



***competition*commission**
south africa

**COMPETITION COMMISSION COMMENTS ON THE
DISCUSSION DOCUMENT FOR THE INQUIRY INTO
SUBSCRIPTION TELEVISION BROADCASTING
SERVICES**

19 December 2017

Final

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1. INTRODUCTION

- 1.1. On 25 August 2017, the Independent Communications Authority of South Africa (“ICASA”) published a Discussion Document on the Inquiry into Subscription Television Broadcasting Services (Discussion Document) for comments. This document serves to provide the Commission’s views in response to the questions raised in the ICASA Discussion Document.

2. BACKGROUND

- 2.1. Over the past few years, the Commission has received and subsequently undertaken a number of investigations and research into the broadcasting sector, particularly the Pay-TV (subscription) broadcasters’ segment. It is worth mentioning at the outset that the focus of the investigations and research conducted by the Commission have been with respect to premium sport content.
- 2.2. The Commission has, from 2012 to date, investigated at least five complaints in the subscription broadcasting television segment against Multichoice South Africa Holdings Proprietary Limited (“Multichoice”). The views expressed herein do not represent the Commission’s findings in these investigations (the majority of which are still ongoing), as these are only observations from the various investigations and research.
- 2.3. The complaints raise a number of issues but are essentially centred around allegations that, *inter alia*, Multichoice is abusing its dominant position and limiting consumers’ choice by not allowing consumers to select the channels of their choice or particular programmes on channels for the payment of a fee commensurate with their choices. The complaints further allege that Multichoice’s premium bouquet of pre-selected channels is excessively priced and that in order to watch premium live sport, consumers are forced to purchase programming that they are not interested in, which Multichoice offers as part of the DStv premium bouquet. In addition, the complaints allege that broadcasters who compete with Multichoice are being excluded from broadcasting premium sports content acquired by SuperSport because Multichoice currently has exclusive rights through contracts of long duration to such content.
- 2.4. Broadly, these allegations are said to amount to excessive pricing, a refusal to grant access to an essential facility; requiring or inducing a supplier or customer

not to deal with a competitor by concluding exclusive agreements with content rights holders; and selling goods or services below their marginal or average variable cost. These allegations may be possible contraventions of sections 5 and 8 of the Competition Act no 89 of 1998 (as amended).

3. RESPONSE TO ISSUES RAISED IN THE DISCUSSION DOCUMENT

- 3.1. We set out below the Commission's responses to the questions in the ICASA Discussion Document.

4. 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?

- 4.1. The Commission wishes to submit the following:

4.1.1. The differentiated nature of the pay-tv service offering renders the process of defining relevant antitrust markets to be quite complex. In most cases, the nature of economic evidence considered for such purposes, *inter alia*, includes product characteristics, survey evidence, and trends in prices and subscriber numbers. In terms of survey evidence, the key question relates to the customers' (stated) preference to switch to potential substitute products such as general entertainment alternatives like movies. However, such survey evidence is complicated by the fact that customers may potentially overstate or understate their willingness to switch, owing to a number of factors. Nonetheless, a larger sample will tend to lead to an average preference by subscribers¹.

4.1.2. The Office of communications ("Ofcom") in the United Kingdom has noted potential challenges regarding trends in prices and subscriber numbers as indicators for market definition purposes, citing difficulties in "*controlling for quality changes and other factors which may drive subscriber numbers*"². The Ofcom mainly relied on product characteristics and survey evidence in respect

¹ See Pay TV statement by Ofcom dated 31 March 2010, paragraph 5.4, available at http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf.

² Ibid, paragraph 5.5.

of the relative importance of different product characteristics to consumers to conclude on market definition.

4.1.3. In defining the relevant upstream market(s), the Commission is of the view that the following factors are instructive:

4.1.3.1. International case precedence, where relevant;

4.1.3.2. The valuation of rights by broadcasters;

4.1.3.3. Product characteristics; and

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

4.1.4. In respect of the theoretical approach to defining the relevant downstream markets, the Commission is of the view that the key consideration is the extent to which Pay-tv broadcasting services can be considered to be in the same antitrust market as free-to-air (“FTA”) and other broadcast platforms. This process of market delineation is determined by the business model adopted by the firms using such broadcast platforms, and the technical platform used to broadcast content.

4.1.5. As regards the relevant geographic market, the Commission is in agreement with the approach adopted by ICASA.

4.2. The Commission is of the view that the theoretical approach to market definition as set out in the Discussion Document accords with globally accepted principles insofar as it relates to the consideration of both demand- and supply-side factors.

5. TELEVISION BROADCASTING VALUE CHAIN

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

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

5.1. The Commission submits that the approach of using the value chain to identify functional markets is in accordance with accepted international norms. This is based on the view that each level of the vertical production value chain can and does constitute a distinct markets. The foregoing is premised on the fact that there is no functional or economic substitutability in respect of the activities involved at each level of the value chain. The Commission notes that the structure and

operations of the South African television broadcasting industry exhibit similar functional characteristics to other markets internationally.

6. DOWNSTREAM RETAIL MARKETS: Q5 & Q6

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?

- 6.1. As generally accepted, the attractiveness of any particular television broadcaster to potential subscribers or viewers depends heavily on its ability to acquire content, particularly premium content. Broadly defined, premium content, *inter alia*, includes sports, movies and series. The discussion below will focus on movies and sport.
- 6.2. Hollywood studios only release a limited number of movies per annum, particularly the so-called blockbuster movies. The way in which the rights to broadcast movies are sold is that they are made available over time (i.e. the release windows structure). Typically a movie has a cinema release, then a DVD format, and then it will be first broadcast exclusively on the first window (the first window is normally between 6 to 12 months). Typically, the first window period is reserved for Pay-tv broadcasters. Eventually, the movie is broadcast on FTA. The release windows structure drives the timing of when movies over different formats become available for viewing and determines when different types of broadcasters can acquire such content rights. The release windows structure also enables movie studios to set different prices for different windows. Insofar as it relates to the first and second window releases, it is generally the case that content rights are first made available to Pay-tv broadcasters and thereafter FTA.
- 6.3. The implication of the window release structure is that by the time the movie is available to FTA broadcasters, for example, it is already mature and less attractive to viewers. Consumers value movies more the closer they are to the theatrical release date. This confers upon the first window movie release a premium element that is not characteristic of subsequent window releases. The Commission notes that there are some movie series such as the James Bond movies who not only derive their premium character from the first window release only but the fact that they are part of a suite of highly popular movies. In this regard, although the movies within the series might be old, as a collective they are considered to be premium.

A key indicator in this regard is the fact that Hollywood studios would generally sell these as a package rather than a single movie release.

- 6.4. With reference to sports, the Commission is of the view that there are five features that are critical in defining those aspects of sports content that render it as premium as opposed to non-premium. These, *inter alia*, include that the sports event(s) (i) be of a high quality production; (ii) must be broadcast live; (iii) with sufficient regularity; (iv) popularity; and (v) costs of acquiring the content rights. These are briefly discussed below.
- 6.5. **High quality production** - the quality of the games and the technical production of the broadcast are key components that attract viewers to view a game. The skills and the celebrity of the top players in the various leagues also drive up the subscription numbers. **Live broadcast** - it is recognised that sports content consumers derive satisfaction and utility from being able to watch a game live, “as *it happens*”, and that sports content loses attraction once the outcomes of a game are well known. Sport is an ephemeral product and therefore the allure and value of sports content is in its live element. **Regularity** - it is well accepted that sports content attracts viewers and establishes credibility with sports consumers on the basis of regularity. It is for this reason that scheduling and fixtures cannot be changed once they have been established, for example. **Popularity** - popularity, which is considered to be one of the key criteria, varies from country to country depending on the sports content consumption patterns of that populace. Popularity is generally gauged by using viewership numbers per event. This approach of using viewership numbers to gauge popularity is a well-accepted standard and widely used by market participants. **Costs of acquiring the content rights** - another indicator that illustrates that premium sport content may be a distinct antitrust market is the cost of acquiring such content. It is well accepted that in order to acquire the exclusive rights to premium sports content, firms will pay substantial amounts of money.
- 6.6. The Commission is of the view that the definition of premium content as comprising live sport, among other entertainment genres such as blockbuster movies, latest local and international series aligns with internationally accepted approaches.

7. DOWNSTREAM RETAIL MARKETS: 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?

- 7.1. The Commission is of the view that there is limited supply- and demand-side substitutability between subscription television services and FTA broadcasters in relation to premium sports content, for example. Similarly, the emergence of alternative broadcast platforms such as internet-based television does not appear likely to constrain the behaviour of subscription television services in the short to medium term. The characterisation of premium content has been provided in 6 above. The Commission is of the current view that ICASA's characterisation of the relevant retail market(s) is in line with international norms.

8. UPSTREAM WHOLESALE MARKETS: CONTENT PROVISION – Q9 & Q10

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

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

- 8.1. As regards the nature of the bargaining power between independent wholesale channel suppliers and broadcasters, the Commission will approach its response from the dynamic relating to the presence of countervailing buyer power.
- 8.2. While generally considered to be likely to give rise to pro-competitive outcomes, the existence of countervailing power may have differing effects when exercised by buyers who are active at both an intermediate input and downstream retail levels of the production value chain. Literature has shown that in the event that a buyer possesses market power in both the upstream and downstream markets, the existence of countervailing buyer power may present competition problems³. In this regard, the gains achieved from the exercise of buyer power upstream, in the

³ Chen, Z., (2007), Buyer Power: Economic Theory and Antitrust Policy, *Research in Law and Economics*, vol (22), pp 17-40; Röller, L-H., (2004), Buyer Power in the EU, Presentation at the American Antitrust Institute Conference on "Buyer Power and Antitrust", Washington D.C. June 22nd, 2004, available at http://ec.europa.eu/dgs/competition/economist/buyer_power.pdf, accessed on 17.06.2016; Lars, H., (2012), COUNTERVAILING BUYER POWER IN EU ANTITRUST ANALYSIS, Presentation at Bergen Center for Competition Law and Economics, BECCLE, October 17, 2012, available at <http://www.beccle.no/files/2013/06/Henriksson-Okt-2012-Countervailing-Buyer-Power-in-EU.pdf>, accessed on 17.06.2016.

presence of a competitive downstream retail market, may give rise to consumer welfare as the savings attained upstream may be passed onto consumers. On the contrary, the absence of downstream competition obviates the need for the buyer to pass on the cost savings to customers. In other words, the exercise of buyer power upstream may give rise to competition concerns if it strengthens the selling power of a market participant to the detriment of consumers and/or competitors.

- 8.3. In the **upstream wholesale markets** for the supply of premium content, as defined, we note that the sports federations, as owners and sellers of the sports content rights, may decide (in the context of a bidding process, for example) how and to whom to sell their sports broadcasting rights, the duration and the territory. In the context of private negotiations, these factors are an outcome of the bargaining process that takes place.
- 8.4. The South African experience has shown that there are a limited number of buyers (i.e. broadcasters) in South Africa to which sports federations can sell their broadcasting rights. In respect of subscription television services, these include SuperSport and ODM while for FTA services, the SABC and e.tv would be contenders. This, in the view of the Commission, significantly limits the sports federations' bargaining power as there are a few number of potential buyers to whom content rights owners could sell. This is further exacerbated by the fact that even on other considerations such as the capacity to broadcast live matches, expertise and production quality standards, subscriber base and the ability to pay the required amounts for rights, there are limitations which rule out other buyers. These limitations include the capacity and technical expertise to broadcast sports events at the required level of quality of production, for example. This effectively narrows down the number of suitable buyers even further, thus limiting the alternatives available to content rights owners.
- 8.5. As a result, it is noteworthy that certain sports federations have repeatedly sold their content rights (on an all-inclusive basis) exclusively to a single broadcaster over a significant period of time. This is illustrative of the limitations faced by content rights owners and indicative of the constraints on their bargaining power given the limited buyer alternatives available.
- 8.6. The assessment of countervailing power at the **downstream retail level** focuses on the availability of alternatives for end consumers, constraints to switching between subscription television services and the fragmented nature of customers

at this level of the market. Crawford and Yurukoglu (2012) find that prices in subscription retail markets are affected both by negotiated input prices at the wholesale level and competition at the retail level. They find that countervailing buyer power effects do not compensate the price hike driven by the increase in market power, and that consumers are worse off when the retail market becomes more concentrated.

- 8.7. As noted in the Discussion Document, it appears that ODM cannot be considered to be a credible and viable alternative in the market given its history and challenges. This limits the number of alternatives available to end consumers. As regards the constraints to switching, it is noteworthy that customers may find it difficult to switch due to barriers such as the cost of acquiring an alternative set of equipment. Consumers incur an initiation fee plus the cost of Set Top Boxes (“STBs”), when a pay-tv service is installed in their homes. These STBs are designed such that they are not interoperable and therefore should a customer wish to switch to another service provider, they would have to incur an additional cost relating to initiation fees and a new STB that is aligned to the new service provider. Lastly, individual customers in retail markets are generally fragmented and their purchasing decision making is not coordinated. The lack of coordination in the decision making process negatively impacts on their ability to exercise countervailing buyer power, particularly in the context of large national retail chains where pricing decision making is centralised.
- 8.8. The Commission is of the view that ICASA’s characterisation of the wholesale markets is in line with accepted international standards.

9. UPSTREAM WHOLESALE MARKETS: CONTENT PROVISION – Q11

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

- 9.1. The Commission is of the view that the characterisations of the market and the market definition are in line with international norms.

10. 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/s in this regard?

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

10.1. The Commission notes that the consideration of technical services in the subscription television services markets is a dynamic that serves to distinguish whether FTA is in the same relevant market as subscription television services, for example. In this regard, the consideration of such services would be in light of supply-side substitutability in retail markets, for example. Similarly, the consideration of same would also serve to assess the extent of barriers to entry in the relevant markets.

10.2. The Commission believes that the economic principles of market definition as discussed in this response and in the Discussion Document are instructive. In light of the foregoing, the Commission does not have a view to posit on the matter.

11. EFFECTIVENESS OF COMPETITION IN RELEVANT MARKETS

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

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

11.1. The Commission is of the view that the factors that ICASA proposes to use in its assessment of the effectiveness of competition are mandated by legislation and are therefore deemed appropriate for the evaluation.

11.2. The Commission has not yet had cause to consider the market for the acquisition of non-premium content and therefore is not in a position to posit a view in this regard.

12. BARRIERS TO ENTRY

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

12.1. The Commission is in agreement with the barriers to entry consideration noted in the Discussion Document. The Commission is of the current view that the existence of barriers to entry is a crucial indicator of market power and creates an environment that would be conducive for competitive harm to arise in markets.

- 12.2. The Commission is of the current view that barriers to entry in the relevant markets, *inter alia*, include **sunk costs** (such as the cost of acquiring content rights, marketing expenditure, among others), **economies of scale and scope**, **incumbency advantages** and **brand loyalty, exclusive contracts** and **network effects** as noted in the Discussion Document.
- 12.3. As regards **sunk costs** in the relevant markets, the Commission is of the current view that new entrants have to incur significant costs when entering the relevant markets. These costs range from the significantly high costs of acquiring premium content, regulatory costs in relation to licensing (broadcasting and spectrum licensing), capital costs for infrastructure and operations. The infrastructure costs include studios, staff, marketing, distribution, sale of STBs, satellite uplinking costs and transponder capacity leasing costs. Subscriber management services also add to the cost burden for subscription television broadcasters. These costs would include signing up of subscribers, the storage and updating of customer information, the enabling and disabling of subscriptions depending on the subscription choices and payments, and subscriber queries. In addition to the subscriber management services, broadcasters also actively engage in marketing of the channels or bouquets to customers in order to stimulate demand. This marketing may, *inter alia*, involve subsidies on STBs, distribution costs for the supply and installation of the satellite dishes and STBs, etc.
- 12.4. The Commission notes that subscription television markets are regarded as two-sided markets and that they are characterised by **economies of scale and scope**. In this regard, the ability to provide compelling content that will attract subscribers rests on acquiring a sufficiently large and varied set of content rights that will fulfil the subscribers' consumption preferences. Similarly, the ability to attract advertising revenue is dependent on the number of subscribers that the advertisers can access.
- 12.5. **Incumbency advantage**, as noted in the Discussion Document, is firmly couched in the long standing relationships between the incumbent and premium content rights owners and the brand loyalty it has established with its retail customers. Such incumbency works in favour of the incumbent firm in the market and competitors do not pose a competitive constraint when customers make their purchasing decision regarding subscriptions.

- 12.6. **Brand loyalty** is an important consideration in that content which is broadcasted on a particular platform over a significantly long period of gains traction. This makes it more likely that the demand for that broadcast platform not only increases but that customers are also less likely to switch to other alternatives. The sustained and continuous selection and use of the incumbent's platform the subscriber base is a clear example of this.
- 12.7. All of these factors are further exacerbated by the existence of **staggered long-term exclusive contracts**. The staggered nature of long-term exclusive contracts means that competitors and new entrants are unlikely to attain minimum efficient scale that would enable them to enter and effectively compete in the market.

13. DYNAMIC CHARACTER AND FUNCTION OF THE MARKET – Q17

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

- 13.1. The Commission views premium content in South Africa to include live sport and movies (particularly first-window movies). The concept can extend to other forms of content, but various studies show sports and movies to be the leading premium content. The Commission does not have full information on who holds the full-spectrum of premium content in South Africa.

14. DYNAMIC CHARACTER AND FUNCTION OF THE MARKET – Q18

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

- 14.1. The Commission is in agreement with the proposals to use the number of rights as a unit of measure for market share calculation purposes. Further, the use of revenue figures as well as the number of subscribers as a basis for market share calculation is a well-accepted approach in these markets.
- 14.2. In respect of the other factors for consideration, the Commission notes that given the differentiated nature of the products in these markets as well the fact that these are sometimes bidding markets, it is helpful to consider the strength of both existing and potential competitive constraints. In this regard, an incumbent firm with a high market share in a market characterised by significant entry barriers is likely to have

market power.⁴ In the alternative, it is well recognised that the likely constraint from potential competitors is increased when barriers to entry or expansion are lower. Similarly, the existence of countervailing buyer power is indicative of constrained market power. Therefore, an assessment of market power in the identified upstream and downstream markets, must cumulatively consider market shares over time, barriers to entry and expansion as well as the degree of countervailing power.

15. NATURE AND EXTENT OF VERTICAL INTEGRATION – Q19

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

- 15.1. The Commission notes that, depending on the circumstances, vertical integration can give rise to either pro-competitive efficiencies or anticompetitive outcomes or at times both. In terms of pro-competitive efficiencies, it is well accepted that the benefits associated with vertical integration, *inter alia*; include the efficiencies associated with lower prices, product quality as well as increased consumer welfare. These benefits arise as a result of, *inter alia*, the internalisation of input costs thus removing double marginalisation and the reduction of transaction costs.
- 15.2. On the other hand, vertical integration can contribute to the heightening of barriers to entry and/or expansion. In this regard, the Commission notes that the competition issues potentially arising from vertical integration, *inter alia*, include refusals to supply essential inputs to rival downstream (retail) firms; exclusionary conduct such as raising rivals' costs, margin squeeze, exclusivity deals or monopsony in content acquisition. The potential for such competition concerns arising is increased in the presence of vertical integration across all levels of the value chain. A vertically-integrated firm may, for example, have the incentive to increase profits by foreclosing its downstream competitors in the retailing or distribution of subscription television content by denying access to such 'must have' content.
- 15.3. It is argued that vertical integration in subscription television broadcasting stifles competition by giving upstream (wholesale) firms an incentive to deny downstream (retail) firms adequate content, leading to the form of market foreclosure associated

⁴ Ofcom pay-tv statement.

with an uncompetitive broadcasting environment. Snyder (1995) and Chipty (2001) both find that vertically integrated firms, on average, are likely to offer limited premium content and even more restricted basic content to rival operators or impose onerous terms of access to premium content which may lead to some degree of market foreclosure.

- 15.4. In light of the foregoing, the Commission notes that vertical integration in these markets can give rise to competition concerns given the potential change in incentives by incumbent firms. As discussed above, the changes in incentives can give rise to potential input foreclosure and/or raising rivals costs' strategies being used by the incumbent firm to the detriment of competition in the market.

16. ADEQUACY OF COMPETITION LAW ALONE

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?

- 16.1. In the context of there being a possible suboptimal outcomes in the acquisition of premium content in South Africa, especially with the bulk of premium content vesting on the incumbent firm, it is likely that *ex post* interventions through competition law may have limitations.
- 16.2. There can therefore be the need for a pro-competitive regulatory intervention that will deal with the observed market failures and create a conducive environment for effective competition. Such a regulatory intervention would have to promote favourable conditions for all broadcasting licence holders to compete. Specifically, the incorporation of such *ex-ante* regulation can be aimed at ensuring that a competitive downstream retail market thrives to the benefit of consumers.
- 16.3. Accordingly, the Commission is of the current view that a combination of competition law and *ex ante* regulatory interventions are required to deal with the market failures and potential competition challenges that are observed in these markets.

17. BARRIERS TO ENTRY: DOWNSTREAM RETAIL MARKET

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

17.1. The Commission is of the current view that barriers to entry in the downstream retail market, *inter alia*, include sunk costs (such as marketing expenditure and subscriber management services), economies of scale and scope and brand loyalty. These are discussed in greater detail in Q16 above.

18. CONCENTRATION IN THE SUBSCRIPTION-TV RETAIL MARKET

Q22. 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?

18.1. The use of subscriber numbers as a unit of measure for calculating market shares is a widely used approach and is thus appropriate for the present purposes. In addition, revenue accrued from subscription fees is another measure that is widely used for calculating market shares.

19. 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

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

19.1. The Commission is of the view that the identification of players with significant market power is mandated by legislation and is therefore deemed appropriate for the evaluation.

19.2. In respect of vertical integration, the Commission notes that this can, depending on the circumstances, give rise to either pro-competitive efficiencies or anticompetitive outcomes or at times both. The pro-competitive efficiencies largely relate to the removal of double marginalisation and the reduction of transaction costs which ultimately can be expected to result in lower prices and product quality, among others. On the other hand, vertical integration can contribute to the

heightening of barriers to entry and/or expansion in a market as well as perverse incentives on the part of vertically-integrated firms.

20. 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.

- 20.1. The South African Pay-tv broadcasting services market is characterised by the presence of an overwhelmingly dominant incumbent, significant barriers to entry, limited countervailing power (by both sellers of content rights and end consumers), and ineffective entry. The presence of long-term exclusive contracts gives rise to possible input foreclosure which renders new entrants and existing players ineffective competitors and serves to further entrench incumbency. The discussion below explores various remedial actions that can be considered to deal with the identified issues in the market broadly.
- 20.2. **Shorten exclusive contracts** - the Commission is of the current view that while shortening the duration of exclusive contracts can reduce the likelihood of anti-competitive outcomes, this is not sufficient. While short duration contracts are unlikely to raise competition concerns, the possibility for the renewal of these contracts with the same broadcaster still remains as a risk factor. The continuous renewal of exclusive contracts with the same broadcaster serves to entrench incumbency. This confers upon incumbents a competitive advantage in the market and effectively forecloses new entry and/or expansion by existing players.
- 20.3. **Introduce unbundling** – the introduction of unbundling is could be welcome long-term remedy. Given the limited uptake and usage of alternative broadcast platforms such as mobile tv and IPTV, the Commission is of the current view that such a remedy would not provide the necessary resolution to the identified market failures and competition concerns in the market. From a long-term perspective and in order to allow for these broadcast platforms to gain traction, the Commission is of the view that such unbundling is necessary should be effected as part of the suite of regulatory intervention instruments in this market.
- 20.4. **Impose rights splitting** - the introduction of rights splitting is a welcome potential remedy. The Commission notes that while the Splitting of rights, subject to the terms set out in the Discussion Document, allows for numerous players to have

access to a critical input, due regard must be given to the design of the various rights packages. This is to ensure that all rights acquirers are afforded the opportunity to acquire sufficiently compelling packages that will enable them to effectively compete in the market.

20.5. **Impose wholesale-must-offer** – the imposition of a wholesale-must-offer obligation on dominant can serve to promote competition by ensuring that smaller and new market participants are able access critical inputs such as premium content. However, such an obligation would necessitate the regulation of terms of access as vertically-integrated broadcasters may have incentives to stifle competition at the downstream retail level. Such incentives could be effected through strategies that would result in the raising of rivals' costs and/or constructive refusal to deal with competitors.

20.6. The Commission is of the view that none of the proposed remedies would be sufficient if considered in isolation. Rather, a combination of the proposed remedies, underpinned by effective regulation would serve to deal with the identified market failures and competition challenges.

21. OPEN UP DOMINANT FIRM'S NETWORK

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

21.1. The Commission is of the view that while access to a dominant firm's network may reduce barriers to entry for smaller and new entrants into the market, this will also require the regulation of terms of access. A wholesale access regulatory framework, which regulates terms of access on non-discriminatory and cost-based (with a reasonable return) terms would have to be developed.

21.2. Opening up access to the dominant firms' network could also lower customer switching costs thereby reducing barriers to entry.

22. INTRODUCE SET-TOP BOX INTER-OPERABILITY

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

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

- 22.1. The Commission is of the view that the lack of interoperability of STBs can potentially raise barriers to entry for subscription television service providers as this has implications for the ease with which individual incumbent broadcasters' STBs interoperate with signals from other subscription television service providers. Ultimately, this also has implications for the ease with which customers can switch between different service providers. Inter-linked with the issue of operability is the issue of conditional access, particularly in the context of access to premium content.
- 22.2. The Commission is of the view that it is imperative that an appropriate regulatory framework in respect of interoperability and conditional access is put in place to safeguard the pro-competitive and consumer-welfare enhancing outcomes that are likely to arise from the implementation of such a system. In this regard, it is important to note that in order to ensure interoperability; a fundamental set of standards must be put in place.