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Dear Madam

Re: Cell C's written submission with respect to the Discussion Document: Inquiry into Subscription Television Broadcasting

1. Cell C would like to thank the Authority for the opportunity to provide written comments on the Discussion Document: Inquiry into Subscription Television Broadcasting as published in *Government Gazette 41070* on 25 August 2017 ("Inquiry Document").
2. Cell C looks forward to engaging with the Authority should the Authority have any queries on Cell C's written submission below.
3. Cell C confirms its readiness to participate in any subsequent consultations and oral hearings that might be called by the Authority.

Kind regards



Themba Phiri (Mr)
Executive Head: Regulatory

**RESPONSE TO ICASA ON INQUIRY INTO SUBSCRIPTION BROADCASTING
INTRODUCTION TO THIS SUBMISSION**

1. Cell C Ltd (Cell C) is very interested in the ICASA inquiry into the subscription television broadcasting services market (which we refer to for convenience as the “pay tv market”), which is presented in the Discussion Document dated 25 August 2017¹ (Inquiry Document). As ICASA may be aware, Cell C has recently launched an online ‘on demand’ service called Black, offering a variety of content to its subscribers. This is not unlike the MTN Play service. The market power that we believe that Multichoice has in relation to access to and choice of content, is therefore of great concern to Cell C. Furthermore these are our preliminary submissions on the Discussion Document, based on our limited analysis to date.
2. It has become apparent to Cell C, and in the ICASA discussion document that Multichoice Pty Ltd (Multichoice) and other two pay TV broadcasters provide satellite service broadcasting and direct-to-home services.
3. Cell C observes that Multichoice is a subsidiary of the Naspers Ltd group of companies (the Naspers group), and have obtained access to content over a period of three decades since the MNet service was first launched in South Africa, on terms which have the result of placing Multichoice in an exclusive or commercially unassailable position to the detriment of its competitors (such as they are) or new entrants that wish to offer audio-visual content. These arrangements have been the subject of several inquiries including complaints by third parties to the Competition Commission on the basis that they are a dominant operator whose behaviour may constitute abuse of Multichoice’s dominance.
4. As ICASA itself acknowledges, the commercial television broadcasting and specifically the Pay TV market has never been the subject of regulation within the sector – no controls or limitations have ever been applied by ICASA to any of the licensees in this market in order to promote competition². As a result, the market has not developed in the same way that international broadcasting services markets have developed. ICASA

¹ Gazette 41070 of 25 August 2017.

²

has referenced a number of international cases and sources, which referencing is appropriate in a discussion document such as the Inquiry Document, however Cell C cautions against reliance on these documents as exemplifying best practise in circumstances that are very different from those that subsisted when those international cases were decided. The decisions and the reasoning for those decisions can best be regarded as informative, rather than determinative in the South African context.

5. The Naspers group can best be depicted using their own graphic³ which we have included at **Annexure A**. In South Africa the group companies include 8 so-called “video entertainment” entities (one of which is a conditional access or encryption provider named Irdeto), and 5 print and digital media companies. We note that section 66 of the Electronic Communications Act, 2005 (ECA) refers to the ownership and control of both broadcasting services licensees as well as ownership and control of newspapers. The News24 website is a news publication, albeit electronic, and Media24 is the publisher of more than 60 magazine titles⁴ and more than 60 newspaper titles. Media24 says this of its newspapers:

*“Media24 News publishes more than 60 titles and about 187, 5 million newspapers annually. Many of these titles are leaders in their respective markets, such as South Africa’s top-selling daily newspaper, Daily Sun, which boasts a readership of more than 5 million a day. With a daily circulation of about 437,635 Media24’s dailies account for a large portion of the national newspaper circulation figures. The weekly urban newspapers have a strong market penetration and a circulation of about 894 413 per week, while the community newspapers’ circulation amounts to about 1, 3 million a week”.*⁵

6. Naspers claims in its financial statements that it faces competition from the following entities:

³ Naspers Financial Results Presentation, 31 March 2017.

⁴ <http://www.media24.com/magazines/>

⁵ <http://www.media24.com/newspapers/>



7. In this submission we have addressed ICASA's specific queries and dealt in more detail with our views on these matters, including our views that whilst Multichoice may be facing an increase in the number of providers that wish to offer or do in fact offer content, the level of competition in various of the markets in which it has a presence, is far from vigorous. In fact some of the entities that Naspers claims compete with Multichoice do not in fact offer any competition at all. BBC iPlayer for example, is a UK service restricted to UK residents whilst they are in the UK. There is no legal way in which any customers in South Africa would be able to watch this service. In addition, Openview HD carries etv, thus the diagram includes these companies twice. It is also highly unlikely that any one could regard youtube as a competitor to Multichoice, given the nature of the content made available on youtube, its ease of access, the fact that it is free, and the typical duration of any clip on youtube. StarSat, as ICASA knows, is the last of the licensees other than Multichoice, that actually provides service under a satellite television broadcasting service licence, and the number of StarSat subscribers is still, after 10 years, only 100,000 whilst Multichoice's subscribers number 5,700,000.⁶
8. We note that ICASA has not yet reached a conclusion on the existence of any competition problems in the context of the pay tv market.⁷ We trust that this submission will assist ICASA in coming to the conclusion that the market for content in Pay TV or

⁶ Table 3 of the Inquiry Document.

⁷ Paragraphs 1.1.4 and 2.2.19 of the Inquiry Document.

otherwise, is dominated by the Naspers group, and specifically that pay tv is dominated by Multichoice⁸. This has resulted in, principally:

- a. it being impossible for new entrants to make headway in this market;
- b. it being impossible for existing licensees to compete effectively; and
- c. higher prices, reduced choice for consumers, and arguably, a lack of service innovation as a result of (a) and (b).

9. The result of this is that (i) the pay tv market is not effectively competitive, (ii) this affects several important related markets, and (iii) ICASA's intervention is therefore required.

10. ICASA has set out several possible remedies that it considers may be appropriate having regard to the sort of remedies that it is empowered to impose under section 67(7) of the ECA, and proportionate to the market failures identified. Cell C is of the view that more than one remedy is required in order to correct the entrenched imbalance and lack of effective competition in this market over the past 3 decades. Although section 67(7) sets out 8 remedies that might be applicable to broadcasting service licensees, it is clear that the legislation does not intend ICASA to be limited by this list, as the introductory wording to the subsection is "Pro-competitive licence terms and conditions may include but are not limited to - ...". We believe it would be appropriate and proportionate and lawful for ICASA to consider the application of one or more of the following:

- a. Obligations to publish information concerning long term and/or exclusive contracts concluded by Multichoice for premium content (as defined), and the terms on which such content is available for acquisition by third parties;
- b. Obligations to make programmes and channels available separately on terms regarding distribution, reselling and access to be imposed by ICASA;

⁸ In an OECD paper entitled "Competition Issues in Television and Broadcasting" published in 2013, the South African contribution to the paper recognised this, "Multichoice is the only fully vertically integrated subscription television company in South Africa, and is active at each level in the vertical structure, although it operates primarily in the broadcasting and retailing layers. Its main activity is the purchase of rights to premium content from original rights owners, such as major sports events and Hollywood movies, for direct distribution to its own satellite subscribers, and for resale to its downstream competitors in distribution. Multichoice is dominant in the subscription television broadcasting market with a market share in the excess of 95%." Accessible at <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>, page 277.

- c. Rate regulation on wholesale services, such that no content should be made available on terms that are less favourable than Multichoice first acquired it, pro rata to the total price if content is sold by programme;
- d. Obligations relating to accounts, records and other documents to be kept, provided to the Authority and published;
- e. Obligations regarding the amount and type of premium, sports and South African programming for broadcasting over a period of time, in the aggregate; and
- f. Obligations to carry the channels and advertising of products that are not in the same market as Multichoice, for example, Cell C's Black.

CELL C'S RESPONSE TO ICASA'S SPECIFIC QUESTIONS

Question 1: Do you agree with the theoretical approach to defining relevant markets and market segments?

Cell C agrees with the theoretical approach set out by ICASA in terms of the ECA read with the Guideline for Conducting Market Reviews published by ICASA in March 2010. This is not only consistent with local practise and law, but accords substantially with international best practise.

However, we note that ICASA has not determined a time horizon for the forward-looking review of competition in the market. We suggest this be set at a period of no less than 3 years. The next review of this market should take place not earlier than 3 years.

Question 2: Are there aspects of this market definition theoretical framework that would not apply to subscription television broadcasting services?

We do not agree that where a licensee may not make the majority of its revenue from advertising and sponsorship, that the market is two-sided. This would tend to unnecessarily complicate the inquiry.

Furthermore, in the past, distinctions have been drawn between pay tv and free to air television, and distinctions have also been drawn on the basis of subscriptions and advertising revenue. We consider these distinctions to blur the essential and most common and problematic element of the inquiry, namely access to content. In the context of supply-side and demand-side substitution, the type of access and the type of content that Multichoice is able to obtain would tend to suggest that the market should be defined as narrowly as possible, in other words, it should be confined to the pay tv market.

It is likely that Multichoice will argue that the market should be defined as broadly as possible so that its dominance is effectively diluted by the apparent presence of competition from free-to-air broadcasters. However this would be not only self-serving but also defeat the purpose of this inquiry which is to limit Multichoice's obvious dominance across audio-visual content in the pay tv market, and its ability to leverage this dominance into other markets where it could then also defeat competition.

For purposes of this inquiry we do not consider the technical aspects of pay tv to be particularly relevant to market definition, i.e. the hardware vendors and technical and support

services, except insofar as they confirm Multichoice's vertically integrated nature (see below).

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

Cell C agrees in principle with the approach of using a value chain to identify functional markets. However – and flowing from our answer to Question 2, it is very important that ICASA takes the vertically integrated nature of Multichoice and its (dominant) presence in all of the markets in the value chain into account when analysing the chain, rather than simply considering each market in isolation.

We note that the OECD had the following to say concerning Multichoice and the value chain, *"Multichoice is the only fully vertically integrated subscription television company in South Africa, and is active at each level in the vertical structure, although it operates primarily in the broadcasting and retailing layers. Its main activity is the purchase of rights to premium content from original rights owners, such as major sports events and Hollywood movies, for direct distribution to its own satellite subscribers, and for resale to its downstream competitors in distribution."*⁹

ICASA states that Multichoice itself agrees that it is a vertically integrated player in the value chain¹⁰. This integration only reinforces Multichoice's dominance in pay tv because it can leverage its presence in the various layers of the value chain (both at the wholesale and retail levels) to ensure economies of scale and scope, access to capital markets, and deny access to services in the upstream content market where the rights owners are situated, for example (see below).

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

Please see our answer to Question 3.

As regards Figure 4 (Television Broadcasting Value Chain), we propose that the first layer which depicts the wholesale market and content producers should not be conflated with acquisition and commissioning of content. Acquisition and commissioning is in fact carried out at the channel provision and content aggregation level i.e. the top level should be

⁹ Ibid.

¹⁰ Paragraph 5.6.5 of the Inquiry Document.

identified only as content production, with the next level down consisting in acquisition, commissioning, aggregation and channel packaging, because these activities are all taking place in the same market.

Multichoice produces content in this wholesale market, then it also aggregates, commissions, packages and acquires content, and then it makes certain content available to third party broadcasters in South Africa in terms of its obligations to provide content featuring national sports teams or individuals, on request, which obligations are imposed in the Sport Broadcasting Services Regulations, 2010 (Sports Regulations).¹¹ Finally, Multichoice is also providing content directly to subscribers.

The availability of content and the terms on which it may be acquired from content producers is key to this inquiry thus content aggregation and channel provision is an important layer, however we suggest that the markets to consider at this layer should be carefully defined. ICASA identifies 6 markets for acquisition of content¹², which should, if this number is correct, more accurately be defined first as 6 markets for content production. There are then likely to be 6 markets (which are analogous to the first 6) for channel provision and content aggregation. Below content production there is a market for channel provision and content aggregation, which involves:

- a) acquisition of content rights from third parties (e.g. to film and produce programming of football matches);
- b) acquisition of ready produced content from third parties (e.g. Hollywood movies);
- c) commissioning of the production of new content; and
- d) aggregation of content from sources (a) to (c), plus any self-produced content.

As such it would seem better to define markets for channel provision / content aggregation in each of the 6 categories that ICASA identifies, or such smaller number as would be more appropriate. Our views on these 6 markets are set out below in more detail, but suffice it to say in this section, that we believe there are only 2 markets at the present time, namely premium and non-premium content.

¹¹ Section 60(1) of the ECA read with the Sport Broadcasting Services Regulations, 2010.

¹² Paragraph 5.9.18 of the Inquiry Document.

This structure for the value chain would be consistent with the international approach taken for example, in the United Kingdom in the early 2000s¹³, a time period with which the current South African situation can be more accurately compared both as to the level of regulation, and market structure. Even in 2007 BSkyB (Sky) had a market share in satellite pay tv of over 95%¹⁴ (but it is important to note that even in at this stage, there was significant competition to pay tv in the United Kingdom from other pay tv platforms¹⁵ – which is not the case in South Africa even in 2017).

We also recommend that ICASA use the category “audio-visual content” rather than “TV content” since content is produced for distribution, use or viewing by consumers in a variety of different forms allowing it to be made available over a wide variety of platforms and devices. The Naspers group includes many different digital content providers including internet service providers, IPTV or VOD offerings, as well as subscription television broadcasters. This is relevant to the consideration of Multichoice’s market power in related markets. Not only is content available through subscription to the various bouquets that are broadcast to televisions, but Multichoice also supplies devices including Explora which contains Showmax among other offerings of movies, series, sport and children’s programmes, Catchup which enables a viewer to pull content when convenient rather than to watch it at the scheduled time, and Drifta which enables mobile tv.

Question 5: Do you agree with the Authority’s definition of what constitutes premium content?

Cell C agrees that there should be a distinction between premium and non-premium content.

Cell C also agrees that certain sports events are especially popular and may attract more viewers than say a documentary might, and accordingly that content may be more expensive to obtain at a particular moment in time. However dividing content first into premium and non-premium and then again into types of premium content and basic content may then require ICASA to make a determination about dominance of an entity in a sub-category or sub-market of the premium or non-premium market that is changing considerably all the time as viewing trends change.

¹³ The Decision of the Director General of Fair Trading - BSkyB Investigation: Alleged Infringement of the Chapter II Prohibition, dated 17 December 2002 - case CP 01916-00.

¹⁴ Ibid.

¹⁵ Pay TV subscriber numbers by platform, 1996 (Q3-2006), Screen Digest, referenced on page9 of a submission made to OFCOM by British Telecommunications plc, Setanta Sports Holdings Ltd, Top Up TV Europe Ltd, and Virgin Media Limited on 3 July 2007. It can be accessed at:

https://www.ofcom.org.uk/data/assets/pdf_file/0017/51353/submission1.pdf

This is likely to make it easier for Multichoice to argue that it is not dominant in certain premium content sub-markets (e.g. Hollywood movies) because it can simply argue against ICASA's categorisation. In the UK, OFCOM, the regulatory authority, distinguishes between premium and non-premium content, whilst in Singapore, the regulatory authority has not designated dominance in any market but imposed a general public interest obligation on licensees to share content across platforms. We note that other broadcasters in South Africa have suggested that the distinction be drawn on yet other bases.

Therefore there is no one "right" way to define sub-markets or need to do so once the primary distinctions of premium and non-premium have been made, but equally the reasoning for the definition of the premium and non-premium markets should be as objective as possible.

We do not consider it appropriate to narrowly define premium content as being provided or acquired "on an exclusive basis". Content can be and is provided on an exclusive basis, without necessarily being "premium". The exclusivity may, in some circumstances, have little to do with Multichoice if the producer wishes to provide it on an exclusive basis only. Conversely some content that is premium may not be sold exclusively, although this is less common. What is more common however is that a contract may not have an explicit label of exclusivity, but in fact that is precisely what it is (i.e. "de facto exclusive"). Therefore if the definition of premium content is limited to "exclusive" much of the content acquired by Multichoice would fall outside the definition which would defy the objective of this inquiry.

We agree that content may effectively be "exclusive" to Multichoice by virtue of its market power and significant bargaining power and scale, but this is different because it arises as the effect of Multichoice's behaviour and its market power, rather than constituting a valid description of the commercial terms on which the content has been acquired.

We suggest that the definition of "premium content" should be "valuable content determined to be valuable either by a financial or public interest standard, and/or that is made available on bouquets that are priced so as to be priced above the price of the majority of content or subject to a retail buy-through, or both".

We also do not agree that premium content is that content that fosters national identity. We say this given the numerous languages spoken in South Africa and the obligation on broadcasters to provide a certain amount of local content, which obligations do not apply in

the same way to subscription television broadcasters as they do to free to air television broadcasters¹⁶.

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

We do not believe it is necessary to distinguish between sub-sets within premium and non-premium content for purposes of market definition.

In the course of developing remedies it will become important to ensure that premium content obtained by a dominant licensee on an exclusive or long term basis, or on auction or by any other method which awards content rights on the basis of the highest offer, is offered to third parties on regulated terms as to provision (see below).

We note that there is no question 7.

Question 8: 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?

We do not fully agree for the reasons stated above. Cell C agrees with the principle of the market definition at the retail level, but it is not clear from the Inquiry Document why the retail markets should differ so substantially from the wholesale markets for the acquisition of rights. The distinction seems to be somewhat forced or even artificial having regard to what we say above about the value chain. The current 6 markets defined at the rights acquisition (wholesale) level appear to be aggregated at the retail level without any justification. Although in our view premium content need not be segmented into multiple sub-markets, it will be necessary for ICASA to first determine the wholesale market and then the retail market having regard to the same considerations. Assuming that the wholesale markets at the content production and content aggregation levels are only divided into two sub-markets (premium and non-premium) then ICASA's current categorisation of the retail market would be likely to be logically consistent with these market definitions. However, if ICASA continues to divide the wholesale markets into a greater number of sub-markets then a justification as to why the retail market is less divisible would be required, though it is possible even in this circumstance that ICASA's retail market definition would remain sensible.

¹⁶ Regulations 5 and 6 of the Local Television Content Regulations. *Gazette* 39844 of 23 March 2016.

Question 9: 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 in this regard?

We have stated above and reiterate here that the top level market should be defined as the production market, whereas the market below this at the wholesale level should include acquisition, content aggregation, channel packaging, and commissioning.

The 6 markets defined by ICASA in paragraph 5.9.18 deserve more consideration. We believe that it may be appropriate to define premium and non-premium content without any sub-markets because in time a sub-market is bound to change because viewing preferences and trends change, so trying to shoehorn content into these narrow categories or any categories at all at this time would seem to be premature. If the market is to be effectively competitive, Multichoice should be considered to be dominant in the widest set of premium content, rather than the narrowest.

In addition, if one were to apply the SSNIP test (which ICASA refers to in paragraph 5.3), one would have to apply it to the entire bundle or bouquet of channels offered by Multichoice, since the channels that it offers are not available on an individual basis, or on the basis that one could acquire so-called "premium" content for one price and "non-premium" content for another price.

Any obligations that might, as a result of this suggestion (a broad definition of premium content) apply to other licensees with access to premium content if defined broadly would not apply where those licensees do not have significant market power in the wholesale market, and those licensees are highly unlikely to have market power in the retail market either.

Question 10: 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?

Cell C views Multichoice as having significant buying power in its negotiations with third party channel providers (i.e. in the level below content production), which in turn reduces the appetite of these channel providers to negotiate with Cell C and others. Here we are thinking of Multichoice itself and the BBC for example.

Furthermore, where Multichoice produces channels it will not meaningfully negotiate with other retailers because of the ability and incentives that arise from its vertical integration.

Question 11: 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?

ICASA has itself noted that certain content differs in terms of characteristics and the profiles of its followers, giving the example of sport and particularly soccer, rugby and cricket. ICASA proposes to designate separate markets for different sports¹⁷. Within these sports are also sports that are international in nature, national in nature, or international but featuring national teams or individual participants.

In this first market review, Cell C considers it to be unnecessarily complex to attempt to divide premium content into sub-markets by different sports events because the criteria which ICASA may use or Multichoice may prefer, are almost impossible to prove with empirical data. Whilst in other market definition exercises, for example in the determination of a market for fixed line telephony, it may well be appropriate to consider whether or not mobile telephony could be a substitute for fixed line telephony because they both offer the consumer connectivity for the purposes of communications. However in this instance, we consider the criteria to be considerable in number and open to challenge. ICASA itself recognises this in paragraph 6.3.1 where it proposes to consider the six possible "markets" for premium content, simply as "premium content". See our arguments on this above .

As regards the characterisation of the markets in paragraph 5.9.18, Cell C recommends that "live sport" be categorised as a sub-market within premium content for which there is no substitute, regardless of what the sport is. Therefore the characterisation should read as follows in Cell C's view (if ICASA wishes to retain first window movies as a sub-market of premium content):

- (a) A market for the aggregation of first window movies for wholesale distribution in South Africa;
- (b) A market for the aggregation of live sport in South Africa;
- (c) A market for the aggregation of non-premium audio-visual content for retail distribution in South Africa.

¹⁷ Paragraphs 5.9.13 to 5.9.15 of the Inquiry Document.

In Cell C's view, (a) and (b) need not be defined separately within the premium content market definition and there could be two markets only – the market for the aggregation of premium content at the wholesale level, and the market for the aggregation of non-premium content, at the retail level.

Question 12: 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?

This section deals with technical services. Cell C has no view on this aspect save to say that Multichoice controls the distribution and activation of specifically designed set top boxes capable of receiving only Multichoice bouquets. To the extent that they are not interoperable between Multichoice's own bouquets, or with any other digital service, there may well be a competition problem here.

Question 13: Is it necessary to define a market for technical services? What are the competition challenges in this market?

Please see above. If Multichoice is leveraging or likely to leverage its market power in every level of the value chain and in certain markets into related markets that include technical services, then this should also be regulated in order to ensure that there is effective competition in this market as well. Set top boxes are an issue that directly bears on consumer interests, both as to cost and ability to switch providers.

Question 14: Do you agree with the Authority's proposal to use the above factors in determining the effectiveness of competition? Please substantiate your answer.

The more typical "three criteria test" comprises the following:

- (a) the presence of high and non-transitory structural, legal or regulatory barriers to entry;
- (b) the market structure does not tend towards effective competition within the relevant time horizon, having regard to the state of competition behind the barriers to entry; and
- (c) competition law alone is insufficient to adequately address market failure(s) concerned.

This test is used to check that a relevant market has been correctly defined *as well as* to determine the effectiveness of competition. Other factors can be used, such as those

referred to in section 67(4A) of the ECA, which ICASA refers to at paragraph 6.1.4 of the Inquiry Document, which includes *“the dynamic character and functioning of the market or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward-looking assessment of the relative market power of the licensees in the markets or market segments.”*

In this case, we believe it is essential to consider the history of competition in this market which has led to the current skewed market structure and dominance by Multichoice in pay tv in relation to audio-visual content. Regardless of whether ICASA chooses a time horizon of 2, 3 or 5 years (the most common choices) in relation to a forward-looking assessment of competition in the relevant markets, we do not believe there can be effective competition because of the barriers to entry created by Multichoice’s sheer size, and its resultant bargaining power with both content producers for premium content, and third party channel providers or content aggregators for non-premium content.

In this regard it is important to traverse the history of this market again: Multichoice entered the market in 1986 in the form of MNet, a terrestrial subscription television broadcaster, and in 1995 in the form of DStv, a satellite subscription television broadcaster. It did not have a licence to operate DStv until ICASA issued an invitation to apply and awarded licences to five companies including Multichoice, at the end of 2007. Of these licensees, only 2 remain in operation – Deukom (a German language service), and Starsat (formerly TopTV). Multichoice’s closest competitor has a fraction of the subscribers of Multichoice.¹⁸ Multichoice has therefore dominated the market for almost 3 decades and is likely to continue to do so. It is noteworthy that it also dominates the continent in the provision of subscription television broadcasting.¹⁹

We have taken into account the possibility that digital terrestrial television migration may have some impact on Multichoice, but the prospect is slight. Not only has it taken nearly ten years to get to the point today where there is still very little movement by broadcasters and even dual illumination only commenced in February 2016 in South Africa and is expected to last several years²⁰, but the transition by customers to televisions capable of viewing encrypted content or acquiring set top boxes remains mired in litigation – there is still no firm

¹⁸ See Table 3 of the Inquiry Document.

¹⁹ http://www.itweb.co.za/index.php?option=com_content&view=article&id=147712:SA-leads-Africa-s-pay-TV-market&catid=260

²⁰ <https://techcentral.co.za/finally-digital-tv-era-arrives-in-sa/62948/>

position on whether or not signals must be encrypted²¹. It is also unclear which set top box manufacturers will manufacture the equipment needed to decrypt signals if they are encrypted, and whether they will be interoperable.

In addition, Multichoice's bouquets have been priced for the greater part of its history, so as to attract only customers in the highest LSM bracket. Its sources of revenue have included subscriptions and advertising, whereas free-to-air broadcasters must rely on advertising only (despite the provisions of the former Broadcasting Act, 1999 and section 60(4) of the ECA).²²

In 2007 a number of interested parties prepared a submission to OFCOM, the United Kingdom's regulatory authority, entitled "Submission to Ofcom on the need for a market investigation into the Pay TV industry" in which they stated "*Sky's incentives and ability to leverage the existing market structure mean that any competition or other regulatory remedy aimed at addressing one or other aspect of its conduct will not prevent Sky from exploiting that structure in other ways. Accordingly, this market failure cannot adequately be addressed by piecemeal regulatory intervention (in particular, on the basis of the Competition Act), aimed at addressing individual manifestations of market failure. Indeed, previous attempts by competition authorities to address competition problems present in the UK pay TV industry and in particular to regulate individual instances of Sky's conduct have proved inadequate to deal with the structural features which allow such conduct to occur and the industry-wide market failure which results.*"²³ This led to a market inquiry by OFCOM, which began later that year²⁴ (the OFCOM document).

Cell C believes that the South African situation can be compared to the situation subsisting at that time in the United Kingdom and that this statement is true in relation to Multichoice in the South African context.

We therefore agree with the methodology proposed by ICASA in section 6.2 but believe it must go further to specifically consider the effectiveness of competition as a whole and the drivers for this, under section 67(4A).

²¹ <https://www.groundup.org.za/article/constitutional-court-decision-could-change-tv-landscape/>

²² Section 60(4) provides that "Subscription broadcasting services may draw their revenue from subscriptions, advertising and sponsorships, however in no event may advertising or sponsorships, or a combination thereof, be the largest source of annual revenue".

²³ The submission was made by British Telecommunications plc, Setanta Sports Holdings Ltd, Top Up TV Europe Ltd, and Virgin Media Limited on 3 July 2007. It can be accessed at:

https://www.ofcom.org.uk/data/assets/pdf_file/0017/51353/submission1.pdf

²⁴ OFCOM, Pay TV Market Investigation, Consultation Document, 18 December 2007, which can be accessed at https://www.ofcom.org.uk/data/assets/pdf_file/0014/54005/pay_tv.pdf.

Question 15: 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?

ICASA itself recognises that there is a need to investigate whether or not to regulate this market in the Inquiry Document, by launching this inquiry. Once ICASA considers all the facts, it is an inescapable conclusion that regulation is required. We say this because for Cell C to enter the content market, it will have to compete with Multichoice on all fronts. As a new entrant, Cell C simply cannot compete for the same content either as to number of channels (or choices) or type of content.

ICASA has not carried out an inquiry into competition in this sector before and it is our view that ICASA should start from the premise that Multichoice is dominant in non-premium content at the retail level by virtue of the number of channels that it is able to and does aggregate, and its buying power.

It is also important to bear in mind that by virtue of the number of subscribers coupled with the access to a significant number of rights, Multichoice has substantial buying power or scale. It is impossible for any new entrant to the pay tv market (or indeed anyone else) to compete because Multichoice will be able to drive up a new entrant's costs simply by paying over the odds for the content that it acquires. Even if Multichoice were to be dominant only in the market for aggregation of "premium" content, as we have described elsewhere in this submission, Multichoice is able to leverage this dominance into the related "non-premium" market.

We note that ICASA itself observes that *"...the vicious cycle[,] begins with the acquisition of premium content on an exclusive basis for a stipulated time frame. Exclusive premium content attracts more viewers thereby increasing the broadcaster's chances of acquiring even more premium content as rights holders would prefer to sell to an established broadcaster with an established and growing subscriber base. More viewers also mean an (sic) increase in advertising and subscription revenue that enables the broadcaster not only to outbid its rivals but also acquire even more exclusive content. Consequently, new entrants are forced from the market."*²⁵

Cell C agrees with this statement and notes that this vicious cycle theory was also upheld as correct by OFCOM in its pay TV market investigation in the UK between 2007 and 2010.

²⁵ Paragraph 6.3.5 of the Inquiry Document.

Question 16: Kindly comment on the nature of barriers to entry in the upstream market.

We agree with ICASA's position. We believe the description of the likely barriers to entry set out in the OFCOM document captures this well, and for ease of reference, have set this out below:

“6.62 There are likely to be substantial challenges facing a firm wishing to enter the wholesale channel market and bid for premium content rights, particularly if it is in competition with a vertically integrated incumbent.

6.63 An incumbent retailer will typically have built up a portfolio of content rights over a number of years. We observed in section 5 that content rights will typically have been provided on the basis of a fixed duration of between three and five years for most sports rights, and that movie contracts do not tend to come up for renewal at the same time, so that they could be contestable only on a staggered basis over the course of the next few years.

6.64 The benefits of content aggregation combined with the staggered availability of rights suggest that there are likely to be important first-mover advantages for certain wholesale channel providers. By aggregating content into channels, wholesale channel providers can increase the collective value of the content above its standalone value. This means that a channel provider that already has the rights to a significant range of content can potentially extract more value from the next set of rights to come available than could a new entrant. It will therefore be able to pay more for those rights. Staggered availability of rights also facilitates the content aggregation effect described above, by making it easier for an incumbent with a significant portfolio of rights to accumulate and retain other rights as they become available.

6.65 In contrast, a new entrant that wishes to assemble a portfolio of rights must gradually accumulate those rights, by repeatedly winning the bidding for different pieces of content. Indeed, that potential new entrant may need to incur initial losses (in order to outbid the incumbent which is able to extract more value from those rights), in the hope that it ultimately acquires sufficient content for the market to begin to “tip” in its favour. These difficulties may be exacerbated when rights agreements have a long duration, in which case this is likely to take a number of years. As a

result, there may be significant barriers to entry for wholesale channels which wish to supply certain types of content.

6.66 It might be possible to influence the barriers to entry described above through regulatory intervention. The FAPL remedy is likely to have facilitated Setanta's acquisition of content rights previously acquired by Sky and which Sky might have otherwise acquired, given the aggregation benefits described above.

6.67 In addition to those barriers to entry which may be intrinsic to content markets at the wholesale level, a vertically integrated incumbent may have an incentive to create additional barriers to entry by exploiting its position in downstream markets. During the extended period in which a new wholesale channel provider is building up a portfolio of content rights, the vertically integrated incumbent may be able to restrict the new entrant's access to retail markets, and therefore make it more difficult for the new entrant to monetise its rights."²⁶

Question 17: What in your opinion are the premium rights in the South African television sector? Who currently holds them?

By far the most by number of items and type of audio-visual content for pay tv is held by Multichoice in different forms of rights. ICASA has described many of them in paragraphs 6.3 and following.

If ICASA is minded to define rights in these categories, it is clear from ICASA's own table²⁷, incomplete as it may be, that Multichoice holds the vast majority of these rights. However, please see our answer to Question 18.

Question 18: Kindly comment on the Authority's proposal to use the number of rights as a unit of measure for market share calculation purposes. What other factors should be analysed to determine the dynamic character and functioning of the market?

Although the table is a reasonable simplification, this approach is also likely to understate the extent of Multichoice's dominance if this is the only measurement. For example, the rights held by StarTimes (StarSat) are the German Bundesliga rights in football, which are arguably not the most desirable rights listed in ICASA's table.

²⁶ Ibid.

²⁷ Table 1: Key Sports and Movie Rights, page 73 of the Inquiry Document.

We presume in this question that ICASA is referring to the market for premium content. However, by any measure and in any market or market segment that ICASA may define for audio-visual content, Multichoice has the greatest share of market, with the obvious exclusion of the total number of television viewers. Multichoice has the greatest number of pay tv subscribers, the greatest number of channels and therefore the largest amount of content, the greatest number of premium content rights, the greatest number of set top box sales, and the largest revenue on any measure.

There are no substitutes for Multichoice and there are no substitutes for its content that can be considered to be equivalent. Even where Multichoice has made sports rights available to third parties, the terms on which those parties may replay sports events, for example, renders those events delayed rather than live, which they are when broadcast on Multichoice.

Therefore as we say above, although the table of rights held by licensees might be a relatively simple way to look at whether or not a licensee is dominant, there are deep potential flaws in this approach.

Finally, whilst the vast majority of consumers in South Africa cannot afford a pay tv subscription, this does not mean they would not watch live sport, for example, if they could afford it.

Question 19: Do you consider the nature and extent of vertical integration in subscription television likely to harm competition? Kindly elaborate on your answer.

Cell C believes that vertical integration is certainly a factor in this case that harms competition and Multichoice itself confirms that it is a vertically integrated player – it participates at every level of the market including in the technical services level.

Multichoice is dominant in the aggregation of premium content and due to its vertical integration is incentivised (and has the ability) to restrict supply of this content to other retailers (and in turn other platforms). This restricts competition and leads to bad outcomes for consumers.

Moreover, the “vicious cycle” identified by ICASA is apparent in every aspect of the pay tv market such that the advantages that accrue for Multichoice across the value chain, owing to its vertical integration, lead to other competition issues. For example, Multichoice arguably has the ability to acquire all of the best non-premium content on an exclusive basis at the

retail level, with much the same (negative) effects as if it was acquiring premium content on an exclusive basis.

In addition, the way that certain content is made available means that Multichoice can stagger its use of that content across its various platforms. It has total control of the value chain for much of its content.

In the OFCOM document, OFCOM states that *"A vertically integrated incumbent may have the incentive and ability to foreclose potential new retailers by denying them content. The prevalence of vertical integration between retail and platform operations may cause this problem to extend to foreclosing the possible development of new platforms."*²⁸

In relation to the development of new platforms, this is a very real concern for Cell C. If it is not able to gain access to content or if the content which it can gain access to is not comparable with the content acquired by Multichoice, the launch of Black as a new platform may not succeed.

Question 20: 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?

Yes, Cell C wholeheartedly agrees with this view. We are aware that similar findings have been made in other jurisdictions where a sector-specific regulator operates concurrently with a national competition authority. A sector-specific regulator regulates in generally ex ante fashion i.e. before the problem manifests in anti-competitive outcomes or an abuse of dominance that has a negative effect on the consumer and the market, whereas the competition authorities typically address harm caused by anti-competitive behaviour or an abuse of dominance on an ex post basis, i.e. after the fact.

The provisions of the ECA in relation to both broadcasting and competition are more appropriate to address the market in an ex ante fashion, rather than waiting for an interested party to lodge a complaint when the damage has already been done, or for the overburdened Competition Commission to launch an investigation on its own initiative.

The suite of remedies that ICASA may choose from to impose on a licensee if a market is found not to be effectively competitive are more likely to have the desired result in that

²⁸ Page 118 of the OFCOM document.

market than imposing a monetary penalty would do, which is the Competition Commission's sole remedy.

We deal with remedies in more detail below.

Question 21: Kindly comment on the above analysis of possible barriers to entry at the retail level of the market. What other barriers to entry are prevalent in this market?

We agree with ICASA's analysis except in relation to the matters put forward in paragraph 6.4. Even in the case of locally produced content Multichoice is able to leverage its market power and revenues into the production of local content. In addition, its acquisition of channels puts it in a position to dominate the market on any measure, whether or not the channels are so-called premium content or not.

In this regard, we draw your attention to the Inquiry Document at paragraphs 5.8, 6.5.3 and 6.5.4 in which ICASA discusses bundling and content aggregation. Because of Multichoice's ability to combine channels into bouquets of its own choosing, for which it charges one price, consumers are not at liberty to take one or more channels without taking all of them in the bouquet. For this reason, premium content is made available alongside non-premium content (if we use the definitions in the Inquiry Document) for one price. In Cell C's view, Multichoice is dominant in premium content at the wholesale level and in non-premium content at the retail level, and the high barriers to entry subsist in both content markets.

There are simply no other entities within this market (or any other) which have the same amount and type of content available, therefore it is not necessary to create a distinction in order to determine dominance.

Furthermore, the bargaining power of Multichoice in acquiring content coupled with their massive scale, allows them to negotiate favourable terms with upstream providers, and even long term contracts. This bargaining power is also problematic in the downstream market because it ensures that Multichoice can determine its own terms for licensing content to third parties. Similar findings were made in the OFCOM document.

This is because, for example, the Sports Regulations do not regulate the terms on which Multichoice may provide content to third parties, and it is the case that Multichoice will provide sports content on a delayed basis. This dilutes the competitive nature of the third party offering, constituting an effective barrier to entering the market and/or sustaining a

viable business within the same market by attracting subscribers. It would appear that Multichoice is essentially acting to restrict supply of the content to benefit its own downstream retail arm, unless someone is willing to pay it a price that is truly compelling. The fact that there is such a price arises only because of the extent of Multichoice's downstream dominance – i.e. that even when a competitor is armed with "premium" or valuable content, Multichoice still does not really feel threatened at the retail level.

ICASA has dealt with this issue in particular at paragraphs 6.3.3, 6.3.4, 6.3.5, 6.3.8, 6.3.9, 6.5.1, 6.5.2, 6.5.3, 6.5.7, 6.5.8 and 6.5.9 of the Inquiry Document.

As another example of where the incentives that might otherwise operate are distorted, Multichoice can determine whether or not to accept third party advertising on its platform, such as Cell C's advertising of its new product, Black. Multichoice's agents have refused to place Cell C's advertising on any of Multichoice's channels, despite the fact that in doing so, it is turning away advertising revenue. Multichoice's vertically integrated nature enables it to create a barrier to entry here too because Cell C is denied access to the vast array of Multichoice's pay tv channels, its related group companies, and ultimately the type of consumer that subscribes to Multichoice because there are no other pay tv platforms to advertise on with the same reach as Multichoice.

By contrast, there are a large number of commercial sound broadcasters licensed in South Africa, that provide different formats around the country to listeners in their footprint. It is understandable that a radio station would not want to advertise another radio station in its footprint, nor should it be required to since in almost all regions (primary and secondary markets) more than one licence has been issued and more than one licensee is operational. There is thus significant competition for advertising revenue and listeners nationally and within provinces, and even within the same cities. This is not true of the pay tv market, despite ICASA having licensed more entities none of them other than Multichoice and Starsat are operational and Multichoice has a market share in excess of 96%.

Question 22 (incorrectly numbered as 21 again): Is the Authority correct to use subscriber numbers as a unit of measure for market share calculation purposes? How else would you calculate market share at this level? What other factors should be analysed to determine the dynamic character of the market?

Cell C has dealt with this in the context of the number of rights, in response to Question 18. However, we do agree with ICASA that subscriber numbers is a sensible measure of retail

market share, and certainly more sensible than a quantity such as advertising revenue, which does not tell the whole story in relation to the market power of different operators, particularly when there is a regulatory limitation on advertising and sponsorship revenue for pay tv licensees.

Question 23: Do you support the Authority's proposed approach in identifying players with significant market power? Kindly elaborate.

Cell C agrees with the theoretical approach taken by ICASA, but we do not agree that it is relevant that there are three players that have rights to premium content in the upstream market for supply and acquisition, for all the reasons that we have set out above in response to Questions 16 and 17.

Question 24: Does the nature of any licensee's vertical integration in this market raise competition concerns?

There is only one licensee, namely Multichoice, that has market power in all the markets in which it operates. Its vertical integration only entrenches its dominance in Cell C's view. Not only is it able to aggregate content from multiple suppliers at high prices, but it is able to compile it into bouquets of its own choosing and make these available across numerous platforms.

The vertical integration doesn't just entrench market power, it also provides Multichoice with the ability and incentive to engage in practices which are detrimental to the development of the market and ultimately to consumers (for example, by restricting the supply of content).

We also discuss this in our response to Questions 4 and 19.

Question 25: Kindly comment on each of the remedies discussed above and indicate their possible applicability in the South African context.

We have commented on possible remedies in our General introduction.

In response to ICASA's proposals we have the following observations:

- Shortening exclusive contracts is not a solution in of itself since Multichoice would still be in a position to win the contract each time, suppliers may not be amenable to shortened time periods or may have minimum time periods in all their contracts. We propose that Multichoice should have to disclose the terms of all agreements to acquire premium content on an exclusive or long term basis and

the terms on which it will make that content available to third parties for ICASA's approval. This could be likened to a facilities leasing or interconnection Reference Offer in the electronic communications sector;

- Unbundling across platforms is only of any use if it is accompanied by restrictions on Multichoice's ability to buy rights across multiple platforms and/or "warehouse" the rights particularly where it acquires various types of rights to the same content. The acquisition of rights unless sold as a bundle, must be by item. Where suppliers sell rights as a bundle, Multichoice must resell rights that it does not intend to use with immediate effect, on reasonable terms, to be agreed by ICASA;
- Rights splitting does mean that an operator other than Multichoice would get access to some premium content. However, it does not alleviate the concerns raised regarding exclusivity, just with more than one operator having some of the content; and
- Wholesale 'must offer' obligations could be imposed on Multichoice in relation to all categories of premium content.

Our proposals are:

- a. Obligations to publish information concerning long term and/or exclusive contracts concluded by Multichoice for premium content (as defined), and the terms on which such content is available for acquisition by third parties;
- b. Obligations to maintain separate accounts for each of its various offerings by platform, premium and non-premium type of content, and wholesale and retail content;
- c. Obligations to make programmes and channels available separately on terms regarding distribution, reselling and access imposed to be by ICASA;
- d. Rate regulation on wholesale services, such that no content should be made available on terms that are less favourable than Multichoice first acquired it, pro rata to the total price if content is sold by programme;
- e. Obligations relating to accounts, records and other documents to be kept, provided to the Authority and published;
- f. Obligations regarding the amount and type of premium, sports and South African programming for broadcasting over a period of time, in the aggregate;

- g. Imposition of an interoperability obligation in relation to its set top boxes; and
- h. Obligations to carry the channels and advertising of products that are not in the same market as Multichoice, for example, Cell C's Black.

Question 26: Is the above proposal feasible in the South African market context?

Cell C has no comment on this.

Question 27: Kindly comment on competition implications of set top box interoperability.

This is desirable although may be technically complex.

Question 28: What other conditions could be imposed on any licensee having significant market power to remedy market failure in the relevant market?

Cell C believes that should ICASA find that Multichoice or any other with SMP across the value-chain, the following remedies should apply:

- a. Obligations to publish information concerning long term and/or exclusive contracts concluded by SMP licensees / Multichoice for premium content (as defined), and the terms on which such content is available for acquisition by third parties;
- b. Obligations to make programmes and channels available separately on terms regarding distribution, reselling and access to be imposed by ICASA;
- c. Rate regulation on wholesale services, such that no content should be made available on terms that are less favourable than the relevant SMP licensee / Multichoice first acquired it, pro rata to the total price if content is sold by programme;
- d. Obligations relating to accounts, records and other documents to be kept, provided to ICASA and published;
- e. Obligations regarding the amount and type of premium, sports and South African programming for broadcasting over a period of time, in the aggregate; and
- f. Obligations to carry the channels and advertising of products that are not in the same market as Multichoice, for example, Cell C's Black.

A remedy that abolishes exclusivity to content rights traditionally acquired by Multichoice / SMP licensees (e.g. no exclusivity, no tiered pricing or other clauses that are likely to preclude smaller retailers) could be imposed with a requirement on pay TV broadcaster with

SMP / Multichoice to provide access to the content where there is a breach. We understand that Singapore adopted a similar approach.

Please also see our response to Question 25.

ANNEXURE A: THE NASPERS GROUP OF COMPANIES

Group structure

