport and latest series, consumers have to pay more. Thus premium content can be identified by considering what content the subscription-TV broadcaster classifies as premium and avails on upper-end bouquets only.

³⁶ OECD. 2013. Competition issues in television and broadcasting. Policy Roundtables

³⁷ 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?)

- 5.7.17 Based on the above the Authority proposes a definition of premium content as valuable content that is acquired on an exclusive basis and made available on high end, premium bouquets.
- 5.7.18 In this regard, live sport, blockbuster movies, latest local and international series are generally thought of as premium content³⁸

Q5. Do you agree with the Authority's definition of what constitutes premium content?

Q6. What other content would you classify as premium in the South African context and why?

- 5.7.19 Given the differences in prices for the basic-tier and premium bouquets, emanating from the differences in premium versus non-premium content it is unlikely that a subscriber to a premium bouquet would consider a basic tier bouquet as a substitute and vice versa.
- 5.7.20 From an advertiser's perspective, the choice of channel within which to place an advert depends on the profile of viewers for that particular channel. Basic-tier channels are usually targeted at viewers in the lower living standards measure (LSM) categories, and the converse applies. It is unlikely that a luxury goods advertiser whose target market is the upper LSMs would find premium channels substitutable with basic tier channels.
- 5.7.21 Insofar as the geographic market definition is concerned, broadcasters are licensed on a national basis, although within South Africa there are community based licensees. Rights to content are also given for specific geographical areas, usually limited to national boundaries. Thus, we view the geographic market as being South Africa.

³⁸ See for example Z-Coms. 2014. Research and analysing of the broadcasting sector in South Africa; and Ofcom. 2007. Market definition and market power in pay TV

5.7.22 Given the above, the Authority proposes the following relevant markets at the retail level:

(a) a market for the retail supply of subscription television services in South Africa, which can be divided into

(i) a market for the retail supply of premium subscription-tv channels in South Africa; and

(ii) a market for the retail supply of basic-tier subscription-tv channels in South Africa.

Q8. 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?

5.8 Upstream wholesale markets: *Channel provision*

5.8.1 Above the retail market there is a wholesale market comprising the aggregation and packaging of television content into channels. The Broadcasting Act defines a 'channel' as '*a single defined programming service of a licensee other than a video on demand programming service*'. Section 4(3) of the Broadcasting Act mandates ICASA to authorise any additional channel, upon application by a licensed broadcasting service that consists of more than one channel.

5.8.2 Channel packaging can be done either in-house by a vertically integrated broadcaster ³⁹ or by an independent channel producer, such as Discovery Channel, for wholesale supply to broadcasters. The wholesale supply of television channels involves bargaining between broadcasters and channel providers on the terms and conditions for the distribution of television channels to viewers.

5.8.3 From a demand side substitution perspective the question is whether broadcasters, on behalf of their viewers, would consider two or more channels as substitutes. Whilst channels in the same genre may

³⁹ For instance, the SABC's and etv's 24 hour news channels are broadcast on Multichoice's DStv platform

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.

- 5.8.4 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.
- 5.8.5 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.
- 5.8.6 From a supply-side perspective the test for substitutability is whether an increase in the price of a channel will attract suppliers of other channels. Channel providers tend to specialize in certain type of content. It is therefore unlikely that in the event of a hypothetical monopolist increasing prices there will be an immediate switch.
- 5.8.7 According to the European Commission,

"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."

5.8.8 Flowing from the above the Authority is inclined to propose the following markets at the wholesale level:

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

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

Q9. Do you agree with the Authority's characterisation of the wholesale market and the market definition as outlined above? If not, how would you define the relevant market/s in this regard?

Q10. What is the nature of the bargaining power between independent wholesale channel suppliers and broadcasters? How has the nature of this power changed over time?

5.9 Upstream wholesale markets: Content provision

5.9.1 Above the wholesale market for channel provision there is the first level of the value chain as depicted in Figure 4 above involving 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.

5.9.2 The question that arises in this regard is whether two or more types of content are substitutable and will satisfy a typical broadcaster's demand equally. This is particularly paramount in the subscription television broadcasting space where content is the driving force. In order for a viewer to subscribe to a service, there must be a certain value that is

Its document defining relevant markets in the media sector⁴⁰, the EC identifies markets for the wholesale supply of subscription TV premium content channels and wholesale markets for the supply of premium film and sport rights, among other broadcasting markets.

- 5.9.8 In the Viacom/Channel 5 Broadcasting decision, the 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 markets⁴¹. In News Corp/ BskyB⁴² 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/Open⁴³.
- 5.9.9 Taking into account (a) the characteristics of premium and non-premium content (b) case precedent (c) responses to the questionnaire; and (d) internal research, it would appear that at the upstream level there could be a market for the supply and acquisition of premium content and a market for the supply and acquisition of non-premium content.
- 5.9.10 The next question that arises is whether all premium content is substitutable and similarly, whether all non-premium content is substitutable. From the preceding discussion, and based on the cases considered above, there is a possibility of further sub-dividing premium content into various categories, including premium sport, premium films and other premium content.
- 5.9.11 In order to determine this, we consider the likelihood of a broadcaster or channel producer⁴⁴ substituting premium movies for premium sport in the event of an increase in the cost of premium sport. It is unlikely

⁴⁰ Media Market Definitions In Ec Competition Law – Recent Developments, available at http://ec.europa.eu/competition/sectors/media/documents/chapter_1_ec_final.pdf

⁴¹ Case No Comp/M.7288 - Viacom/ Channel 5 Broadcasting

⁴² Case No COMP/M.5932 – News Corp/ BskyB available at http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf

⁴³ 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>

⁴⁴ Bearing in mind that a broadcaster or channel producer's demand reflects the demand for viewers and advertisers

that should a hypothetical owner of Premier Soccer League rights, for instance, increase prices by 10% a broadcaster would turn to the purchase of movie rights as a substitute, all things being equal. This owes to the fact that the type of audience attracted to a movie channel is not necessarily the same as the one attracted to a sport channel.

- 5.9.12 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 LSM grouping. 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.
- 5.9.13 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, we propose a further distinction, that is, between types of premium content, distinguishing between feature films and movies; series and live sport, including live rugby, cricket and PSL soccer matches on the other.
- 5.9.14 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 content⁴⁵. 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 followers⁴⁶.

⁴⁵ 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>

⁴⁶ 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/irie.aspx>

Thus, a broadcaster is unlikely to substitute soccer for rugby or cricket. Therefore we propose separate markets for soccer, rugby, cricket and other sport.

- 5.9.15 From a supply side substitution perspective, creators of content are specialised entities with a focus on specific areas, such as movies, soccer, rugby, cricket, soapies, 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, sport and other premium content.
- 5.9.16 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.
- 5.9.17 Non-premium content is usually bundled up with premium content in order to create a bouquet or package for retail offering. For our purposes it is not necessary to consider whether all non-premium content is substitutable from a demand side, at this stage.
- 5.9.18 Having considered the above, the Authority proposes as a preliminary view that the following relevant markets can be distinguished:
- (a) a market for the acquisition of first- window subscription television broadcasting premium movies for retail distribution in South Africa;
 - (b) a market for the acquisition of premium live soccer matches for retail television distribution in South Africa;
 - (c) a market for the acquisition of premium live rugby matches for retail television distribution in South Africa;
 - (d) a market for the acquisition of premium live cricket matches for retail television distribution in South Africa;

- (e) a market for the acquisition of other premium⁴⁷ content for retail television distribution in South Africa; and
- (f) a market for the acquisition of non-premium content for retail television distribution in South Africa.

Q11. Do you agree with the Authority's characterisation of the market and the market definition as outlined above? If not, how would you define the relevant market in this regard?

5.10 Technical Services

- 5.10.1 The operation of subscription television broadcasting services differs substantially from free-to-air services due to the specific technical infrastructure required to ensure that only authorized viewers access the content. Such technical infrastructure and services can either be provided in-house or by third parties and include conditional access capabilities including encryption and decryption software, middleware technologies such as smart cards and subscriber management services, and hardware such as set-top-boxes.
- 5.10.2 These services can constitute a barrier to entry or they can impede competition, for instance where there is lack of inter-operability of systems.
- 5.10.3 Therefore the Authority's initial view is that there is a market for the wholesale provision and acquisition of technical services required for operating a subscription television broadcasting service.

Q12. Do you agree with the Authority's characterisation of the market and the market definition as outlined above? If not, how would you define the relevant market in this regard?

Q13. Is it necessary to define a market for technical services? What are the competition challenges in this market?

⁴⁷ Including series and premium local content

6. CONSIDERATION OF THE EFFECTIVENESS OF COMPETITION IN RELEVANT MARKETS

6.1 Overview

- 6.1.1 Competition in the context of industrial economics refers to inter-firm rivalry or contestation for market share. It is generally accepted that where there is competition consumer welfare is enhanced through lower prices, wider choice of quality products and constant innovation. Regulatory policy and law is intended to develop, promote and preserve a conducive environment where firms can compete fairly. The ideal state of perfect competition exists where there are no barriers to entry, there are many buyers and suppliers of a homogenous product that is perfectly substitutable and there is perfect flow of information in the market, among other things. Whilst perfect competition is an ideal market structure, most markets are characterised by barriers to entry, information asymmetry, a limited number of suppliers and lack of innovation, all of which are symptomatic of market failure. Economic regulation is applied in instances of market failure in order to mimic competition.
- 6.1.2 The effectiveness of competition in a market can be influenced by the structure of the market. For instance, oligopolistic and highly concentrated markets generally do not exhibit effective competition. The structure-conduct-performance paradigm posits that the structure of a market influences or affects the conduct of firms in that market, which in turn determines their performance. The features of a market are integral to a determination of the effectiveness of competition. The conduct of firms, in the sense of whether there is any exercise of market power, also assists in determining whether competition in the market is effective or not.
- 6.1.3 In dealing with ineffective competition 67(4) of the ECA requires that there must be an inquiry to assist the Authority in defining the relevant market or market segments where appropriate and sufficient pro-competitive licence conditions are to be imposed on those licensees found to have significant market power.

6.1.4 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**⁴⁸ 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.

6.1.5 In this section the Authority sets out –

- the factors that it considers important in assessing competition in the identified markets and market segments in the television broadcasting service sector;
- features of the relevant markets and market segments that have been taken into account in its assessment of competition in those markets and market segments; and
- its preliminary assessment of the effectiveness of competition in the identified markets and market segments.

6.2 Proposed Approach

6.2.1 In making a determination regarding the effectiveness of competition in the relevant markets the Authority proposes that the following factors should be assessed:

- Non-transitory 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

⁴⁸ Own emphasis

- whether competition law alone will be sufficient to deal with the identified market failure.

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?

6.3 Upstream wholesale Market for content: Markets for the Acquisition of Premium Live Soccer, Rugby, Cricket, First-run Subscription TV Movies and other Premium Content for Retail Distribution in South Africa⁴⁹

- 6.3.1 In section 5.10 above, the Authority proposed to define six (6) markets at the upstream level. However, purely for purposes of convenience in determining the effectiveness of competition, these markets will be assessed together as a market for the acquisition of premium content.

Barriers to Entry: Scarcity and Cost of Premium Content

- 6.3.2 The major barrier to entry into the upstream market for the supply and acquisition of premium content appears to be the scarcity of premium content. Whilst in its response to the questionnaire Multichoice says there are no barriers to entry into the broader audio-visual market, it concedes in its annual report⁵⁰ for instance, that sport rights have become increasingly expensive and hotly contested. Telkom notes 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.

⁴⁹ Please note that the separate markets defined in section 8.2 have been consolidated here purely for ease of discussion

⁵⁰ Multichoice, Integrated Annual Report 2016. Available at http://multichoicereports.co.za/multichoice_for_2016/ebook/pn1/files/assets/common/downloads/publication.pdf

- 6.3.3 The SABC points to high levels of capital investment, high levels of operational investment, market saturation and delays in transitioning to DTT. e.tv notes the regulatory barriers wherein the Authority only calls for licence applications at intervals. Siyaya points to the cost and scarcity of premium content as major barriers to entry in the subscription television broadcasting market. e.tv lost rights to broadcast the UEFA Champions League in 2015, citing the prohibitive costs of the rights⁵¹. In 2007, the SABC lost its exclusive rights to the local Premier Soccer League (PSL) to SuperSport, in a deal worth R1.6 billion. In August 2011, SuperSport paid a further R2 billion to renew its contract with the PSL for another five years which started in the 2012/13 season⁵². The scarcity of premium content and therefore the fierce competition for it is driving up its cost and pushing it out of reach for new entrants. Furthermore, there are substantial sunk costs involved in setting up a new subscription television broadcasting service and marketing it to potential subscribers.
- 6.3.4 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.

Barriers to Entry: Long-term Exclusive Contracts

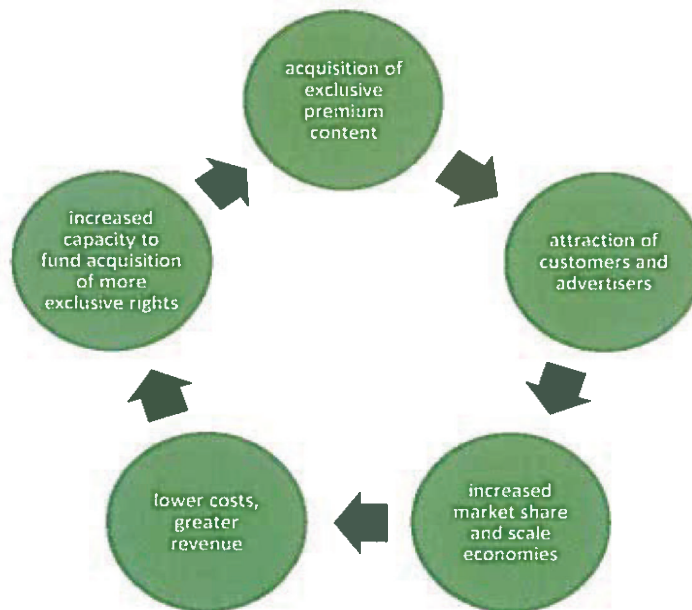
- 6.3.5 Apart from the high cost, premium content is usually tied up in long term exclusive contracts, meaning that for a new entrant such content would not be readily available until the end of the contract. Even then, there is no guarantee that a new player will outbid an incumbent at the next round of bidding due to the competitive advantage that exclusive content bestows on the holder. This is depicted in figure 6 below where the vicious 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

⁵¹ 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>

⁵² <http://www.kickoff.com/news/23761/supersport-pay-r2-billion-for-psl-rights>

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.

FIG 6: EXCLUSIVE PREMIUM CONTENT AND MARKET POWER VICIOUS CYCLE



Source: Windsor Place Consulting⁵³

6.3.6 In its 2005 Position Paper on Subscription Broadcasting Services⁵⁴ the Authority expressed a view that the ability of subscription broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services and that some forms of exclusive contracts are desirable and efficient. However, this should not be construed to mean that exclusivity is desirable and efficient all the time. Exclusivity can limit competition and create challenges such as:

- driving up prices due to the scarcity of the content that is locked up;

⁵³ 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

⁵⁴ ICASA. Subscription Broadcasting Services. Position Paper. 1 June 2005. Available at <https://www.icasa.org.za/LegislationRegulations/FinalRegulations/BroadcastingRegulations/SubscriptionBroadcasting/lobid/509/cit/ItemDetails/mid/1568/ItemID/852/Default.aspx>

- limited access to exclusive content by those who cannot afford the service;
- creating a barrier to entry; and
- reinforcing the dominant player's position in the market.

6.3.7 According to Armstrong⁵⁵, without regulatory constraints, exclusivity is a likely outcome.

Incumbency of Special Relationships

6.3.8 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.

6.3.9 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 figure⁵⁶"

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

⁵⁵ Armstrong, M. Competition in the Pay-TV Market. *Journal of the Japanese and International Economies*. Volume 13, Issue 4, December 1999, Pages 257-280

⁵⁶ Case IV/M.1027 Deutsche Telekom/BetaResearch

Dynamic Character and Functioning of the Market

6.3.10 One way of determining the effectiveness of competition is by assessing the level of concentration in the market. High levels of concentration are usually indicative of less competition and vice-versa. Table 1 below lists categories of content and the current rights holders in South Africa. The Authority intends using this approach to assess the level of concentration in the upstream market, noting that this list is incomplete at this stage.

TABLE 1: KEY SPORTS AND MOVIE RIGHTS^{57, 58}

Content	Category	Rights Owner
Hollywood Movies	Movies	Multichoice
South African Rugby Union	Rugby	Multichoice
Cricket South Africa	Cricket	Multichoice
SA Premier Soccer League	Soccer	Multichoice
UEFA Champions League	Soccer	Multichoice
Spanish La Liga	Soccer	Multichoice
English Premier League	Soccer	Multichoice
UEFA Europa League	Soccer	Multichoice
German Bundesliga	Soccer	StarTimes
SAFA - Bafana Bafana	Soccer	Siyaya

Source: Own compilation

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

6.3.11 The level of concentration in a market can be measured through various methods, the most common being the 4-firm concentration ratio and the Herfindhal-Hirschman Index (HHI). Since there are only 3 firms that

⁵⁷ <http://www.livesoccer.tv/channels/supersport-3/>

⁵⁸ <http://www.news24.com/Archives/City-Press/Football-broadcasting-wars-20150429>

own premium content as depicted in Table 1 above, the four-firm concentration ratio will be irrelevant. We therefore turn to the HHI, which is the sum of the squared market shares of the firms in the market. An HHI of less than 1500 indicates a market that is not concentrated, whereas an HHI of between 1500 and 1800 indicates moderate concentration and an HHI higher than 1800 indicates high concentration. As an example the HHI in the upstream market for the acquisition of premium content would be calculated as follows, based on Table 1:

TABLE 2: LEVEL OF CONCENTRATION IN MARKET FOR PREMIUM CONTENT ACQUISITION

Rights owner	No of rights	Market share	HHI
Multichoice	8	80%	6 400
Siyaya	1	10%	100
StarTimes	1	10%	100
Total	10	100%	6 600

Source: own calculation⁵⁹

6.3.12 An HHI of 6 600 is indicative of a very high level of concentration and therefore limited competition.

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?

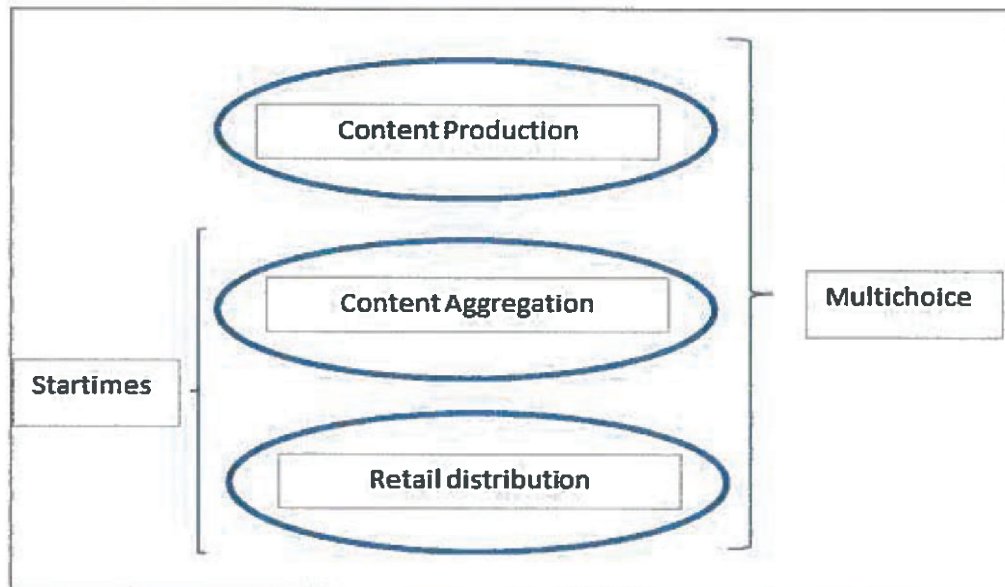
⁵⁹ The Authority is aware that the list of exclusive rights to premium content is not complete and will rely on the broadcasters to provide a full list

Nature and Extent of Vertical Integration

6.3.13 Vertical integration refers to the expansion by a company into one or more stages along the supply value chain. Loertscher and Riodan⁶⁰ define vertical integration as *"the organization of successive processes within a single firm..."*, whereas according to Hovenkamp⁶¹ vertical integration *"occurs when a firm does something for itself that it could otherwise procure on the market"*.

6.3.14 Figure 7 below illustrates the nature and extent of vertical integration by subscription television broadcasters. As can be seen, Multichoice is vertically integrated along the entire value chain, whereas StarSat is only present in the last stages of the value chain. In their responses to the questionnaire both the SABC and e.tv do not regard themselves as vertically integrated even though they are involved in some activities along the value chain.

FIG 7: VERTICAL INTEGRATION IN SUBSCRIPTION-TV



⁶⁰ Loertscher S and Riodan MH. 2014. Outsourcing, vertical integration and cost reduction. Available at http://www.law.northwestern.edu/research-faculty/searlecenter/events/antitrust/documents/Loertscher_Outsourcing.pdf

⁶¹ Hovenkamp H. 2010. The Law of Vertical Integration and the Business Firm: 1880-1960. University of Iowa Legal Studies Research Paper Number 08-40

- 6.3.15 Whilst vertical integration is a legitimate business model that produces economic benefits, such as internal efficiencies and economies of scope, it can also be used to foreclose competitors. A vertically integrated incumbent has the incentive to leverage its market position downstream to gain power in an upstream market for content. Consequently it then uses its upstream buyer power to exercise additional market power in the downstream market, and the cycle continues to self-reinforce perpetually.

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

Adequacy of Competition Law Alone

- 6.3.16 The subscription television broadcasting sector has been characterised by a limited number of players despite various attempts by the Authority to license new entrants. Apart from the market enquiries as well as mergers and acquisition powers, competition law in South Africa, as in many other jurisdictions, is applied *ex post*, that is, to remedy a breach of the law after the fact. Sector specific law on the other hand is flexible and is normally applied *ex ante*, to prevent certain conduct before a breach occurs or to remedy market structure challenges.
- 6.3.17 It is doubtful that competition law on its own can produce the desired market outcomes, hence the necessity of this inquiry to determine what the challenges are and what the possible remedies could be in an instance where it is found that competition is ineffective.

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?

6.4 Upstream Market: Market for the Acquisition of Non-Premium Content for Distribution in South Africa

- 6.4.1 The schematic depiction of the broadcasting value chain in Figure 4 above indicates 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 sector. Commercial free-to-air and community television broadcasters pursue different business models to subscription broadcasters, including the kind of content offered. Subscription broadcasters need both non-premium and premium content. The latter is what drives subscription for services and is often acquired on an exclusive basis and commands high prices in terms of access.
- 6.4.2 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.

6.5 Downstream Market for the Retail Distribution of Premium and Basic Tier Subscription Television Broadcasting Channels⁶²

Barriers to Entry: Brand Loyalty

- 6.5.1 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.

⁶² Please note that the separate markets defined in section 8.2 have been consolidated here purely for convenience and ease of discussion

Barriers to Entry: Switching costs

- 6.5.2 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. The added hassle factor of making the switch exacerbates the high switching costs.

Barriers to Entry: Bundling

- 6.5.3 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. In the television broadcasting sector, it is not uncommon, especially in Europe, for a broadcaster to offer a service comprising of, for example, a primary subscription TV service bundled with fixed telephony, mobile telephony and broadband services. In a less obvious way, subscription broadcasters bundle premium content channels such as sport and movies with basic subscription channels.
- 6.5.4 The main competition concern with bundling and tying is that it 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 South Africa bundling may take the form of offering access to discounted data services in addition to subscribing to a television service.

Barriers to Entry: Regulatory barriers

- 6.5.5 Regulatory barriers are those restrictions to market entry that emanate from government policy or regulations. For instance, broadcasters need to be licensed before offering a service in the market.
- 6.5.6 The Authority issues an invitation to apply for subscription television licences at intervals. In the intervening period it is not possible for potential entrants to enter the market. However, even with the spaced

licensing approach, those that have been issued with licences seem to struggle to stimulate much needed competition.

Barriers to Entry: Marketing costs

- 6.5.7 New entrants incur high marketing costs to attract subscribers, relative to existing players. First, a new entrant needs to raise awareness of its existence. An existing broadcaster already has a presence in the market and its marketing strategy will be slightly different to that of a new entrant. Second, in order to attract subscribers, a new entrant might have to offer incentives, such as free installations of decoders and satellite dishes as part of a marketing strategy. Meanwhile, an existing player has the incentive and ability to undercut the break-even pricing of new entrants' offerings and may even be prepared to make short-term losses in order to maintain and grow its market share.

Barriers to Entry: Lack of capital

- 6.5.8 Most of the responses to the questionnaire cited high capital costs as a barrier to entry in the broadcasting sector. A broadcaster needs access to capital to purchase the right equipment and pay for operating expenses. It takes a long period of time for a new player to break even, thus requiring a large amount of working capital to absorb the losses. Capital can become a barrier to entry for a new entrant if it is insufficient or when access to capital is available only to certain firms or at preferential terms and conditions. This can affect the sustainability of a new entrant.

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?

Dynamic character and functioning of the market

- 6.5.9 The level of concentration at the downstream market can be determined by using the number of subscribers, subscription revenue or advertising

revenue. The Authority will use subscriber numbers, since television is about the number of eyeballs that one can capture. However, given the structure of the market, the Authority believes that even if subscription revenue or advertising revenue were to be used the results of the analysis will not change, since the two factors are largely influenced by subscriber numbers in any case. Multichoice's subscriber base has been growing over the years and reached 5.7 million⁶³ in 2016. At its height StarTimes managed to reach 200 000 subscribers. This figure has dropped to around 60 000⁶⁴. Deukom on the other hand is targeted at the German speaking population in South Africa, and has about 4 000 subscribers⁶⁵. Using the above figures for StarTimes and Deukom the following market shares at the retail level can be calculated.

TABLE 3: LEVEL OF CONCENTRATION IN THE SUBSCRIPTION-TV RETAIL MARKET

Broadcaster	No of subscribers	Market share	HHI
Multichoice	5 700 000	98.1%	9 623.6
Deukom	10 000	0.18%	0.032
StarTimes	100 000	1.72%	2.3
Total	5 810 000	100%	9 626

Source: own calculation

6.5.10 An HHI of 10 000 indicates a pure monopoly. The HHI in the downstream market for the retail distribution of subscription television broadcasting channels is more than 9 000 indicating that the market is almost a pure monopoly.

⁶³ Multichoice Annual Report, 2016

⁶⁴ Letter from StarSat to Icasa confirming subscriber numbers

⁶⁵ Letter from Deukom to Icasa, confirming subscriber numbers

Q21. Is the Authority correct to use subscriber numbers as a unit of measure for market share calculation purposes? How else would you calculate market share at this level? What other factors should be analysed to determine the dynamic character of the market?

Nature and Extent of Vertical Integration

6.5.11 As discussed in section 6.3.13 vertical integration has pros and cons. A vertically integrated player can use its position to limit competition in the market. The discussion on the nature and extent of vertical integration in section 6.3.13 applies to this section.

Adequacy of Competition Law Alone

6.5.12 Given the historical trends in this market, it is doubtful that competition law alone is adequate to deal with any competition concerns. The discussion on the nature and extent of vertical integration in section 6.3.16 applies to this section.

7. CONSIDERATION OF LICENSEES WITH SIGNIFICANT MARKET POWER

7.1.1 In this section we discuss 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 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. 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.
- 7.1.4 As shown in Table 1, there are indications that in the upstream market for the supply and acquisition of premium content only three players own rights to premium content. Once the list of rights and their owners has been completed the Authority will be in a position to calculate market shares and identify licensees with significant market power. Suffice to indicate at this stage that the approach of using the number of rights to premium or exclusive content is preferred by the Authority. However, using the information that is currently available as depicted in Table 2 above, any licensee that has a market share of 45% and above will be regarded as having significant market power.
- 7.1.5 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.

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. POSSIBLE PRO-COMPETITIVE LICENCE CONDITIONS****8.1 Overview**

8.1.1 This section considers possible pro-competitive licence conditions 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 must then consider what the appropriate remedies to deal with the market failures would be. 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 It must be emphasised that any licence condition would only be imposed following a regulation making process as provided for in section 67 of the ECA. Such a process would follow a separate consultation course where all the matters are open for public input. For purposes of this inquiry the Authority can only make findings on issues consulted on and published in a Findings Document.

8.1.3 Jurisdictions that have dealt with competition issues in subscription television services have designed various remedies to deal with the identified market failures. The following sections outline some of the possible remedies.

8.2 Shorten exclusive contracts

- 8.2.1 The focus at the upstream market for the acquisition of premium content is on how rights are sold, including the terms and conditions of such sale.
- 8.2.2 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 market⁶⁶. 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.

Input Foreclosure

- 8.2.3 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 duration⁶⁷. Whilst the South

⁶⁶ Including risk sharing, hold-up and asset specificity

⁶⁷ European Commission. Guidelines on Vertical Restraints, 2010. Available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

African market may be different from the European market, it may be useful to consider possible lessons from the European market.

8.3 Introduce unbundling

8.3.1 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 IPTV for instance. Jurisdictions that have unbundled sport rights into separate packages include Brazil⁶⁸ and the broader European market⁶⁹. 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).⁷⁰

8.4 Impose rights splitting

8.4.1 Rights splitting requires a rights owner to split content rights and sell them to more than one broadcaster⁷¹. The design of the split is paramount to ensure wider access and benefit to the rights owner. There are various arguments for and against the splitting of rights. In the end the Authority would be interested in a condition that has long term benefits in 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

⁶⁸ 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

⁶⁹ Blackshaw, I. 2013. Collective sale of sports television rights in the European Union: competition law aspects. *De Jure*

⁷⁰ Dec 2003/778.

⁷¹ 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

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 market⁷².

8.5 Impose wholesale-must-offer

- 8.5.1 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 content⁷³. There was entry into the subscription-tv market by British Telecommunications plc (BT) who 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.
- 8.5.2 The South African market broadband market is still not mature as yet. Although mobile broadband connection has gained traction, fixed broadband connection is still at low levels⁷⁴. As a result the uptake of OTT services may not 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 remedy⁷⁵.

Q25. Kindly comment on each of the remedies discussed above and indicate their possible applicability in the South African context.

⁷² Toft, T. Football: joint selling of media rights. Competition Policy Newsletter. Number 3 – Autumn 2003

⁷³ Ofcom. 2014. Review of the pay TV wholesale must-offer obligation. Available at <http://stakeholders.ofcom.gov.uk/binaries/consultations/wholesale-must-offer/summary/condoc.pdf>

⁷⁴ ICASA. State of ICT Sector in South Africa. 2016

⁷⁵ 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)

8.6 Open up dominant firm's network

8.6.1 At the technical services level the following could be possible remedies:

8.6.1.1 One way of fostering entry would involve placing an obligation on a dominant provider to open their distribution infrastructure to other subscription television broadcasting providers. Technical interventions can create the conditions in which competitor offerings are better able to take on a dominant subscription television broadcasting provider. In the case of Ofcom's guidelines on technical platform services, channels are able to distribute direct to the consumer using BSkyB's digital satellite platform infrastructure because they have regulated access to BSkyB's services including conditional access, and they have certainty about how the channels will be listed on the EPG. Under Ofcom's guidelines, prices for these services are regulated. In this way, competition may be enhanced by creating the circumstances for a new entrant to utilise existing infrastructure, thereby lowering barriers to entry.

Q26. Is the above proposal feasible in the South African market context?

8.7 Introduce set-top box inter-operability

8.7.1 At the downstream level the following could be a possible remedy:

8.7.1.1 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.

Q27. Kindly comment on competition implications of set-top-box interoperability

Q28. What other conditions could be imposed on any licensee having significant market power to remedy market failure in the relevant markets?

9. CONCLUSION

- 9.1.1 The Authority used responses to a questionnaire issued on 11 July 2016 and its own internal research as well as one-on-one meetings with some stakeholders to compile this Discussion Document for public consultation purposes. The Discussion Document analyses the television broadcasting services sector in general and then focuses on subscription television broadcasting services in particular.
- 9.1.2 The Authority proposes to define relevant markets based on the television service value chain. A number of relevant markets and sub-markets have been proposed, but are subject to Input from stakeholders in response to the Discussion Document. The research suggests that there are a number of markets in the upstream, and downstream levels as well as technical markets. Stakeholder views are sought in relation to the approach and instruments that the Authority can employ in defining markets, vis a vis the research conducted in the information seeking phase.
- 9.1.3 In line with the ECA, the Authority also considered the effectiveness of competition in the proposed markets. Factors considered include barriers to entry, the dynamic nature and character of the market, vertical integration and whether competition law alone would be sufficient to address any potential market failures in the subscription broadcasting markets. Stakeholder views are sought in response to the

analysis. Stakeholders are also invited to provide alternative approaches and research on these issues.

9.1.4 Insofar as the identification of licensees with significant market power is concerned, the Authority has proposed methodologies for calculating market shares. In the event that the relevant markets are confirmed and that there is ineffective competition in those markets the Authority is required to then consider possible conditions that can be imposed on licensees with significant market power. In addition to the conditions listed in section 67(7) of the ECA, the Authority also discusses possible remedies from literature and remedies imposed in other jurisdictions. The Authority seeks input on the suitability and feasibility of these remedies in the South African context.

9.1.5 The Discussion Document serves to initiate public consultation on the Inquiry into Subscription Television Broadcasting Services. Following the publication of the Discussion Document the public will be given an opportunity to comment. Should it be deemed necessary a public hearing will be convened and thereafter a Findings Document published, marking the end of the inquiry.

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