ACT-SA

Association of Community Television – South Africa

REPRESENTATIONS BY Act-SA on the ICASA Inquiry into Subscription Broadcasting Television Services

1 INTRODUCTION

1.1 The Association of Community Television of South Africa ("ACT-SA) thanks the Independent Communications Authority of South Africa (ICASA) for the opportunity to make written submissions to ICASA on the Discussion Document: Inquiry into Subscription Broadcasting Television Services ("the Discussion Paper"), published in Government Gazette No. 41070 on 25 August 2017 and granting our request for an extension.

1.2 ACT-SA wishes to place it on record that it would like to be given the opportunity to make oral representations should ICASA deem it fit to hold oral representations with regards to submissions received on the Discussion Paper.

1.3 ACT-SA is the main representative of South Africa's Community TV Broadcasting Industry.

1.4 ACT-SA aims to further the interests of the Community TV broadcasting industry in South Africa by contributing to the development of the Broadcasting Industry and Associated Industries in South Africa. Our interest as community broadcasters in this inquiry is how to access those viewers who are no longer on terrestrial free-to-air platforms, and ensure that they still have access to non-profit community channels owned by communities, that address marginalised groups, languages and enable people to use the medium of television as a means of communication.

1.5 A general observation, before ACT-SA engages with the issues outlined in the Discussion Paper is that globally, because of convergence, there has been a regulatory shift from a narrow focus on traditional broadcasting to a broader concept of Audiovisual Media Services. In fact since 2014, there has been a European Regulators Group for Audiovisual Media Services (ERGA) which advises the European Union (EU) Commission on the implementation of the EU's Audiovisual Media Services Directive (AVMSD).[1] Convergence has dramatically changed the way in which consumers access and watch audio-visual services, and it can be provided over multiple platforms – traditional analogue broadcasting or Digital Terrestrial Television (DTT), satellite , digital cable, Internet Protocol Television (IPTV) and Over-the-Top (OTT) Television.

1.6 The Department of Communications (DOC) a few years back commenced work on developing a new policy on broadcasting, but recently it appears to have kept pace with regulatory change and in the DOC presentation on the Annual Performance Plan to Parliament this year it reported on a draft White Paper on Audio-visual and Digital Content Policy.[2] In this presentation the DOC spoke of a South African audio-visual content sector and the need for a strategy to provide collaborative measures to increase content output, include rural

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[1] https://ec.europa.eu/digital-single-market/en/audiovisual-regulators

[2] DoC presentation on the Annual Performance Plan (2017/18-2019/20) to the Parliamentary Portfolio Committee for Communications, 10 May 2017

communities and SMMEs in the production cycle, lower barriers for entry to the content development sector, skills development, funding schemes and marketing and exportation of SA audio-visual digital content. In our submission, we are going to adopt the language of the DOC and talk about the South African audio-visual content market that needs to be developed based on principles of social inclusion. A key element will also have to be on what role will community TV and radio play in the development of this South African audio-visual content sector and how can community media be funded to play a role online and on traditional broadcasting platforms in the production of radio, TV, internet and new digital content.

1.7 It was noticeable based on the text and questions of the Discussion Paper that despite this trend to a broader view of the regulatory role and prospective policy developments in South Africa, it appeared that the Authority had pre-determined the relevant markets as being subscription television broadcasting without providing any data or information to demonstrate rationally how they arrived at that conclusion and on what basis they have dismissed the wider audio-visual content market which would have included international and local Over-the-Top (OTT) audio-visual media providers currently available in the South African (SA) market. There was also no real effort in the discussion Paper to consider the competition provided by public and commercial free TV providers on Pay TV in SA. These exist, just as Community TV must compete with Public, Commercial free-to-air and Pay TV operators for audience attention and advertising.

1.8 OTT is a very serious future threat to all traditional broadcasters in South Africa in term of competition with foreign service providers who have no regulatory constraints, while at the same tine representing an opportunity as a platform that can drive the future growth of the industry. In our submission below we will provide more detailed responses on why we believe OTT as a force of digital disruption cannot be ignored by the regulator when determining current and future relevant markets.

1.9 A similar observation, is that based on digital migration in the United States and DTT in Kenya covered in Discussion Paper in para 4.10.3 to 4.10.5, the Authority reaches the conclusion that Digital Terrestrial Television (DTT) will have no real impact on the market which does not appear to match up with reality.

1.9.1 Firstly, the US would not be a good market to make digital migration comparisons with as the technical standard used there ATSC was not adopted in South Africa and the migration was done in such a manner there that it was simply a direct switchover of, in the main, a single analogue over-the-air channel to a single High Definition (HD) channel. The primary benefit of digital migration in the US was not a host of new digital channels or new entrants, but simply a better-quality picture for transmission to HDTV sets.[3]

1.9.2 Secondly, the Authority has focused only on digital migration roll-out in Kenya and ignored that Pay TV has played a critical role in the roll-out of the DTT platform in many African countries where it has been built and operated by Pay TV operators GOTV and StarTimes or jointly developed by a Pay TV operator and the Public Broadcaster (e.g. Burundi, Mozambique and Zambia).[4]

1.9.3 Furthermore, if the Authority is not convinced there is a business case for Pay TV services on DTT platform why did it gazette the Promotion of Diversity and Competition on Digital Terrestrial Television Regulations on 22 August 2014 that proposes allocating 45% of the capacity on DTT Multiplex 3 to one or more commercial subscription broadcasting television licensees and why did the Authority gazette an Invitation to Apply for the Mux 3 Radio Frequency Spectrum Licence to provide Commercial Subscription Television Broadcasting Services on 10 September 2015? If there is no real impact by Pay TV on DTT platform as seems to be suggested by the lack of attention to it by the Authority in the Discussion Paper, may ACT-SA then propose that the Authority withdraw this 45% allocation on DTT Multiplex 3 for commercial subscription television broadcasting services and make it available for commercial free-to-air TV and Community TV and Community radio services in South Africa.

1.10 In our submission, ACT-SA will highlight that it is more the lack lustre implementation of licensing in an efficient and reliable fashion by the Authority that has caused many problems for new entrants and licensees in the commercial and community broadcasting sectors, than the search for market failure.

1.11 We also note our puzzlement at the resources being devoted to a continuous string of Pay TV inquiries and licensing processes when these are services which are ultimately aimed only at those who are on the fortunate side of the Digital Divide. More time should be spent by the Authority on uplifting those who are unfortunate and do not have access. The future lies with the Internet and so much more can be achieved if the Authority were to focus its time on lowering the cost to communicate and the cost of data so that we can all be part of the growth of creative economies that are happening everywhere else.

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[3] http://www.en.wikipedia.org/wiki/Digital_television_transition_in_the_United_States

[4] DTT: Analogue to digital migration in Africa – Strategic Choices and Current Developments 2015. http://www.balancingact-africa.com

1.12 We address these main concerns at length but, since this arises only in response to barriers to entry, our submissions on these points are contained from questions 16 onwards, and in particular question 21.

1.13 In this submission, our structure will follow the main policy issues as raised in the Discussion Paper:

1.13.1 Definitions of relevant markets and market segments;

1.13.2 Defining Premium Content;

1.13.3 Wholesale Markets;

1.13.4 Content Provision;

1.13.5 Technical Services;

1.13.6 Effectiveness of competition in relevant markets;

1.13.7 Barriers to entry;

1.13.8 Consideration of Licensees with significant market power; and

1.13.9 Possible pro-competitive licence conditions.

2 MARKET DEFINITION

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

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

Q3. Do you agree with the approach of using the value chain to identify the relevant markets/s in subscription broadcasting?

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

2.1 In the context of Market Definition and relevant markets, the Authority raised four questions to respondents. ACT-SA is concerned that these questions appear to have pre-determined the relevant market. This is particularly apparent in the way that questions have been phrased, such as Q2-Q4., which will pre-determine the responses received by respondents to the Discussion paper on relevant markets to focus on subscription broadcasting.

2.2 The first question prompts the respondent to indicate whether they agree with the theoretical approach to defining relevant markets and market segments. Clearly from a theoretical perspective there is agreement that this in the main reflects the general approach to market definition. The conceptual approach for defining a market is usually the hypothetical monopolist test.[5]

2.3 However, the Authority fails to address the fact that there already exists both academically and within the context of work done by other regulators the acknowledgement that audio-visual content and services in the digital media environment have a range of characteristics that add further layers of complexity to the market definition exercise. This does not mean that the established tools and methodologies are outdated, they continue to remain relevant. However, the higher degree of differentiation that marks audio-visual content and services does mean that defining markets by relying only on end-use and product characteristics is difficult and often unsuitable.

2.4 The Authority also appears to be operating on a range of pre-determined assumptions that led it to limit its view to a market that is subscription broadcasting without ever really considering broader markets such as a South African audio-visual content market or even in the old media context an over-the-air broadcasting market. This should have been done when one considers the competition offered by OTT and free audio-visual content services (traditional free-to-air and online) both now and in the future.

2.5 Equally disconcerting is the failure by the Authority to note that broadcasting is a sub-set of the electronic communications sector that is characterised by rapid technological change, which in turn has a range of implications regarding the reliability of the use of historical information in defining markets. Markets characterised by rapidly evolving technology pose difficulties in defining markets as the defined market may rapidly become outdated, especially where such a market is on the verge of what Malcom Gladwell described as a "tipping point"[6], wherein the public may switch to new technologies in large numbers making the old technology obsolete. In such situations using historical information, even recent information to define markets may be misleading.

2.6 The lack of a forward-looking analysis is particularly noticeable in para 4.9.5 of the Discussion paper where the Authority with very minimal analysis of current situation in South Africa regarding OTT concluded that:

"the impact of OTT is expected to remain small but noticeable in the forseeable future."

That is in fact a stunning quote by a communications sector regulator. We think it may find a place one day on the Internet right next to this quote by Darryl F. Zanuck Head of 20th Century Fox (1946) *"Television won't be able to*

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5 http://www.ee-mc.com/tools/agreements/hypothetical-monopolist-test-hm-test.html

6 The Tipping Point: How Little Things can make a Big Difference by Malcolm Gladwell

hold on to any market it captures after the first 6 months. People will soon get tired of staring at plywood box every night"[7].

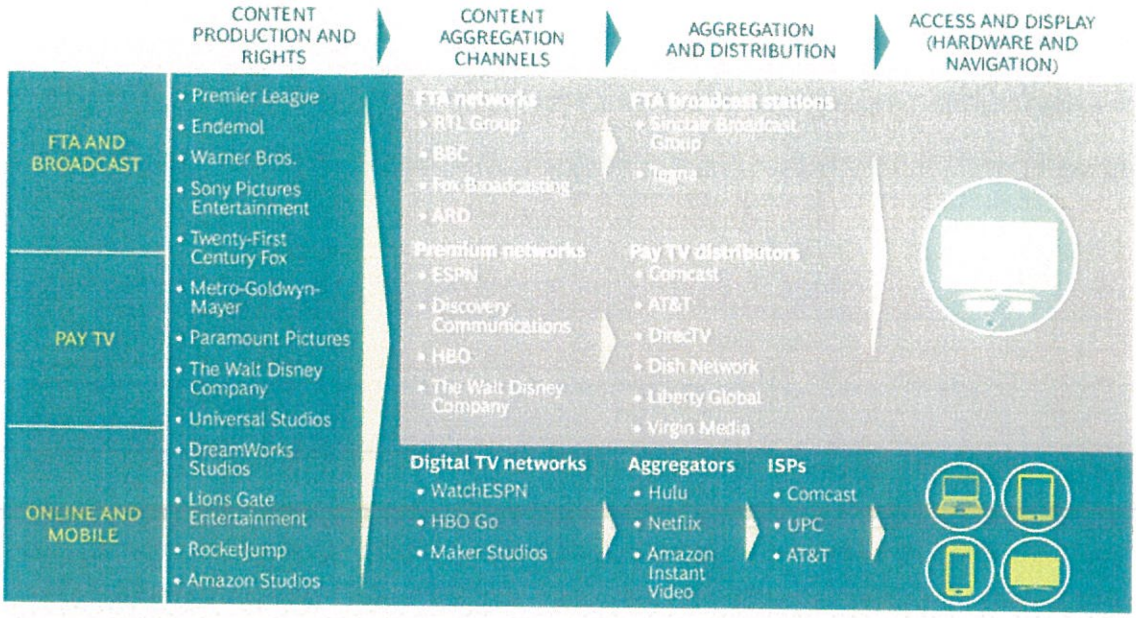
2.7 This is a significant flaw in the Discussion Paper, as there seems to be a focus on OTT offerings in SA only in a very narrow fashion and a lack of consideration that South African consumers can sign up for subscriptions with OTT providers anywhere in the world and not just OTT offerings in the domestic market. That's the nature of the open Internet. An example in this regard, is that there are a number of subscribers to Amazon.com for e-books both on Amazon kindle devices and on the Kindle app on other third-party devices in South Africa. These subscribers are often offered a free upgrade for 3 months at a time to Amazon Prime and have access to the Amazon video library of movies and TV series despite Amazon not being formally in the SA market or actively marketing its services in South Africa. Netflix who is in the SA market has entered into partnerships with cellular providers and local OTT services, as well as regularly offering free subscriptions for a limited period to entice subscriber sign-up.

2.8 Keeping this in mind, for the Authority to claim that OTT will remain small for the foreseeable future is to ignore all the signs that OTT meets the pre-requisites for being a "digital disruptive" technology. There is no apparent use at all by the Authority when it makes this claim about OTT current and future growth of any forward-looking tools including user trends, early adopter evidence, specialist/expert forecasts or business cases that would have assisted with a rationally developed forward-looking market definition.

2.9 Another comment is that the Authority has used a television broadcasting value chain to identify relevant markets with no proper analysis or consideration of alternative means of accessing television programming, such as video-on-demand, pay-per-view, internet based services, websites and services geared to smart phones, media players, tablets and computers. Below in Figure 1 is another approach to mapping out value chains proposed by BCG Analysis which, unlike Figure 4 provided by the Authority in the Discussion paper, includes the role played by online and mobile in the current audio-visual content value chain.

Figure 1: Three Value Chains: FTA, Pay TV and Emerging Online and Mobile[8]

[7] https://bravenewcoin.com/news/8-examples-of-experts-getting-it-wrong/



Source: BCG analysis.
Note: FTA = free to air; ISP = Internet service provider.

2.10 It is noticeable that Figure 4: Television Broadcasting Value Chain, in the Discussion Paper, appears to be an incomplete reflection of all the players in several respects. It ignores the OTT role in content aggregation/content packaging. Under retail distribution it ignores the role of OTT even though it reflects the Internet under transmission networks. It appears to see IPTV and Cable Pay TV as two separate forms of retail distribution, whereas both are provided over managed wired networks (not the public Internet) the only difference being that one uses the Internet Protocol (IP) for transmissions and the other would use one of the digital cable broadcasting standards for transmission.

2.11 The content aggregation/channel packaging layer in Figure 4 in the Discussion Paper, is also confusing as based on first three blocks in that layer it appears that the Authority is building its approach on the three tiers of licensee, but then it splits Pay TV into basic Pay TV channels and Premium Pay TV channels. It has not followed this with a similar distinction regarding Commercial free-to-air television channels. Furthermore, this split bears no resemblance to how channels are packaged. Nobody starts off saying they are going to make a basic Pay TV channel. Usually, in the broadcasting industry a business plan would be developed for a specific channel package which may provide a broad range of content acquired at different price points (as a channel broadcasts 24/7 it is practically impossible to have any single channel that is comprised of only high value premium content). The channel might be packaged in-house, commissioned or provided by third party provider (local or international). The

[8] https://www.bcgperspectives.com/content/articles/media-entertainment-digital-revolution-disrupting-tv-industry/?chapter=3

decision on where to place the channel in the various bouquets offered by a Pay TV broadcaster is essentially a business decision, and one assumes that Pay TV broadcasters try to find the right mix of channels in even their lower tier bouquets to justify the price charged and customer satisfaction.

2.12 The licensee approach or three tiers of broadcasting approach in this layer also appears to ignore the fact that there are content providers who are not licensees or broadcasters and who package channels for provision to any broadcaster who can provide a platform for their content.

3 PREMIUM CONTENT

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

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

* Note there appears to be a numbering error in Discussion paper as there is no Q7 prior to Q8.

Q8. Do you agree with the Authority's characterisation of the retail market and the market definition as outlined above? If not, how would you define the relevant market/s in this regard?

3.1 In the context of Premium Content and retail markets, the Authority raised three questions to respondents. ACT-SA will respond to these questions below.

3.2 We note that the Authority in approaching analysis in the Discussion Paper in the area of premium content have once again totally ignored OTT services. For some strange reason when considering substitution between subscription television and free television services the Authority only considers analogue terrestrial free-to-air television broadcasting. It fails to address the shift from single analogue channels to free-to-air digital multi-channels on DTT, offering a variety of content to compete with satellite Pay TV and it ignores the availability of free audio-visual content and services online. For example, the Kwesé Play set top box based on Roku, according to advertising to market the platform, provides over 100 streaming channels all free in South Africa in Standard Definition, High Definition and Ultra High Definition.[9]

[9] http://www.channel24.co.za/Music/News/watch-kwese-play-allows-you-to-stream-100-channels-for-free-20171015; https://www.kwese.com/play/channels?field_category_streaming_value=Movies%20%26%20TV ;

3.3 Digital free-to-air satellite offerings only merit one line in para 5.7.3 *"although satellite offerings are now available in the market"*. Once again, a statement is made in the Discussion paper with no attempt at forward looking analysis. A simple consideration of publicly available information would suggest that free-to-air digital satellite is seeing a rapid adoption as an alternative option to households migrating to DTT. OpenViewHD has now entered a period of rapid upward growth increasing TV household activations from 388, 812 to 1 million in the period between May 2016 and September 2017. This is hardly an insignificant trend, so one wonders why the Authority fails to acknowledge it in the Discussion Paper.[10]

3.4 The Authority develops a very simplistic argument in the Discussion Paper that free programming does not substitute for subscription programming, which fails to consider the price constraining effects of free programming on subscription programming. It only considers access to premium content as being a primary reason for viewers to shift to Pay TV, totally ignoring that the ability of satellite to offer more channels than analogue terrestrial free broadcasting services may mean that originally a greater variety of content was another factor that led to a viewer being willing to pay a premium. There is therefore no consideration that with the introduction of free DTT and free digital satellite which will increase the number of free channel offerings, that the Pay TV advantage of offering greater variety of content is now being constrained. Put more clearly, the willingness of viewers to pay a premium for a product attribute such as "greater variety of channels", will be limited by the increased availability of the free alternative, which would suggest that <u>the two products are actually in the same market</u>.

3.5 If one followed the Authority's argument in the section dealing with premium content to its logical conclusion then the only reason that viewers do not totally abandon the free-to-air platform (Public, commercial free-to-air and community broadcasting) for Pay TV is price. This seems to ignore that free-to-air broadcasters can avoid losing viewers to Pay TV by competing in other areas such as quality, variety of programming, their own exclusive commissioned programming, or, in the case of community broadcasters, by offering "localism".[11] Most local content is of high quality and in demand by viewers.

3.6 If premium content is what most people want to watch then that premium content appears to be on the SABC. The top 5 watched TV shows in South

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[10] Line chart constructed based on TV household figures in articles at the following websites: https://mybroadband.co.za/news/broadcasting/227919-openview-hds-big-push-to-1000000-activations.html ; http://www.etv.co.za/news/2017/09/26/ovhd-we-ve-found-our-millionth-customer

[11] By "localism" we mean that community broadcasting is the only place where communities of interest, whether geographically or socially defined, can access information specifically relevant to their lives. This includes information, sometimes in languages other than English, relevant to particular cultures, or audiences with an interest in local community news, sport, social and cultural events - https://www.radioinfo.com.au/news/community-media-matters-report-says-localism-community-broadcasting-strength

Africa in August 2017 were Uzalo, Generations:The Legacy, Skeem Saam, Tjovitjo and Muvhango all carried by the SABC. The number of viewers watching these shows ranged between 9 to 5 million, in contrast DSTV's most watched TV show in the same period was "Our Perfect Wedding" with viewership of just over a million.[12] So just as Pay TV and Pay OTT TV/VOD can attract viewers prepared to pay to watch exclusive content that they own, so can Free-to-air broadcasters compete by attracting viewers and consequently advertising revenue through exclusive local TV series produced in-house, by commissioning independent producers or offering local content/localism that cannot be found anywhere else.

3.7 The Authority places a lot of emphasis in the Discussion Paper on the fact that Hollywood's six major studios release film productions in windows based on time of release, and that free broadcasters cannot compete with Pay TV broadcasters because of terms and conditions surrounding their release. Furthermore, it is stated that consumers are prepared to pay more to be able to view first run movies on Pay TV channels. This is a very unsophisticated view of feature film releases that fails to consider recent pressures on the traditional release window process.

3.8 It is true that a copyright holder who has invested a significant amount in producing the film and promoting the film wants to derive the maximum value from their copyright by releasing the film in windows usually starting with public exhibition in movie cinemas, before moving to VOD or home video (DVD, Blu Ray) and then to broadcast syndication. VOD players, such as Netflix, have become such strong players globally that they get this "window" prior to Pay TV in most cases.

3.9 Broadcast syndication usually begins with Pay TV broadcasters who are prepared to pay more for being first to broadcast as opposed to free broadcasters who are prepared to wait to obtain the film when it is at its lowest value. It should be kept in mind just as there are viewers who are prepared to pay premium to watch first release films on Pay TV channels, there are also viewers who are prepared to wait for the film to be available free or who have already watched the feature film when it was publicly available at cinemas during the theatrical release window. Free broadcasters also use other strategies to compete around films such as commissioning made for TV films, or co-inciding scheduling of films that are available for free broadcasting prior or at the same time as the release of sequels in cinemas or home video. The most watched film on TV in August 2017 was Dawn of the Planet of the Apes with 3.9 million viewers on the free-to-air broadcaster, etv.[13] This was clearly timed to align with the next film in the trilogy, War for the Planet of the Apes, which was in cinemas in July 2017 becoming available for viewing on online Video-on-demand services and DSTV Box Office.

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[12] https://mybroadband.co.za/news/broadcasting/229187-the-most-watched-tv-shows-in-south-africa.html

[13] https://mybroadband.co.za/news/broadcasting/229187-the-most-watched-tv-shows-in-south-africa.html

3.10 Figure 5: Typical Feature Film release cycle in the Discussion Paper, appears to have forgotten to include VOD which has, in the face of declining DVD sales, become a critical window for the rights holder. The theatrical window initially of a 6 month duration has been shrunk over the years to deal with piracy and declining DVD/Blu Ray sales to being now between 14-17 weeks. Major studios are also making movies available to VOD services shortly after theatrical release for a premium price and since 2010 Netflix has been securing a number of films for VOD release prior to distribution on Pay TV channels. Netflix has also been securing global distribution rights to feature films and simultaneously releasing them theatrically and online through its VOD service. In fact, Netflix, has become so powerful globally as an OTT provider of choice in many markets that it has refused to offer exclusive theatrical release windows.[14] It can comfortably do this as in 2017 it planned to spend $6 billion to produce hours of original content in the form of exclusive movies and TV series that in many cases will only be available on its platform.[15]

3.11 So, considering the above one must say that free television does compete with Pay TV. In fact SABC and etv have appeared in the past before the Authority saying that they compete with Pay TV for advertising and wanted the amount of advertising permitted on Pay TV limited even further. Since advertising in free-to-air is dependent upon number of viewers, they are in fact competing with Pay TV for share of audience. Furthermore, there is competition between Pay TV platforms, namely satellite and OTT for audience based on exclusive TV series and film content. As pointed out above this is why Netflix and Amazon are investing very heavily into producing original content that is not available on other platforms.

4 WHOLESALE MARKET

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

4.1 The Authority is proposing that there are two markets at the wholesale level: a market for the wholesale supply of basic tier subscription TV channels; and a market for the wholesale supply of premium-tier subscription TV channels in South Africa. As indicated previously this does not appear to accord with the way channels are produced, they are produced based on a business case. How Pay TV broadcasters and OTT players then use those channels depends on their choices based on the customers they are serving..

[14] https://www.theverge.com/2017/4/17/15331834/netflix-streaming-movies-adam-sandler-amazon; http://fortune.com/2017/04/18/netflix-movie-theaters-shareholders-letter/; http://www.hollywoodreporter.com/news/netflix-film-debate-hits-south-korea-okja-launch-1009737

[15] http://fortune.com/2017/04/18/netflix-movie-theaters-shareholders-letter/

4.2 The wholesale markets also seem to be artificially limited by referring to only subscription broadcasting, when we have already noted that Pay TV, OTT and Free TV compete for the same viewers. For example, in practice a local independent producer who develops a business case for a TV channel may shop it to StarSat, DStv and OpenviewHD as his/her interest is in finding a platform prepared to pay to acquire his/her product. In the context of the launch of number of OTT services both in South Africa and Africa (e.g. by Cell C, Kwese Play), such a local independent producer would also shop his product to OTT providers who may be seeking to find exclusive local content and channels to drive uptake of their services. In this case, the relevant wholesale market is audio-visual channels, which would capture Free, Pay and OTT services retail market. The initial offering may start as a linear streamed channel, but very soon that content will be offered as non-linear downloads of film and/or TV series so even the use of the term channel is not proper, the wholesale market is audio-visual content.

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

4.3 In terms of bargaining power of independent wholesale audio-visual content suppliers or channel providers that has changed over the years. International suppliers obviously had more bargaining power in the past, versus local content suppliers. However, the growth of the Internet has now given audio-visual content suppliers another channel to distribute their packaged content and some have chosen to skip traditional distribution channels and go direct to the consumer with OTT offerings.

5 CONTENT PROVISION

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

5.1 The Discussion Paper proposes, that relevant markets can be distinguished around a premium and non-premium content provision. The proposed relevant markets are:

(a) acquisition of first-window subscription television broadcasting premium movies for retail distribution in South Africa;

(b) acquisition *of* premium live soccer matches for retail television distribution in South Africa;

(c) acquisition of premium live rugby matches for retail television distribution in South Africa;

(d) The acquisition of premium live cricket matches for retail television distribution in South Africa; and

(e) The acquisition of other premium content (including series and premium local content) for retail television distribution in South Africa.

5.2 Our comment is one made before in our response to questions posed by this Discussion paper that price is not the only determinant of what constitutes premium. It is difficult to define the term "premium" as it is dependent upon the value placed upon it by different broadcasters and upon the fickle opinion of the public. Also, what is considered premium may differ from one person to another. One could even argue that all content on a Pay TV platform is premium on the basis that viewers are prepared to pay to receive it versus remaining on free platforms.

5.3 Clearly, there is a market for audio-visual content, both linear and non-linear, and within that market there is some high value content that it is desirable to have on an exclusive basis, whether one is a Pay TV, Free or OTT player. The market should therefore not be limited to subscription TV or television retail distribution only, but acknowledge the existence of OTT. Amazon and Netflix have already demonstrated that theatrical released movies can be countered with original films and TV series that are not available anywhere else except on their platforms.

6 TECHNICAL SERVICES

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

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

6.1 Technical services one would assume would be conditional access systems, subscriber management and the electronic programme guide. This should not be limited to considering only television broadcasting services, but should consider technical services available for linear and non-linear audio-visual media services on all platforms, including the Internet.

6.2 The international Conditional Access System (CAS) market is highly competitive even though there is some consolidation with major players like China Digital TV Holding, Cisco Systems, Nagravision, Verimatrix and Irdeto being the main players in this market. The market is characterised by intense competition with very rapid technological development and frequent changes resulting in new products and solutions being offered to maintain competitive edge.[16] In the South African market, if one just considers traditional television broadcasting services who make use of conditional access systems this competition between CAS providers is very apparent - OpenViewHD uses Cisco, DStv and M-Net use Irdeto, StarSat (previously know as TopTV) uses Conax and Sentech uses Nagravision. Globally, there are also many developers who offer bespoke subscriber management and EPG services so this is also a highly competitive area spanning satellite, cable and OTT platforms.

6.3 In terms of offering Technical Platform Services specifically to 3rd parties for traditional television broadcasting services in South Africa, Sentech provides an open access and interoperable DTH platform which provides an array of services along the broadcasting value chain ranging from up-linking, multiplexing, encoding and transcoding to playout.[17] OpenView HD has leased capacity on IS20 and SES5 satellites and in 2014 publicly indicated it was willing to provide access to new licensed Pay TV operators on its broadcasting distribution platform.[18] The platform uses Cisco which would allow a broadcaster to encrypt and charge for access using the same STB as OpenViewHD.

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

6.4 There does not appear to be a reason to define a market for technical services. As pointed out above, there is competition between service providers of the different technical service offerings. If one takes a narrower focus only on broadcasting as defined in the 20th Century, then there is a common carrier prepared to provide terrestrial broadcasting signal distribution, including technical platform services, and on satellite there are at least two satellite platforms prepared to offer newly licensed Pay TV operators access to end-to-end distribution services. If one adopts a 21st Century view of audio-visual service offerings, then there are also no barriers to entry to provide transactional or subscription video-on-demand services on the Internet in South Africa, as there are a host of service providers internationally and locally prepared to offer bespoke software (application/EPG development) and hardware solutions (Android media boxes/IPTV boxes).

7 EFFECTIVENESS OF COMPETITION IN RELEVANT MARKETS

16 http://www.businesswire.com/news/home/20170608006100/en/Top-5-Vendors-Global-Conditional-Access-System

17 http://www.sentech.co.za/content/products-services-0

18 https://techcentral.co.za/platco-hopes-to-attract-pay-tv-players/51555/

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

7.1 The Authority quotes section s67(4A) of the ECA on what it should follow when deciding on effectiveness of competition in a relevant market.

7.2 The Authority then states it proposes the following factors should be assessed: non-transitory barriers to entry; the dynamic character and functioning of the market (including market power and concentration levels); the nature and extent of vertical integration in the market; and whether competition law alone will be sufficient to deal with the identified market failure.

7.3 However, what this fails to address is that s67(4A)(b) specifically mentions that when looking at the dynamic character and functioning of the markets or segments of the markets, in addition to assessing market share of various licensees one should also assess the providers of exempt services. In this case as the definition of broadcasting has not yet been amended in the ECA, there are many OTT Subscription Video-on demand (SVOD) and transactional video-on-demand (TVOD) services that are in the market and which are currently exempt from applying for a licence as they do not fall within the regulatory licensing framework. It is generally acknowledged that the ECA which was enacted in 2005 to deal with convergence, did not actually update the broadcasting regulatory framework to reflect the new audio-visual market that was developing because of this convergence of previously separate sectors. It merely brought the broadcasting framework put in place in the late 90s over "as is" from previous legislation and "ring-fenced" it in chapter 9 of the ECA.

7.4 This myopic view of the sector in outdated legislation is also reflected in the manner that ICASA approaches inquiries, such as the Inquiry into Community Broadcasting where the discussion document failed to consider the wider community media development in respect of platforms other than terrestrial, such as radio on DTT and satellite and the development of Internet radio in South Africa. Notably, areas which did not fall within the current licencing framework. The point is that the Authority needs to assess these other players in addition to licensees who currently fit into the narrow, traditional licensing framework currently in place. Markets should not be defined solely by the regulatory jurisdiction of ICASA, but in terms of competition as experienced by public, commercial and community broadcasters and principles of economics.

7.5 When setting out the proposed approach in para 6.2.1 of the Discussion Paper, the Authority also appears to have omitted the latter half of s67(4A)(b) which required it to do a forward-looking assessment of the relative market power of the licensees in the markets or market segments. As the list is open to add other things, it is suggested that the forward-looking assessment of the relative market power should also consider OTT services which currently do not require a licence in the markets or market segments, but which currently and in the future, do have an economic impact and provide constraints on the exercise of market power.

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

7.6 It is difficult to deal with question 15 on whether there is a need for intervention in the market for non-premium content, as the concept of premium content as developed by the Authority in the Discussion Paper is not properly defined. There are first release movie rights and sports rights which are an advantage to have, but the very fact that consumers are prepared to pay to access the content on the Pay TV platforms versus that which is available free would suggest that all content on a Pay TV platform, except for must carry free-to-air channels, are premium content. So, the differentiation is that there is some content that is more premium than others, rather than that there is a distinct premium and non-premium content market. Alternatively, a distinction could be that some content is offered on an exclusive basis and other content is available on a non-exclusive basis.

7.7 In ACT-SA's view there should be some regulation of general application to all audio-visual content that encourages fair and transparent competition at the point that the content is made available to the market exclusively and to prevent barriers to entry this content should become available for open bidding at regular intervals, e.g. between 3 and 5 years. Contracts for content which are not offered on an exclusive basis can be entered for longer periods up to 10 years.

8 BARRIERS TO ENTRY

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

8.1 The Discussion Paper raises the spectre of scarcity of content and the price of this scarce content. It makes us wonder if we live in the same world as the Authority. The world we live in has so much content it is impossible to view it all or own it all in our lifetime. We are going through a golden age of Television and a hyper-abundance of choices. The huge growth of content providers, professional and amateur, and social media platforms means that viewers have unlimited access to films, TV shows, articles and pictures anywhere, any time.[19] The amount of digital content that is being developed, exchanged and consumed is growing daily because the Internet democratised access to creation and distribution. If traditional Pay TV operators want to differentiate themselves with exclusive content there is no scarcity, because no single operator can buy all the rights which are now available globally when it comes to TV series and films.[20]

8.2 Its puzzling why so much time is being spent by the Authority on Pay TV inquiries when these are services ultimately aimed at those who are on the fortunate side of the Digital Divide, more time should be spent on uplifting those who are unfortunate and do not have access. The future lies with the Internet and so much more can be achieved if the Authority were to focus its time on lowering the cost to communicate and the cost of data so that we can be part of the growth of creative economies that are happening everywhere else. We refer the Authority to PWC's "Content Democratization: How the Internet is fuelling the growth of creative economies" strategic report[21]which provides information on how access to the Internet has contributed to content providers and distributors, emerging artists and consumers in Australia, India, Japan, South Korea and Thailand. A key takeaway was how the Internet has brought digital content in markets such as India, where the vast majority did not have access to traditional media such as newspapers, books and pay TV, but are now able to access content on the Internet through their mobile phones.[22]

8.3 Sports Rights are a distinct form of content where there may be scarcity in terms of the demand for a very narrow range of sports in South Africa, so there must be some limitation on the period for which exclusive contracts can be entered and that there be no automatic renewals.

8.4 Mention is made that SABC lost the PSL sports rights in 2007 in para 6.3.3. which would seem to indicate they are viewed as a competitor in the same market as Pay TV. This is highlighted in a very simplistic fashion and does not note that SABC still shows PSL games on free-to-air television. In fact, in 2015, when giving an example to the press of how licensing works SABC spokesperson Kaizer Kganyago stated *"SuperSport buys rights for PSL games, and we pay [Multichoice] to be able to play some of the games on our platforms. The same applies with the World Cup. We buy the rights, then they pay us a fee and we give them a license to play the World Cup games*

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19 http://www.computerweekly.com/news/4500273357/We-Are-Colony-Tackling-the-death-of-traditional-film-and-abundance-of-content

20 https://www.strategyand.pwc.com/reports/content-democratization

21 https://www.strategyand.pwc.com/reports/content-democratization

22 https://www.strategyand.pwc.com/reports/content-democratization

on SuperSport,"[23]. The paragraph in question also does not deal with the impact of the Authority's own Sports Broadcasting Regulations which limit exclusivity and provide a very specific list of games that must be sub-licensed to free-to-air television providers. ACT-SA believes that in the interests of promoting Community TV, the regulations should also require sub-licensing to Community TV.

8.5 It must be mentioned that when the SABC did have the PSL rights they were not in a position, as an analogue broadcaster who had to schedule sport in-between other programming on their channels, to broadcast all the games which was a detriment to the PSL who wanted to promote the sport and an outrage for fans were unable to watch their teams play. Whereas on the multi-channel DTT platform, the SABC will for the first time be able to provide a 24-hour Sports Channel, as opposed to the past where sports rights were purchased as a bundle in the analogue environment and could not be broadcast. We expect the SABC on DTT to now broadcast more of the games to which they hold rights, and access to DTT may also prompt the SABC to also acquire more sports rights than they did in the past, either through direct bids or sub-licensing from Pay TV broadcasters and other rights holders.

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

8.6 As we mentioned previously premium is not a good description as by definition everything on a Pay TV operator is premium because somebody is prepared to pay to watch it. If the definition is not based on being prepared to pay to watch the content and rather that it is content that the majority of people want to watch, then premium content is Uzalo, Generations:The Legacy, Skeem Saam, Tjovitjo and Muvhango all carried and owned by the SABC.[24] If one defines it as television content that has high production values, good storylines and is expensive to buy then premium content cannot be defined simply as coming from the Hollywood production system as there are great TV series coming from UK, Canada and other markets, even the Internet giants, such as Amazon and Netflix, now have their own film and TV show productions that are regarded as being worth entering into exclusive contracts for. Locally, in SA, there is investment in original series TV content that has high production values, great scripts and which Act-SA would consider as being "must have" content.

8.7 Comment on Table 1: Key Sports and Movie Rights in Discussion Paper, is that the Authority does not appear to view local content as a key right as it is mentioned nowhere in the table, nor is there mention of any other sports

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[23] http://www.destinyconnect.com/2015/04/09/the-sabc-clears-up-the-confusion-surrounding-their-licensing-deal-with-multichoice/

[24] https://mybroadband.co.za/news/broadcasting/229187-the-most-watched-tv-shows-in-south-africa.html

besides the Big Three where acquisition of such rights could lead to a valuable niche play. A final comment is that there is no such category of rights as Hollywood movies, and even if there were it would be impossible for one broadcaster to be holding them all. Movie rights are sold by studios, that's why we just saw in South Africa Cell C's Black streaming service acquiring first run rights for Fox Shows. The deal includes Fox+, the studios streaming service, it will feature shows like The Walking Dead, Empire, Modern Family, and Homeland. The Fox channels that will be launching on Black include, Fox Sports, Fox Sports 2, Fox entertainment, NatGEO, BabyTV, Fox News and Fox Life.[25] As mentioned previously, one cannot focus in on rights in a narrowly defined traditional TV market, the wider audio-visual content market which includes OTT must be considered.

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

8.8 Act-SA throughout this submission have indicated that what is being meant by premium is very narrowly defined, that exclusivity itself is not a problem so long as there was competition at the point the exclusive content was made available and that the contract term is not unduly long.

8.9 Table 2: Level of Concentration in Market for Premium Content therefore does not make sense, nor the approach of counting the number of documents/contracts. Firstly, it only looks at rights held by 3 parties which is unduly narrow, it does not look at rights held by free-to-air or OTT service providers. Counting makes no sense either as surely the competition analysis should be looking at whether the contracts were made available for open tender and what period they are being entered into for. The other consideration is that broadcasters choose which content is valuable for their platform and what they are prepared to bid for, so simply counting does not take this factor into consideration. As previously mentioned the list also don't seem to be correct as there not only a single broadcaster who contracts with Hollywood studios, and these days as Hollywood power is being eroded by online players like Netflix the question is more of who has exclusive contracts for original series as well.

8.10 Finally, there are a range of OTT services that could also be looked at namely Apple TV, iTunes, Netflix, Facebook, KweseTv, Black, etc, with a view on what rights are held. So, in our view the Table does not help with determining the dynamic character and functioning of the audio-visual content market in SA.

25 https://mybroadband.co.za/news/broadcasting/237566-cell-c-scores-entire-21st-century-fox-line-up.html

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

8.11 At its most basic form most audio-visual markets can be described in terms of two stages of production – namely content production and content distribution which are clearly distinct from each other. Identifying competitors and level of competition at specific stage of production can be complex if some parties are vertically integrated across both stages, while others are not. A competition concern could be that a company that is involved in both stages may have a motive to not sell its product/service in one stage of production to a competitor in another stage of production in which the vertically integrated company also competes thereby having a negative impact on the effectiveness of the competing broadcaster.

8.12 Of course, that consideration of vertical integration is only relevant based on the market that is defined. For example, if you define the market as satellite and access to satellite to reach consumers is limited then vertical integration across stages of production must be considered to determine if there is harm to competition. But, if the market is the provision of Pay TV to subscribers and there are a variety of ways to get to those subscribers, such as over-the-air, cable, satellite and the Internet then limited competition to access one type of facility e.g. satellite would be irrelevant as there many ways the consumer can choose to access that programming they want. In this context one can look at other countries, such as Canada, where vertical integration in cable was a concern and attracted regulation, but once Direct to Home Satellite entered the market there was a decision to deregulate Cable because the new platform provided new sources of competition.

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

8.13 If we can loosely summarise the situation, ex post competition law assumes that dominance alone is not a problem, it is only when the dominant company abuses that dominance to act in an anti-competitive manner that a Competition Authority would step in to deal with market failure. This is the opposite of a sector regulator's pessimistic view that ex ante rules are needed upfront to promote competition otherwise companies will pursue their own narrow self-interest leading to inefficient market outcomes.

8.14 It should be pointed out though that government or regulatory intervention in itself if not properly implemented can also lead to inefficient allocation of resources, this is called "government failure" as opposed to "market failure". In South Africa, we need to properly assess whether the failure we have seen to date in the sector is due to dominant players abusing dominance and acting in anti-competitive fashion or if is it a direct result of regulatory interventions leading to market failure. In our view, it is the lack lustre implementation of licensing in an efficient and reliable fashion by the Authority that has caused many problems for new entrants and licensees in the commercial and community broadcasting sectors. We have raised this point previously in our submission on the Authority's Discussion Paper on Community Broadcasting.

8.15 As previously stated in our response to the Discussion Paper's question 15 on regulating the "so called" non-premium rights, in our view there should some ex ante regulation of general application to all audio-visual content that encourages fair and transparent competition at point that the content is made available to the market exclusively and to prevent a barrier to entry this content should become available for open bidding at regular intervals, e.g. between 3 and 5 years. Contracts for content which are not offered on an exclusive basis can be entered for longer periods up to 10 years.

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

8.16 s67(4A)(a) of the ECA requires the Authority to consider the non-transitory – structural, legal and regulatory – entry barriers in the applicable markets and market segments.

8.17 However, when discussing barriers to entry the Authority does not examine the regulatory barriers to entry in any meaningful fashion in the Discussion Paper, beyond listing it as a possible barrier to entry in the downstream market. In this regard, it is useful to look at the timelines around subscription broadcasting. It was first dealt with by the Authority's predecessor the Independent Broadcasting Authority (IBA) in the 1995 Triple Inquiry where a general approach to regulating Subscription Broadcasting was set out, however four years would go past before the IBA would commence a process to put in place a licensing framework when it published the Discussion Paper on Satellite Broadcasting in 1999. Unfortunately, this process fell apart due to a range of legal obstacles which were later rectified by the Broadcasting Amendment Act in 2002. Even though from 2002 onwards there were no longer obstacles to putting in place a licensing framework for subscription broadcasting, it would take another two years for the Authority to commence a process to do so in June 2004.

8.18 During that time, all legacy subscription satellite broadcasters who were in place prior to the Broadcasting Act of 1999 were deemed to have permission to continue their business until the Authority put in place a regulatory framework within which they could apply for a licence. The final position paper and regulations for Subscription Broadcasting Services was published in 2005 and a process to licence subscription broadcasting services commenced in 2006.[26]

8.19 In September 2007, out of 20 applicants ICASA licensed MultiChoice SA and four new subscription broadcasters that included Telkom Media, e.Sat, On Digital Media and Walking on Water. It could be argued that of the four licensees only Telkom Media demonstrated that it had sufficient funds to purchase both film and sports rights in open bidding processes. The number of licences issued was also viewed at the time as undermining the ability of new entrants to compete effectively in a limited market, as a number of applicants, including e.Sat, argued that the Authority should only licence two new operators in addition to MultiChoice.[27] The feeling was that licensing more than this would lead to attrition and consolidation in the satellite television broadcasting segment based on international experience, i.e. the Authority was licensing for failure. So, from the time subscription broadcasting was identified as a licence category requiring attention in 1995, it took the Authority and its predecessor, the IBA, over twelve years to put in place the required licensing framework for new entrants. A period in which the legacy broadcasters in the satellite sector Sentech's Vivid platform and MultiChoice's DStv had ample period to grow their audience share without regulatory constraints. Ultimately, when the licensing framework for satellite subscription broadcasting was put in place in 2007 Sentech decided to withdraw its application for a licence as it had failed to develop a sustainable business and pursue a free-to-air satellite platform business instead.

8.20 In 2008, the Authority commenced a process to licence mobile digital broadcasting services, both free-to-air and pay television, in line with a Ministerial directive to do so in 2007.[28] This prolonged process to licence frequency spectrum for Mobile TV using the DVB-H standard only bore fruit in 2010. In the first licensing process in that year only etv's application complied with the Authority's requirements and applications by Mobile TV consortium, Super 5 Media (the company which had taken over Telkom's Media's subscription broadcasting licence) and MultiChoice were disqualified. As etv's application was for a free-to-air spectrum allocation of 40% only, a second round of licensing took place for the remaining spectrum on the multiplex to which only MultiChoice and Super 5 Media applied.

8.21 As the bids of MultiChoice and Super 5 Media totalled more than the available capacity for Mobile Pay TV, the Authority conducted an auction. In August 2010, Super 5 Media informed the Authority they would no longer participate in the auction and the remaining spectrum by default went to MultiChoice for a Mobile Pay TV business. As opposed to the situation in 2007 where no "sunset clause" was imposed on new subscription broadcasting licensees and many retained their licences without launching, licensees on the Mobile TV

[26] ICASA Subscription Broadcasting Services – Position Paper, 1 June 2005, page 4.

[27] http://www.itweb.co.za/index.php?option=com_content&view=article&id=5527

[28] http://www.bizcommunity.com/Article/196/78/31162.html

multiplex had 12 months to use all the capacity awarded to them and launch Mobile TV services.[29]

8.22 In stark contrast to Mobile TV which had a defined period of time in which to launch, in 2009, media analyst Avhasei Mukoma, in an opinion piece pointed out that the new Pay TV operators licensed in 2007 had yet to take off because of financial constraints.[30] At that point, e.Sat based on market analysis and its concerns expressed in the licence hearings that if too many licences were issued the market would become too fragmented to sustain new entrant decided to produce a news channel instead and sell it to the DStv platform rather than launch a Pay TV satellite platform. It is interesting that e.Sat had in the hearings and submission demanded that ICASA conduct an economic analysis of the market before licensing to determine the number of licensees that would be sustainable based on market size. Highlighting an issue of regulatory failure, rather than market failure being at play.

8.23 Mukoma also mentioned that it was *"critical for the new pay TV players to offer compelling programming and cheaper subscriptions to lure subscribers."* A problem in delivering on cheaper subscriptions was that *"Icasa policy prohibits pay TV licensees from generating more revenue through advertising, making it difficult for new pay TV players to be financially sustainable."*[31] On Digital Media did commence broadcasting the next year branded as TopTV, but by October 2012, in line with the 2009 analysts projections of financial constraints, it filed for business rescue due to lack of funding and being R1.4 billion in debt.[32]

8.24 The Business Rescue Plan reported in in the press stated that *"TopTV was unable to cope with the high cost of content, among other things, and was losing subscribers because of signal problems and loss of key channels."* [33] Another reason why On Digital media (TopTV) may have struggled in 2012, was that it could no longer sell the idea to investors that besides DStv it was the only game in town. As In February 2012, the Authority had published an Invitation to Apply (ITA) for individual commercial subscription broadcasting services, heralding a second round of new entrants being poised to enter the SA market.[34] It is interesting to note that MultiChoice had actually tried to assist its competitor to remain in the market, as Mail & Guardian reported that it had given a "no strings" attached unconditional loan from its Enterprise development arm to Black owned media Group MSG Afrika and Malose Keka of Falk Trading, who branded themselves Dynamic TV, and who had placed an offer on the table during the business rescue process to pay creditors and

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29 https://mybroadband.co.za/news/cellular/15073-mobile-tv-broadcasters-in-south-africa-announced.html

30 https://www.iol.co.za/business-report/opinion/new-broadcast-players-face-tough-challenges-706574

31 https://www.iol.co.za/business-report/opinion/new-broadcast-players-face-tough-challenges-706574

32 https://mg.co.za/article/2013-04-30-chinas-startimes-to-take-over-toptv

33 https://mg.co.za/article/2013-04-30-chinas-startimes-to-take-over-toptv

34 http://www.screenafrica.com/page/news/business/1641870-ICASA-grants-five-new-individual-subscription-broadcasting-licences

restructure the company. The other offers on the table were from the Kenyan Pay-TV operator Wanachi Group and the Chinese operator StarTImes.[35] It appears from the business rescue plan that regulatory issues and lack of sufficient capital to operate a pay television business were behind the problems at TopTV.

8.25 In 2013, the creditors selected StarTimes to take over the business and it stepped forward to inject the required funding and On Digital Media (TopTV) was rebranded StarSat. To date StarSat has not competed as aggressively with DStv as it does in other African markets. This could be based on finding the right mix to channel offerings that the audience want to view and are prepared to pay to view, because StarSat still does not appear to understand the South African market judging by the amount changes to its channel line-up. StarTimes may also be hesitant to inject more capital into a business where it is unable to own more than 20%, because of legislated foreign ownership limitations to keep broadcasters in South African hands.[36]

8.26 Despite these business woes of On Digital Media, the Authority proceeded to public hearings in July 2013 and subscription broadcasting service licences were granted to Close-T Broadcast Network Holdings, Mindset Media Enterprises, Mobile TV (Pty) Ltd, Kagiso TV and Siyaya Free-to-air (Pty) Ltd in 2014 even though the Authority held the view that none of the applicants had met the requirements of the ITA. The licensees were given a period of three months to comply with conditions for licensing, which was later extended.[37] Eventually in August 2016, licences were issued to only Siyaya and Close-TV.

8.27 The defining criticism of this second licensing process was that once again the Authority had not conducted an economic impact assessment to determine the size of the market or the potential harmful impact of licensing another round of subscription broadcasting licensees when some of the new entrants licenced in 2007 had not yet launched (Walking on water), had become inactive yet still held subscription broadcasting licences (e.Sat and the licence Telkom had sold to Super 5 Media) or had launched as in the case of On Digital Media and were struggling to develop a sustainable business model. The licensing process also took over 4 years which is a long time to expect investors to remain in place in terms of capital guarantees. Similar, to the 2007 process we saw a case of being licensed to fail, demonstrating regulatory failure rather than market failure at play.

8.28 The key barriers to entry highlighted above are prolonged regulatory and licensing processes, coupled with inadequate business planning and securing long term funding (8 years) by prospective applicants (i.e. lack of capital). It

[35] https://mg.co.za/article/2013-04-30-chinas-startimes-to-take-over-toptv
[36] https://mg.co.za/article/2013-04-30-chinas-startimes-to-take-over-toptv
[37] http://www.screenafrica.com/page/news/business/1641870-ICASA-grants-five-new-individual-subscription-broadcasting-licences

should be highlighted that this is not an issue reserved for subscription broadcasting it is prevalent in community broadcasting as well.

Q21. Is the Authority correct to use the subscriber numbers as a unit of measure for the market share calculation purposes? How else would you calculate market share at this level? What other factors should be analysed to determine the dynamic character of the market? * Numbering mistake in Discussion Paper, there were two Q21. this one should have been numbered Q22.

8.29 A very simplistic way to determine market share is to look at the total purchases of a consumer of a product or a service. The percentage that goes to a company defines its market share, i.e. if one bought 100 bottles of red wine and 40 were from 1 wine farm that wine farm would hold 40% market share of that consumer's wine purchases. Essentially, a high market share is not bad it just demonstrates a consumer's preference for a specific product over other similar products. Although, it also means it is easier to sell such a consumer more products and that preference does create a barrier to entry that other competitors must overcome by being more aggressive, agile or niche.

8.30 The problem with Table 3: Level of Concentration in the Subscription- TV retail Market in the Discussion Paper is that it only lists 3 players and does not list any of the OTT service providers who locally have larger subscriber numbers than Deukom and, in the case of Netflix, globally exceed all broadcasters, in both subscriber numbers and financial resources.

9 CONSIDERATION OF LICENSEES WITH SIGNIFICANT MARKET POWER

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

9.1 Act-SA believes that the ECA is very clear on how to identify players with significant market power and that the Authority will have to act in compliance with the legislation. We have pointed out above that we think the way the Authority is defining premium content is not 100% correct and that in determining the number of contracts in the Table in the Discussion Paper based on that definition is incorrect as there are a number of exclusive contracts in the audio-visual content market and the Authority is excluding counting them based on its definition thereby creating an artificial reflection of reality. As we said before there is no single exclusive contract called Hollywood movies, there are studio contracts and those go across broadcasters and OTT players in SA. Rights holding essentially reflects the providers' choices on what content they want to provide.

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

9.2 We refer you to our response to Q.19 above.

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10 POSSIBLE PRO-COMPETITIVE LICENCE CONDITIONS

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

10.1 The remedies raised appear to assume that market failure is due to a player with significant market power being in a relevant market and to rectify ineffective competition in that market these remedies should be imposed on that player. Whereas, when we responded to Q21. above we pointed out fairly clearly that the main culprit for the failure of new entrants, no matter what type of broadcaster they are, can be identified as regulatory failure and lack of capital. One can implement all the remedies discussed in this section on the player with significant market power and still end up with ineffective competition, as the real problem is the speed of regulatory processes and lack of capital to fund broadcasting business for at least 8 years. Market intervention should only take place where it is necessary to deal with market failure.

10.2 The remedy to shorten exclusive contracts is something we have proposed elsewhere in our response to the Discussion Paper, stating that exclusivity itself in not a problem so long as competition takes place at the point exclusive rights to content are made publicly available for bidding. In order, not to foreclose the market to new entrants the terms of contracts, including for sports rights, should be limited to 3 years, there should be no automatic renewal clauses and the rights must be offered in an open tender process. This should be required not only of a player with significant market power, but should be of general application to all licensees in the TV market.

10.3 As we believe the Authority must first deal with the regulatory problems that give rise to market failure we will not deal now with the remedies. But we thought it useful to comment on one of the examples provided around "must offer" remedy. When dealing with must offer remedy, the Authority gave the example of the BSkyB premium Sky Sports channels case which initially was based on the view that without a must-offer obligation, the availability of content to the public was restricted and thus the public's choice was restricted. This view later changed because of the increased availability of internet services and the must offer obligation on BSkyB was lifted. It should be noted though that a similar must offer obligation was imposed by the Competition Authority in Belgium, and later even revised, it was eventually annulled by the Court of Appeals, because they held a different view of what was in the public interest. The Court of Appeal found that Belgian Competition Council had failed to consider that Telenet, to avoid alternative platform operators using the must-offer obligation, would simply not buy all live packages. Given that broadcasting rights would then end up split between two service operators (Telenet and Belgacom), football fans that wanted to watch all matches of a particular match day would now be obliged to subscribe to two different platforms and install incompatible decoders. So, although the revised must-offer obligation by the Competition Authority had positive effects from a competition perspective, it would have rather negative effects for the wider public and therefore was not in the public interest.

10.4 Adequate capital and funding is a key issue in our sector, particularly for community broadcasters. As mentioned in the introduction our interest as community broadcasters is how to access those viewers who are no longer on terrestrial free-to-air platforms, and ensure that they still have access to non-profit community channels owned by communities, that address marginalised groups, languages and enable people to use the medium of television as a means of communication. To support community broadcasters on Pay TV, free-to-air and Internet platforms we believe there is merit post digital broadcasting migration in removing the requirement for broadcasters to, in terms of s89(1) of the ECA, pay prescribed annual contributions of their licensed activity into the Universal Service and Access Fund. Instead Pay TV and OTT players should make this contribution to a Community Audio-Visual Content Fund. This fund can then be accessed by community broadcaster on all platforms to create diverse local content for South Africans who are on over-the-air platforms, Pay TV platforms or who access digital content via new media, the internet and on-demand.

10.5 Coupled to this funding obligation there should also be an obligation to carry community channels in Pay TV basic tiers and provide assistance in terms of training and skills development for community audio-visual content services.

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

10.6 It appears from the Discussion Paper that the proposal is that market entry would benefit from opening the dominant provider's distribution infrastructure to new entrants. As indicated previously, in our view the main barrier to entry in our sector has in fact been regulatory entry barriers. A close second is lack of adequate funding for broadcasters in South Africa, especially when having to bid for rights when they are available, which speaks to a general lack of investment in the sector which is a problem for all commercial and community broadcasters or, in the specific context of Pay TV in South Africa, a lack of initial understanding in business planning by new entrants of the actual cost of "Pay TV window" content versus "free window content".

10.7 Where Pay TV competitors have launched in South Africa they have not found difficulty in putting in place distribution networks for their content, as previously pointed out in our response to question 13 there is competition at different levels of the distribution value chain and competing platforms. The proposal seems to suggest that the Authority's view of competition is that new entrants should compete and divide up the dominant provider's subscriber base, rather than introduce new offerings and innovative products to grow the Pay TV audio-visual sector in South Africa.

10.8 In our view, the Authority's proposal would have a chilling effect on innovation in different levels of the distribution value chain and on players who compete in the technical platform services business in South Africa. Taken to its logical conclusion if the proposal were to be implemented there would be no incentive for new entrants to engage with the electronic manufacturing sector to produce locally manufactured set top boxes, or other receiving devices, there would be no incentive for new entrants to commercially engage with OpenViewHD for satellite platform services or Sentech for terrestrial, satellite or Content Delivery Networks (IPTV/Internet) platform services or potential local software providers of bespoke EPGs/SMS systems.

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

10.9 Set top box interoperability is a question that would have been better raised two decades ago. Firstly, there is not much point in raising it now when "the writing is on the wall" for proprietary set top boxes. OTT services are placing pressure on the traditional Pay TV operators to shift away from hardware solutions to applications that are available for download over the open Internet to tablets, laptops, smart TV sets and 3rd party IPTV/TV media boxes. The user interface rather than being a feature defined by proprietary set top box will now be defined by software.

10.10 Secondly, If the focus on interoperability of set top boxes is being informed by lowering switching costs of consumers, then it falls into the same category of regulation as number portability, which was a costly regulatory solution that only ever was used by a very small number of consumers. The fact is, Pay TV and OpenViewHD set top boxes are priced low enough to make it easier to switch between platforms. This is demonstrated in the rapid growth of OpenViewHD. There are also a wide variety of OTT Android boxes, tablets and mobile phones that enable streaming of pay and free OTT services over the Internet available at low cost in South Africa permitting a clear option for viewers to abandon "old style" television completely if they wanted to.

10.11 Thirdly, globally markets that have attempted to regulate interoperable set top boxes, have led to prolonged standardisation processes and have had a chilling effect on innovation in set top box development by operators.

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

10.12 Surely before one gets to the question of other conditions to be imposed on a licensee which holds significant market power, one should first properly define the relevant market/s and then determine if there has been market failure. To hypothetically ask questions is to pre-determine the outcome of defining markets and determining significant market power.

10.13 In our mind, the Authority has not adequately defined the relevant market/s, nor has the Authority demonstrated that there has been market failure because of significant market power. As previously stated, in our view market failure in our sector appears to be a direct result of regulatory failure to put in place the necessary licensing frameworks timeously and once regulatory frameworks have been put in place the accompanying licensing processes have been drawn out and protracted. In the electronic communications industry which is characterised by rapid technological development this is simply inadequate as by the time regulatory hurdles have been overcome and the platform has been licensed, the technology initially proposed has become redundant.

10.14 As an example, in SA delays around roll-out of DTT saw a platform that was initially going to deploy the DVB-T broadcasting transmission standard having to shift to the second generation of that standard DVB-T2 before launch. Digital Radio which had frequency set aside by ITU in terrestrial broadcasting frequency plans since 2006, has still not seen a regulatory framework put in place or a licensing process. In fact, by the time the Authority gets around to dealing with Digital Radio the analogue radio sector in South Africa may have been overtaken by Internet radio.

10.15 Prolonged licensing processes and decision-making by the Authority is the main barrier to entry in our sector. The Authority's first steps should be in rectifying the regulatory framework and implementation of that framework, as these are the primary barrier to entry in the "old style" broadcasting market, these obstacles do not exist for OTT players and that is why we are seeing rapid growth, innovation and new entrants choosing the Internet as the platform of the future for audio-visual content services.

11 CONCLUDING REMARKS

11.1 ACT-SA once again thanks the Authority for providing us with the opportunity to make submissions and we look forward to engaging further with the Authority at any public hearings they hold on this subject in future.

11.2 As we have indicated, the real problem is regulatory failure and lack of capital. South African broadcasters could have achieved so much more for communities if the Authority had minimised the prolonged regulatory and licensing processes since 1995. However, in the current digital age where the Internet has democratised access to creation and distribution of content, the Authority should not be focusing so much time and resources on Pay TV which is a luxury good, but on lowering mobile access and data costs to help the community have access to the power of the Internet. To assist community broadcasters to respond to the threat of OTT players who have better access to this infrastructure, by establishing access to funding mechanisms not linked to advertising.

11.3 For reasons we have indicated, remedies seem to assume market failure due to a player with significant market power, when actually regulatory failure and lack of capital is the main culprit. Accordingly, remedies aimed at a misconceived market failure are not helpful. However, if content cannot be bid for publicly, a remedy to shorten exclusive contracts from 3 to 5 years will be appropriate. However, this remedy will not assist our members if it is limited to one broadcaster who cannot access all the content currently available in any event. In the current digital environment, with the threat of OTT players with deep pockets, this remedy must be imposed on the entire industry to protect smaller broadcasters and new entrants.

11.4 We also believe that in addition to public broadcasting channels, Pay TV operators should carry community broadcasting channels in their basic tiers to promote access to and provide a voice for communities of interest on their platforms.

11.5 Finally, we proposed that Pay TV and OTT players should contribute to a Community Audio-Visual Content Fund, which can be accessed by community broadcasters on all platforms to create diverse local content for South Africans who are on over-the-air platforms, Pay TV platforms or who access digital content via new media, the internet and on-demand. This would replace the current contribution made by existing Pay TV operators to the Universal Service and Access Fund.