

SUBMISSION BY THE SOUTH AFRICAN BROADCAST CORPORATION

IN RE:

ICASA's Supplementary Discussion Document: Inquiry into Subscription Broadcasting Services

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INTRODUCTION AND OVERVIEW

- Under a notice dated 6 January 2025, the Independent Communications Authority of South Africa (**ICASA**) issued a document titled "Supplementary Discussion Document: Inquiry into Subscription Broadcasting Services" (the **Discussion Document**). The Discussion Document sets out ICASA's preliminary views regarding the state of competition in the subscription television broadcasting market and invites stakeholders to submit written representations regarding the preliminary findings therein (the **Preliminary Findings**).

- 2 The South African Broadcasting Corporation SOC Ltd (the **SABC**) is a stakeholder as envisaged. This document serves as the first part of the SABC's written representations, in response to ICASA's invitation.

- 3 ICASA's Preliminary Findings include that:
 - 3.1 Competition is effective in the (upstream) wholesale market for the supply and acquisition of (i) premiums sports content, (ii) premium movies and series, and (iii) non-premium content.¹ In other words, ICASA finds that competition is effective in the (upstream) wholesale market for content acquisition.

 - 3.2 In the (downstream) retail market for subscription and free-to-air (**FTA**) services, *"there is no indication of ineffective competition"*.²

 - 3.3 In the market for premium subscription and over-the-top (**OTT**) services, *"MultiChoice has been experiencing significant subscriber losses to competing services pointing to increased levels of competition"* (i.e., effective competition).³

- 4 The SABC disagrees with each of those Preliminary Findings. In demonstrating why that is so, this Submission traverses the following themes:

¹ Paras 5.5 & 5.6, page 108.

² Discussion document, para 4.17, page 105.

³ Discussion document, para 4.18, page 105.

- 4.1 It begins with an overview of the events leading up to ICASA's Discussion Document, including a summary of the SABC's previous submissions on the state of competition in the subscription broadcasting market.
- 4.2 It then examines how competition works in broadcasting markets, providing a framework for assessing the effectiveness of competition.
- 4.3 With those principles in place, this Submission applies them to both the upstream market – focusing on content acquisition and broadcast rights – and the downstream market – analysing competition in the market for broadcasting and distribution.
- 4.4 This Submission identifies three major factors that impede fair competition, namely: (i) MultiChoice's dominance and its abuse thereof, (ii) the impact of ICASA's Must Carry Regulations, and (iii) a skewed regulatory landscape, which strictly regulates the likes of the SABC while leaving providers of OTT streaming services and search engines largely unregulated. This Submission also addresses the likely effect, from a competition perspective, of MultiChoice's upcoming merger with Canal+, a behemoth in the global media landscape, often dominating the premium television and sports broadcasting jurisdictions in which it operates. This merger will only serve to entrench MultiChoice's already-insurmountable position.
- 4.5 Finally, this Submission sets out regulatory interventions to address these market failures to promote a more competitive broadcasting environment.

- 5 This Submission must be read together with the report by RBB Economics, which provides expert economic analysis on the Preliminary Findings and other aspects of the Discussion Document, and in particular the preliminary view, expressed in the Discussion Document, that there is sufficient competition in the retail markets for subscription and FTA television services.
- 6 In this submission the SABC will not respond to each of the eleven questions contained in the Discussion Document; but will instead concentrate on question 11, as well as to some extent questions 8 to 10. For present purposes, the SABC will accept ICASA's market definitions (though it submits that, at least in the sporting context, there may be separate markets for major sports), thereby obviating the need to address the questions relating thereto. The SABC's concerns relate primarily to ICASA's findings about the extent of competition in the market, rather than the delineations of the market themselves.

BACKGROUND AND CONTEXT

Background to the issuance of the Discussion Document

- 7 The Discussion Document is part of an inquiry by ICASA to assess the state of competition and to determine whether there are markets or market segments within the subscription broadcasting services value chain that may warrant regulation in terms of section 67(4) of the Electronic Communications Act, 36 of 2005 (the **ECA**).

- 8 ICASA initiated an inquiry into competition in the subscription television market in 2016 to assess barriers preventing new entrants from establishing a sustainable subscriber base. A voluntary information-gathering process began in July 2016, followed by a Discussion Document (2017) and a Draft Findings Document (2019), each of which highlighted market concentration concerns.
- 9 Public Hearings were delayed due to COVID-19, resuming in January 2021. By that time, significant market shifts had occurred, including:
 - 9.1 The rise of OTT streaming services and search engines, and increased digital content consumption;
 - 9.2 Partially improved internet affordability and accessibility;
 - 9.3 Partial digital migration (analogue switched off in some provinces in July 2023);
 - 9.4 Increased penetration of affordable smart-phone devices.
- 10 In response to these changes, ICASA revised its market definitions in 2023, consolidating retail markets into (i) basic-tier subscription and FTA services and (ii) premium subscription and OTT services.
- 11 Wholesale markets were also redefined to focus on premium sports, premium entertainment, and non-premium content acquisition.
- 12 The Discussion Document seeks stakeholder input on competition concerns and potential regulatory interventions in this evolving landscape.

- 13 Prior to responding directly to the Discussion Document, this Submission summarises the SABC's previous submissions to ICASA regarding the state of competition in the subscription broadcasting market, which the SABC requests that ICASA again consider.

Core concerns previously raised by the SABC

- 14 The SABC has actively participated in this Inquiry since inception, including by making submissions regarding ICASA's earlier draft findings.
- 15 The SABC submitted that competition in the subscription broadcasting sector remains skewed in favor of MultiChoice, limiting fair participation by participants in the FTA space and other emerging competitors.
- 16 One concern which was raised was that the Must Carry Regulations required the SABC to provide its channels to subscription broadcasters at no cost. As the SABC pointed out, it has effectively been required to provide the subscription broadcaster (MultiChoice) with all its content free of charge, which MultiChoice then broadcasts to its commercial benefit. There is no reciprocal obligation on MultiChoice, which acquires exclusive access to premium content without having any duty to provide any of that to the SABC. This asymmetrical market dynamic, which involves MultiChoice exploiting public-funded content at no cost, has distorted the competitive landscape.

- 17 The SABC proposed that ICASA take steps to ensure that subscription broadcasters like MultiChoice compensate the SABC at fair market value for accessing and broadcasting the SABC's content.
- 18 The SABC also raised concerns about restrictions in the Digital Migration Policy, particularly the 84% Digital Terrestrial Television (**DTT**) and 16% Direct-to-Home (**DTH**) split, which limits flexibility in using DTH technology. It objected to the "use it or lose it" spectrum allocation principle, citing financial and operational constraints, and recommended a standardised channel authorisation process.
- 19 In respect of sports rights, the SABC submitted that exclusive long-term agreements prevent market access and need to be addressed. It recommended unbundling sports rights, limiting exclusivity, mandating fair sub-licensing for FTAs, and ensuring public funding for sports broadcasting to maintain accessibility.
- 20 On OTT competition, the SABC argued that platforms like Netflix and Showmax compete directly with traditional broadcasters for audiences and advertising revenue but remain largely unregulated. The SABC called for regulatory parity to address this imbalance, which has only become more pressing with the rise of other streaming platforms such as Disney+ , Apple TV and Amazon Prime.

- 21 The SABC also highlighted concerns about MultiChoice's exclusive licensing, both in the sporting and non-sporting contexts. In particular, as MultiChoice has previously confirmed under oath, it concludes exclusive licensing agreements in respect of premium content, including major sports events and Hollywood films and shows, which restricts competitors' access to those necessary inputs. The SABC proposed capping exclusive agreements, reducing exclusivity periods, and prohibiting automatic contract renewals.
- 22 Particularly in respect of sports rights, the SABC recommended that FTAs be allowed to negotiate rights directly with content owners rather than relying on sub-licensing from MultiChoice. It also called for measures to prevent inflated sub-licensing costs and to ensure fair access to sports content.
- 23 The SABC concluded that regulatory intervention is necessary to address distortions in content licensing, sports rights, advertising revenue, and OTT regulation, promoting a more competitive and accessible broadcasting market. Such intervention is not only desirable but required, given that the failure to ensure appropriate regulatory intervention to protect the integrity and viability of public broadcasting services is a breach of section 2(t) of the ECA.
- 24 The SABC's previous submission remains of application, and is accordingly reiterated and incorporated into this Submission. The earlier submission can be provided by the SABC to ICASA on request.

HOW COMPETITION WORKS IN BROADCASTING MARKETS

- 25 The SABC fundamentally disagrees with ICASA's preliminary conclusion that competition in the broadcasting market (at each of its levels) is effective. The analysis in the Discussion Document fails adequately to consider how competition actually operates across the broadcasting supply chain. Effective competition in the retail (downstream) market for subscription and FTA broadcasting is necessarily contingent on fair and competitive access to premium content in the wholesale (upstream) market for content acquisition and broadcast rights. Put differently, without proper competition at the upstream level – being the level at which broadcasters compete for content, including premium content – there can be no effective competition at the downstream level where broadcasters compete *inter se* for subscribers and, in turn, advertising revenues.
- 26 The Discussion Document fails to appreciate that the current market structure does not facilitate effective competition at either level.
- 27 ICASA finds that competition in the upstream market is effective because broadcasters have multiple avenues for acquiring content, including direct licensing, sub-licensing, and original content production. It finds further that the downstream market is competitive, citing MultiChoice's recent subscriber losses and the growth of new entrants such as OpenView and OTT streaming services and search engines. The SABC submits that these Preliminary Findings overlook, among other things, the critical role played by access to premium content, particularly live sports and high-demand entertainment, in determining market competitiveness. The Preliminary Findings also fail to take

into account the content – i.e., the Must Carry Channels – that the SABC is required to fund and provide to Multichoice free of charge in terms of ICASA's Must Carry Regulations, whilst Multichoice is not required to provide the SABC with any reciprocal content, let alone do so at no cost.

- 28 In terms of its Preliminary Findings, ICASA finds, at least impliedly, that premium content and non-premium content are substitutable, in circumstances where that is certainly not the case. ICASA also fails adequately to define premium content, which is an inherently fluid and dynamic concept, at least in the entertainment context (in the sporting environment there is less uncertainty, as it pertains to domestic, foreign and international matches and competitions for the major sports, and thus, in addition to including rugby (both the 15- and 7-person version), soccer, cricket and athletics events in which South African teams compete, covers popular foreign sporting competitions such as the English Premier League, the English FA Cup, UEFA Champions League, La Liga and the Indian Premier League (IPL) cricket tournament).⁴
- 29 Premium content is a key differentiator in the broadcasting industry. The ability to consistently broadcast sought-after content attracts viewers, builds brand

⁴ The Discussion Document defines Premium Content as: content that is fluid and dynamic concept shaped by geographical, cultural, and market conditions at a given time, and content that is highly sought-after, commands high viewership, and serves as a competitive differentiator for broadcasters. It states that premium content is also time-sensitive and exclusive—for movies, proximity to theatrical release enhances status; for television, first-run and exclusive series drive competition; and for sports, live, high-quality broadcasts define premium status. The Discussion Document adds that Premium Content is determined by a combination of factors, including audience demand, exclusivity, cost, and cultural relevance, making it a key driver of competition, market power, and revenue growth. See paras 2.3.5 at page 17 and 2.8 on page 57 of the Discussion Document”.

loyalty, and generates crucial revenue from both advertising and subscriptions. However, the current market structure limits effective access to premium content, reinforcing MultiChoice's dominance. MultiChoice continues to secure exclusive long-term rights to major sports leagues and premium entertainment content, creating a self-reinforcing cycle of market foreclosure.

- 30 ICASA acknowledges that exclusive premium content creates barriers to entry, but nonetheless contradicts that assertion by concluding that competition remains effective.
- 31 It is unclear how competition can be effective if, as ICASA acknowledges, exclusive access to premium content creates a barrier to entry.
- 32 MultiChoice's continual acquisition of premium content on an exclusive basis self-evidently lessens competition appreciably.
- 33 Even where sub-licensing arrangements exist, MultiChoice imposes restrictive conditions that limit the competitiveness of sub-licensed content, such as requiring that the sub-licensee may only broadcast the content (i) on a delayed-live and/or delayed basis, and/or (ii) restricting the SABC to broadcast the content on certain platforms and excluding other platforms. These limitations prevent new entrants and existing competitors from effectively posing any serious competitive threat to MultiChoice's dominant position.
- 34 Another tactic employed by MultiChoice/SuperSport is securing long-term exclusive agreements with rights holders and then deliberately delaying the

conclusion of any sub-licensing agreement with the SABC until just before the event takes place. This leaves the SABC with insufficient time to promote the event and attract viewers, significantly limiting its ability to generate advertising revenue from the broadcast. This tactic is employed particularly for sports broadcasts, where live coverage is essential. Unlike other content, the SABC cannot delay the broadcast to allow time to inform viewers that the event will be broadcast on the SABC; this prevents the SABC from attracting large audiences, which diminishes the attractiveness of the broadcast to advertisers.

- 35 ICASA also concludes that the transition from analogue to DTT will improve competition by enabling FTA broadcasters to offer more channels and higher-quality broadcasts. However, in the considered view of the SABC, the analogue switch-off may well reduce, rather than enhance, competition – at least between the SABC and the subscription broadcasters. Viewers who previously accessed FTA broadcasts without additional equipment now require set-top boxes (**STBs**) to receive digital signals. Given the slow and incomplete rollout of STBs, many viewers may migrate to DTH services like MultiChoice's DStv, further weakening the competitive position of FTA broadcasters. It is therefore incorrect to conclude that the transition from analogue to DTT will enhance competition. It may in fact further entrench MultiChoice's dominant position.
- 36 Moreover, effective competition in the downstream market cannot exist without fair and competitive access to premium content in the upstream market.

- 37 Therefore, MultiChoice's dominance in premium content acquisition (generally on an exclusive basis), combined with its restrictive sub-licensing practices and the potential audience loss caused by the digital migration, undermines the effectiveness of competition in South Africa's broadcasting industry.
- 38 To ensure a genuinely competitive broadcasting market, it is submitted that ICASA should reassess the conclusions which have informed the Preliminary Findings, and consider regulatory interventions that prevent dominant players from monopolising premium content and restricting competitors' ability to compete.

MAJOR FACTORS INHIBITING EFFECTIVE COMPETITION

MultiChoice abusing its dominance

- 39 The SABC respectfully submits that one of the major inhibitors to proper competition in the television broadcasting market in South Africa is MultiChoice's dominant position and the manner in which it (ab)uses that dominance.
- 40 MultiChoice has a long-standing strategy of acquiring premium content on an exclusive basis and then either simply refusing to sub-license it *at all* or only sub-licencing it on terms that ensure that the sub-licensee cannot use that content to seriously challenge MultiChoice's position in the market for the

provision of television broadcast services. MultiChoice deploys this exclusionary strategy in respect of both sporting and non-sporting content.⁵

41 For the reasons described above, reasonable access to premium content is a critical input for any broadcast service seeking to compete with MultiChoice for subscribers and, in turn, advertisers. If a broadcaster cannot access premium content on reasonable terms, then it cannot compete in the broadcasting market. Even worse for the SABC, the major television content being carried on the SABC Must Carry Channels must be, and is being, provided to MultiChoice free of charge, despite MultiChoice being an entity with which the SABC must compete.

42 MultiChoice's acquiring premium content on an exclusive basis and then either refusing to sub-license it or only sub-licensing it on prejudicial terms creates a self-reinforcing cycle of foreclosure. The pattern is as follows:

42.1 MultiChoice acquires exclusive premium content rights. By definition, this exclusivity limits competitors' access to premium content, a critical input for effective competition.

⁵ The SABC notes a communication dated 20 February 2025 in which MultiChoice has issued a call for offers to acquire free-to-air television broadcasting rights to listed events in 2025 and early 2026. Although on its face this appears to be an improvement from the historical position, several material concerns remain. First, why is it that MultiChoice – which lacks a free-to-air licence – is contracting for free-to-air rights in the first place? Second, the terms of the document itself suggest, as per paragraph 9, that MultiChoice still intends to impose unreasonable restrictions on the successful bidder. Third, as per paragraph 10, MultiChoice reserves the right to withdraw the call for offers or to abandon the process in its entirety.

- 42.2 Exclusive content – which only MultiChoice has access to by virtue of the exclusivity provisions it insists on – draws larger audiences, strengthening MultiChoice's subscriber base.
 - 42.3 A larger audience base attracts more advertising revenue and subscriber fees, increasing MultiChoice's financial advantage.
 - 42.4 With stronger financial resources, MultiChoice can consistently outbid competitors for future premium content rights.
 - 42.5 Smaller broadcasters and new entrants are unable to secure premium content, restricting their ability to grow their audience and compete for advertising revenue.
 - 42.6 As a result, competition remains stifled at both the upstream and downstream levels.
- 43 This creates a snowball effect. First, MultiChoice ties up a significant volume of premium content through exclusivity provisions. This premium content attracts large numbers of paying subscribers, which in turn attracts high-value advertisers. For instance, by virtue of MultiChoice's monopolising of national sporting events and premium entertainment content, subscribers can only access such content by subscribing to MultiChoice's expensive DStv subscriptions. Thus, through exclusive access to premium content, MultiChoice secures for itself two highly-lucrative revenue streams: (i) revenue from paying subscribers, and (ii) revenue from advertisers. MultiChoice then uses this revenue to outcompete any rival broadcaster in the (upstream) market for

premium content acquisition. And so the cycle continually repeats itself. Rival broadcasters cannot access premium content on reasonable terms; they therefore cannot generate sufficient revenue to compete with MultiChoice; and without sufficient revenue, they cannot outbid MultiChoice in the market for content acquisition.

- 44 Plainly, that is a market failure and there is no evidence that it will self-correct.
- 45 This cycle operates to the detriment of millions of South Africans, particularly in the sporting context. Millions of South Africans have been denied access to major national sporting events – including Springbok rugby matches, international cricket tournaments and PSL games – because they cannot afford a DStv subscription.
- 46 This perpetuates Apartheid socio-economic norms. And it places the SABC in an invidious position. The SABC must either pay exorbitant sub-licensing fees (using tax revenue) to MultiChoice or the majority of South Africans remain unable to access national sporting events.
- 47 Examples of some of the long-term contracts to which MultiChoice has historically had exclusive rights are the following:
- 47.1 Domestic and international football: Premier Soccer League (PSL), UEFA Champions League, the Confederation of African Football (CAF) Championship Matches and the English Premier League (though there is no longer exclusivity in respect of the last-mentioned);

47.2 Rugby: Springbok Test Matches, Rugby Championship, Super Rugby, Currie Cup, and the Rugby World Cup;

47.3 Cricket: ICC events, and SA20.

48 In all of these instances, MultiChoice/SuperSport's exclusivity has extended to FTA. This despite the fact that MultiChoice/SuperSport does not even broadcast via FTA. MultiChoice/SuperSport thus obtains exclusivity over a medium it does not use, and obtains rights which merely serve the purpose of reducing competition, in addition to generating revenue from sub-licensing fees and increasing the costs for a FTA public broadcaster like the SABC. Furthermore, when MultiChoice/SuperSport decides to sub-license the content to the SABC, there is no transparency on the cost at which MultiChoice/SuperSport acquired the content. As a result, MultiChoice/SuperSport can charge the SABC a sub-licence fee at its sole discretion; and can therefore charge the SABC a sub-licence fee which contains a considerable "markup" (such as 60% or even 100%).

49 What is MultiChoice seeking to achieve, one asks rhetorically, by securing exclusive broadcast rights that it cannot itself exploit? The answer is clear: MultiChoice/SuperSport wants to control the entire sports broadcast market to prevent anyone from properly competing with it.

50 Where MultiChoice is required – or chooses – to sub-license content, it does so in an anti-competitive manner, imposing on the sub-licensee terms that prevent any serious competitive rivalry with SuperSport. Some examples of this –

derived from the SABC's interactions with MultiChoice/SuperSport over the past five (and more) years include:

50.1 Delayed Broadcast Restrictions: MultiChoice often requires that any sub-licensed sports broadcasts are only broadcast on a delayed basis. This ensures that rival broadcasters cannot air matches live, significantly reducing audience engagement and advertising revenue potential. Airing sports matches on a delayed basis reduces the advertising revenue that the SABC can generate by approximately fourfold.

50.2 Platform-Specific Limitations: Sub-licensed content is often restricted to being broadcast over FTA only, barring competitors like the SABC from airing content via digital streaming or satellite platforms. Again, this is to prevent the SABC, or any other satellite broadcaster, from directly competing with MultiChoice/SuperSport.

50.3 Channel Restrictions: Even where sub-licensing occurs, MultiChoice prevents competitors from broadcasting on dedicated sports channels, limiting their ability to establish a foothold in sports broadcasting. Again, MultiChoice seeks to shield SuperSport from having to compete against a dedicated sports channel that would rival SuperSport.

51 By way of some examples of situations in which these kinds of restrictions have been insisted upon by MultiChoice to the detriment of the SABC:

51.1 The recently expired contract which the SABC concluded with SuperSport for certain PSL soccer games and MTN8 fixtures between the 2019/2020

and 2023/2024 soccer seasons confined the SABC to broadcasting licensed matches only “*on its existing Free to Air domestic terrestrial television channels, known as SABC 1, SABC 2 and SABC3*”.

51.2 There were also similar restrictions in the sub-licence agreements which the SABC concluded with SuperSport for the following competitions or matches (though in certain instances the sub-license agreements also permitted broadcasts on the SABC’s OTT platform known as SABC+):

51.2.1 the ICC Women’s T20 Cricket World Cup (played in South Africa in 2023); and

51.2.2 the semi-final and the final of the (rugby) Currie Cup in 2023;

51.2.3 the 2023 Rugby World Cup and

51.2.4 certain matches of the ICC Cricket World Cup, played in 2023.

51.3 SuperSport also sought to impose similar restrictions in sub-licensing rights for Springbok rugby test matches played in South Africa over the past few years, including matches against the British & Irish Lions, who toured South Africa in 2021. By way of illustration:

51.3.1 Given the South African public’s interest in Springbok rugby (and the particular interest in tours by the British & Irish Lions, which took place more than a decade apart), the SABC engaged SuperSport in the latter part of 2020 with a view to

reaching an agreement that would permit the SABC to broadcast all Springbok rugby games played in South Africa over the following three years.

51.3.2 It was necessary for the SABC to engage in negotiations with SuperSport in relation to the broadcasting of Springbok rugby matches, because SuperSport was the exclusive licensee in respect of all broadcasting rights, including FTA rights, for all Springbok rugby games played in South Africa for the period 2019 to 2024. This exclusivity extended to all broadcast formats and platforms. The SABC thus had no alternative other than to engage, and seek to obtain agreement with SuperSport, if it wished to broadcast Springbok rugby matches over any platform.

51.3.3 The discussions between the SABC and SuperSport culminated in a written proposal being issued by SuperSport on 7 April 2021. SuperSport's position, as reflected in the proposal, was that it was willing to conclude a sub-licence agreement with the SABC, but only on restrictive terms which it appeared to regard as non-negotiable. More particularly, SuperSport's position was articulated thus:

“Other Key Terms:

— As per the PSL, SLA rights to be exploited on the terrestrial Free to Air channels owned and operated by

the SABC known as SABC 1, 2 and 3 **only (not on any other channels)**

— As per the PSL, SLA broadcast rights extend to domestic Terrestrial FTA Television **only (not carriage on OTT or other platforms)**”

(bold and underlining in the original)

51.3.4 The SABC closely considered SuperSport’s proposal, before reverting on 31 May 2021, stating that, while it considered that, in the interest of its public mandate, it had no choice but to agree to the majority of the terms of the proposal, including (i) the price, and (ii) that the SABC would only be permitted to air Springbok games on a delayed basis, i.e., commencing no earlier than the final whistle, it could not agree to confine its broadcast of Springbok games to FTA terrestrial platforms only. This was because doing so would have meant that even the SABC’s dedicated SABC Sport channel distributed on FTA, DTH and OTT platforms would not have been able to provide coverage of the Lions tour. This would have limited the SABC’s ability to build brand recognition and viewer loyalty for its new dedicated sports channel. Moreover, this restriction would have imposed additional costs on the SABC, because the SABC would have been required to provide different streams of its channel(s) covering the Lions tour games on OTT and DTH platforms for the duration of these broadcasts.

51.3.5 The SABC therefore requested that this restrictive clause be removed from the agreement. SuperSport was not agreeable to removing those restrictions and so the SABC was not able to broadcast the Lions rugby matches in South Africa.

51.3.6 SuperSport was subsequently agreeable to allowing the SABC to broadcast Springbok rugby matches at the 2023 Rugby World Cup on SABC Sport and on SABC's wholly-owned and operated OTT platform known as SABC Plus, though it is not known whether it was contractually obliged by the 2023 Rugby World Cup Committee to do so, or changed its stance for other reasons.

52 The contracts for the relevant sporting events which have been referred to above can be provided by the SABC to ICASA on request.

53 Beyond sports, MultiChoice exercises similar exclusionary measures in respect of premium international entertainment content, including Hollywood films and high-budget TV series, acquired through exclusive deals with major studios.

54 MultiChoice also does the same with high-profile local productions, where MultiChoice's control over production funding allows it to dictate distribution terms, ensuring exclusivity.

- 55 The impact of this is that rival broadcasters, including the SABC, cannot access first-run, high-demand content, which in turn limits their ability to attract audiences and therefore advertising revenue.
- 56 Regulators the world over have recognised – and sought to address – market failures such as those described above. It is respectfully submitted that similar regulatory interventions ought to be considered by ICASA – which must anyway seek to level the playing field which has been skewed by its own Regulations.
- 57 By way of example of such regulatory interventions:
- 57.1 The European Commission mandates content unbundling in sports broadcasting, ensuring multiple broadcasters can acquire live rights.
- 57.2 The UK Competition and Markets Authority imposes a no-single-buyer rule for the English Premier League broadcasting rights. By contrast, SuperSport has had the right to broadcast every single English Premier League (being a total of 380 games), while the SABC, after long being excluded entirely, has only been able to obtain an FTA package of 33 matches.
- 57.3 The Swiss competition authorities have held that exclusive long-term agreements in the broadcasting market substantially impede competition and consumer access.
- 58 The fact that MultiChoice's market power is not being corrected by market forces can be seen in its enduring market shares. Multichoice controls an

incredibly high share of the upstream market in respect of premium sporting content, as well as in respect of non-sporting content. This enduring position of dominance demonstrates the market failures in subscription television broadcasting in South Africa.

59 Not only is MultiChoice's market power not being corrected by market forces, but MultiChoice's market power is likely to be materially enhanced in the near future. That is because of the pending merger between MultiChoice and Canal+, a French-based behemoth in the global media landscape, often dominating the premium television and sports broadcasting jurisdictions in which it operates. This merger will only serve to entrench MultiChoice's already-insurmountable position.

60 MultiChoice's unrivalled ability to already compete for premium content has been described above. This is likely to be compounded by the pending merger between MultiChoice and Canal+. ICASA is referred in that regard to the statement made by the MultiChoice Chief Executive Officer, Calvo Mawela, in an article published by BusinessTech on 14 November 2024 (annexed hereto marked as annexure "A"). In the article, which is titled "*MultiChoice's big plan to take on Netflix in South Africa*", Mr Mawela states that the merger will improve the merged entity's ability to compete for content.

61 As has already been explained, even prior to the anticipated merger, MultiChoice's ability to compete at the upstream level is unrivalled. This means that the SABC is unable to compete effectively against MultiChoice in the

market for the acquisition of popular content. If the merger enhances the ability of MultiChoice / SuperSport to acquire such content, which is what Mr Mawela says, that would further exclude the SABC and others from competing for the same content and thus, the audiences that procure these broadcasting services.

62 In the circumstances, and contrary to the view expressed by ICASA, MultiChoice's position has not and will not be addressed by market forces. If anything, MultiChoice's already-insurmountable position will simply be further entrenched.

63 Moreover, ICASA's finding that the growth of OTT streaming services and search engines has resulted in enhanced competition, thereby diluting MultiChoice's market power, overlooks the fact that OTT streaming services have not to date broadcast live sports, a critical driver of subscription choices. (For clarity, any streaming of live sport on OTT streaming services such as DStv Stream is still subject to the audiences having subscribed to the Multichoice/SuperSport pay television (subscription broadcasting).)

The Must Carry Regulations

64 A further feature of the regulatory landscape that materially skews the playing field in favour of MultiChoice is that, as already alluded to, the SABC must make available all of its FTA content to MultiChoice, without being able to obtain any compensation for doing so, despite MultiChoice being able to attract thousands

of viewers by promoting their DStv packages using such FTA content and by airing it; while MultiChoice has no corresponding obligations.

65 The SABC's duty to make its FTA content available to MultiChoice, free of charge, arises from the SABC's channels having been designated as "*Must Carry Channels*" under regulation 4 of the ICASA Must Carry Regulations, 2008 (as amended in March 2022) (the **Must Carry Regulations**).

66 The relevant provisions of the Must Carry Regulations are as follows [emphasis added]:

"3 Television programmes to be carried

(1) All the television programmes comprising a channel and broadcast by a PBS Licensee [i.e., Public Broadcasting Service Licensee] as part of its broadcasting service are subject to Must Carry obligations.

(2) The PBS and the SBS Licensees [i.e., Subscription Broadcasting Service Licensees] must negotiate the carriage of PBS channels.

4 Obligation to carry television programmes

(1) All SBS Licensees must carry the channels of the PBS Licensee designated as Must Carry Channels as part of the service offering, subject to regulation 5.

(2) The SBS Licensee must submit a request to carry the television programmes of the PBS Licensee within six (6) months of the coming into effect of the Must Carry Amendment Regulations, 2022 or within six (6) months from the date of issuance of a new SBS Licence or within six (6) months from the date that an obligation to add Must Carry Channels

is triggered as a result of a licensee adding new channels that amount to twenty-nine (29) channels or more.

(3) The SBS Licensee must commence to transmit the Must Carry Channels within three (3) months of receipt of the Must Carry Channels from the PBS Licensee.

...

6 Obligation to offer television programmes

(1) The PBS Licensee must offer its television programmes, subject to commercially negotiable terms, to the SBS Licensee upon a request from the SBS Licensee.

(2) The PBS Licensee must offer its television programmes to the SBS Licensee within three (3) months from the date of conclusion of the agreement on commercially negotiable terms.

(2A) The agreement contemplated in subregulation (2) above must be concluded within three (3) months from the date of receiving a request for the Must Carry Channels.

(3) The PBS Licensee must deliver its signal to the SBS Licensee in an un-encoded and compatible format.

6A Negotiation of commercially agreeable terms

(1) Should the parties to a commercial negotiation fail to conclude an agreement within three (3) months as contemplated in regulation 6(2A), the parties may request an extension in writing to the Authority to finalise the agreement.

(2) A request for extension must be lodged with the Authority before the lapse of the three (3) months period mentioned in regulation 6(2A) above.

(3) The duration of extension granted by the Authority in terms of regulation 6A(1) must not exceed a period of thirty (30) working days.

(4) If the parties fail to conclude the agreement, they must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations.

(5) The Authority may refer any failure to comply with these Regulations or any unresolved dispute to the CCC for resolution.

7 Transmission of television programmes

The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes that are identified as Must Carry programmes.

8 Agreement

The SBS Licensee must submit to the Authority a copy of the agreement within thirty (30) days of the agreement being signed.”

67 Importantly, Regulations 3(2) and 6A were among the provisions introduced or amended by the Must Carry Amendment Regulations 2022. The reasons for those additions were explained by ICASA in its “*Reasons Document*”, which accompanied the 2022 amendments, the salient portions of which are referred to below.

67.1 As regards regulation 3(2), ICASA stated that “*The purpose of the insertion is to provide certainty that the parties to the agreement should negotiate carriage as the Authority does not have the mandate to get involved in the commercial negotiations.*”

67.2 And as regards regulation 6A, ICASA stated that:

“The purpose of inserting regulation 6A is to allow in the regulations with section 60 sub three of the ECA that the subscription broadcast service licensee must carry television programmes provided by public broadcasting service licensees subject to commercially negotiable terms.

... If the negotiating parties failed to reach an agreement after exhausting the processes of resolving the disputes such as arbitration, the parties must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations. The Authority will, through the CCC, investigate the dispute to ascertain matters such as the reasonableness of the negotiations. It is worth noting that the Authority will not interfere in the commercial nature of the negotiations.

... The timeframe for negotiations seeks to ensure that the negotiating parties do not negotiate in perpetuity whereby the Regulations will not be fully implemented.”

68 The Must Carry Regulations (as amended subsequent to the SABC’s earlier submissions to ICASA) require that the Public Broadcasting Service (**PBS**) Licensee (the SABC) must offer its television programmes to the Subscription Broadcasting Service (**SBS**) Licensee (being MultiChoice) on “*commercially negotiable terms*”. As the SABC has discovered to its detriment, however, there is currently no way to compel MultiChoice to reach agreement on the commercial terms, or even to negotiate in good faith; while the PBS Licensee’s obligation to offer its television programmes to the SBS Licensee without any compensation to the PBS Licensee continues unaffected by (and thus

irrespective of) the absence of the agreement contemplated by Regulations 6 and 6A.

69 The stark reality is that, despite a concerted effort on the part of the SABC, it has not been able even to come close to agreeing commercial terms with MultiChoice. There is also no mechanism to resolve this impasse.

70 Referring the matter to ICASA is also cold comfort to the SABC in circumstances where, as ICASA's Reasons Document has made clear, ICASA will not get involved in commercial negotiations between a PBS Licensee and an SBS Licensee regarding Must Carry Channels.

71 SABC is thus left in an untenable position, which, notwithstanding the 2022 amendments to the Must Carry Regulations, is effectively no different to the one in which the SABC found itself when earlier making submissions to ICASA. The SABC has a duty to make all of its content available to MultiChoice; while the MultiChoice flatly refuses to pay anything for that content, or even to enter into negotiations in respect of the value of the content being provided to them by the SABC, and there is no mechanism available to the SABC to force MultiChoice to do so.

72 The prejudice to the SABC is exacerbated by the fact that (as noted above) the SABC is required to provide its content to Multichoice free of charge in terms of ICASA's Must Carry Regulations, whilst Multichoice is not required to provide the SABC with any reciprocal content.

- 73 To put this prejudice into perspective, according to the SABC's calculations, the fair value to MultiChoice of having access to all the SABC's content is approximately R700 million per annum. As matters stand, MultiChoice acquires that content for free. Not only does the SABC content come at huge cost to the public purse, but for the reasons that follow, the SABC content is hugely valuable to MultiChoice.
- 74 The SABC channels are amongst the most popular channels on the DStv platform. On aggregate, the SABC channels account for a significant share of the total audiences on DStv, accounting for between 20% and 26% of the total average audience in 2022.
- 75 Each SABC channel individually is also amongst the most popular channels on DStv. SABC 1 generates an average audience that is substantially (24 times) larger than all other channels on DStv on average. Similarly, in 2022, SABC 2, SABC 3 and SABC News generated average audiences of 95,324, 18,715, and 21,623, respectively, compared to the average audience of 17,588 on non-SABC channels.
- 76 This high ranking of the SABC channels in terms of audience generation reflects the fact that they carry a significant share of the most popular programmes broadcast on the DStv platform.
- 77 In particular, they account for 7 of the top 10 most popular programmes, and more than 75% of the top 50 (and 70% of the top 100) most popular

programmes, across all subscription packages. The most popular programmes on DStv also generate materially larger audiences than other programmes. For example, Uzalo attracted an average audience of close to 3 million viewers in 2022, which was almost 140 times higher than the average across other programmes on the platform (20,776).

- 78 The SABC channels are also differentiated in terms of content from the other channels carried on DStv. Around 30% of the SABC's prime-time content consists of local programming while, by contrast, local content only accounts for around 9% of prime-time viewership on other DStv channels (excluding eTV). In similar vein, around 18% of the SABC's prime-time viewership is attributable to drama programming, while drama content only accounts for around 9% of prime-time viewership on the other DStv channels.
- 79 In addition, the SABC channels provide content that appeals to viewers with different demographics compared to other channels on the DStv platform. For example, SABC 1 predominantly attracts Nguni-speaking audiences, while SABC 2 caters more for Sotho-speaking viewers than other channels. By contrast, the other DStv channels account for a higher share of the English-speaking audience.
- 80 The SABC channels also appear to be aligned with, and supportive of, the key areas of subscriber growth for DStv, providing a further indication that these channels assist, and are likely to continue to assist, DStv in attracting and

retaining subscribers (thereby generating value for MultiChoice through their inclusion on the platform).

81 There can thus be no doubt that the SABC channels generate substantial value for MultiChoice. The SABC channels enable MultiChoice to attract and retain a large number of subscribers on the DStv platform. Indeed, not only do the SABC channels draw viewers to the platform by broadcasting highly popular programmes, but the programmes appeal to a wider audience than any other channels on the platform.

82 Self-evidently, MultiChoice ought to compensate the SABC.

83 In an attempt to resolve this untenable position – in which MultiChoice free-rides on hugely valuable public-funded content – the SABC has sought to refer the matter to arbitration. In response, Multichoice wrote to the SABC asserting that an arbitration would be unnecessary as the parties are capable of reverting to negotiations and reach consensus on the Must Carry fee to be paid by Multichoice to the SABC. Contrary to those assurances, Multichoice has not however taken any steps for the parties to resume the negotiations. Instead, Multichoice has recently presented to the Minister of DCDT and the Parliamentary Portfolio Committee its reasons for declining to pay the SABC the Must Carry fees. Copies of the correspondences between the SABC and MultiChoice can be provided by the SABC to ICASA on request. **C**". Although the parties had reached deadlock, discussions are being revived for the parties to resume negotiations.

- 84 There can, in the SABC's submission, be no serious doubt that MultiChoice has obstructed the SABC's attempts to address this issue, nor that this approach has been prompted by a desire to seek to perpetuate the status quo, in terms of which MultiChoice can access and broadcast all of the SABC's content on SABC 1, SABC 2 and SABC 3 free of charge.

An asymmetrical regulatory landscape

- 85 A further difficulty facing the SABC is that OTT streaming services and search engines do not have to adhere to the same strict Regulations to which the SABC, as the public broadcaster, is subject. That is despite the fact that the OTT streaming services and search engines compete with the SABC. That further skews the competitive landscape, and places the SABC on an unequal footing.

- 86 By way of brief overview:

- 86.1 Because the SABC is the public broadcaster in South Africa, the SABC's objectives, as well as its content and its business practices are set out and tightly regulated through legislation (including the Charter in Chapter IV of the Broadcasting Act, 4 of 1999 and the ECA), and licence conditions and Regulations issued by ICASA. These Regulations and limitations are applicable to all SABC services, and also apply to the SABC's broadcasts on digital media.

86.2 By contrast, OTT streaming services and search engines remain unregulated, despite competing directly with licensed broadcasters for audiences and advertising revenue. That is contrary to, and undermines, the principle of regulatory parity.

86.3 As a consequence of this disparity, OTT streaming services and search engines can, unlike the SABC, enter market without: (a) a licence, (b) local content quotas/obligations, (c) obligations to promote all languages and to source content from underserved provinces (50% of the SABC's annual budget for produced programmes is spent on African languages and/or programmes commissioned from underserved areas), (d) any obligation to cover listed national sporting events, and (e) any obligation to serve minority interests and carry unprofitable content.

86.4 Moreover, while the SABC has the obligation to adhere to the Code of Conduct for broadcasters to ensure content credibility, OTT streaming services and search engines have no obligation to ensure content credibility and this leads to dissemination of misinformation and disinformation.

86.5 The SABC is further disadvantaged vis-à-vis the OTT streaming services and search engines in that:

86.5.1 the SABC must provide content in various official languages (thereby increasing its operating and productions costs);

- 86.5.2 the SABC's content must always be accessible for free, in line with the SABC's universal service and access obligation (and so the SABC cannot attempt to recoup costs by putting up a paywall);
 - 86.5.3 the SABC has to consider including a low bandwidth format of the content, and online and social media content that is usable on data zero-rated platforms, as well as utilising low bandwidth multimedia distribution platforms, whereas OTT streaming services and search engines have no such constraints;
 - 86.5.4 the SABC must also be judicious in the advertisements it associates with its content, being careful that the advertisements do not harm the SABC's status as the public broadcaster, thereby limiting its potential sources of advertising revenue – which is a crucial component of the SABC's income in the light of the very limited government subsidies and low income from licence fees due to the ineffective collection mechanism.
- 86.6 The SABC is furthermore obliged to contribute a levy of 0.2% of its annual turnover towards the universal service and access fund, whereas OTT streaming services and search engines do not have the obligation to promote universal service and the access of local and community media.

86.7 OTT streaming services and search engines can use existing broadband infrastructure to distribute their services whilst the SABC has to pay the high cost of signal distribution to deliver its services to all. The average cost to the SABC for those signal distribution services is about R59,3 million per month, which is about R711.7 million per annum.

87 We should add that the fact that the SABC, as the public broadcaster, is obliged to provide content for free is particularly disadvantageous given consumers' shift from traditional to digital media, and the resultant migration of advertisers away from traditional media to digital media. For-profit broadcasters are able to offset losses attributable to lower advertising revenue by monetising their digital content, for example, by adding subscription options and paywalls. By contrast, as has been pointed out above, the SABC cannot implement the same strategies to offset losses in advertising revenue on traditional media.

CONCLUSION AND APPROPRIATE REMEDIES

88 South Africa's subscription broadcasting market suffers from significant market failures, primarily driven by MultiChoice's entrenched dominance and its abuse thereof. There can be no debate regarding MultiChoice's dominance, both in the sporting and non-sporting segments, through SuperSport and DStv respectively. MultiChoice has to date maintained its overwhelmingly dominant position and constantly reinforced that market power through anti-competitive practices. Chief among these is MultiChoice's practice of acquiring premium content on an exclusive basis, both in respect of sporting and non-sporting

content. Once MultiChoice has secured exclusive licensing rights over this content, it leverages that exclusivity, effectively foreclosing competitors from accessing essential content of reasonable terms. This stifles fair competition among rival broadcasters, restricts South African audiences' access to major sporting events (including national sports teams), and ultimately redounds to MultiChoice's continued unrivalled position of dominance.

89 This distortion is further exacerbated by the Must Carry Regulations and an asymmetrical regulatory framework.

89.1 The Must Carry Regulations deepen the competitive imbalance by mandating that the SABC provide its publicly funded content to MultiChoice, without any mechanism for obtaining a commercially fair price or even compensation, and without any reciprocal obligation on the part of MultiChoice. The SABC ought to be fairly compensated for providing its publicly funded content to MultiChoice. The production of this content comes at major cost to the public purse; it is hugely popular; and MultiChoice's access to it at no cost constitutes free riding. There is however no way in which the SABC can currently obtain payment from MultiChoice, as the current mechanism for addressing a dispute between the PBS licensee and the SBC licensee over commercial terms for the broadcast of the Must Carry Channels is entirely ineffective. The regulatory regime should accordingly be amended so that a dispute such as the long-standing impasse between the SABC and MultiChoice regarding payment for the SABC's Must Carry Channels can be properly ventilated before a decision-maker with binding powers.

89.2 Meanwhile, the regulatory asymmetry between traditional broadcasters and OTT streaming services and search engines allows streaming services – direct competitors to the SABC – to operate with minimal regulatory oversight, further undermining the SABC’s ability to generate advertising and subscription revenue. Without regulatory intervention, these imbalances will continue to undermine fair competition and the sustainability of public broadcasting in South Africa.

90 Moreover, given the fact that MultiChoice’s unrivalled position has been largely unchanged for decades, and MultiChoice’s financial position and market reach is only likely to strengthen further as a result of the pending merger with Canal+, there is no reasonable prospect of these market failures self-correcting. Regulatory intervention is plainly necessary.

91 For all the reasons above, as well as what is contained in the RBB Economics’ report, the SABC urges ICASA to reassess its Preliminary Findings and to implement measures that foster a genuinely competitive and equitable broadcasting landscape in South Africa. To that end, the SABC respectfully proposes that ICASA consider regulatory interventions, such as the ones set out below.

Suggested remedies

92 The SABC draws ICASA's attention to the provisional report of the Competition Commission's Media and Digital Platforms Market Inquiry (MDPMI) (February 2025) ("MDPMI Provisional Report"), a copy of which is annexed hereto marked as annexure "**B**". From the MDPMI Provisional Report, it is evident that the Competition Commission holds a view that there is no competition in the digital broadcasting market. Therefore, the SABC calls upon ICASA to take into account some of the remedies recommended by the Competition Commission in the MDPMI Provisional Report when developing remedies to address the anti-competitiveness in the market. ICASA should also establish a regulatory framework that addresses the imbalance created by digital platforms. Among other remedies recommended in the MDPMI Provisional Report, ICASA should consider the establishment of a media industry fund financed by tech companies to support news organizations. This aligns with international regulatory trends and underscores the need for ICASA to explore similar mechanisms. Accordingly, we propose that ICASA consider these recommendations and integrate appropriate elements into its regulatory approach to foster a more equitable digital media ecosystem.

93 As regards MultiChoice's misuse of its dominance:

93.1 Limitations ought to be placed on exclusive licensing. No broadcaster ought to be permitted to obtain exclusive broadcast rights over a stipulated percentage of the content available for licensing, which should be imposed in respect of both sporting and non-sporting content.

- 93.2 Limitations should be imposed on the duration of licensing agreements. Licensing agreements should be of relatively short duration such that rival broadcasters regularly have an opportunity to compete for popular content.
- 93.3 In those instances where exclusive licensing agreements are concluded, the exclusive licensee ought to be required to sub-license on terms that are fair, reasonable and non-discriminatory.
- 93.4 There ought to be an outright prohibition on broadcasters licensing content they are not licensed to broadcast. For instance, a broadcaster who lacks the licence to broadcast via FTA ought to be precluded from acquiring FTA broadcast rights. ICASA should carefully protect and safeguard the interests of South African citizens in accessing national sporting events for free, in line with the principle observed world-wide by regulators and sports federations.
- 93.5 ICASA should also impose requirements pertaining to transparency in rights acquisitions and sub-licensing, and, in appropriate cases, the unbundling of rights, in line with the approaches adopted in other jurisdictions referred to above.

94 Re the Must Carry Regulations:

- 94.1 As indicated, the amended Must Carry Regulations need to be further amended to remove the disadvantages to the SABC and the benefits to MultiChoice inherent in the current framework; and to include an effective

mechanism for resolving deadlocks between negotiating parties. It does not suffice for the Regulations to contemplate that ICASA's Complaints and Compliance Committee (CCC) could make a determination of the reasonableness or otherwise of the parties' positions. The Regulations should mandate that, where the parties are unable to resolve a dispute through negotiation within a specified time, the dispute should be referred to arbitration.

94.2 The Must Carry Regulations should also contain adequate measures for dealing with delays in agreeing commercial terms on which the Must Carry Channels are to be provided. Appropriate measures could include permitting a PBS licensee to withhold Must Carry Channels until the negotiations have been finalised (and agreement reached) and/or providing for agreed pricing to have retrospective effect, of which these options should be at the instance of the PBS licensee.

94.3 There should also potentially be some mechanism for the Competition Commission to make a price determination based on markets.

95 As regards the asymmetrical regulatory framework between the SABC and OTT streaming services and search engines:

95.1 ICASA should consider Regulations OTT streaming services and search engines, not only because that is itself in the public good, but also because, without such regulation, the competitive landscape is skewed in their favour.

95.2 ICASA must also take cognisance of section 2(t) of the ECA, which enjoins ICASA to protect the integrity and viability of public broadcasting services. ICASA's Regulations should enable the SABC to carry out its public service mandate, including provision of universal access of public media, and still be financially viable. For example, while ICASA may still want to regulate accessibility of digital services, and signal interference challenges, there should be some relaxation of regulations or "light touch regulations" post the analogue switch-off (ASO), as this will enable the SABC better to compete with the unregulated content providers.

95.3 ICASA should also enable the SABC to reduce its high signal distribution costs, which further undermines its competitive position.

95.3.1 It is relevant in this regard that, although, in terms of s 62(3) of the ECA, Sentech is required to carry public broadcasting services, there is no statutory obligation on the SABC to exclusively utilise Sentech for signal distribution where competitive options exist. The SABC should therefore not be confined to one signal distributor when there are more signal distributors who can offer coverage at competitive pricing; and should be able to choose the best platforms for its business (particularly where this important for its financial viability, and thus the object enshrined in s 2(t) of the ECA).

95.3.2 Furthermore, as Sentech currently has a monopoly over (a) analogue terrestrial radio transmission (b) analogue terrestrial television transmission and (c) DTT transmission, it

is imperative that the tariffs in these categories are regulated in line with section 62(3)(b) of the ECA. The failure by ICASA to do so has exposed the public broadcaster to monopoly pricing.

96 Further remedies to address the competitive imbalances and the SABC's inherent disadvantages:

96.1 *Technology neutrality:*

96.1.1 The SABC submits that ICASA's current regulation of the DTT-DTH network split, and its stipulation of the percentages for DTT and DTH, need to be revisited, in line with the technology neutrality principle as enshrined in the ECA.

96.1.2 While the SABC does not necessarily cavil with the proposal that it should reach 100% of the population with its digital television services, it does not agree that the technology to be used to achieve this should be "coded" into the Broadcasting Digital Migration Policy and Regulations. The SABC believes that the network split should be a commercial decision that should be decided upon by the SABC and its signal distributor.

96.1.3 Not only does the SABC want to be everywhere and available at all times, but it also wants to be available on every device or terminal equipment. This goes beyond the issue of

achieving 100% population coverage, and also entails enriching the coverage with convenience and comfort. To achieve this, it will be necessary to use multiple technologies such as OTT and DVB-T2 Lite. To that end, the Broadcasting Digital Migration Policy should enhance flexibility and promote network neutrality.

96.2 *Licensing framework:*

96.2.1 In 2011, during ICASA's DTT Regulations development process, the SABC proposed a framework that provides for holistic quotas for television rather than channel-based quotas. In terms thereof, television as a whole would still be obliged to deliver on its mandate across channels, merely not be constrained to doing so on a particular channel. For instance, the television network would be licensed to provide X number of children's programmes, rather than having to provide them for individual channels as in the current regulated process. This would allow flexibility in scheduling and assist the SABC to reposition the channels, incubate new channels and allow them space to grow on the DTT, DTH and OTT platforms.

96.2.2 The SABC also notes and supports the 2016 ICASA Local Content Position Paper and Regulation Findings Document, which stated that the 2016 Regulations will apply per bouquet. In the SABC's view, effect should be given to those

recommendations, so that the SABC does not still have to apply channel-based targets or quotas, which deprive the SABC of flexibility, and preclude it from changing its schedules in order to be proactive and responsive to the needs of the audiences.

96.2.3 In summary, the SABC submits that the licensing framework should take due cognisance of the prevailing competitive digital environment in which the public broadcaster's agility and scheduling flexibility is heavily constrained by channel-based quotas.

96.3 *Amendments to ICASA's Digital Migration Regulations:*

96.3.1 *Use it or lose it principle:*

(a) Regulation 3(8) of ICASA's Digital Migration Regulations specifies that *"Where any capacity in Multiplex 1 and Multiplex 2 which is allocated in terms of these Regulations to be used by a terrestrial television broadcasting service licensee, is not being utilised for content provision by that licensee on the date 36 months after the commencement of the dual illumination period, the unutilised capacity shall be forfeited"*.

(b) There are high costs involved in the implementation of a broadcasting network. The stipulation of the time

period for the use of the licence capacity in the Multiplex places undue commercial pressure on the SABC as the PBS licensee. It is accordingly submitted that regulation 3(8) should be removed and allowance made for instances which are beyond the control of a licensee. Thus, for example, ICASA should grant licensees an opportunity to apply for condonation upon reasonable grounds, in cases where the licensee is unable to launch services on the allocated spectrum.

- 96.3.2 *Channel authorisation:* Regulation 6(6) of ICASA's Digital Migration Regulations provides that there could be public hearings for the SABC public service channels. This could result in the channel authorization process for the SABC alone being lengthened, as no broadcaster other than the SABC will be subjected to public hearings. Whilst it is appreciated that ICASA has not initiated public hearings during the implementation period; it is important to remove this regulation with a view to levelling the playing fields and fostering certainty, as this will allow the SABC to be more agile and responsive to audience needs.

MultiChoice's big plan to take on Netflix in South Africa

14 November 2024

Bloomberg

"MultiChoice Chief Executive Officer Calvo Mawela is preparing to take on US streaming giants as the African TV company works to get its approximately \$3 billion (roughly R55 billion) deal with Vivendi SE's Canal+ over the line with regulators.

"A combination gives us a better chance to compete against the global giants," Mawela said.

"Scale matters in this industry, then you are able to negotiate better rates for content, and you are able to generate more revenues, especially with one party operating in French-speaking Africa and one in the English-speaking part of Africa."

The company has been losing subscribers and struggling with currency depreciation across many of its markets, especially Nigeria, which has hit profits and customers' spending power.

A deal with France's Canal+ would help scale a combined entity to better compete for content and technology needed when going up against dominant platforms like Netflix Inc. and Amazon.com Inc., Mawela said.

While the companies have been in talks with regulators in South Africa, where local ownership rules may prove to be a serious regulatory hurdle to the deal, the French broadcaster has continued to slowly up its stake in MultiChoice.

"We put something together that should be acceptable for the regulators, and engagements are ongoing," he said.

"We believe it's a good story for Africa."

Africa has a young and fast-growing population that's an attractive market for streamers, although the continent also struggles with uneven internet access, low incomes and currency volatility.

A combination of Canal+ and MultiChoice would create a group with nearly 50 million subscribers and the resources to invest more in local content and sports.

MultiChoice is already working with Canal+ on new productions and the South African company, known for its sports content, is providing its partner with access to English Premier League football matches, said Mawela.

He said the company hopes to boost its sales to \$1 billion from its Showmax service in the next five years.

French billionaire Vincent Bolloré's Vivendi is in the process of breaking up his sprawling media and entertainment empire, and Canal+ is actively preparing its own listing in London. The newly spun-off company may also have a secondary listing in Johannesburg."

This article can be accessed online via this link:

<https://businesstech.co.za/news/media/799805/multichoices-big-plan-to-take-on-netflix-in-south-africa/>



competition commission
south africa

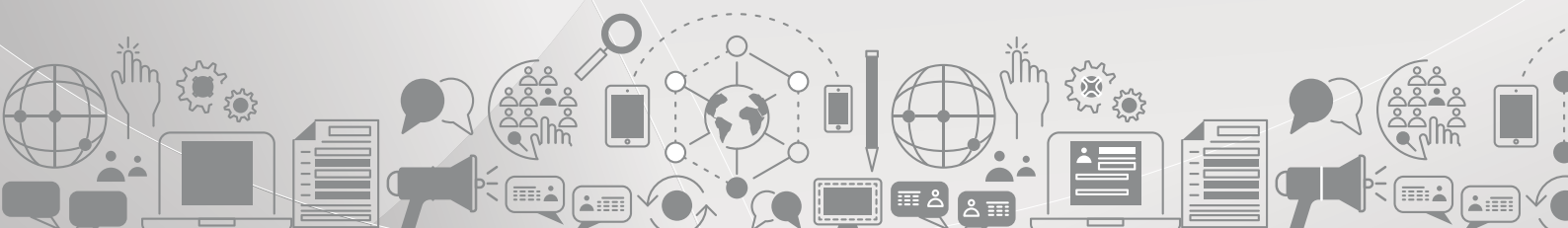


Media and Digital Platforms Market Inquiry (MDPMI)

PROVISIONAL REPORT

NON-CONFIDENTIAL

FEBRUARY 2025



a growing, deconcentrated and inclusive economy

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SUMMARY OF PROVISIONAL FINDINGS AND REMEDIES

1. SEARCH

1.1. Provisional Findings

1. The provisional findings on search and personalised feeds are as follows:
 - 1.1. Google's monopoly position and the unequal bargaining position of the media means there has not been an equitable share of value between Google and news publishers in South Africa both historically and currently. This inequity has materially contributed to the erosion of the media in SA over the past fourteen years and will continue to do so unless remedied. The Inquiry has used a variety of measures to determine the additional value extracted by Google search annually from publishers, or value destroyed through conduct that promotes zero-clicks, resulting in a range of estimates from R300m-R500m for 2023. The value will be higher today. The value will also be higher if Google AdTech and SERP/feed YouTube referral benefits are included, but the Inquiry has considered remedies for AdTech and YouTube below which should address the inequity in that market.
 - 1.2. The unequal bargaining position has resulted in an inequitable sharing of user data and insights between Google and news publishers.
 - 1.3. The Google algorithm distorts competition between news media organisations insofar as it a) over-represents global news media in SA for search and Top Stories, b) under-represents vernacular and community media, and c) over-represents subscription publishers. Furthermore, Google appears to self-preference YouTube links on the SERP and Discover feed relative to links to third-party video providers, including SA news broadcasters. These issues are exacerbated by SEO requirements for the algorithm and for core updates to the algorithm where there is insufficient transparency on how the media will be affected and how to avoid traffic loss.
 - 1.4. AI-powered search is likely to cause an even greater extraction of value by search engines from news publishers unless a) news publishers have the option to opt-out of AI summaries, and b) technological choices are made that ensure referral traffic to news publishers is not degraded by these tools.
 - 1.5. Microsoft Bing has the potential to become more relevant to news publishers in future given the outcome of the US case against Google and its relationship with OpenAI. This will make its approach



to search, and AI-powered search, more impactful on the media in future.

2. The conduct identified has an adverse effect on competition through:
 - 2.1. Competition for advertising revenue and consumer data by throttling referral traffic and denying the user data to enable better ad targeting. Evidence of the effect includes the high levels of zero-clicks for news queries, the declining share of 3rd party referral traffic and the limited data sharing.
 - 2.2. An imbalance in bargaining power that enables the extraction and monetization of news media content, distorting competition for news content distribution and monetization. Evidence of the effect includes practices designed to extract news content from the media and the higher value derived by search engines for news content relative to the media itself.
 - 2.3. Distorting competition amongst news media through degrading the prominence of SA media relative to foreign, community and vernacular media relative to mainstream English media, and paywalled media relative to the public

broadcaster and other advertising-led media. Evidence of the effect includes the higher levels of impressions despite lower CTRs for foreign over SA media, mainstream English over community and vernacular media and paywalled media over free media.

- 2.4. Distorting competition for news broadcast video distribution and monetization by degrading news and broadcaster website sources relative to YouTube. Evidence of the effect includes the higher levels of impressions despite lower CTRs for YouTube over SA media websites.
3. As a result, the conduct has an adverse impact on the quality and consumer choice of SA news media, particularly the diversity of media through SME and HDP-owned media that offer community and vernacular media along with the public broadcaster. Harm to the quality and diversity of media, along with the plurality of voices and the ability for citizens to get news in their home language, undermines citizen's Constitutional rights and hence the adverse effect is considered substantial.

1.2. Provisional Remedies

4. The provisional remedies are designed to form the basis for further debate and engagement. The Inquiry has mostly focused on addressing the source of adverse competitive outcomes and setting out the more competitive outcomes it would like to see, being open to different mechanisms to achieve those competitive outcomes. Our remedies are broadly informed by the need to compensate the news publishers directly for a period to rebuild, innovate and strengthen the news industry, including its capability to generate

revenues in a digital environment. This is essential given the historic erosion of revenues by Google that has left the media in a weak financial and operational position. Data-sharing forms part of empowering news publishers to generate revenues.

5. A bargaining solution only is unlikely to remedy the issues and the large print media have in any event failed to reach an agreement despite negotiations with Google whilst other media organisations such as the public broad-

caster have been excluded from negotiations altogether. The Inquiry has therefore determined the range for the remedial value which can be imposed or act as a guide for further negotiations between the media and Google. The Inquiry has also felt the need to set out how such funds may be dispersed given the divergent interests in the media and concerns that outcomes may favour the established large media in a market where media concentration already exists. Lastly, the Inquiry seeks to overcome the other problem with bargaining models, namely that solutions are found for the underlying structural causes of the imbalance in value and how referral traffic can be grown to bring the value more closely into balance. However, the Inquiry sees the value in facilitating current and future bargaining between the media and search engines as this may permit a negotiated outcome in the range identified by the Inquiry in lieu of its imposition, and the opportunity to bargain over future issues that may arise, including the evolution of AI-powered search.

6. There is a value inequity which must be addressed, and in the short-term this is best done through payment into a media industry fund. These funds elsewhere have been linked to either content volume or journalist numbers, either way favouring the large mainstream media at risk of undermining media diversity and plurality. Some countries have offered subsidies in a manner that privileges smaller media over legacy to improve diversity. Needs also differ materially, as some of the larger media already benefit from the 'winner-takes-most' subscription outcomes in the market and the corporate broadcasters and local 'knock & drop' may be less existentially impacted than mainstream and community print, along with the public broadcaster. It is therefore imperative that any dispensing of funds takes into account needs and the promotion of media diversity and plurality.
7. As the inequity in value exchange is a product of search design choices which have resulted in less referral traffic, the value that search engines provide to news publishers, then there is an opportunity for search to make different choices and rebuild that referral traffic to enable a more equal value share without the need for indefinite transfers. Referral traffic can be monetised at higher rates by the news media which is why it is ultimately preferred to a share of lower-value ads on the platform, including as compensation or as other monetisation options on the platform. In essence, a proposal to fix the competition problem rather than simply compensate for the negative outcome. If this opportunity is not taken, then the option remains for a permanent digital tariff or levy to compensate for the negative outcomes in lieu of fixing them. The same applies to the choices that are made with AI-powered search which is in its infancy. Those choices can enhance traffic and revenue generation for news media or not, and the aim is to incentivise the former to ensure a fair exchange of value, failing which a digital tariff or levy is the only option.
8. As Microsoft Bing has the potential to become more relevant in the future, recommendations rather than remedies are proposed for its traditional search design, but binding remedies are proposed for its AI-powered search given its relationship with OpenAI, the dominant Chatbot.
9. The provisional remedies recommended by the Inquiry are as follows, with a recommended implementation period of 6 months:
 - 9.1. Google to compensate the SA news media for the additional value extracted annually of R300-500m. The compensation can include funding support for projects that build digital news capabilities with the objective of improving revenue generation, but the majority of funding must be transfers to support and strengthen journalism. Administration costs are for Google's account.

News media and broadcasters are eligible if they predominately service the SA market, report on current issues or events of public significance for South Africans at a local, regional or national level and adhere to the regulatory oversight by the Press Council or BCCSA. The public broadcaster must be included in the compensation. The compensation for individual news publishers should consider weighting based not only on relative content levels, but also relative needs and contribution to media diversity and pluralism in SA. A potential option is to split the fund into three, where a third is dispensed on content levels, a third on relative needs and a third on contribution to media diversity. The compensation must be in place for at least 3-5 years.

- 9.2. During this period Google must put in place measures and make search engine design choices that seek to build referral traffic to fully compensate the SA news publishers for the value deficit of [R300-R500m] (adjusted for future search revenues) through sufficient ad-generating clicks, or other revenue streams on search. Potential options to increase SA media referrals include removing bias against SA media in favour of foreign media and YouTube, enhancing the ease of following SA news media on Discover, improving search for community and vernacular media, optimizing snippet lengths to promote click throughs, and an SA news filter on the SERP. Identifying and addressing reasons for zero-clicks would contribute to options available. Potential options for other monetization options include launching the Google News Showcase and copyright payments. It is highly likely that some of the additional value and traffic over time may be generated from implementing some of the other recommendations below.

- 9.3. Google to provide news publishers with enhanced user data and insights to compensate for the imbalance in user data access, subject to POPIA requirements. POPIA compliance should not prevent sharing, and options for anonymised data or news users to provide consent should be made available where necessary. Proposals include aggregated data on audience demographics, interests, psychographics and shopping intent along with more granular but anonymized data for different sections of the news website or app.
- 9.4. Google to put in place search engine related measures to reduce the over-representation of foreign media, address the under-representation of vernacular and community media, reduce the over-representation of subscription media, and address the over-representation of YouTube videos relative to SA news broadcaster video links on Google's SERP (following news-related queries) and the Discover feed. It is proposed that impression share more closely align with observed CTRs for content as a means to avoid bias. It is recommended that Microsoft Bing ensure the development of its search engine avoids these outcomes.
- 9.5. Google to provide dedicated SEO support for SA news publishers to assist with responding to core updates timeously to avoid traffic disruptions. This should include pre-emptive assessments of the likely impact of core updates and how to ameliorate traffic disruptions.
- 9.6. Google and Microsoft to negotiate annual contributions to the oversight institutions, namely the Press Council and BCCSA.
- 9.7. Google and Microsoft to allow for news publishers to opt-out of AI summaries on search results on their own search engines, Chatbots and those of third parties that use API access to their

- search index. Those that choose not to opt out should benefit from a 1% digital tariff or copyright levy on content used by the AI LLM to provide an AI summary.
- 9.8. Google and Microsoft to support an independent programme to educate SA news publishers on AI opt-out options and assistance in putting it in place where requested. The support of other AI companies for this initiative is contained in the AI remedies.
 - 9.9. Google and Microsoft to put in place measures and design choices to ensure that AI-powered search does not result in any reduction in referral traffic from news-related search queries in SA or provide alternative monetization options in lieu of referral traffic. Proposals would include contracting with SA news media for training data and grounding AI summaries, more prominent source listings and measures to promote user clicks.
 - 9.10. It is recommended that a 5-10% digital tariff or levy on digital advertising revenues is imposed if the search engines (i.e. both Google and Bing) fail to implement the remedial actions identified above. These revenues should then be placed in a Media Industry Fund to be distributed to the news media based not only on relative content levels, but also relative needs and contribution to media diversity and pluralism in SA. The public broadcaster must be included in the compensation.
 - 9.11. Exemption for the news media in SA to negotiate collectively with search engines to find resolution to current or future issues (including implementation issues) that threaten the equitable share of value for news content on condition that collective negotiations are inclusive of all media (or their representatives) including broadcasters, the public broadcaster and community media.
10. Some of the media have proposed compensation for historic inequities in the value exchange with Google. This should be considered, and the Inquiry welcomes further submissions on this proposal. Our preliminary view is that if the remedies outlined above are implemented in good faith to rebuild the industry and provide for long-term sustainability through improving the referral revenue from search then historic compensation may be of less relevance. However, were there to be a non-cooperative position adopted by the search platforms that continues to leave the media industry in a precarious position then pursuing historic compensation may be more appropriate. There is also the option of employing a hybrid of ensuring long-term sustainable solutions and offering some historic compensation.

2. SOCIAL MEDIA

2.1. Provisional Findings

11. The provisional findings on social media are as follows:
 - 11.1. Meta, YouTube, X and TikTok each dominate their particular social media mechanism and have large consumer use in SA with the ability to adversely affect the news media in SA. However, YouTube and Meta are the largest from a digital advertising perspective that warrants

particular focus on their conduct. TikTok is likely to become more important in digital advertising as they improve monetization of an already large consumer base. Whilst smaller, X is an influential platform given its role for breaking news and public debate. South African consumers value news content on social media platforms which they actively visit more regularly for news and where they actively choose to follow the accounts of news organisations and their journalists/presenters.

11.2. YouTube

11.2.1. YouTube has considerable market power as an aggregator of long-form video content where users go to search and view video content, cementing this position using Google search's dominance to direct the majority of search queries generating video results to YouTube. News has considerable value for YouTube, much like the search engines which it mimics, establishing itself as the platform to watch authoritative and breaking news on its various news verticals which it monetises through in-video ads and increasingly interstitial ads in the feed.

11.2.2. Its market position results in an inequitable bargaining outcome as news media need to place their content on YouTube to reach the audience but are rewarded with a 55% share of low-value in-video programmatic ads, in contrast to the full share of higher value ads on their own platforms if traffic was referred instead. The option of higher-value ad sales on YouTube is available in theory but not practice as the news media have no meaningful direct sales and YouTube itself competes with targeting by channel.

11.2.3. Many are excluded from the YPP programme altogether due to the eligibility criteria. There is also a lack of transparency over the payments made by YouTube.

11.2.4. The public broadcaster is particularly affected by YouTube, making public interest broadcasting in vernacular languages far less financially sustainable.

11.3. Meta

11.3.1. Facebook is the most used social media platform as a primary source of news and the value bargain has been that the news media provides content and this creates referrals for the news media which they can monetise with higher-value digital ad inventory.

11.3.2. However, the deliberate deprecation of public content and follower posts more generally since 2018, and news more specifically since 2021, on Meta, along with the deprecation of posts with links to keep users on their platforms distorts competition for digital advertising and distorts the value share arrangements with the news media. It also undermines consumer choice which is to have news content available on their feed, including credible news which users have made a deliberate decision to follow on social media.

11.3.3. Opportunities to monetise on Meta are also limited with a similar low revenue share for in-stream video ads and of lower value than monetisation on news websites and broadcasts.

11.4. X

11.4.1. X has deliberately deprecated posts with links to keep users on their platform and starving the news media of referral traffic.

11.5. TikTok

- 11.5.1. No evidence has been put forward to indicate that TikTok deliberately deprecates news content.

11.6. YouTube, Meta, X and TikTok

- 11.6.1. The incentive to drive engagement on social media has resulted in the promotion by the social media algorithms of more sensationalist and provocative content, and an unwillingness to completely remove mis- and dis-information. This algorithmic bias distorts competition on the platform for selection and ranking, placing the news media at a disadvantage given their focus on credible news reporting. It also undermines efforts to counter the negative impact of misinformation with credible news content, as credible news is surfaced less in the feed.

- 11.6.2. News media also bears a cost of fact-checking mis-information spread on social media and yet are not compensated by social media for this role. Social media benefits from the regulatory oversight to ensure credible news but does not contribute to those institutions. These effects are particularly harmful to children who lack the digital literacy skills.

- 11.7. The inequity in bargaining position means that less data is shared on those users that engage the news media content on social media. This places the news media at a competitive disadvantage in competing for digital advertising with social media platforms, as user data enables better targeting.

- 11.8. Social media would appear to have an advantage over news websites insofar as MNOs offer Facebook Basic Mode, Free Basics and discounted social me-

dia bundles to consumers, incentivising them to seek information through social media rather than direct to news websites. As these are commercially negotiated arrangements, the news media should collectively engage with the MNOs and ICASA on the potential for zero-rating SA news media websites or offering discounted data bundles to access those sites. Such engagements might identify alternative arrangements that benefit both parties.

- 12. The conduct identified has an adverse effect on competition through:

- 12.1. Competition for advertising revenue and consumer data by throttling referral traffic and denying the user data to enable better ad targeting. Evidence of the effect includes the substantial reductions in referral traffic from Meta through deprecating credible news and, along with X, deprecating posts with links.

- 12.2. An imbalance in bargaining power that imposes uncompetitive and untransparent levels of monetization shares for the news media content on social media platforms, particularly YouTube. Evidence of the effect includes the low levels of revenue shared despite the large number of video views, the lower revenue shares relative to more competitive content creator areas (like gaming and influencers), lack of transparency on detailed revenue generation and sharing.

- 12.3. Distorting competition for user attention and monetization between credible and regulated news media content and unregulated, untrusted sources of misinformation through algorithmic promotion of sensationalist content and outrage over factual news reporting. Evidence of the effect includes documented rises in algorithmic bias to sensationalist content, the admitted and visible

deprecation of credible news content and the shift to community notes and users to police misinformation with admitted results of more misinformation.

- 12.4. Distorting competition for news broadcast video distribution and monetization by degrading news and broadcaster website sources relative to YouTube. Evidence of the effect includes the higher levels of impressions despite lower

CTRs for YouTube over SA media websites.

13. As a result, the conduct has an adverse impact on the quality and consumer choice of SA news media, particularly an adverse effect on credible news media that supports the realization of citizen's Constitutional rights to be informed and active members of a democracy which makes the adverse effect substantial.

2.2. Provisional Remedies

14. The provisional remedies are designed to form the basis for further debate and engagement. The Inquiry has mostly focused on addressing the source of adverse competitive outcomes and setting out the more competitive outcomes it would like to see, being open to different mechanisms to achieve those competitive outcomes. The difference between search and social media is that users make news queries in search and so the volume of news is driven and controlled by users, whereas with social media the platform largely determines the content of the user feed and so it is less within user control.¹ The difference means that social media is able to reduce the volume of news unlike search, which has important implications for remedy design.

15. The recent tactics of social media platforms have been to starve the news media of referral traffic, the value it offered in return for the content. The preferred outcome is that referral traffic is restored given the higher value ads that the news media can generate on referral traffic, rather than monetisation on those platforms with low-value ads. For YouTube where users go to watch content, an outcome where news can monetise more and at

higher rates is likely the preferred outcome, along with fixing search at the referral stage. Improved data sharing is complementary insofar as it strengthens the ability of news media to monetise that traffic better. Whilst fixing the competition issue is the preferred route, if this opportunity is not taken then the only feasible remedial action would be to compensate the news media for the negative outcomes emanating from the conduct of social media. The best tool would be a tariff or levy on digital advertising as this would avoid the unintended consequences of the 'pay for news' remedy that has resulted in some platforms removing news media altogether. At this stage there is no evidence that TikTok has deprecated news media content or diverted traffic, but its data sharing falls short of the equitable arrangement and it too is implicated in efforts to stem misinformation.

16. On misinformation, best practice within the industry tends to be ensuring that likely misinformation is not actively promoted on the platform and a range of strategies used to identify likely misinformation (by either fact-checkers or community notes). Platforms tend to allow followers to receive likely misinformation posts but this is problematic where

¹ Users may be able to shape the feed through following pages or individuals, but the social media platforms still determine the importance of followed pages and therefore ultimately control the content.

individuals have millions of followers which then reshare to their own followers, as identified by the MIT study. Rather than dictate how platforms detect likely misinformation, the Inquiry is of the view that introducing a level of liability for actively promoting misinformation is the best means to ensure the platforms choose effective means of doing so, including identifying what is likely misinformation. This should be alongside a policy of not amplifying misinformation, including through promoted posts. Promoting credible sources of news has to be part of the solution too. The Inquiry is of the preliminary view that this is best achieved through legislation and/or regulation rather than remedial orders as the Commission is not in a position to police misinformation on platforms. Legislation with regulatory support is a more robust means to ensure enforcement.

17. The provisional remedies recommended by the Inquiry are as follows, with a recommended implementation period of 6 months:

17.1. YouTube

- 17.1.1. To extend the YPP to all news media in SA that wish to join, adjusting eligibility criteria if necessary and engaging in a deliberate on-boarding programme.
- 17.1.2. To increase the revenue share for news media and broadcasters to at least 70% for programmatic advertising.
- 17.1.3. To adopt strategies designed to enhance the ability of news media to monetise at the higher levels necessary to compensate the value from the media on its platform, including ensuring direct sales of advertising on their content accounts for the majority of ad sales. Other monetisation options can be proposed but may include a share of interstitial ads on news verticals or paying for a curated news vid-

eo service much like Google News Showcase.

- 17.1.4. To provide greater levels of transparency over the payments made to news media and broadcasters, including a breakdown of advertising spend received on their channels, views that generated revenue, average CPMs and a breakdown of deductions made to what is received by the news media and broadcasters.

17.2. Meta

- 17.2.1. To cease deprioritising SA news media posts with links in the home Feed algorithm and ensure that the organic reach of SA news media posts with links is on average similar to the organic reach of SA news media posts without links.
- 17.2.2. To cease deprecating news content in SA and to restore the Facebook referral traffic for SA news media through algorithm changes that result in an 100% increase in SA news media referral traffic, or to match peak referral traffic to the news media in the past eight years. Algorithm changes could potentially include reversals of changes designed to deprecate news content on Meta such as improvements to organic reach or reach amongst followers in addition to not deprecating posts with links.
- 17.2.3. To open the in-stream video ad monetization option to all news media that wish to join with a deliberate on-boarding programme
- 17.2.4. To increase the revenue share of news media and broadcasters for in-stream videos to 70%.

17.3. X

- 17.3.1. To cease deprioritising news media posts with links in the For You and

Latestfeed algorithm and ensure that the organic reach of SA news media posts with links is on average similar to the organic reach of SA news media posts without links.

17.4. YouTube, Meta, X and TikTok

- 17.4.1. To provide news publishers with enhanced user data and insights to compensate for the imbalance in user data access, subject to POPIA requirements. Options for news followers to provide consent should be made available where necessary. Proposals include aggregated data on audience demographics, interests, psychographics and shopping intent along with more granular but anonymized data for different sections types of posts.
- 17.4.2. To partner with the media on fact-checking to prevent misinformation and to provide for some compensation mechanism for fact-checking by the media.
- 17.4.3. To make an annual financial contribution to the Press Council and BCCSA, which may vary based on relative revenues generated in SA.
- 17.4.4. To make an annual financial contribution to national programmes for digital literacy of children, which may vary based on relative revenues generated in SA, and provide easier tools to report and block content.
- 17.5. The introduction of a 5-10% digital advertising tariff or levy on platforms that fail to implement the above remedies, or which deprecate news in the future.
- 17.6. A recommendation to the Department of Communications and Digital Technology (DCDT) to amend the ECTA to introduce liability for online platforms

where they allow harmful content and amplify misleading content through their algorithms, or where misinformation reaches a certain threshold of users through follower accounts (e.g. over 10,000 followers). Additionally for the ECTA to be amended to introduce a provision requiring platforms to adopt a policy of pro-actively removing harmful content and not providing an algorithmic boost to misinformation, including a prohibition on promoted posts or ads that contain misinformation.

- 17.7. An exemption for the news media to collectively engage in negotiations with MNOs around the zero-rating or data discounting of news website access for mobile subscribers, or to engage ICASA on potential regulatory interventions to level the playing field with social media.

18. It has been suggested that there is a form of historic compensation for past conduct where anti-competitive conduct has been found. This should be considered and the Inquiry welcomes further submissions on this proposal. Our preliminary view is that if the remedies outlined above are implemented in good faith to rebuild the industry and provide for long-term sustainability through improving the referral revenue from social media then historic compensation may be of less relevance. However, were there to be a non-co-operative position adopted by the social media platforms that continues to leave the media industry in a precarious position then pursuing historic compensation may be more appropriate. For instance with Meta there has been a clear deprecation of news with measurable drops in referral traffic. There is also the option of employing a hybrid of ensuring long-term sustainable solutions and offering some historic compensation.

3. GENERATIVE ARTIFICIAL INTELLIGENCE

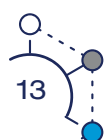
3.1. Provisional Findings

19. The provisional findings on AI Chatbots are as follows:

- 19.1. In SA, OpenAI's ChatGPT, Meta AI, Google's Gemini and Microsoft's Co-pilot will have the largest collective impact of all AI products on the news media due to their extensive distribution through standalone sales and partnerships, social media, Android devices and desktops respectively.
- 19.2. The AI developers have already benefited from SA news media content in the training and development of their AI Foundational Models and Chatbots. This is likely to be a small fraction of the total training dataset based on information currently available to the Inquiry, even if news media globally is a more important source of training data. However, it may be a large proportion of non-English SA official language content that may be used for certain AI capabilities such as translation.
- 19.3. The South African news media continues to provide access to AI web crawlers to scrape their website content for training purposes, and as a result appears either ill-informed or ill-equipped to protect their content from AI web crawlers due to the opt out rather than opt in requirements. Restricting access places SA news media in a better position to negotiate content deals with AI developers, whilst still providing access for public interest GenAI projects that deploy their own web crawlers.
- 19.4. Archival material is the next frontier of training data but accessing this material will require AI developers to conclude content deals as this material is

not available on the public Internet. This gives media companies an opportunity to share in the value generated by AI companies from their content. However, the existence of many data sources means that the news media is unlikely to extract a fair value individually and there is a risk of only a few selective deals with one or two large media companies occurs to the exclusion of independent media. This may adversely affect media diversity and plurality, albeit the public broadcaster has one of the larger archives but just not text-based. There is also a risk that intermediaries such as YouTube that store content adjust their terms such that they are able to use news media content for Google's AI training and do content deals with third parties whereby they monetise and not the news media whose content is stored.

- 19.5. It is now fairly certain that news queries will be an important use case for AI Chatbots, as it has been for search. However, like search, the manner in which AI Chatbots summarise news queries and provide limited source links is unlikely to result in much shared value through referral traffic to the news websites. News websites have no real scope to opt out of AI Chatbot search given it is currently provided by Google and Bing search index APIs. Content deals are one means to extract value, but it is not apparent that any SA news media is of the size to attract interest from AI companies and even if one or two did, this does not assist the full diversity of news media in the country. The likelihood of favouring content, and hence sources,



from those global media companies for which content deals have been struck, further reduces the potential for referral traffic from AI Chatbots even if SA media wished to opt into being used in those summaries.

- 19.6. On the design choice and referral of traffic, Meta AI offers a thumbnail and a link which, depending on what the user clicks on, either takes the user directly to Google Search or Bing or the website of the news media.
20. The conduct identified has an adverse effect on competition through:
 - 20.1. The unfair use of news media content to develop LLMs and Chatbots that now compete to inform consumers on news queries and monetise that consumer traffic. Evidence of the effect is the actual use of news media to develop models and to respond to news queries on Chatbots, along with the limited referral traffic that AI summaries provide.
 - 20.2. An imbalance in bargaining power that enables the extraction of news media content for responding to news queries by linking traditional search indexing to AI summaries, and adopting an opt-

out approach to crawling for both AI training and user queries which most news media is uneducated or incapable of, rather than an opt-in approach. Evidence of the effect is the practices themselves and the limited number of news organizations in SA that make a conscious decision to either opt-out or not.

- 20.3. Distorting competition amongst news media through degrading the prominence of SA media relative to contracted foreign media. Evidence of the effect includes the contractual provisions to make use of the contracted news media as the preferred source for news query grounding.
21. As a result, the conduct has an adverse impact on the quality and consumer choice of SA news media, particularly the diversity of media through SME and HDP-owned media that offer community and vernacular media along with the public broadcaster. Harm to the quality and diversity of media, along with the plurality of voices and the ability for citizens to get news in their home language, undermines citizen's Constitutional rights and hence the adverse effect is considered substantial.

3.2. Provisional Remedies

22. The provisional remedies are designed to form the basis for further debate and engagement. The Inquiry has mostly focused on addressing the source of adverse competitive outcomes and setting out the more competitive outcomes it would like to see, being open to different mechanisms to achieve those outcomes. The concerns around adverse competitive outcomes are similar to that of AI-powered search insofar as the likelihood of limited shared value through referral traffic given the design of AI summaries, and the limited ability

to opt out of both training and search web crawling. For this reason, the remedial actions do mirror those for AI-powered search in the main. This common concern may be exacerbated in the context of AI Chatbots if referral traffic is biased to publishers with whom content deals have been struck.

23. These issues on training data and AI summaries are being resolved commercially through in many cases through content deals with large global media companies. This market

solution is optimal as it permits for negotiated compensation to the media for its content use in a context where determining fair value is particularly complex. The Inquiry has therefore sought to shape remedies that promote these commercial solutions rather than imposing specific value transfers on AI companies. There is a need to at least permit collective negotiation of content deals across SA media to improve the bargaining position to extract fair value and to ensure more inclusive training and content deals with AI companies. This may not preclude individual deals but should be inclusive if the strength of many is to be used to conclude more favourable outcomes. However, where the attempts to prod AI companies to negotiate with the SA media fails, then digital levies may be inevitable as a solution to the exploitation of SA news content for private gain by AI companies.

24. The provisional remedies proposed by the Inquiry for public comment are as follows, with a recommended implementation period of 6 months:

- 24.1. Where YouTube does content deals either within Alphabet or 3rd party AI companies, it is required to inform the Commission of such deals and to provide an equitable share of the revenues from those deals with the SA news content providers based on their share of YouTube content forming part of those deals. Alternatively, YouTube may not sell SA news media content to Alphabet companies or 3rd party AI companies without the permission of the SA news media companies and a negotiated share of the proceeds from those deals.
- 24.2. Google, Microsoft, OpenAI and Meta to allow for SA news publishers to opt-out of AI summaries on search results on their AI Chatbots.
- 24.3. OpenAI and Meta (along with Google and Microsoft cited above) to support an independent programme to educate

SA news publishers on AI opt-out options and assistance in putting it in place where requested.

- 24.4. Google, Microsoft, OpenAI and Meta to put in place measures to ensure that there is no over-representation of global news media for which content deals have been concluded at the expense of SA media. One proposal is for the AI companies to conclude SA deals and to ground SA user news queries using content from the SA media.
- 24.5. To the extent that OpenAI and Meta develop their own search web crawlers, these need to offer SA news media the ability to separately opt out of the training for their models.
- 24.6. Google, Microsoft, OpenAI and Meta to put in place measures and design choices to ensure that AI-powered search provides significant referral traffic from news-related AI Chatbot queries in SA. or provide alternative monetization options in lieu of referral traffic. Proposals would include contracting with SA news media for training data and grounding AI summaries, more prominent source listings and measures to promote user clicks. For Meta AI, this includes removing the links to Google Search and Bing and replacing them with direct website links to only the news media sites. It is recommended that a 5-10% digital tariff or levy on revenues is imposed if the AI developers fail to implement such measures and AI Chatbots result in minimal referral traffic.
- 24.7. Exemption for the news media in SA to negotiate collective content and training data agreements with AI companies, conditional upon the inclusion of the public broadcaster and smaller independent and community media in any collective negotiations.

4. DIGITAL ADVERTISING TECHNOLOGY

4.1. Provisional Findings

25. The provisional findings on the AdTech Stack are as follows:

25.1. Google has established a super-dominant position in the entire AdTech stack value chain in SA. This has been achieved through acquisitions and entrenchment strategies, many of which are ongoing, with the foundation being control over the supply-side inventory through GAM. The dominant position across the stack now benefits from strong network effects, where websites choose Google supply-side to access quality advertisers and advertisers choose Google demand-side to access quality inventory. This network effects make it difficult for competitors to dislodge Google products even with better performance and/or pricing, because it is access to quality advertisers and inventory that are of greater importance.

25.2. The entrenchment strategies currently in place that adversely affect competition include a) GAM additional ad server fees to publishers on bids from 3rd party SSPs, b) GAM providing AdX with the winning 3rd party SSP bid as a floor price, c) AdX additional ad server fees to publishers using 3rd party ad servers, d) information sharing and close integration across Google products and e) YouTube exclusivity for DV360. The result is not just exclusion of rivals, but also that fees are higher than in a competitive market.

25.3. There is insufficient transparency on advertising pricing and deductions for SA publishers relative to the EU.

25.4. The news media are placed at a user data disadvantage by Google sharing

data across its products but not with the websites themselves. The news media is further hindered by the asymmetry of data and information being provided with limited programmatic advertiser information to target advertisers for direct sales whilst at the same time DSP targeting practices that include targeting their own website inventory.

25.5. Vernacular news media are placed at the additional disadvantage by Google not prioritising ad reviews in SA vernacular languages and then self-imposing a complete prohibition on ads in these languages on their AdTech. This undermines the ability of vernacular news media to generate revenue given the dominant position held by Google AdTech.

26. The conduct identified has an adverse effect on competition through:

26.1. The suppression of competition from alternative ad servers, SSPs and DSPs throughout the AdTech value chain which reduces the news media share of programmatic advertising spend. Evidence of the effect includes the absolute dominance and continued entrenchment of Google throughout the AdTech value chain as a result of the practices despite higher fees than competitors in certain cases.

26.2. Promoting programmatic sales in competition to direct sales through information asymmetry and lack of data sharing practices. Evidence of the effect includes the gradual rise of programmatic advertising as a share of news media inventory and the degradation of direct sale CPMs. This impedes the ability of

news media to generate sufficient revenues and undermines their sustainability.

- 26.3. Distorting competition amongst news media for digital advertising through the prevention of advertising campaigns in local vernacular languages. Evidence of the effect is the current unwillingness to permit vernacular advertising.

27. As a result, the conduct has an adverse impact on the quality and consumer choice of SA news media, particularly the diversity of media through SME and HDP-owned media that offer vernacular media along with the public broadcaster. Harm to the quality and diversity of media, along with the plurality of voices and the ability for citizens to get news in their home language, undermines citizen's Constitutional rights and hence the adverse effect is considered substantial.

4.2. Provisional Remedies

28. Google AdTech has been the subject of antitrust remedies by the FCA, most of which have been rolled out globally but with some unjustified exceptions given that the same conduct that is being remedied occurs globally. Given the SA market uses the same Google AdTech tools and is even more dominated by Google, this conduct harms competition in the SA market. Google AdTech is also currently the subject of an antitrust case in the US and an investigation in the EU. It would seem that in both cases the remedial actions targeted include some form of structural remedy to break the hold of Google on the AdTech market, along with other behavioural remedies. Given the finding that Google AdTech is now entrenched and benefits from strong network effects, structural remedies have a strong appeal but are unlikely to be workable if pursued in an SA context alone given the small market size. However, should structural remedies be pursued in these other markets then implementation in SA becomes workable given the scale of the remedy across markets, and desirable given the super-dominance Google AdTech has in SA across the whole value chain. As such, Google should implement globally whatever remedial actions, if any, stem from these cases to ensure countries like SA benefit too. The Inquiry has identified its own set

of remedies that directly address the findings and which should be practical to implement in SA.

29. The provisional remedies proposed by the Inquiry for public comment are as follows, with a recommended implementation period of within 6 months:
- 29.1. Implementation in SA of remedies 5A and 5B of the Autorité de la Concurrence ("FCA") Decision 21-D-11 dated 7 June 2021. These remedy the findings in respect of AdX being provided with the winning bid of 3rd party SSPs and AdX charging 3rd party ad servers an additional ad serving fee.
- 29.2. Implementation in SA of any structural remedies implemented by Google emerging from the EU and US cases against Google AdTech, including remedies undertaken for settlement purposes.
- 29.3. GAM to cease charging publishers an additional 5-10% fee for bids by 3rd party SSPs.
- 29.4. GAM, DV360 and Google Ads to continually provide news publishers with information on the volumes of impressions purchased by different advertisers.



- 29.5. Google to implement the DMA remedies on price data transparency for news publishers.
- 29.6. Google to end DV360 exclusivity for YouTube.

- 29.7. GAM and DV360 to reduce fees for programmatically serving direct advertising.
- 29.8. Google AdTech to permit ads in vernacular SA languages by either investing in the language capabilities or adjusting its policies on ad reviews.

5. GOVERNMENT AND BUSINESS

5.1. Provisional Findings

- 30. The provisional findings for the news media's relationship with government and business are as follows:

- 30.1. The news media has public good qualities which means it provides positive externalities to SA citizens and business which it is unable to recoup, resulting in less news coverage than what is socially optimal. Given the importance of that public good for human rights and sound democratic governance, it is socially desirable to support the news media to recoup those positive externalities.
- 30.2. The media has proposed certain tax and spend commitments from government and business to address the public good benefits derived by citizens and business. As the Inquiry only has powers to make recommendations in this regard, it is preferable that the media, which is already organized, en-

gage government and business organisations directly on these proposals to ensure there is no delay in negotiating potential options that might offer the media relief. This includes support for the self-regulatory bodies such as the Press Council and BCCSA.

- 30.3. There is an opportunity for a collective media industry fund and collective advertising sales across community media which may improve direct advertising sales and sustainability.
- 31. The inability of the media to collectively organize to raise industry funds and for community media to sell collective advertising inventory due to potential contraventions of the Competition Act has the effect of diminishing pro-competitive initiatives that would serve the public interest and promote the Constitutional rights of citizens.

5.2. Provisional Recommendations

- 32. The recommendations are limited to actions by the Commission to support collective industry funds and community national adver-

tising sales given the finding that the media organisations can engage directly with government and organised business around their

proposals for media support to avoid delays in seeking that support. This is in the context where the Inquiry can only make recommendations and not binding remedies in respect of such proposals, and therefore would simply delay the process that could begin now.

33. The provisional remedies proposed by the Inquiry for public comment are as follows, with a recommended implementation period of 6 months:

33.1. An exemption for community media to establish a mechanism to collectively sell advertising across the different local publications to offer a national audience.

33.2. An exemption for the news media organisations to establish industry funds that will enable industry-level donations that provide support to the news media and self-regulatory bodies based on need. This can include donations, funding of projects or training and equipment support. The news media organizations can establish and operate the fund, with the proviso that there is industry consultation on the principles for funding and transparency of decision-making.

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