SUBMISSION BY ECONET MEDIA LIMITED ON THE AUTHORITY'S DISCUSSION DOCUMENT: INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES

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1 INTRODUCTION

1.1 Econet Media Limited ("**Econet Media**") thanks the Independent Communications Authority of South Africa ("**the Authority**") for giving it the opportunity to furnish the Authority with its written representations on the Discussion Document: Inquiry into Subscription Television Broadcasting Services dated 25 August 2017 ("**Discussion Document**").

1.2 Econet Media is a recent entrant into the African pay television services market having launched its pay television services in Botswana, Ghana, Kenya, Lesotho, Malawi, Nigeria, Rwanda Zambia and Uganda during 2016/2017. In selecting the African territories for the launch of its pay television services, Econet Media took a deliberate decision not to launch a pay television service in South Africa for two reasons. Firstly, it does not hold a licence to provide a subscription broadcasting service in South Africa and secondly, it took the view that the existing barriers to entry in the South African pay television market, discussed in detail in this Submission Document, would pose a substantial risk to its 'start up' pay television operations. Despite, this decision, Econet Media has experienced significant constraints as a new entrant in the pay television markets in the African territories in which it has launched a pay television service. This is due to the fact that the market position of the incumbent operator extends beyond South Africa into a number of African territories with the result that the effects experienced by Econet Media in other territories are more than likely to be replicated in the South African pay television market. Econet Media would like to expand its pay television service offerings into the South African market as soon as it becomes feasible for it to do so. It is for this reason that Econet Media wishes to make written submissions to the Authority on the Discussion Document.

1.3 Econet Media further records that it would like to make oral submissions to the Authority on the Discussion Document, if public hearings are to be held as part of the consultative and participative process to be undertaken by the Authority in respect of the Discussion Document.

2 SUMMARY OF CONCERNS

2.1 Market definition and economic approach

2.1.1 In principle, we agree with the Authority's approach to market definition, i.e. that the SSNIP test (referred to in para. 5.3.1. of the Discussion Document) is a useful framework for defining markets in the subscription broadcasting sector. We also agree with the main conclusions on market definition, i.e. that subscription television forms a separate market and that there are relevant sub-markets within the premium content market. Our main focus in the comments we provide below is on how the Authority could further strengthen the market definition exercise, by pointing out common pitfalls in applying the SSNIP test in a formalistic manner and emphasizing specific features of subscription broadcasting markets that need careful consideration.

2.1.2 While the SSNIP test is the correct conceptual framework, it needs to be applied with care for two main reasons. The first is the well-known theoretical principle described as the 'Cellophane Fallacy'. Where there is an incumbent provider with market power, there is a strong probability that prices for the relevant product – subscription television services – have already been increased to monopoly levels. At such high price levels, products that are not substitutes and do not form part of the relevant market could appear to be substitutes. In the current case, products such as free to air ("**FTA**") and over-the top ("**OTT**") (including transactional video on demand ("**TVOD**") and subscription video on demand ("**SVOD**") might appear to be substitutes, but should be excluded from the relevant subscription television market. We provide more reasons for our conclusions in the main document.

2.1.3 The second important issue is that broadcasting markets can be seen as two-sided markets. In general, the market power of the incumbent is constrained in two-sided markets due to the fact that two sets of customers – advertisers and subscribers in the current case – have to be kept on the platform. This is always an appealing argument for the incumbent to use. While the Authority recognises the two-sided nature of the market, the implications of this are not explored in any depth. The main economic issue here is that in markets with high entry barriers (e.g. regulatory licencing), the market power of the incumbent is not constrained by the two-sidedness of the market, as both sets of customers have little or no substitution possibilities. We therefore show in our comments below that because of MultiChoice's dominant position in the relevant market, the two-sidedness of the market has a limited effect on its pricing power, since there are no large competing subscription television broadcasters that subscribers can turn to in the event of a price increase (SSNIP).

2.2 **Pro-competitive conditions**

2.2.1 Access to premium entertainment and sports content is essential to the success of new entrants into the pay television market. Not only is premium content a key driver for the uptake of subscribers but it is also an important service differentiator and a means of increasing brand awareness and audience size. The extensive acquisition of premium entertainment and sports content by MultiChoice on an exclusive basis as well as its access to exclusive local content has resulted in significant barriers to entry for new market entrants. These barriers in turn distort and restrict competition, have lead in the past to market failure and are further exacerbated by MultIChoice's vertical integration at every level of the supply chain.

2.2.2 If the Authority finds, after having followed the process set out in section 67(4) of the ECA, that the incumbent operator has significant market power ("**SMP**") in the pay television market (" **SMP Broadcaster**"), then Econet Media proposes that consideration be given to the imposition of the following pro-competitive licence conditions:

2.2.2.1 if a SMP Broadcaster in the pay television market enters into an exclusive agreement for the acquisition of premium entertainment content, the duration of such agreement should be limited to three years for premium sports content and to two years for premium entertainment content;

2.2.2.2 a SMP Broadcaster (including its affiliates) must be limited to only entering into output license agreements and volume licensing agreements with no more than two of the seven Hollywood studios;

2.2.2.3 a SMP Broadcaster (including its affiliates) must be prohibited from entering into output licensing agreements with independent content suppliers;

2.2.2.4 premium sports rights must be made available by way of an open tender process;

2.2.2.5 premium sports rights must be offered and made available in unbundled separate packages for licensing across a variety of platforms (i.e. DTH, mobile and Internet);

2.2.2.6 the imposition of wholesale 'must offer' remedies in terms of which the SMP Broadcaster is required to offer its channels or channel packages to other broadcasters and/or operators on regulated terms; and

2.2.2.7 the SMP Broadcaster must be obliged to make available, on regulated terms, certain technical services its platform (i.e. conditional access systems ("**CAS**"), application programming interfaces ("**API**"), electronic programme guide ("**EPG"**), access controls as well as access to all associated hardware and software) to broadcasters and other operators who wish to gain access to viewers using the SMP Broadcaster's set top boxes.

3 CHAPTER 2 - DISCUSSION DOCUMENT: INTRODUCTION

3.1 General

3.1.1 While the Authority does not pose any direct or specific questions in this section of the Discussion Document, we seek to provide a brief but relevant set of comments in respect to its contents. We do so because the procedural rigour with which the Authority approaches this and any subsequent process that follows from this inquiry, will always be open to attack on procedural grounds. Given the importance of this process to competition in the market, Econet Media encourages the Authority to ensure at all times that it adheres to all necessary procedural rigour.

3.1.2 In giving notice of its intention to conduct an inquiry into subscription television broadcasting services, the Authority indicated that it would follow a two-stage consultation process: an initial information-gathering stage, to be followed by the publication of a discussion document for public comment. The inquiry notice was published in the Government Gazette No. 40133 on 11 July 2016[1].

3.1.3 Econet Media supports the bifurcated approach to the inquiry,[2] as well as the Authority's understanding of the legal framework within which the inquiry is being conducted. Read together with the Broadcasting Act 4 of 1999 ("**Broadcasting Act**") and the Electronic Communications Act 36 of 2005 ("**ECA**"), the Independent Communications Authority of South Africa Act 13 of 2000 ("**ICASA Act**") provides clear legal authority for the contemplated inquiry into subscription television broadcasting services.

3.1.4 In particular, Econet Media has identified the following four concerns:

3.1.4.1 First, while Chapter 2 of the Discussion Document suggests that the Authority intends to conduct public hearings, it does not provide any certainty in this regard.

3.1.4.2 Second, it is not at all clear whether a draft of the type of regulations contemplated by section 67(4) of the ECA will be published as part of the Findings Document, should the Authority conclude that there is a need for systemic regulatory intervention, or will be published at some later point.

[1] Notice of Intention to conduct an inquiry into subscription television broadcasting services, 2016 published under Notice No. 401 of 2016 in the Government Gazette No 40133 dated 11 July 2016.

[2] In Econet Media's view, there is nothing in the legislative framework which precludes the Authority from conducting an information-gathering process before proceeding with the substance of an inquiry in terms of sections 4B and 4C of the ICASA Act. On the contrary, the Guideline to which paragraph 3.1.4.3 refers expressly contemplates such an approach.

3.1.4.3 Third, while the Authority recognises that the Guideline for Conducting Market Reviews ("**the Guideline**") is not binding, it nevertheless appears to have committed itself to acting in accordance with the Guideline.

3.1.4.4 Fourth, the Authority has provided insufficient information regarding the one-on-one meetings it requested with some stakeholders who responded to the questionnaire issued as part of the information-gathering process. We now address each of these four concerns below.

3.2 **Public hearings**

3.2.1 At times, Chapter 2 seems to suggest that the Authority has already decided to hold public hearings. For example, it states that the Authority will act in accordance with the Guideline, which expressly recognises the holding of such hearings as an integral part of any public consultation process.[3] This is made clear at paragraph 2.2.5 of the Discussion Document.

3.2.2 Elsewhere, however, Chapter 2 refers more generally to *"public consultation"* and *"public consultations"*, without providing any specifics. And in paragraph 2.2.17, the Discussion Document suggests that the Authority will make findings based on the responses it receives from stakeholders, suggesting that these will be in written form. Moreover, the inquiry notice states that the Authority *"may hold public hearings"*.

3.2.3 Given the complexity of the issues to be considered in this inquiry, and the likely need for stakeholders to be given the opportunity to consider – and where necessary address – the submissions made by others, Econet Media submits that the Authority ought to commit publicly to the holding of public hearings. In addition, all stakeholders who make written submissions on the Discussion Document should be entitled – but not required – to participate in such hearings.

3.3 **Publication of draft regulations**

3.3.1 A consideration of the issues in respect of which stakeholder input has been requested makes it plain that a thorough public consultation process should provide the Authority with sufficient input to publish draft regulations alongside its findings. But while the Guideline contemplates the publication of draft regulations together with the Findings Document,[4] Chapter 2 generally appears to equivocate on this issue.

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[3] See Guideline, Figure 1, p 5

[4] Should ICASA conclude that there is a need for systemic regulatory intervention.

3.3.2 The Discussion Document correctly recognises the need to conduct a separate consultative process on regulations. In Econet Media's view, this is not inconsistent with the publication of draft regulations together with the Findings Document. Should this be done, the regulation-making process contemplated by section 67(4) of the ECA would be able to proceed without undue delay.

3.4 **Acting in accordance with the Guideline**

The Authority correctly notes that the Guideline is not binding. Despite this, it appears to have committed itself to acting in accordance with the Guideline. While Econet Media recognises that the adoption of and reliance upon such a document to assist the Authority in conducting the inquiry is both lawful and sensible, it is important for all stakeholders to recognise that the Guideline remains a mere guide: it cannot bind the Authority inflexibly. Put differently, any non-compliance with the Guideline will not necessarily (and should not) give rise to a procedural irregularity.

3.5 **Information regarding the one-on-one meetings**

3.5.1 Paragraph 2.2.12 of the Discussion Document states that seven stakeholders submitted responses to the questionnaire. Of the seven, the Authority identified an unspecified number of stakeholders with whom meetings were sought *"to obtain further clarity and information."* One-on-one meetings were only held with three stakeholders: the SABC, Telkom and e.tv.

3.5.2 It is to be regretted that the Authority has not indicated which of the other stakeholders were invited to follow-up meetings, and the reasons provided by any invited stakeholder for choosing not to meet with the regulator. In Econet Media’s view, the Authority should make such information available, particularly in circumstances where concerns regarding the information-gathering process have been raised.

4 CHAPTER 3 - DISCUSSION DOCUMENT: SCOPE AND PURPOSE OF THE INQUIRY

4.1 The inquiry notice incorrectly indicated that the information-gathering stage would be conducted in terms of section 4C of the ICASA Act. The Authority corrected this error in a notice dated 7 September 2016[5], removing the reference to section 4C.

4.2 As amended by the erratum notice, paragraph 1.3 of the inquiry notice sets out the purpose to be served by the two-stage inquiry:[6]

"The Authority has the responsibility to ensure that all communications and broadcasting service markets are open, competitive and sustainable. The purpose of the inquiry is to establish the factors that have contributed to new subscription broadcasting service licensees not being able to successfully launch their services and/or attract a fair number [of] new subscribers.

It is important for the Authority to understand the challenges faced by these licensees so that it can address the regulatory impediments, and create an enabling environment for the introduction of competition, it any."

4.3 It is therefore surprising that in a letter dated 15 September 2016, under cover of which it submitted a partially completed questionnaire, MultiChoice South Africa Holdings (Pty) Ltd ("**MultiChoice**") persisted in a previously-expressed view that the inquiry notice *"does not indicate the purpose of the inquiry"*. In an earlier letter sent to the Authority prior to the publication of the erratum notice, MultiChoice's attorneys had raised certain concerns about the purpose of the inquiry.[7]

4.4 In Econet Media's view, the two-fold purpose of the inquiry – as set out in the inquiry notice – is clear: first, to understand why the majority of licensees appear to be struggling to compete; and second, to establish if there is a need to *"create an enabling environment for the introduction of competition"* by *"address[ing] the regulatory impediments"* that may exist.

4.5 But if there was any room for doubt, this has been removed by the expanded discussion of the inquiry's purpose in the Discussion Document.[8] In particular, paragraph 3.2.5 provides:

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[5] Inquiry into subscription television broadcasting services erratum and clarification of process, 2016 published under Notice No. 552 of 2016 in Government Gazette No. 40246 dated 7 September 2016.

[6] In paragraph 1.2, the inquiry notice explains that despite a number of licences having been issued in the subscription television broadcasting services market, only a handful of licensees had commenced operations, with two of them facing *"sustainability challenges"*.

[7] In a letter sent on MultiChoice's behalf on 22 July 2016, two concerns were identified in respect of the need for a clear indication of the purpose of the inquiry: one dealing with ICASA's powers in terms of section 4C(2) of the ICASA Act; and another dealing with the making of representations in terms of section 4B(2)(a) of that Act. Given that the reference to section 4C in the inquiry notice has been removed, and that the Authority has only now called for representations (in respect of the Discussion Document), continued reliance on these concerns would be misplaced.

[8] See, for example, paras 3.2.3-3.2.5, pp 33-35

"Against this background, the purpose of the inquiry is to (1) establish the factors and understand the challenges that have contributed to new subscription television broadcasting service licensees not being able to successfully launch their services and/or attract a fair number of new subscribers; (2) assess the regulatory impediments (if any) faced by new subscription television broadcasting service licensees; (3) assess the state of competition in the context of subscription television broadcasting; and (4) investigate possible interventions in the context of subscription television broadcasting services."

4.6 Significantly, this paragraph ends with a reference to – and consideration of – section 67(4) of the ECA, indicating unequivocally that a possible outcome of the inquiry is the making of regulations to enable the imposition on licensees of pro-competitive licence conditions in appropriate circumstances. With this level of detail, the purpose of the inquiry is abundantly clear.[9]

[9] Econet has no concerns regarding the scope of the inquiry, which accords with the stated purpose.

5 CHAPTER 3 - DISCUSSION DOCUMENT: MARKET DEFINITION

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

5.1.1 We broadly agree with the Authority's theoretical overview of the purpose and methodology of market definition, but there are certain characteristics of broadcasting markets that require the analysis to look beyond demand and supply-side substitution. The United Kingdom's Office of Communications ("**Ofcom**"),[10] identifies a number of difficulties associated with defining broadcasting markets.[11] These include (1) how to account for the possibility that current prices may be above competitive levels, (2) how to take the stated preference bias of consumer research into account, (3) how to accommodate the two-sided nature of the market, (4) how to establish the substitutability of products that can only be consumed as part of a bundle, and (5) how to define markets for highly differentiated products. Specific characteristics of the market also needs to be considered, such as high fixed and low marginal costs, bundling of services and/or content, non-price competition, the degree of vertical integration and rapid technological development.[12]

5.1.2 Rapid technological development specifically holds interesting implications for this inquiry as the regulation of television broadcasting must keep up with changes in the sector. Technological development and innovation have enabled consumers to view content on devices other than television (e.g. on cell phones or computers) and the platforms available for viewing content are also changing rapidly. In addition to television broadcasting, MultiChoice has entered the OTT SVOD market through Showmax. Other converged product offerings that it has, include DStv Online (a linear television service that replicates its satellite service over the Internet), DStv Catch Up (an on demand service comprised of select programmes from its linear channels that are made available to subscribers via temporary download or streaming to set-top boxes ("**STB**"), personal computers and mobile handheld devices via satellite, mobile or online), Box Office (which offers electronic video rental of blockbuster and other film titles), DStv Mobile streaming (which allows subscribers to view mobile TV or stream the same on 3G-capable mobile cell phones), and DStv Now (which makes content available on mobile handheld devices or personal computers). Although MultiChoice can broadcast its content across all of these platforms, it does not necessarily mean that they all fall in the same relevant market or that other providers of services on OTT platforms (e.g. Netflix) are able to impose competitive pressure on MultiChoice. Instead, as

[10] Ofcom did a market investigation into the UK broadcasting sector in 2007, on which we rely considerably to inform and support our answers to the questions posed in the Discussion Document.
[11] Ofcom (2007). Market definition and market power in pay TV. *Annex 13 to pay TV market investigation consultation* (p. 8)
[12] OECD (2013). Competition issues in Television and Broadcasting. *Policy Roundtables* (p.6)

we explore in more detail below, MultiChoice's ability to extend its services across all of these platforms and devices increases the barriers to entry for competitors in the market for subscription television broadcasting.

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

5.2.1 All of the general aspects of the theoretical framework for market definition apply to broadcasting, but because of MultiChoice's dominance and the fact that this is a two-sided market the SSNIP test (described by the Authority in para. 5.3.1) needs to be applied with care.

5.2.2 The Authority recognises the limitations of the SSNIP test in defining broadcasting markets in para. 5.3.3 of the Discussion Document, but it merits more discussion. The two-sided nature of the market means that a broadcaster's pricing and production decisions are intertwined since the behaviour of customers on one side of the platform (viewers) impacts on the behaviour of customers on the other side of the platform (advertisers and/or content/channel providers). A broadcaster's' expenditure on acquiring content rights is in turn a function of the advertising and subscription revenue that it expects to derive from that content, but in the context of MultiChoice some content providers may also pay to be on the DStv platform, contributing to the revenue that MultiChoice has available to spend on acquiring content. The complex pricing structure of subscription television broadcasting therefore emphasises the fact that the SSNIP test needs to be applied with care.

5.2.3 In two-sided markets, it is difficult to rely on a firm's price setting behaviour to identify whether or not it is exploiting alleged market power. This causes factors such as barriers to entry or expansion to be important determinants of whether competitors can impose competitive pressure on a platform – this is discussed in more detail in our response to Question 23. Because of MultiChoice's dominant position, however, the two-sidedness of the market has a limited effect on its pricing power, since there are no large competing subscription television broadcasters that subscribers can turn to in the event of a SSNIP. MultiChoice can therefore increase subscription fees without the risk that viewers will switch to a competing service which would have a spill over effect on their revenues from both subscribers and advertisers.

5.2.4 Furthermore, it is important to note that while subscription television broadcasting is a two-sided market, the Authority's Subscription Broadcasting Services Regulations (2006)[13] stipulate that the largest source of revenue of a subscription broadcasting service may not be

[13] Subscription Broadcasting Services Regulations, 2006 published under Notice 152 of 2006 in Government Gazette No. 28452 dated 31 January 2006. See Regulation 1.4

advertising, sponsorships or a combination thereof, so as not to crowd out the main source of income of FTA broadcasters. Despite this, MultiChoice accounted for 48.7% of television broadcasting ad spend in 2015[14], considerably more than the 16.3% accounted for by SABC 1 which was the next largest player in terms of ad spend. In doing so it crowds out much of the ad spend that would otherwise have been available to FTA broadcasters, constraining their key source of revenue and hence limiting the budget that they have available to spend on content.

5.2.5 A second point to consider is the fact that the SSNIP test that is commonly used in market definition, is of limited use when there are firms with market power that are active in the hypothesised market. If customers switch away in the event of a 5-10% price increase (the SSNIP test), it may be evidence that a dominant firm is already pricing at the level of monopoly prices, rather than evidence that services are part of the same relevant market. In competition economics, this phenomenon is known as the cellophane fallacy. Bishop and Walker explain that "*the problem arises because in many non-merger investigations the prevailing price level does not provide the appropriate benchmark against which to assess competitive constraints. Profit maximising firms will always set prices at a level at which further price increases would be unprofitable*".[15] This makes market definition using the SSNIP test particularly difficult in the South African pay television market due to MultiChoice's absolute dominance in this market.

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

5.3.1 We agree with the Authority that an accurate representation of the subscription television broadcasting value chain is helpful to identify functional markets. It also provides an understanding of how broadcasters are vertically integrated, and of the inputs that feed into the different markets. In this context, Ofcom notes that "*since the broadcasting of television involves a multitude of players, analysis of substitution must take into account all of them, including advertisers, viewers, broadcasters, infrastructure/network operators, or content right holders*".[16]

5.3.2 In Figure 1, we depict our understanding of the television broadcasting value chain. MultiChoice is active in the market segments that are framed in dotted lines, illustrating the extent of its vertical integration (which we discuss in our response to Question 24).

[14] Discussion Document on Regulatory Framework for Community Broadcasting Services, 2017 published under Notice 170 of 2007 in Government Gazette No. 40660 dated 3 March 2017.
[15] Bishop, S. & M. Walker (2012). The relevant Market. In *The Economics of EC Competition Law.* (p. 125)
[16] OECD (2013). Competition issues in Television and Broadcasting. *Policy Roundtables* (p. 29)

5.3.3 At the top-most level of the value chain, content is produced and content rights are acquired. A detailed overview of the manner in which content rights are acquired is given in our response to Questions 15 and 16. Importantly, MultiChoice is not involved with the in-house production of content, however M-Net and SuperSport – sister companies of MultiChoice and juristic persons in their own right – are involved in content production.

5.3.4 At the next level of the value chain, content and advertisements are combined into channels. This can be done in-house, such as what MultiChoice's sister company M-Net does with its KykNET, Vuzu or Mzansi channels, or by third party independent channels, such as the National Geographic channel or BBC. The content that M-Net and SuperSport aggregate is licenced exclusively to MultiChoice and serve as the primary channels for the broadcasting of premium content.

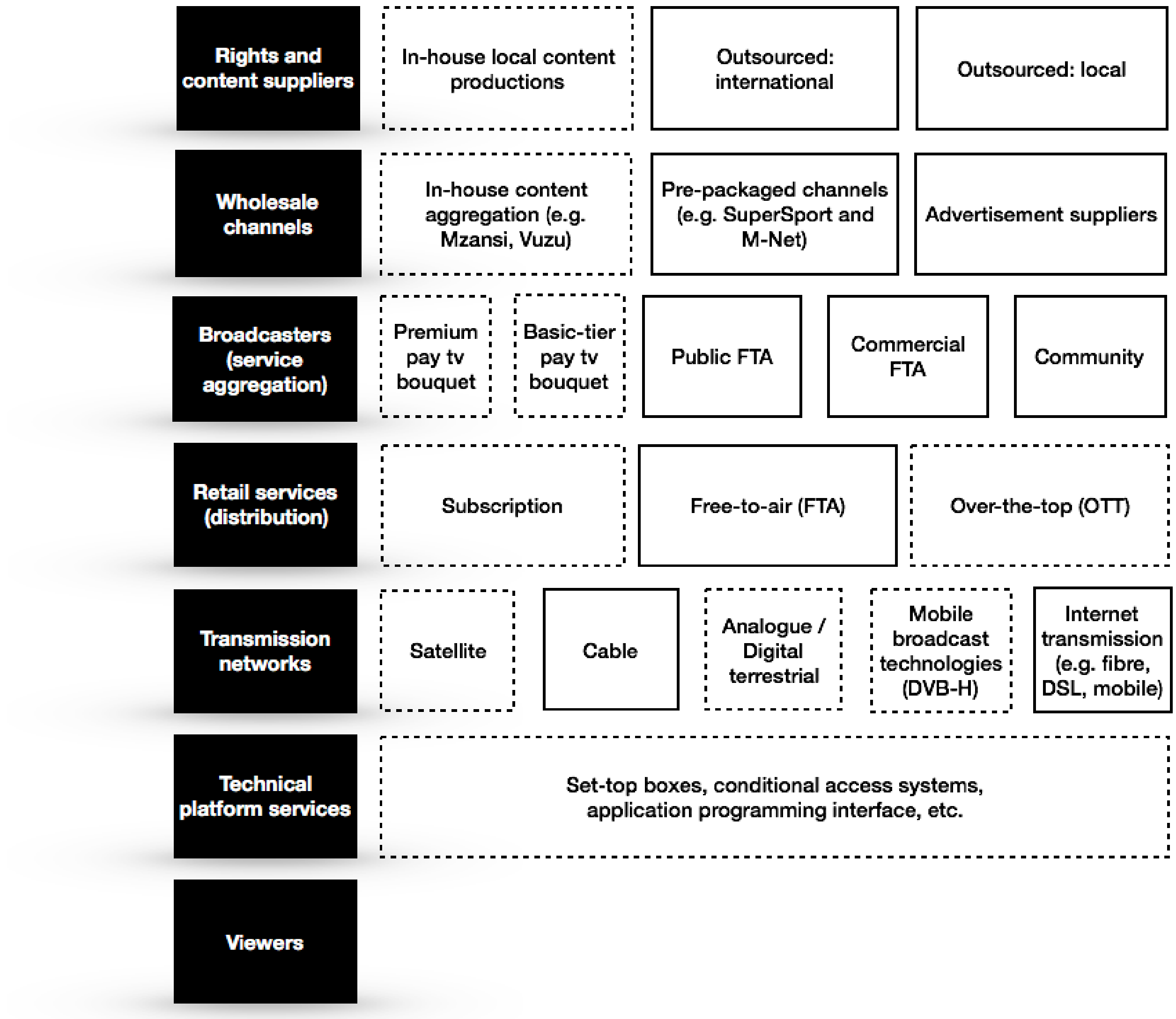
5.3.5 Channels are made available by a commercial, public or community broadcaster as a single channel or for inclusion in all bouquets (Basic-tier) or in Premium bouquets, depending on the content of the channels. At the retail distribution level, these channels or bouquets are made available through subscription services, FTA channels or OTT/Video On Demand ("**VOD**") services.

5.3.6 The transmission network (e.g. satellite, terrestrial, cable, mobile or Internet) that is used depends on the retail service in question. MultiChoice does its own satellite distribution through its subsidiary Orbicom (Pty) Ltd, and also makes use of DTT, fixed networks, broadcast mobile technologies, telecoms mobile technologies, and the Internet. MultiChoice also has an analogue licence which is held by M-Net and which will be converted into a DTT network.

5.3.7 In the case of all transmission means and technical platform services, MultiChoice is the proprietary owner of its STBs and the associated hardware and software. Its CAS is supplied by an affiliate company, Irdeto. An entrant needs access to the transmission network as well as to the full range of technical platform services in order to become a viable competitor.

5.3.8 As illustrated by the dotted lines, MultiChoice is vertically integrated along the entire supply chain.

Figure 1: Television broadcasting value chain in South Africa



5.4 **Q4: If not, how would you go about defining the relevant market/s in subscription broadcasting?**

5.4.1 The Authority is correct that the downstream level of the value chain provides a good place to start to define the relevant markets (para. 5.6.6). This allows one to move up along the value chain to assess the inputs that feed into the provision of services at the retail level, and to understand the competition problems that are created due to the bottleneck for premium and non-premium content. It is necessary to consider the extent to which firms operating at the retail level are also involved in activities higher up in the value chain. While vertical integration can have many pro-competitive benefits, it can also allow an incumbent broadcaster such as MultiChoice to leverage market power. We explore this in more detail in our response to Questions 19 and 24.

5.4.2 To define the relevant markets along the supply chain, one should therefore start by testing whether there is demand and supply substitutability at the level of retail distribution between subscription television and FTA, and then between subscription television and OTT on-demand offerings, including TVOD or SVOD. In our view, The Authority's finding that subscription television falls in a separate relevant market to FTA and OTT/VOD needs to be more thoroughly supported (see our response to Question 8). A similar approach to test the demand and supply-side substitutability along each level of the supply chain should then be taken, as we show in our responses to Questions 9, 11 and 12.

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

5.5.1 The Authority defines premium content as *"valuable content that is acquired on an exclusive basis and made available on high end, premium bouquets"* (para. 5.7.17). According to this definition, it classifies live sport, blockbuster movies, and the latest local and international series as premium content (para. 5.7.18). The fact that it is made available on *"high end, premium bouquets"* means that this content generates higher revenue for broadcasters who are therefore willing to spend more on acquiring such content. Further up the value chain this also means that producers are also willing to spend more on producing premium content because they know that they will be able to sell the rights at a premium.

5.5.2 Ofcom, in its Premium Pay TV Movies Market Investigation Reference Document to the UK Competition Commission, found that the content which is likely to be most effective in driving pay television subscriptions must have two characteristics. Firstly, a significant appeal to a broad audience and secondly a limited availability via FTA channels. In the same document, Ofcom found that first run movies from Hollywood studios are particularly important to competition in the pay television sector because they are highly attractive to large numbers of consumers and are shown only on pay television. The reasons for this are that they are movies of a high quality, at least in terms of box office success, and are shown on television for the first time in the pay television window which is a feature highly valued by subscribers.[17] Although Ofcom's enquiry only focused on Hollywood studio movies, the same characteristics are also a feature of series content made available through the Hollywood studios.

5.5.3 Sports content on a pay television service is an important driver of a consumer's choice of a pay television provider and research has shown that a large number of consumers are willing to pay a premium to access sports content. Whilst consumer habits continue to evolve with the emergence of new services available on a variety of devices, the principal means of

[17] Ofcom Premium Pay TV Movies Market Investigation reference to the Competition Commission dated 4 August 2010 at paragraphs A 2.6, 1.5 and 1.6.

consumption of sports content continues to be through subscription pay television services which offer a core bundle of content and additional services.[18]

5.5.4 The importance of sports on a pay television service is aptly illustrated in the following statement:

"If a channel usually broadcasts certain programmes, such as the UEFA Champions League, which is in itself a strongly branded event, viewers may develop a habit of screening that channel as their first port of call in determining their viewing choices. The creation of a brand loyalty to a channel encourages viewers to use the channel as 'point of reference' for their viewing. This has beneficial effects on other programmes broadcast by the channel. Moreover, as stated by Jeanrenaud and Kesenne (2006), along with first-run major box-office films, sport forms the major premium content that channels use as a means of standing out from their competitors and to increase both audience size and subscriber numbers. Sports has a clear advantage over films for the advertisers as it attracts a more homogeneous audience. The viewers are most likely to be young, male and affluent. This underlines the importance of exclusivity clauses, found in many contracts. In Europe, football rights have been the driving force in the development of pay-TV, and in Britain the acquisition of exclusive rights for live Premier League matches was a key element in Sky's strategy to dominate the satellite television industry."[19]

5.5.5 Although consumers value a range of genres, sports content stands apart in having a high degree of exclusivity on pay television. Whilst, FTA channels show live coverage of some live sporting events, as a global trend the majority of sports coverage is shown exclusively on pay television channels. In addition, sports coverage of major sporting events cannot be replicated as the events are effectively unique in nature. This is due to the fact that sports content is most attractive when broadcast live. Once an event is over and the outcome is known, the value of watching it is considerably reduced.

5.5.6 Most international precedent includes certain types of sport and film rights as premium content[20], but series content has also become a critical driver of pay television subscriptions. Premium content can be seen as content that has wide appeal, has no substitutes and is time critical, and local and international series satisfy these conditions. Local content especially has

[18] Ofcom - Review of the pay TV wholesale must offer obligation dated 19 December 2014 at paragraph 1.10.

[19] SDE (2008) Based on the European Commission Statements referred to "Broadcasting Football Rights in Brazil: The Case of Globo and 'Club of 13' in the Antitrust Perspective" –Cesar Mattos (4 January 2012).

[20] OECD (2013). Competition issues in Television and Broadcasting. *United Kingdom.* DAF/COMP/GF/WD(2013)39 (p. 5) and EU Commission (2006). Joint selling of media rights to the FA Premier League. COMP/C-2/38.173 (para. 22)

become important in the South African context. Channels such as Mzansi Magic[21] or KykNET have become popular and draw large audience numbers. They are also exclusive to MultiChoice (see **Annexure A**). We therefore agree with the Authority's definition of premium content.

5.5.7 In what follows, we consider the competitive dynamics surrounding premium content at different levels of the value chain, e.g. retail access and wholesale supply. At some of these levels, it is necessary to define narrow markets based on the type of premium content (e.g. separate markets for movies and sport).

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

5.6.1 While we agree with the Authority's definition of premium content, some types of content such as kids content, comedy content, reality television or genre specific channels are also important drivers of subscription services. If this type of content starts generating higher viewership numbers and hence more revenue for broadcasters, it is likely that in future it may also satisfy the definition of premium content.

5.6.2 By way of example:

5.6.2.1 Viacom Inc.'s ("**Viacom**") MTV network has seen a ratings growth during 2017, with a focus on a younger audience.[22] It was reported that during August 2017, MTV's ratings for its target audience (aged 18 to 34) increased by 31%, which was influenced by a new reality show 'Siesta Key', as well as 'The Challenge'. Other reality shows on MTV, include 'Pimp My Ride', 'Geordie Shore', 'My Super Sweet 16', 'Jackass', 'Ex on the Beach' and 'Catfish': The MTV channel, as well as the MTV Base channel (which focuses on music for the African continent), is only available to DStv subscribers;

5.6.2.2 Comedy Central, in a 7 (seven) day period in the USA, had viewership ratings of 29 million during Spring 2017.[23] In 2011, MultiChoice obtained exclusive rights to Comedy Central from Viacom for Sub-Saharan Africa. Comedy Central contains local comedy productions,

[21] *Mzansi Magic* is a local channel that provides a wide range of prime, local content programmes in six South African languages. The head of publicity and social media at *Mzansi Magic* stated that in the seven years since its introduction the channel "has not only managed to establish itself as a key developer of local content and talent, working with producers who were previously not producing any work; it continues to grow and expand its offering to the delight of its viewers". Available at http://eng.pendoring.co.za/media.aspx?id=109

[22] Toonkel. *Viacom's MTV sees first summer ratings growth in six years*. Reuters. 13 September 2017. Available at https://www.reuters.com/article/us-viacom-mtv/viacoms-mtv-sees-first-summer-ratings-growth-in-six-years-idUSKCN1BO189

[23] Available at https://www.statista.com/statistics/228937/cable-tv-networks-comedy-central-watched-within-the-last-7-days-usa/.

as well as highly sought after international content, which includes 'The Daily Show with Trevor Noah', 'The Tonight Show Starring Jimmy Fallon', 'The Big Bang Theory', 'South Park', 'How I Met Your Mother', 'The Simpsons', 'Friends', 'Two and a Half Men', 'The Fresh Prince of Bel-Air', 'Seinfeld' and 'Saturday Night Live'; and

5.6.2.3 the Australian Communications and Media Authority ("**ACMA**") found that, whilst FTA viewership for children had subsided over the past 12 years, subscription television had increased viewing numbers for children, specifically in the 0-4 and 5-12 age groups.[24] In terms of premium children's content and animation, Cartoon Network, the Disney channels and VIMN channels, Nickelodeon, Nick Jr. and Nicktoons are only available to DStv subscribers.

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

5.7.1 The Authority's characterisation of the market for the retail supply of subscription television channels divides the market into basic-tier and premium subscription television channels. We agree that such a distinction can be made, but in this section, we also want to illustrate more strongly why subscription television falls in a different relevant market to FTA and VOD/OTT.

5.7.2 The Authority derives its definition of the relevant retail market based on demand-side substitutability from the perspective of advertisers and subscribers. To support its argument, it focuses on the price differentials between premium and basic-tier subscription television, but demand-side substitutability can also be influenced by product characteristics and intended use. Premium channels per definition offer content that is made available exclusively on premium bouquets, and without access to such content basic-tier bouquets are not able to impose a competitive constraint. This is also true from the perspective of advertisers, whose choice of where to advertise is driven by the characteristics of a channel's audience. Basic tier and premium bouquets attract audiences in different LSM groups and hence also different types of advertisers, further supporting that they fall in distinct product markets.

5.7.3 While we agree with the Authority that there is a distinction between premium and basic tier content at the retail level, it would be more accurate to refer to premium subscription TV *bouquets* and basic-tier subscription TV *bouquets*, than to channels. The reasoning is that even though broadcasters compile these bouquets from premium and non-premium *channels* (we discuss the definition of the relevant market for channels in response to Question 9), from

[24] Children's television viewing and multi-screen behaviour Analysis of 2005–16 OzTAM audience data and 2017 survey of parents, carers and guardians. Australian Communications and Media Authority. ACMA. August 2017.

a retail consumer’s perspective the choice is whether or not to subscribe to a premium or a basic tier *bouquet*.

5.8 **Is pay TV and FTA in separate relevant markets?**

5.8.1 The subsequent question is whether the market for basic-tier or premium subscription television bouquets should be broadened to include FTA. The Authority argues that they fall in distinct product markets due to their different characteristics, price points, content and quality (para. 5.7.4). We agree with the Authority’s conclusion, also because the balance of case precedent suggests that FTA and subscription television are in separate product markets.

5.8.2 In the NewsCorp/Telepiu merger (2003), the European Commission acknowledged that FTA may exercise a certain constraint on pay television (in particular where FTA offers a wide choice of channels, some of which would include attractive content), but nevertheless concluded that FTA and pay television fall in separate markets.[25] In SFR/Télé2 (2007), the European Commission argued that the different types of financing and the fact that the offerings are not substitutable from a consumer’s perspective since the one is provided free of charge and the other requires a subscription fee, justifies defining separate relevant markets.[26] In the NewsCorp/Premiere decision (2008), the European Commission defined pay television and FTA as distinct markets based on the type of content and programme schedules, limited demand-side substitutability due to the subscription fee, and limited supply-side substitutability due to the different types of business models.[27] In the NewsCorp/BSkyB merger (2010), the notifying parties argued that the differences in content type and programme schedules between FTA and pay television are diminishing and that digitisation is promoting further convergence between these platforms. The European Commission however concluded that pay television and FTA fall in separate markets.[28]

5.8.3 The motivations for distinct FTA and subscription television markets that are highlighted in the case precedent are also relevant to South Africa. FTA and subscription television have fundamentally different business models, which are further enforced by regulations, such as that advertising revenue may not form the main source of income for subscription broadcasters (as mentioned earlier). The advertisers that are attracted to the different platforms also vary, due to the different characteristics of FTA and subscription television audiences. Furthermore, even DStv’s basic-tier bouquets (e.g. DStv EasyView or DStv Access) offer a much larger number of channels that can be accessed relative to FTA services. This speaks to case

[25] COMP/M.2876 (para. 47). 2 April 2003
[26] COMP/M.4505 (para 45). 8 July 2007.
[27] COMP/M.5121 (para. 17-20). 25 June 2008.
[28] COMP/M.5932 (para. 95-99)

precedent from the UK, where Ofcom defined distinct markets for basic-tier pay television and FTA based on the greater range of channels available in basic-tier bouquets relative to FTA channels, and inconclusive evidence that a sufficient number of subscribers to basic-tier bouquets would switch to FTA in the event of a price increase. [29]

5.8.4 In the realm of sport, one of the factors to be considered is whether there is sufficient premium sport content screened by FTA broadcasters to significantly constrain the prices charged by pay television. It does not help if these are once-off events that generate high viewership numbers for short periods at a time: for FTA to be a significant constraint on pay television, sufficient sport content needs to be available on an on-going basis. MultiChoice holds the majority of exclusive premium sport rights in South Africa, and FTA broadcasters therefore do not impose a competitive constraint in this regard. The fact that there are no effective competitive constraints on MultiChoice is further evidenced by MultiChoice often being in a position to pay well in excess of the market price for premium content. In Econet Media's experience, MultiChoice has on occasion paid substantial amounts for sports rights under circumstances where it was the sole bidder. The only rational conclusion to be drawn from such conduct is that MultiChoice was prepared to pay an unrelated market price for premium sports content as a means of ensuring that no new entrant would be able to afford (let alone match the price) paid by MultiChoice when the rights are once again put out to tender.

5.8.5 Another consideration is that while some subscribers to MultiChoice may switch to FTA in the event of a 5-10% price increase (following the logic of the SSNIP test), this does not provide evidence that FTA and subscription television is in the same relevant market. The cellophane fallacy and the difficulty associated with applying the SSNIP test in the broadcasting market was explained in response to Question 2. It therefore cannot be used to infer that FTA and pay television are in the same market.

5.8.6 FTA and pay television can also be considered to be in separate markets from a supply-side substitutability point of view. Broadcasters are issued with a FTA, subscription or community broadcasting licence, and it is not possible to switch between these licence categories. In addition, licences are not freely available and only issued when the Authority issues an Invitation to Apply (**"ITA"**).

5.8.7 Based on the principles discussed above, we agree with the Authority that basic-tier pay television bouquets and premium pay television bouquets fall in distinct relevant markets from FTA.

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[29] Ofcom (2007). Characteristics of the pay TV market. Pay TV market investigation consultation (para. 5.2.3)

5.9 **Are pay TV and OTT in separate relevant markets?**

5.9.1 The final question in relation to retail market definition is whether OTT services, such as Netflix or Showmax, pose a competitive constraint on subscription television. The Authority argues that these services fall in a distinct product market to subscription television, by virtue of South Africa's limited Internet connectivity and penetration, low data speeds and high data costs (para. 4.9.3-4.9.4).

5.9.2 Despite these constraints, it is important to recognise that the distinction between television broadcasting and OTT is becoming blurred through convergence, defined as "[t]he ability of different network platforms to carry essentially similar kinds of services and the consequent coming together of consumer devices such as the telephone, television and personal computer".[30] Along the same lines, the Organisation for Economic Co-operation and Development ("**OECD**") writes that "the distinction between television and video services is rapidly narrowing, particularly with respect to recorded programming".[31] It is therefore important to consider the impact of the introduction of OTT services on a consumer's choice between traditional pay television and OTT services.

5.9.3 Demand-side substitution between OTT services and pay television (particularly where subscription is mainly taken in order to access movie channels) may arise as some consumers may view these as similar. The UK Competition Commission ("**UK CC**") conducted an investigation into the supply and acquisition of subscription and pay television movie rights, in which they analysed the competitive relationship between OTT and traditional pay television movie services (Sky Movies).[32] It found there to be sufficient rivalry between OTT subscription services and traditional subscription television to be included in the same relevant market.[33] They based this finding on the fact that both offered a wide range of films, and all were available on a subscription basis. Some differences between the two services were that Netflix was significantly cheaper than Sky Movies and had a greater number of movies, but had less first subscription pay television window ("**FSPTW**") content.[34] Here, however, it is important to recognise that the market was constrained to *film content*, and to take the context of the market into account as the UK's broadband market is considerably more developed than that of South Africa. In addition, MultiChoice sells its premium movie content bundled together with premium

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[30] EC (1997). Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. COM(97)623 (p.1)

[31] OECD (2013). Competition issues in Television and Broadcasting. *Policy Roundtables* (p.12)

[32] Movies on pay TV market investigation. Terms of reference, background to the reference and conduct of our investigation. Appendix 4.2.

[33] Movies on pay TV market investigation. Terms of reference, background to the reference and conduct of our investigation. Appendix 4.2. para 92

[34] Movies on pay TV market investigation. Terms of reference, background to the reference and conduct of our investigation. Appendix 4.2. para 84

sport, premium series and non-premium content. From a subscriber's perspective it is therefore not possible to subscribe only to premium film content.

5.9.4 In addition to the reasons that the Authority identified for why VOD and pay television are not part of the same relevant market, we also note that services are made available in different release windows to subscription television, which also limits demand-side substitutability. Supply-side substitutability between pay television and VOD is also limited. Whereas VOD services are unregulated in South Africa, a subscription television licence is needed to offer pay television services. It may therefore be easier for a pay television broadcaster to expand into VOD – as MultiChoice has done with Showmax – than for a VOD service provider (such as Netflix) to enter the pay television market. This limits the competitive constraint that VOD imposes on pay television and supports the argument for distinct product markets.

5.9.5 Given the niche offering of VOD services and other limitations that are characteristic to the South African market (such as low Internet penetration, large price differentials between premium subscription bouquets and OTT services, and bundled content offerings), it is reasonable to conclude that pay television and OTT services fall in distinct relevant product markets.

5.9.6 We therefore agree with the Authority that there exist distinct retail product markets for premium and basic-tier subscription TV content. It would however be more accurate for the Authority to refer to these markets as markets for bouquets, rather than for channels.

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

5.10.1 The Authority defines two markets at the wholesale level of the supply chain: a market for basic-tier subscription channels and a market for premium subscription channels (aggregated into premium or basic-tier bouquets distributed at the retail level). Wholesale channel provision exists upstream of the retail markets defined in Question 8.

5.10.2 We agree with the Authority's definition of the wholesale market for channel provision. It also accords with the European Commission's definition in the Newscorp/BSkyB merger, where it found that premium content channels were not substitutable with basic-tier channels because premium content was not broadcast on any other channels.[35] This led the European Commission to conclude that there was segmentation between basic-tier and premium

[35] European Commission. Case No COMP/M.5932 – News Corp/BSkyB Notification of 3 November 2010 pursuant to Article 4 of Council regulation No 139/2004. 2010. (page 16)

channels at the wholesale level.[36] Ofcom came to a similar conclusion in its pay television market investigation,[37] where it found that most aggregation of premium content happens at the content production or wholesale content provision levels of the value chain. The segmentation of the relevant markets for premium and basic-tier channels is therefore a function of content aggregation higher up in the value chain.

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

5.11.1 The Authority notes that the *"wholesale supply of channels involves bargaining between broadcasters and channel providers on the terms and conditions for the distribution of television channels to viewers"* (para. 5.8.2). These dynamics are summarised by Ofcom: *"where content is aggregated by a purchaser acquiring a portfolio of rights from different suppliers (e.g. a single wholesale channel provider accumulating movie rights from multiple studios) the split in value of that content between suppliers and the aggregating purchaser will depend on their particular circumstances. The relative bargaining position of the parties will depend on factors such as the consequences if they fail to strike a deal […] as well as their relative bargaining skills"*.[38]

5.11.2 Exclusive access to channels can play an important role in incentivising subscribers to sign up to a pay television platform and hence the ability of a broadcaster to enter or expand in the market. Access to premium channels/content is therefore a critical component of a broadcaster's success.[39] The bargaining process predominantly depends on the availability of content sold by right holders, and the number of alternative broadcasters (buyers) that a rights holder can sell to, but may also be influenced by the preferences of the rights holders (such as certain football leagues insisting on contracting with a particular pay television broadcaster as a result of an established and trusted relationship with that broadcaster, (i.e. the relationship between Sky TV and the EPL)). Negotiations for content are affected by the buyer power of the broadcasters relative to the selling power of channel suppliers. A large broadcaster (such as MultiChoice) may have an advantage over smaller broadcasters in acquiring wholesale channels due to 'deeper pockets' or being able to purchase a bundle of channels and thereby reducing transaction costs.

5.11.3 In Ofcom's market investigation into the UK pay television market, Ofcom noted that "*Sky Movies is a 'must have' product for any retailer seeking to provide a premium movie pay TV*

[36] European Commission. Case No COMP/M.5932 – News Corp/BSkyB Notification of 3 November 2010 pursuant to Article 4 of Council regulation No 139/2004. 2010. (page 17)
[37] Ofcom (2007). Pay TV market investigation – Consultation Document (p.9)
[38] Ofcom (2007). Pay TV Market Investigation: Consultation document (p. 103)
[39] COMP/M.2876. 2 April 2003. (para. 74)

subscription service, and so Sky is in a very powerful bargaining position as regards retailers. However, Virgin Media is likely to have some limited countervailing buyer power, as it provides the only means of accessing customers on the cable platform. This countervailing buyer power is however likely to be relatively weak, as whilst a retailer has no alternative but to source from Sky, if Virgin Media dropped Sky Movies, our customer research suggests that significant numbers would leave the cable platform and purchase from Sky instead."[40] This situation is however distinct from South Africa, as much of the premium content that is available on DStv is produced by M-Net or SuperSport, who are part of MultiChoice and supply their content exclusively to the DStv platform. The opportunity for other broadcasters to bargain for this content is therefore severely limited. MultiChoice's incumbency and its associated viewership numbers has given it an advantage over new entrants in terms of commissioning content. Without the certainty provided by a large subscriber base, smaller broadcasters cannot compete in the production of premium content.

5.11.4 In addition, because of MultiChoice's incumbency, for many years it was the only way for a content producer to reach a pay television audience, further entrenching its buying power. As a result, MultiChoice's buyer power and close relationships with content providers in all likelihood allows it to negotiate better prices for content than its competitors in the pay television market (StarSat and Deukom), further entrenching its dominant position.

5.12 **Q11: Do you agree with the Authority's characterisation of the [content] market and the market definition as outlined above? If not, how would you define the relevant market/s in this regard?**

5.12.1 At the top level of the value chain, the Authority defines distinct, narrow markets for the provision of content (para. 5.9.18). This is based on differences in content characteristics and content creators specialising in the production of certain types of content. We agree with the Authority's methodology at this level of the supply chain.

5.12.2 There is a large volume of precedent supporting distinct markets for different types of content at the top-most level of the broadcasting supply chain. The European Commission[41] states that content rights that are bought by pay television operators are not substitutable with each other and therefore in past decisions have segmented the market into separate markets for the licensing/acquisition of broadcasting rights for: (1) sports events, (2) premium films and (3) other TV content (i.e. documentaries). In some past decisions, the European Commission has even gone so far as defining narrower markets for the supply of premium movies,

[40] Ofcom (2007). Market definition and market power in pay TV. *Annex 13 to pay TV market investigation consultation*. (para. 5.68)

[41] European Commission. Case No COMP/M.5932 – News Corp/BSkyB Notification of 3 November 2010 pursuant to Article 4 of Council regulation No 139/2004. 2010. (page 12)

distinguishing between films produced by major Hollywood production companies and other films. The European Commission has also distinguished between film content based on the different exhibition windows: (1) pay-per-view ("**PPV**")/VOD; (2) the first pay television window; and (3) the second pay television widow.[42] The Authority uses this same distinction to define the market for *"the acquisition of first-window subscription television broadcasting premium movies for retail distribution in South Africa"* (para. 5.9.18).

5.12.3 In relation to content rights for sport, Ofcom shows that demand-side substitutability is limited by the exclusivity, staggered availability and duration of the required content rights,[43] supporting the Authority's definition of distinct markets for premium sport content.

5.12.4 In para. 5.9.18(e) the Authority defines *"a market for the acquisition of other premium content"* which it specifies as series and premium local content. This highlights the important role that local content has come to play in subscription television broadcasting, as was described in our definition of premium content. This has also become a matter of regulation through local content quotas that are stipulated in the Local Content Regulations (2016).[44] For subscription broadcasters, the regulations require that "*a subscription broadcasting service licensee that acquires channels must ensure that, a minimum of 15% of their total annual channel acquisition budget, measured across its service as a whole, is spent on channels with local television content that are compiled and up linked from South Africa*" (para. 6(2)). The importance of being able to access local content and the difficulties that new entrants face in acquiring such content are discussed in response to Questions 15 and 16.

5.13 **Q12: Do you agree with the Authority's characterisation of the market [for technical services] and the market definition as outlined above? If not, how would you define the relevant market/s in this regard?**

5.13.1 Dedicated infrastructure (such as STBs, systems services, subscriber management services, etc.) is required to supply pay television broadcasting services. The Authority argues that these services can pose a barrier to entry, for example due to a lack of inter-operability between different pay television providers (para. 5.10.2). It therefore defines a market for *"the wholesale provision and acquisition of technical services required for operating a subscription television broadcasting service"* (para. 5.10.3).

[42] See Case COMP/M.2050 - Vivendi/Canal+/Seagram, Commission decision of 13 October 2000; Case COMP/M.2845 - Sogecable/CanalSatélite Digital/Vía Digital, Commission decision of 14 August 2002 in Case COMP/M.5932 – News Corp/BSkyB (para. 60)
[43] Office of Communications (Ofcom). Market definition ad market power in pay TV. Annex 13 to pay TV market investigation consultation. 18 December 2007. (page 21)
[44] Government Gazette 39844 – No 346 (March 2016)

5.13.2 The Authority's definition of the market for technical services implies that the technical services required for the transmission of any type of subscription television broadcasting services are substitutable, and a question arises as to whether distinct markets should be defined for subscription television provided over <u>different transmission networks</u>. This issue will become increasingly important with DTT and the growth of OTT services. As was illustrated in the representation of the value chain in Question 3, subscription services can be provided via satellite, analogue or digital terrestrial, cable, mobile or Internet transmission. In the Deutsche Telekom/Beta Research merger (1998), the EC argued that *"both satellite and cable transmission require the same technical services for the operation of pay TV"*.[45] They ultimately left the question open, but noted that it was not necessary to define distinct markets for each of these transmission technologies.

5.13.3 In order for a pay television broadcaster to become an effective competitor, it is not enough to have interoperable STBs as a broadcaster requires access to an entire transmission platform to compete. It is therefore important that the market for technical services include the entire transmission platform.

5.13.4 From a pay television broadcaster's perspective, the cost of switching between pay television transmission platforms (e.g. satellite or digital terrestrial) are prohibitively high, limiting the demand-side substitution between these platforms. We recommend that distinct markets for technical services should be defined for different transmission platforms, i.e. separate markets for the wholesale provision and acquisition of technical services required for operating a <u>satellite</u> or <u>digital terrestrial</u> subscription television broadcasting service. The Authority's market definition incorrectly implies that these fall within the same relevant market.

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

5.14.1 Based on our review of the literature, it seems common practice that a market for technical services is defined in the assessment of competition in pay television. Technology challenges in the pay television market centre around five factors: the set-top box, the CAS, the satellite dish and low noise block ("**LNB**") installation, the content that is offered and how it is packaged, and the availability of alternative options. Viewers who subscribe with a pay television operator need to purchase a set-top box and a dish kit (including a satellite dish and a LNB downconverter). To our knowledge, pay television operators are currently using different CAS which require viewers to purchase different STBs for different subscription services. In essence, this means that a subscriber to MultiChoice cannot use the same STB if he/she were

[45] Commission Decision (1998) Case No IV/M.1027 Deutsche Telekom/BetaResearch (para. 18)

to switch to an alternative pay television broadcaster. This increases switching costs and 'hassle factor' for the consumer.

5.14.2 The counter argument is that broadcasters are willing to invest in the development of their STBs as a competitive advantage, and the incentive to do so may diminish if STBs are shared between broadcasters. Despite this, the need to invest in developing your own STB increases the cost of entry, further limiting the opportunity for effective competition to take place. If potential entrants are unable to carry the costs of developing their own STBs and hence unable to become effective competitors, regulatory intervention may be necessary in this segment of the market. This is explored in more detail in response to Question 27.

6 CHAPTER 6 - DISCUSSION DOCUMENT: CONSIDERATION OF THE EFFECTIVENESS OF COMPETITION IN RELEVANT MARKETS

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

6.1.1 The Authority lists four factors that should be considered to establish if there is effective competition in the market: non-transitory barriers to entry, the dynamic character and functioning of the market (e.g. market power and market concentration), the nature and extent of vertical integration, and whether competition law alone is sufficient to deal with an identified market failure (para. 6.2.1). We agree that these factors are important, but in our view a more systematic approach should be followed to assess effective competition.

6.1.2 The European Commission's Recommendation on relevant markets in the electronic communications sector susceptible to *ex ante* regulation[46] provides a three-criteria test that should be applied to examine whether a market exhibits ineffective competition and therefore should be regulated: (i) if there exist high and non-transitory barriers to entry of a structural, legal or regulatory nature; (ii) if the market structure does not tend towards effective competition in a relevant time horizon; and (iii) if the application of competition law alone would not adequately address the market failure(s) concerned. These criteria are assessed cumulatively. The Authority's list does not include the condition that the market does not tend to effective competition in a relevant time horizon, nor does it state that these conditions need to be cumulatively true.

6.1.3 A market that passes the three-criteria test should be assessed in more detail to determine whether any firm has significant market power ("**SMP**"). The European Commission defines SMP as the ability *"to behave to an appreciable extent independently of competitors, customers, and ultimately consumers"*.[47] In other words, the ability to significantly raise prices above competitive levels.[48]

6.1.4 A distinction needs to be made between dominance in terms of high market shares and SMP. While dominance is usually determined through analysing market shares with respect to thresholds stipulated in the Competition Act, determining whether a specific firm exerts market power requires a more detailed and nuanced approach. The problem with only relying on

[46] COMMISSION RECOMMENDATION of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406) (2007/879/EC) (para. 5)

[47] COM 2002/C165/03, recital 30.

[48] L.-H. Röller, M. de la Mano. 2006. The Impact of the New Substantive Test in European Merger Control, in: *European Competition Journal*, Vol. 2, No. 1, 2006, p.14.

market shares to establish if a firm has SMP, is that high market shares may signal that a firm is more efficient or innovative than its competitors. In addition – especially in the context of a two-sided market – a high market share does not necessarily imply SMP since it may be constrained by customers on both sides of the platform. We explained above, however, why the two-sided dynamics of the subscription broadcasting market may not be as strong as in FTA.

6.1.5 In sum, although a structural analysis of market shares is a good first step (especially if these have persisted over an extended period of time), further analyses are required to make a determination on market power. The two step approach, starting with the three-criteria test followed by an analysis of SMP, provides an objective instrument to evaluate the competitiveness of a market. While the Authority recognises some relevant factors in determining effective competition, it should structure its analysis of effective competition to follow the approach set out above more closely.

6.2 **Q15 & 16: In your view, are there any competition concerns and is there a need for regulatory intervention in the market for the acquisition of (a) Premium and (b) non-premium content?**

6.2.1 To ease the flow of the argument, we combine our answers to Questions 15 and 16 in the Discussion Document into one response. To establish if there is effective competition in the markets for the acquisition of premium or non-premium content, it is necessary to think through the conditions of the three criteria test that was described above. First, one has to consider whether there are structural, regulatory or legal barriers to entry that limit competition in the market for non-premium content.

6.3 **How is content acquired?**

6.3.1 Pay television broadcasters acquire content for their pay television platforms in several ways. Where a pay television broadcaster packages its own channels, it will acquire individual programmes from a content supplier (i.e. movies, series and format shows) through the negotiation of either a programme licensing agreement or an output agreement with a content supplier. A programme licensing agreement will typically entail the licensing of specific pieces of content and may consist of a combination of first run and library product. Programme licence agreements can range from the licensing of a single content product to the licensing of a 'volume' of content products.

6.3.2 An output agreement is an agreement where a content supplier licenses its entire output of product to a single pay television operator. Typically output agreements have durations which range from two to five years but if an output agreement is subject to an automatic renewal clause, the contract term will be for a longer duration. The benefit to a pay television broadcaster in entering into an output agreement is that it secures a guaranteed exclusive supply of all first run product (i.e. movies or series) produced by a content supplier over the term of the output agreement, thereby giving it a significant competitive advantage over a rival service. Output agreements are not only confined to the licensing of first run product but usually also entail the licensing of a volume library component of both movies and series. Output agreements are sought after by pay television broadcasters as not only do they assist in the population of content in a 24/7 programming schedule without having the logistical difficulty of having to select and acquire discrete content products but they also afford a pay television broadcaster, the competitive advantage of constantly having new and fresh content on its programming schedules. Where a pay television broadcaster is dominant and it has secured several output agreements it is in the enviable position of being able to broadcast the 'biggest and best' first run movies and series and is able to lay claim to the fact that it literally has everything on its pay television service.

6.3.3 Pay television broadcasters who package their own channels also commission productions for their pay television services. These commissions range from local dramas, soap operas, documentaries, lifestyle and current affairs programmes to international format shows such as 'Idols' and 'Big Brother'. In most instances where a local production is commissioned by a pay television broadcaster, the pay television broadcaster will secure all the intellectual property associated with the production, which then affords the pay television broadcaster ownership rights in respect of such content with the attendant ability to fully exploit such content on all platforms without restriction. The rights of ownership acquired by the commissioning broadcaster are generally viewed as being a necessary incentive for broadcasters to invest in local productions and this practice in and of itself does not generally give rise to competition concerns.

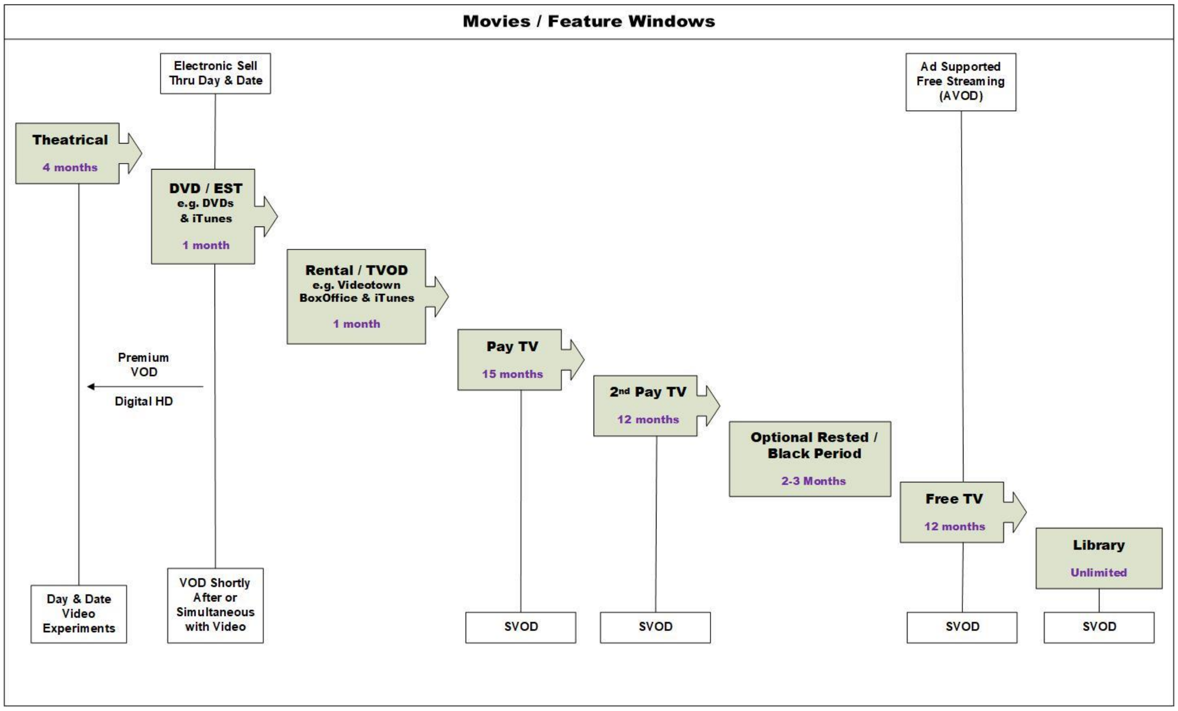
6.3.4 This is not the case with international format productions as the intellectual property rights associated with such formats are held by the international format rights holder, who will invariably license the right to produce and broadcast the format on an exclusive basis for a specified licence period to the pay television broadcaster. Pay television broadcasters may also acquire local movies and dramas through investing or co-investing in the production of a local film or drama prior to the commencement of production. In exchange for its investment, the pay television broadcaster will usually acquire the right to broadcast the drama or film on its platforms on an exclusive basis for a lengthy licence period. These licence periods can range from between five to twenty years. Under these funding arrangements, the producer typically retains all the intellectual property associated with the production but will be precluded from exploiting such content through licensing agreements with other broadcasters due to all of the rights in the production being licensed to the investor pay television broadcaster for a substantial time period.

6.3.5 In addition to the packaging of their own channels, pay television broadcasters also licence fully programmed and packaged channels from channel providers ("**third party channels**"). Third party channels are usually genre specific (i.e. news, kids, comedy, faith, general entertainment, reality, movie, lifestyle, music and documentary channels) and are sought after by pay television broadcasters due to their diversity and ability to appeal to a wide range of subscriber preferences and audiences. CNN, Discovery, E! Entertainment, MTV, Nickelodeon, Disney Junior and Universal Studios are all examples of sought after third party channels. Third party channels can be licensed on an exclusive or non-exclusive basis and have the added advantage of being delivered to the broadcaster as a pre-packaged channel thereby removing the costs and logistical difficulties associated with the selection and acquisition of content.

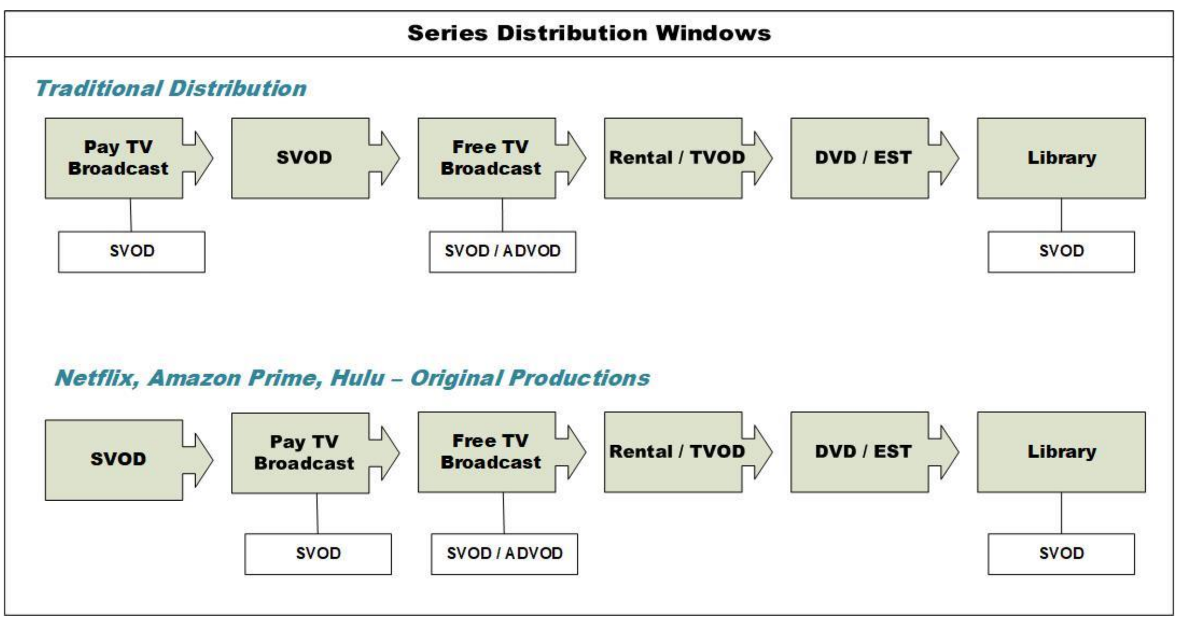
6.3.6 Of further importance to the acquisition of premium entertainment content is the global distribution mechanism for the release of content. From the time of their initial release, movies are sold in a series of different formats in distinct or overlapping time periods known as 'windows'. Typically, a movie has a theatrical release, – followed by a DVD retail or electronic sell through window, - where after it will be shown on TVOD, followed by premium pay television, then in a SVOD window and finally in a FTA window. The length of each of these windows and whether they are exclusive or have a period of non-exclusive overlap with other rights is relatively standard, but far from fixed. With the advent of new technologies and platforms there have been a number of window shifts in the last few years. By way of example, the SVOD window may occur prior to or overlap with the pay television window. Netflix, who operates in the SVOD widow, shows its original content in an SVOD window which occurs prior to the pay television window. The Hollywood studios have also experimented with shortened theatrical windows and with 'day and date' releases (i.e. the release of a film in theatres and on a TVOD service on the same day). In 2014, Lionsgate was the first content supplier to experiment with a day and date release when it released the horror film, "Nurse 3D", in theatres and on TVOD platforms on the same day.[49]

6.3.7 The distribution release mechanism for movies and the customary time periods associated with each window is set out below:

[49] Available at http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-lionsgate-giving-nurse-3d-a-dayanddate-release-20140206-story.html.



6.3.8 Original television series is also released in terms of windows. A television series will have an exclusive run on a pay television broadcaster and then on a FTA broadcaster and thereafter it will be made available in several subsequent markets, including DVD and electronic sell through (i.e. iTunes), SVOD and TVOD. The distribution release mechanism for series is depicted below:



6.3.9 One of the primary features of the distribution windows mechanism is that each window is concerned with a different right cannibalising its window and accordingly the language of windows and distribution is all about holdbacks, exclusivity and the term in which to exploit the rights granted in a particular window. Econet Media, as is the case with other pay television broadcasters, can only acquire premium entertainment content in the pay television window. This being the case, it must compete with other pay television broadcasters, including MultiChoice for the acquisition of premium entertainment content in the pay television window.

6.4 **Barriers to entry into the market for the acquisition of <u>premium content:</u>**

6.4.1 As explained above, Econet Media is of the view that premium content is content which has a wide appeal, has no substitutes and is time-critical in terms of its attractiveness to audiences such as sports, and first-run movies and series produced by Hollywood studios and other independent content suppliers. Local content is also viewed by Econet Media as being an important driver for subscriber take-up of its pay television services. Access to such premium content is thus critical to Econet Media's success as a provider of pay television services in sub-Saharan Africa.

6.4.2 The upstream market for rights to premium content is narrow and limited, yet access to such content plays a critical role in the pay television market. The OECD has stated that: *"The success of entry into television broadcasting is moreover determined by the ability of new broadcasters to gain access to the content that consumers demand and to differentiate their offering from that of incumbent broadcasters."*[50]

6.4.3 The importance of new entrants being able to access content was highlighted by the South African Competition Commission ("**Competition Commission**") in its submission on the National Integrated ICT Policy Discussion Paper[51]. In its submission, the Competition Commission recognised that for new entrants to attract and retain a customer base they must have competitive access to premium content. According to the Competition Commission the following competition rationale underpins this fundamental requirement:

"*From a competition perspective, it is well accepted that access to premium content can be a bottleneck to potential new entry and a source of market power for the incumbent. In this regard, barriers to accessing content can arise in a situation where content owners and broadcasters are vertically integrated; or in instances where there are exclusive contractual arrangements between content owners and incumbent broadcasters; or exclusionary conduct by dominant firm. A key issue is that a downstream broadcasting service provider may be able*

[50] Organisation for Economic Co-operation and Development Policy Roundtables, (2013).

[51] Competition Commission submission on the National Integrated ICT Policy Discussion Paper dated 11 February 2014.

to leverage its market position to gain power in an upstream market for content. This upstream buyer power would enable the exercise of additional market power, by the downstream broadcasting service provider, in the downstream market …

It is also arguable that exclusive rights for premium content act as a barrier to entry into Pay-TV by raising competitors' costs and thus either deterring or delaying entry by potential competitors. As the holder of the right stands to gain more profits by increasing the number of potential viewers, Pay-TV broadcasters are willing to pay higher prices for the exclusivity of the premium content to make up the reduced profits the rights holder gets by selling to only one Pay-TV operator.

While the acquisition of single exclusive premium content rights may not give rise to competition concerns, the cumulative effects arising from a single broadcaster acquiring a significant amount of such rights may raise competition concerns. Competition issues arise from the fact that the acquisition of a significant portion of exclusive premium content rights by single broadcaster may result in the foreclosure of competing broadcasters from accessing such rights and thus impede the ability to compete downstream. Such potential competition concerns are further augmented by the fact that premium content is available in strictly limited supply, thus making the level of the value chain susceptible to potential abuse of market power."[52]

6.4.4 As a new entrant in the pay television market and as a provider of pay television services in various African territories outside of South Africa, Econet Media has experienced significant barriers to entry in accessing premium content due to MultiChoice's ability to exclusively control the acquisition and distribution of premium content in South Africa and in various territories on the African continent. To illustrate, this difficulty we have attached as **Annexure C**, a list of the top 100 movies released in 2016 which were first and exclusive to the DStv platform. This, coupled with MultiChoice's vertical integration and ability to exercise market power at all levels of the supply chain, has resulted in market foreclosure and in some instances the marginalisation or removal of competitors altogether.

6.4.5 Econet Media has experienced significant barriers in its acquisition of premium entertainment content for its pay television platform because of existing exclusive arrangements between MultiChoice and the Hollywood studios, various independent content suppliers and channel providers. These exclusivity arrangements are not limited to South Africa but extend to most of the sub-Saharan territories in which Econet Media has launched its pay television services. In addition, the existing exclusivity arrangements are not limited to satellite distribution but

[52] The Competition Commission submission on the National Integrated ICT Policy Discussion Paper dated 11 February 2014 at paras 7.2.6, 7.2.8 and 7.2.9.

extend to a variety of delivery means, including digital terrestrial television (DTT), mobile (DVB-H, DVB-T, 3G, 4G, LTE and WiMax) and Internet distribution. Due to these existing exclusive arrangements, Econet Media has not been able to acquire first run movies and series programs from most of the Hollywood studios and has been forced to settle, in limited instances, for a few first run series programs and in the main for second pay television or library rights in respect of movies and series programs. MultiChoice has secured a significant number of third party channels on an exclusive basis which has served as a further barrier to Econet Media accessing third party channels for its platform. To illustrate the extent to which MultiChoice enjoys exclusive arrangements with third party channels, Econet Media has prepared a grid which it has compiled based on its own content inquiries, wherein it has detailed the channels on MultiChoice's pay television platform which enjoy exclusivity. This grid is attached as **Annexure A**.

6.4.6 Econet Media has also experienced difficulties in acquiring local content as a large portion of this content is either owned outright by MultiChoice or is licensed exclusively to MultiChoice for extensive periods of time through program license agreements such as the much publicised licensing agreement with the SABC in respect of the SABC's local content library and existing funding agreements. Econet Media has furthermore encountered difficulties in gaining access to local content producers for the commissioning and production of its own content due to the existence of retainer arrangements with MultiChoice which restrict the ability of local producers to freely contract with other broadcasters for the production of local content.

6.4.7 A pay television broadcaster wishing to launch a new pay television service will typically need to acquire movie and series output from more than one studio to construct an appealing content offering. A key barrier to entry for Econet Media has been its inability to acquire a sufficient mass of premium entertainment content from Hollywood studios and other sought after independent content suppliers due to existing exclusivity arrangements. This coupled with the limited pool of first run content and the long-standing relationships held by MultiChoice with content suppliers, has stifled Econet Media's ability to launch a pay television service, showcasing a wide portfolio of content.

6.4.8 Difficulties experienced in the initial phases of the launch of a new pay television service such as the establishment of a subscriber base and the uncertainty about future revenues contribute to the difficulties in acquiring content and add to an increase in the costs of such content as major suppliers of content often require the payment of upfront minimum guarantees in respect of subscriber numbers, alternatively other forms of financial guarantees in respect of the payment of licence fees. None of these effects are experienced by MultiChoice who has the benefit of a significant subscriber base (6.36 million South African subscribers, 11.94 million subscribers in sub Saharan Africa with the addition of 626 000 new direct-to-home customers in South Africa as per the Naspers' financial year report for the period ending March 2017) and a 98% share of subscription broadcasting homes in SA.[53] MultiChoice's market power in the distribution of premium entertainment content to a significant subscriber base in turn gives it a high degree of negotiating power with content suppliers in the upstream market. This then leads to the '*vicious cycle*' described by the Authority in paragraph 6.3.5 of the Discussion Document which *"begins with the ability to acquire exclusive access to premium content which leads to increased market share and therefore a greater ability to acquire content. The result of this cycle is the potential closing out of competitors from the market*."[54]

6.4.9 The fact that MultiChoice is vertically integrated at all levels of the supply chain further secures its ability to acquire premium entertainment content from Hollywood studios, independent content suppliers, channel providers and local producers. That this is so is evidenced by the fact that in addition to making content available on its pay television platform, MultiChoice has also secured premium entertainment content in the transactional VOD window (which it makes available to consumers under its 'Box Office' brand) and in the SVOD window (which is made available to subscribers under the 'Showmax' brand). Further evidence of MultiChoice's market power is its recent decision to make Showmax available to its Premium subscribers at no extra charge.

6.5 **Barriers to entry in the market for the acquisition of <u>non-premium content</u>:**

6.5.1 A dominant firm in the retail market for premium bouquets can further strengthen its position in this market by leveraging from the wholesale market for non-premium content. MultiChoice is the largest buyer of exclusive broadcasting rights in South Africa. By tying non-premium channels to its premium packages, MultiChoice is able to ensure a wide distribution of non-premium content, making its platform more attractive to advertisers and subscribers alike and potentially making it more difficult for smaller broadcasters and new entrants to compete.

6.5.2 MultiChoice also has content supply agreements with community television broadcasters, which requires them to give MultiChoice the first option on any channel or content that they produce. While this is commercially attractive for community broadcasters, it prevents any other pay television broadcaster from accessing their content on equal terms as MultiChoice. This acts as a further barrier to entry into the market for the acquisition of non-premium content.

[53] The ICASA Discussion Document: Inquiry into Subscription Television Broadcasting Services published under Notice 642 of 2017 in Government Gazette 41070 on 25 August 2017 at paragraph 4.3.5.

[54] Windsor Place Consulting – *"Exploring Content-Related Competition Issues: Will Exclusive Content Rights Be the New Bottleneck in Australian Telecommunications Sector?"* (2 October 2012)

6.5.3 The table in **Annexure B** lists the channels available across DStv's various packages. The second, third and fourth columns list channels that are not FTA and which are not exclusively aired on DStv Premium. Many of these channels that MultiChoice provides are made available on an exclusive basis, which prevents other players from accessing this content. Much of the market for non-premium content is already tied up in exclusivity contracts by MultiChoice (see **Annexure B**), who has exclusive agreements with most of the major suppliers of premium and non-premium content.

6.5.4 For the reasons set out above, the barriers to acquiring premium and non-premium entertainment content on a fair and competitive basis are significant. As these barriers in turn prevent, distort or restrict competition and have lead in the past to market failure as evidenced by the fact that out of the seven subscription broadcasting licences issued by the Authority between 2007 and 2015, only three licensees have commenced operations, one being MultiChoice and another being subject to business rescue proceedings, Econet Media is of the view that the imposition of various pro-competitive licence conditions on the dominant incumbent operator are required in order for new entrants to enter the pay television market on a fair and competitive basis.

6.6 The pro-competitive licence conditions proposed by Econet Media are set out in paragraph 8.7 of this submission.

6.7 **Q17: What in your opinion are the premium rights in the South African television sector? Who currently owns them?**

Premium Sports content

6.7.1 Table 1 of the Discussion Document sets out what the Authority considers to be premium rights in South Africa, but further clarification is needed on the content rights that are listed in the table. The most popular sports in South Africa are soccer, rugby and cricket. SuperSport Proprietary Limited ("**SuperSport**"), an affiliate of MultiChoice, is responsible for the packaging of the sports channels broadcast on the DStv platform. A total of sixteen SuperSport channels and one eSports channel are made available on the DStv platform.[55] A third party channel (Tellytrack) dedicated to horseracing is also made available on the DStv platform. Each SuperSport channel is programmed to focus on a specific sport and the sports programme formats are set out in the table to **Annexure D** to this submission.

6.7.2 The sports content rights acquired by SuperSport for the packaging of its sports channels are extensive and encompass the most sought after local sports events as well as highly valued

55 *New SuperSport channel line-up.* 3 July 2017. Available at https://www.supersport.com/press-releases/news/170606/New_SuperSport_channel_lineup_coming_soon

international sporting events. Econet Media has managed to establish that the following sports rights are licensed to SuperSport:

6.7.3 **Soccer:**

6.7.3.1 Premier Soccer League ("**PSL**")

6.7.3.1.1 SuperSport was awarded the 2012/2013 to 2016/2017 PSL broadcasting rights.[56] The five-year exclusive deal was reportedly worth R2 billion.[57] Recently, the SABC requested the PSL to extend its tender process for the broadcasting rights for Sub-Saharan Africa, for seasons 2019 to 2024. Latest reports indicate that SuperSport's five-year deal, which actually extends until 2018, is possibly worth R2.2 billion.

6.7.3.1.2 The ABSA Cup (currently the Nedbank Cup), Coca Cola Cup (currently the Telkom Knockout) and SAA Super Eight Cup (currently the MTN 8) are broadcast on the SuperSport channels. In terms of Regulation 4.5 of the Sports Broadcasting Rights Regulations, the finals of these tournament having been declared as national sporting events, must be made available to FTA broadcasters.

6.7.3.2 English Premier League ("**EPL**")

SuperSport obtained the exclusive sub-Saharan broadcasting rights for the EPL for the 2016-2019 seasons, at a value of approximately £296 million.[58] It has been alleged that this amounted to R6 billion when the agreement was concluded during August 2015.[59] Pursuant to this agreement and after winning an open tender process in 2017, SuperSport was again awarded the exclusive rights to broadcast the EPL in sub-Saharan Africa, which includes South Africa.[60] The renewal is for the period May 2019 to May 2022.

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[56] *SuperSport Awarded PSL rights on all broadcast platforms*. Available at http://www.dstvmediasales.com/supersport-awarded-psl-rights-on-all-broadcast-platforms/

[57] Klate. Irvin Khoza hints at new bumper broadcast deal with SuperSport. 16 November 2016. Kickoff.com. Available at http://www.kickoff.com/news/70712/irvin-khoza-hints-at-new-bumper-broadcast-deal-with-supersport

[58] Harris. *New Year, new TV billions: Premier League rules the world, with foreign sales of games set to hit billion a year in 2016 deals*. 2 January 2016. Mail Online. Available at http://www.mailonsunday.co.uk/sport/football/article-3382281/New-year-new-TV-billions-Premier-League-rules-world-foreign-sales-games-set-hit-1billion-year-2016-deals.html. In the 2013-2016 period, it also had the SSA rights for the EPL for £205 million.

[59] *Here's how much SuperSport paid for English Premier League rights.* 8 January 2016. MyBroadband. Available at https://mybroadband.co.za/news/broadcasting/150883-heres-how-much-supersport-paid-for-english-premier-league-rights.html

[60] SuperSport renews Premier League Rights. 11 April 2017. Available at https://www.dstv.com/en-ng/news/supersport-renews-premier-league-rights-20170411

6.7.3.3 UEFA European Champions League ("**UEFA**") and other UEFA Tournaments

6.7.3.3.1 SuperSport secured broadcasting rights for the UEFA Euro 2020 Championship, the UEFA Euro 2020 Qualifiers and the European Qualifiers (to be held from March 2019 to March 2020), for the 2022 World Cup in Qatar.[61] There is also a new UEFA Nationals League which is to commence in 2018. The broadcasting rights are non-exclusive for sub-Saharan Africa, and the adjacent islands, and exclusive for South Africa. No information is available on the monetary terms of the agreement.

6.7.3.3.2 The exclusive broadcasting rights for the UEFA Champions League and UEFA Europa League, for Sub-Saharan Africa, are also held by SuperSport, after they were awarded the broadcast rights for the period 2015-2018.[62] SuperSport holds exclusive English and Portuguese language rights and non-exclusive French language rights.

6.7.3.4 FIFA

SuperSport has been awarded the pay television rights for the 2018 FIFA World Cup, in Sub Saharan Africa. In addition, SuperSport also holds these rights in relation to the FIFA U-20 World Cup 2017, FIFA U-17 World Cup 2017, FIFA Beach Soccer World Cup 2017, FIFA Confederations Cup 2017, FIFA U-20 Women's World Cup 2018, FIFA U-17 Women's World Cup 2018.

6.7.4 **Rugby:**

6.7.4.1 Springbok and International games

SuperSport broadcasts all international Springbok rugby matches on its channels. In terms of Regulation 4.7(ii) of the Sports Broadcasting Rights Regulations, all international rugby matches played in South Africa, involving the senior South African national team are considered as national sporting events and must be made available by SuperSport to FTA broadcasters. Other international test matches, governed by the International Rugby Board ("**IRB**") are also broadcast on the SuperSport channels.

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[61] *SuperSport scores major Uefa Euro football rights*. 19 June 2017. Available at https://www.supersport.com/football/article.aspx?Id=4039254

[62] SuperSport gets Sub-Saharan rights. 7 November 2013. Available at http://www.uefa.com/insideuefa/about-uefa/news/newsid=2020835.html#/

6.7.4.2 <u>SuperRugby</u>

6.7.4.2.1 Another significant component of rugby broadcasting, is SuperRugby, which now covers teams from Argentina, Japan, South Africa, Australia and New Zealand, and is organised by SANZAR (SANZAR also organises the Rugby Championship).

6.7.4.2.2 In 2010, SANZAR concluded a five-year deal with SuperSport as the host broadcaster for South Africa, Fox Sports (Australia) and Sky Television (New Zealand).[63] The broadcasting rights agreements were worth USD 437 million, and covered the SuperRugby tournament (which then only consisted of 14 teams).

6.7.4.2.3 The Australian Rugby Union, which entered into an agreement with Fox Sports and Ten Network, secured a broadcasting deal worth AUS $ 275 million during 2015 for the new and improved SuperRugby tournament (covering teams from five nations).[64] No information is available on whether SARU secured a similar deal with SuperSport.

6.7.4.2.4 The final of the Super 12 (rugby), (if a South African team is involved), has been declared a national sporting event (as per Regulation 4.6(iii) of the Sports Broadcasting Rights Regulations) and must be made available to FTA broadcasters by SuperSport.

6.7.4.2.5 The Kings and Cheetahs were recently added to a European League after being voted out of the SuperRugby Tournament. The Pro Top 14 is also broadcast by SuperSport.[65]

6.7.4.3 <u>Domestic and other Rugby Tournaments</u>

6.7.4.3.1 Other tournaments that are currently only viewable on SuperSport are the International Sevens Tournament, Currie Cup (which includes the under 19 and under 21 junior tournaments), Varsity Cup, Old Mutual Classic Clashes (for high school teams) and the SuperSport Challenge (for community teams). As per Regulation 4.5 of the Sports Broadcasting Rights Regulations, the final of the Currie Cup has been declared to be a national sporting event and must be made available to FTA broadcasters by SuperSport. The Craven Week Tournament is only viewable on SuperSport.

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[63] *SuperSport renews SANZAR TV Rights Deal*. 22 April 2010. Sports Industry Group. Available at http://www.sportindustry.co.za/news/supersport-renews-sanzar-tv-rights-deal

[64] *Super Rugby TV rights Australia deal worth $293 million*. 17 December 2015. Sydney Morning Herald quoted in Stuff. Available at http://www.stuff.co.nz/sport/rugby/super-rugby/75201467/super-rugby-tv-rights-australia-deal-worth-293-million

[65] Lewis. SuperSport set to cover Pro14. 30 August 2017. SA Rugby Mag.co.za. Available at http://www.sarugbymag.co.za/blog/details/supersport-eyes-pro14-coverage. See also https://www.supersport.com/rugby/pro14/news/170831/pro14_lands_on_supersport

6.7.4.4 International competitions

6.7.4.4.1 Additional rugby union tournaments broadcast on SuperSport are the French T14 club rugby championship, Aviva English club rugby championship, New Zealand Mitre 10 Premiership and Championship club rugby competitions, Australian NRC club rugby competition, European Championship Premiership and Championship club rugby competitions.

6.7.4.4.2 The Six Nations European national championship is also available on SuperSport.

6.7.5 **Cricket:**

6.7.5.1 Proteas and domestic cricket

6.7.5.1.1 In 2015, SuperSport entered into a new agreement with Cricket South Africa ("**CSA**"), which extends until April 2021, with the rights to broadcast all home international games.[66] SuperSport makes a live feed available to SABC. However, games played abroad and domestic matches, are only available on SuperSport's channels. The financial terms of the CSA agreement were not disclosed to the public.

6.7.5.1.2 In terms of Regulation 4.5 of the Sports Broadcasting Rights Regulations, the Standard Bank Cup, which has been rebranded as the Momentum One Day Cup, is classified as a national sporting event and must be made available by SuperSport to FTA broadcasters.

6.7.5.2 International cricket leagues

6.7.5.2.1 SuperSport also had the rights to the 2017 Indian Premier League ("**IPL**") tournament, which covered South Africa and Sub-Saharan Africa.[67] SuperSport also has an agreement with Cricket Australia for the KFC Big Bash League ("**BBL**") and the Rebel Women's Big Bash League ("**WBBL**"). This is for a five-year term, which commenced in 2016.[68]

6.7.5.2.2 In addition, international matches (which consist of non-South African teams) and knock-out tournaments, such as the Championship Trophy, are also only available on SuperSport's channels.

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[66] Moonda. CSA renews deal with SuperSport till 2021. 15 April 2015. ESPN Cricinfo. Available at http://www.espncricinfo.com/southafrica/content/story/861663.html

[67] Chunikiah. *SuperSport and OSN to Broadcast the IPL 2017*. Nextv News International. 4 April 2017. Available at http://nextvnews.com/supersport-and-osn-to-broadcast-the-ipl-2017/

[68] *SuperSport's major cricket rights deal*. 9 June 2016. https://www.supersport.com/press-releases/news/160609/supersports_major_cricket_rights_deal

6.7.5.2.3 The Ashes, which commenced in November 2017, is only available on SuperSport's channels.

6.7.6 **Other Sports:**

6.7.6.1 Tennis

6.7.6.1.1 SuperSport also has the exclusive rights to certain tennis tournaments. From reviewing the publication, *TV Sports Markets*, it is evident that SuperSport has the exclusive rights to sub-Saharan Africa for the 2014-2018 Australian Open.[69] The annual broadcasting fee is US$700 000.

6.7.6.1.2 In 2017, SuperSport extended its agreement with the French Tennis Federation ("**FFT**") to broadcast Roland Garros for 2018 to 2021 in Sub-Saharan Africa.[70] It appears that this is an exclusive arrangement.

6.7.6.1.3 Online reports show that, for Sub-Saharan Africa, SuperSport also holds exclusive rights to Wimbledon and the US Open. [71]

6.7.6.2 Netball

During 2017, SuperSport acquired the exclusive broadcast rights for South African netball for a period of five years.[72] This covers the Test Series, Brutal Fruit Netball Premier League, Quad Series and Spar Championship.

6.7.6.3 WWE

SuperSport acquired the broadcasting rights for WWE (which includes live broadcasting) for sub-Saharan Africa.[73] Details of the agreement are limited, with SuperSport only referring to it as a "multi-year agreement".

6.7.6.4 Olympics

[69] *Open TV revenue to jump in 2017 thanks to pan-regional deals*. 19 February 2016. Volume 20. No 3. TV Sports Markets. Available at http://www.sportsmediaadvisors.com/docs/DS_Article_-_TV_Sports_Markets.pdf

[70] FFT and SuperSport Extend Partnership On Roland Garros Broadcasting Rights. 25 January 2017. Available at http://www.tennis-tourtalk.com/17613/fft-and-supersport-extend-partnership-on-roland-garros-broadcasting-rights

[71] Available at http://www.totalsportek.com/tennis/wimbledon-tv-channels/ and http://2016.usopen.org/en_US/about/tv_intl.html

[72] *SuperSport Renews Deal with Netball South Africa*. 3 July 2017. https://netball-sa.co.za/supersport-renews-deal-with-netball-south-africa/

[73] *WWE Coming to SuperSport*. 20 July 2017. Available at https://www.dstv.com/en-za/news/supersport-secures-wwe-broadcast-rights-2-20170720

The IOC awarded the Olympic Games pay television broadcasting rights for South Africa to SuperSport for the next two Summer Olympic Games and the Winter Olympics.[74] These rights also extend to sub-Saharan Africa.[75]

6.7.6.5 Varsity Sports

The Varsity Sports Tournament, in addition to Varsity Cup Rugby, covering athletics, soccer, hockey and netball is only accessible on SuperSport Channels. No further information is available in relation to the broadcasting terms.

6.7.6.6 Formula One Motor Racing

Although information is limited, it appears that SuperSport has exclusive rights for the broadcasting of Formula One in South Africa. Recently, extended commentary was obtained through Sky TV, which appears to hold certain exclusive rights to the broadcasting.

6.7.7 **Alternative sport categories**

6.7.7.1 Information relating to the Tour de France, Hockey, Swimming and other minor sports, which are all broadcast on SuperSport are difficult to obtain. The IAAF Athletics are also broadcast on the SuperSport channels.

6.7.8 The ability to broadcast key sports content for new entrants is essential if they are to have any chance of competing with MultiChoice for a significant number of high value subscribers. New entrants who do not have access to key sports content will simply not be able to grow their subscriber base as effectively as they would be able to do, if they had access to key sports content. The ability of new entrants to effectively compete will not only be impacted in respect of attracting high value subscribers but also in the provision of pay television services to other subscribers. Limited access to key sports content will also negatively impact on a new entrant's ability to package their own sports channels. Where a pay television broadcaster with a dominant market position limits access to key sports content, this will inevitably constrain the ability of new entrants to enter and effectively compete in the pay television market. It is for these reasons that Econet Media is of the view that the imposition of pro-competitive licence conditions on MultiChoice with regard to sports content rights are required. Econet Media's proposed pro-competitive licence conditions are set out in our response to Questions 25 to 28.

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[74] Ferreira. SABC, SuperSport given Olympic TV rights until 2024. Sport24. Available at http://www.sport24.co.za/OtherSport/South-Africa/sabc-supersport-given-olympic-tv-rights-until-2024-20170711. The SABC was awarded the FTA broadcasting rights for South Africa

[75] For the upcoming Olympics, Econet Media obtained FTA broadcasting rights in sub-Saharan Africa, as well as pay television broadcasting rights for the Kwese Sports channels.

Premium film and series content

6.7.9 Whilst, there are numerous global content suppliers, there is a limited supply of English language premium entertainment content available to Econet Media for the packaging of its own channels and the licensing of third party channels for its pay television platform. The reason for this is that there are a finite number of major Hollywood studios, namely Fox, MGM, Warner, Paramount, Sony, Disney and Universal as well as a select number of independent suppliers of highly prized content such as HBO, Fremantle, Endemol Shine, CBS and Lionsgate. The Hollywood studios have the financial ability to create a large range of products and, when compared to independent content suppliers from a pure quantity standpoint, studios have the greatest volume of product and on average higher production budgets. Hollywood studios release about thirty new movies per year compared to independent suppliers who release only a handful of movies per year. The box office receipts garnered by independent suppliers is also only a sliver of the total of box office receipts earned by the Hollywood studios in a year. Hollywood studios are known for their 'block buster' movies and acclaimed series. Likewise, a select number of independent suppliers are also known for consistently delivering 'hit' series (i.e. CBS, Showtime and HBO). Along with sports content, it is this mix of Hollywood studios and independent premium content which is the most desirous to pay television platforms as such content is regarded as the key drivers of pay television subscriptions.

6.8 **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?**

6.8.1 As mentioned earlier, the market share of a firm can provide an indication of dominance, but needs to be considered in conjunction with factors such as barriers to entry before conclusions about market power can be drawn. Keeping this in mind, we have two concerns with the way in which the Authority tries to illustrate market power in the upstream market for rights to premium content.

6.8.2 Our first concern is that the Authority identifies five separate markets for premium content (premium movies, premium live soccer, premium live rugby, premium live cricket and other premium content). As each of these constitute a separate relevant market (with the implied assumption that broadcasters/ channel aggregators would not substitute between these types of content), it is incorrect to group these together to calculate a single market share for right holders. Instead, a right holder's market share needs to be calculated within each of these distinct markets.

6.8.3 Second, it is an oversimplification to calculate market shares based on the count of rights that a broadcaster holds. Even within premium content, there is variation in the value that a broadcaster can derive from these rights and hence the cost that it is willing to pay. A more accurate approach would be to estimate market shares based on the value (cost) of the rights that a broadcaster holds in each of these categories.

6.8.4 Our response to Question 14 on effective competition also provided insight into what other factors besides market shares should be used to understand the dynamic functioning of the market.

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

6.9.1 Vertical integration is in general considered to be pro-competitive and efficiency enhancing[76], but the Authority has correctly identified that it may limit effective competition in the subscription broadcasting market (para. 6.3.15). Besides the concerns that it may create in terms of anti-competitive behaviour that fall within the realm of ex post competition policy (e.g. refusals to supply, margin squeezes, raising rivals' costs, exclusivity deals, or monopsony (buyer power) in content acquisition[77]), it may also create market failure that needs to be addressed through *ex ante* competition policy.

6.9.2 Ofcom notes that, besides the barriers that are intrinsic to gaining access to content rights, a vertically integrated incumbent may have the incentive to create additional barriers to entry by leveraging from its presence in the retail market. For instance, while a new wholesale provider may be building up its portfolio of content rights, the vertically integrated incumbent may restrict the entrant's access to the retail market (e.g. through a short term reduction in subscription fees) and in doing so limit the ability of the entrant to *"monetise its rights"*.[78] We illustrated above that MultiChoice is active at all levels of the supply chain. For a new entrant to become a successful competitor, barriers to compete effectively at all levels of the supply chain need to be as low as possible.

6.9.3 In relation to the UK market, Ofcom writes that *"we are now at a point in time where new market entry is becoming possible based on new distribution technologies (IPTV, DTT, Internet, mobile TV). We therefore need to be particularly alert to the risks associated with dynamic foreclosure, i.e. the risk that firms already present in the market might exploit or benefit from certain dynamic characteristics of the market to foreclose entry by new providers*

[76] Benefits of having an integrated relationship between different levels of the value chain include removing the effects of double-marginalisation and, in the context of broadcasting, can also reduce the transaction costs associated with negotiating agreements for content rights. Vertical integration between a broadcaster's retail service and the wholesale content market can also result in the provision of content that is closely tailored to specific consumer preferences.

[77] OECD (2013). Competition issues in Television and Broadcasting (p.7)

[78] Ofcom (2007). Pay TV market investigation. *Consultation Document* (p. 115)

(*or – analogously – to drive out firms that have recently entered)."*[79] Ofcom highlights three factors that may strengthen the position of the incumbent satellite provider (Sky) in this regard: its vertical integration, its firm grasp on attractive content that it acquires on an exclusive basis, and its retail customer base *"which is larger than those of all other pay TV operators combined".*[80] They argue that these characteristics enable Sky to pay more for attractive content because it can recover its costs over a larger customer base. All of these factors listed by Ofcom also apply to MultiChoice.

6.9.4 Importantly, it is not necessarily the nature of vertical integration *per se* that may limit effective competition. Rather, it is the barriers to entry in the market for content or wholesale channels (see our response to Question 15), specifically in relation to premium content. If MultiChoice's comparative advantage in the acquisition of premium content can be addressed, the benefits to competition should trickle down along the rest of the supply chain.

6.10 **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 <u>acquisition of premium content</u>?**

6.10.1 The Authority and the Competition Commission have concurrent jurisdiction to look into the competitive dynamics of the broadcasting market. South Africa's broadcasting sector is regulated by the Authority [81], while the Competition Commission and Tribunal are responsible for implementing competition policy. The Authority also has a measure of responsibility to facilitate competition in the sector. This is provided for by sections 3(1A)(a) and 82 of the South African Competition Act 89 of 1998 as amended ("**the Competition Act**"), according to which concurrent jurisdiction over competition matters applies where a sector is subject to regulation by another regulatory authority.

6.10.2 There is however an important distinction in the type of competition problems that the Authority and the Competition Authorities have to deal with. The purpose of competition law is to address ex post anti-competitive behaviour, whereas *ex ante* sector specific regulation is put in place to address market failure, i.e. when a lack of competition is caused by structural market features rather than by the illegal, anti-competitive behaviour of firms. *"Ex ante regulation refers to explicit, systemic market intervention by the regulator 'before the fact', to establish conditions within an industry to ensure that the relevant market functions optimally. In contrast, ex post regulation refers to a situation where no explicit market intervention is performed, but where a regulator will detect and investigate alleged prohibited practices within any industry*

[79] Ibid. (p. 113)
[80] Ibid. (p. 114)
[81] ICASA was established by the ICASA Act in 2000 to regulate broadcasting and telecommunications in the public interest.

or sector on a piecemeal basis and, if necessary, punish or remedy any identified unlawful conduct. Competition authorities enable competitive markets ex post by investigating alleged anti-competitive behaviour and evaluating merger activity, while sector regulators are obligated to implement ex ante regulation to correct market failure."[82] It is therefore not so much a matter of choosing between remedies, but rather of identifying the root of the competition problem(s) and establishing whether the behaviour satisfies the conditions that make it punishable under the Competition Act.

6.10.3 Our analysis indicates various potential sources of market failure in the broadcasting sector, such as the limited availability of rights to especially premium content, switching costs that make entry more difficult, and the advantages that MultiChoice's incumbency gives to it by for instance allowing it to commission more content than smaller players. While these market characteristics may not amount to anti-competitive behaviour *per se,* they do increase entry barriers, substantially lessen competition and need to be addressed through *ex ante* regulatory interventions.

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

6.11.1 We agree with all but one of the barriers to entry that the Authority identifies at the retail market: in our view, brand loyalty (para. 6.5.1) does not play a considerable role as a barrier to entry in the market. If a challenger to DStv is able to offer content of a similar quality but at a lower price, consumers would likely switch, subject to the associated switching costs. In all likelihood it is MultiChoice's access to premium content rather than its brand that drives consumer behaviour.

6.11.2 We agree with the Authority that high switching costs (para. 6.5.2) make it more difficult for broadcasters to enter the market, but the Authority fails to mention the additional pressure that switching costs place on smaller players/ entrants to access premium content. New entrants need to come up with ways of incentivising viewers to alter their behavioural patterns or to switch away from the incumbent subscription broadcaster. The lack of access to DStv's platform and/or interoperability means that new entrants need to offer content that is sufficiently attractive for audiences to incur the costs associated with switching away from their established relationship with a broadcaster. However, as mentioned earlier, MultiChoice has exclusive rights to the majority of rights to premium content and is often in a position to outbid smaller players in acquiring such content. New entrants face substantial capital requirements to be able to purchase rights to premium content, etc. These costs may be prohibitively high,

[82] Fourie, H., L. Granville & N. Theron (2017). Regulatory ambiguity and policy uncertainty in South Africa's telecommunications sector. *ERSA Working Paper* (in press).

especially if it a large part of the retail market is already tied up in subscription contracts with an incumbent broadcaster. This increases the cost of competitors to access premium content, critical for attracting viewers and hence entrenches MultiChoice's position in the market. Ofcom[83] notes that *"having sole access to premium content on a platform is likely to confer significant strength of portfolio on such a retailer. In these circumstances platforms may be prone to 'tipping' – i.e. once one retailer has emerged as predominant, it is likely to be extremely difficult for a competitor to displace it"*. High switching costs contribute to these dynamics.

6.12 We agree with the Authority's view that bundling of premium and basic-tier content can pose a barrier to entry, but the Authority fails to mention another way in which MultiChoice is bundling its products. We explained above that DStv subscribers are able to access content through different platforms in addition to satellite television (e.g. online and mobile platforms). This gives access to real-time streaming of satellite channels as well as to DStv's on demand services (i.e. the catch up service, the TVOD service known as "Box Office" and the Showmax SVOD service) via streaming and temporary download. If competing broadcasters are unable to also offer these services, it is unlikely that subscribers will switch.

6.13 In addition, MultiChoice, as the incumbent dominant broadcaster, has established relationships with content providers, which make it more difficult for new entrants to compete. These relationships may make it easier for MultiChoice to enter into agreements for the exclusive distribution of premium content, thereby foreclosing competitors from the market.

6.14 In terms of regulatory barriers, the Authority fails to mention the effect that South Africa's slow transition to DTT has had on the market in terms of delaying potential new entry on a DTT platform. Furthermore, M-Net's licence will be converted to a DTT licence which will only serve to further enhance its competitive advantage.

6.15 There is an additional barrier to entry that the Authority fails to mention, which is the access that an entrant needs to a broadcasting platform to supply its services, e.g. a satellite transmission platform. As mentioned in our description of the market for technical services, this includes STBs, CAS, the API), etc. Without access to such a platform, no new entrants are able to compete in the market for subscription television. This is aggravated by the fact that MultiChoice has pay television exclusivity on the Intelsat and Eutelsat platforms in terms of satellite capacity agreements with lengthy contract terms. There is relevant case precedent where access to a broadcaster's platform had to be granted, such as with NewsCorp in Italy and KirchPay TV in Germany (see Chapter 8 below).

[83] Ofcom (2007). Pay TV market investigation. *Consultation Document* (p. 105)

6.16 Some of these barriers sprout from ineffective competition higher up in the value chain. A lack of access to attractive programming may for instance point to barriers to entry in the market for premium content or channels. In these instances, it is important that the Authority should target its regulatory interventions as high up in the value chain as possible, so that the effects thereof will trickle down to the retail level of the market.

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

6.17.1 The Authority makes use of the number of subscribers of a subscription broadcasting platform to calculate the platform's market share in the retail market, but makes the mistake of calculating market shares across the entire subscription television broadcasting market. This contradicts the fact that it defines two subscription broadcasting retail markets: a market for premium subscription TV channels and basic-tier subscription TV channels. (As explained in our response to Question 8, we refined these definitions to a market for premium subscription TV *bouquet*s and a market for basic-tier subscription TV *bouquets*.) Market shares in each of these markets need to be estimated separately. For instance, due to MultiChoice's stronghold on the majority of premium content, it is likely to have almost 100% of the retail market for premium bouquets.

6.17.2 A second point is that the proportion of subscribers to a subscription television broadcaster would not necessarily mirror the proportion of revenue that it has of the retail market, since the subscription fees that broadcasters charge may differ. Calculating market shares that are based on revenue is likely to give a more accurate reflection than subscriber numbers of a broadcaster's position in the market.

6.17.3 In the context of market shares, it is important to remember that a firm's market share is not necessarily an indication of its market power: there are other factors that also need to be taken into account to determine if a firm is able to maintain its prices above competitive levels. These include barriers to entry and potential competition, barriers to expansion, countervailing buyer power, product differentiation and the nature of oligopolistic interaction between firms.[84] We elaborate on these factors in our response to Question 23 below.

[84] Bishop, S. and M. Walker (2012) The Assessment of Market Power. In *The Economics of EC Competition Law: Concepts, Application and Measurement.*

7 CHAPTER 7 - DISCUSSION DOCUMENT: CONSIDERATION OF LICENSEES WITH SIGNIFICANT MARKET POWER

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

7.1.1 The Authority (para. 7.1.1) refers to the ECA which states that SMP may flow from dominance, control of an essential facility or vertical relationships, but does not mention any market characteristics that may prevent firms with these characteristics from using its market power. There are conditions under which even a firm with 100% of the market may not be able to profitably maintain price increases. In all likelihood, if found to have a market share of more than 45%, MultiChoice will fall back on any of these factors to illustrate that they are not able to profitably maintain price increases in any of the relevant markets. We deal with some of these below.

7.1.2 First, barriers to entry and potential competition can limit a firm's attempts to exercise market power. "Indeed, the constraint posed by entry, or just the potential for entry, can in certain circumstances prevent even firms which enjoy very high market shares from exercising market power".[85] However, for entry to pose a credible threat, two factors that play a role in a firm's entry decision need to be considered: the extent of sunk (or unrecoverable) costs associated with entry, and the expected profitability of entry. In the subscription television market, the cost of acquiring (especially premium) content is high, and many subscribers already have contracts with MultiChoice, which due to high switching costs potentially lowers the expected profitability of entry for a retail competitor. These factors make entry less attractive, reinforcing MultiChoice's market power.

7.1.3 Another factor that may influence a firm's market power are barriers to expansion, through factors that prevent firms already in the market from quickly and cheaply increasing their output. In the context of the retail subscription market, this may help to explain why other players such as Deukom or StarSat have not managed to substantially increase their market shares. These firms were able to obtain a licence and enter the South African broadcasting market, but struggle to grow. One possible explanation may be a lack of access to the type of content that attracts new subscribers to a platform. Barriers to expansion are high, and therefore do not place a strong constraint on limiting MultiChoice's market power in the subscription television sector.

[85] Bishop, S. and M. Walker (2012) The Assessment of Market Power. In *The Economics of EC Competition Law: Concepts, Application and Measurement* (p. 70).

7.1.4 A third factor that can affect a firm's ability to use its market power is countervailing buyer power. At the retail level, no other subscription television broadcaster is able to offer the same premium bouquets as DStv, and subscribers therefore have no outside options that can limit MultiChoice's market power in this segment of the market. If one reasons that Deukom or StarSat are outside options to MultiChoice in the market for basic-tier bouquets, high switching costs reduce the threat of these outside options to MultiChoice.

7.1.5 These dynamics are also important in the context of a two-sided market, where a broadcaster's ability to sell advertising space may be influenced by the number of subscribers on its platform. However, since the Subscription Broadcasting Regulations prohibit advertising revenue from forming the basis of a subscription broadcaster's income (as we explained earlier) and to our knowledge plays a small role in MultiChoice's revenue stream, we believe that the two-sided nature of the market in this case does not substantially constrain MultiChoice's market power.

7.1.6 Product differentiation may also influence a firm's market power by "softening" the degree of price competition between firms.[86] Consumer switching after a price increase is a function of how closely substitutable other available products or services are. If firms offer differentiated products or services, fewer consumers may switch following a price increase, making it easier for firms to profitably sustain higher prices. As mentioned above, MultiChoice is the only subscription television broadcaster offering a large variety of premium content, and to our knowledge its basic-tier bouquets have a much larger selection of non-premium content than those of its competitors. In addition, the content available through Deukom is specifically targeted to the German-speaking population of South Africa, differentiating it substantially from MultiChoice.

7.1.7 Finally, the oligopolistic interaction between firms can also be assessed to understand whether the prevailing market prices are the outcome of competition. A firm's response to price increases or decreases by its competitors can be analysed to inform this understanding. However, with the information at hand our preliminary view is that the markets which we have defined tend to be monopolistic rather than oligopolistic in nature.

7.1.8 In sum, the Authority is correct to look at factors such as market share and vertical integration to identify SMP, but also needs to look beyond these factors at whether the characteristics of the market contribute to a lessening of competition.

[86] Bishop, S. and M. Walker (2012) The Assessment of Market Power. In *The Economics of EC Competition Law: Concepts, Application and Measurement* (p. 85).

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

7.2.1 In relation to vertical integration, the OECD[87] comments that "A key issue is that a downstream broadcasting service provider may be able to leverage its market position to gain power in an upstream market for content". This has been true for MultiChoice, whose large footprint in the retail market has allowed it to grow its market share in the upstream market for content production and access to premium content rights, and vice versa. MultiChoice is active at the content production and packaging levels of the value chain.

7.2.2 In deciding whether or not to make content or channels that are produced or packaged in-house available to third parties, MultiChoice faces a trade-off between increased income from the sale of the content rights/channels to potential competitors, and the risk of losing subscribers who may switch to competitors if the content becomes available on other platforms. However, a vertically integrated, incumbent wholesale channel provider will not necessarily forego large revenues if it chooses not to supply its channels to a new entrant, who in all likelihood will not have large resources to spend on obtaining content rights. The incumbent will weigh the (potentially low) short term cost of revenue foregone against the longer term dynamic effects in which making access to its content may allow a competing retailer to compete more fiercely. As a result, a vertically integrated wholesale channel supplier will likely choose not to make its channels available to third parties. This may lead to a lessening of competition in the market.

7.2.3 Convergence also influences the ability of broadcasters to leverage market power in some segments of the market to grow in others. MultiChoice's access to premium and non-premium content has made it easy for it to enter the OTT market, which has given it a competitive advantage over other pay television broadcasters and OTT service providers. By leveraging from its negotiations for pay television content rights, it also gains access to content to screen on its own OTT platform/s. Competitors are therefore not only blocked out of the first-run television broadcasting window, but also out of the second-run windows.

7.2.4 Finally, MultiChoice, through its affiliation with firms such as SuperSport, M-Net and Orbicom is fully integrated, which makes it more efficient, but it also makes it more difficult for other subscription broadcasters to enter and become effective competitors. Any competitor that enters the market will be hard-pressed to compete with a firm that is well-established throughout the entire value chain. This creates a competition concern, especially as there are

[87] OECD (2013). Competition Issues in Television and Broadcasting. *Policy Roundtable.* DAF/COMP/GF(2013)13 (p. 7)

few factors that limit MultiChoice’s market power, as was explained in response to Question 23.

8 CHAPTER 8 - DISCUSSION DOCUMENT: POSSIBLE PRO-COMPETITIVE LICENCE CONDITIONS

8.1 The Competition Commission in its Comments on the National Integrated ICT Policy Discussion Paper[88] noted that several international competition law cases have dealt with premium content which offer remedial options incorporating both *ex ante* regulation and *ex post* (competition enforcement) interventions. In the Competition Commission's view, the remedial options considered and enforced in these cases provide a useful framework that could be potentially applied to the South African broadcasting landscape.

8.2 Once the Authority has followed the process set out in section 67(4) under the ECA and if a finding is made that there is ineffective competition and that MultiChoice has SMP in the defined markets, Econet Media would be supportive of an approach where pro-competitive measures similar to those implemented in other international jurisdictions are imposed on any pay television broadcaster found to have SMP in the South African market. Econet Media has detailed below the various international precedents which it believes should guide the Authority's decision when considering the various pro-competition licence conditions to be imposed on the licensee found to possess SMP.

8.3 Germany

8.3.1 In 2000, British Sky Broadcasting Ltd ("**BSkyB**") proposed to acquire a 24% stake in the German pay television operator, KirchPay TV. The notification of the merger was made to the European Commission. [89]

8.3.2 The European Commission determined that KirchPay TV had a dominant market position, particularly in the premium movie and sports domains as it had a number of deals for pay television rights with a number of film studios and as a result enjoyed *a de facto* monopoly. KirchPay TV also controlled the pay television rights to live sports events including the German Bundesliga, Formula One, Grand Prix, boxing, tennis, golf, handball and others. As a result, any potential new entrant into the German pay television market faced a significant lack of premium content. The European Commission's main concern was that BSkyB would be able to provide the necessary resources to enable KirchPay TV to expand into digital interactive television services through the use of its proprietary set-top box which thereby creating a dominant position for KirchPay TV.

[88] The Competition Commission submission on the National Integrated ICT Policy Discussion Paper dated 11 February 2014 at para 7.3.
[89] Case No COMP/JV.37.

8.3.3 The European Commission allowed the acquisition to take place subject to the following commitments:

8.3.3.1 KirchPay TV providing third parties with access to its technical services (i.e. API access and access to other software interfaces on the KirchPay TV platform as well as CAS access) on a fair, reasonable and non-discriminatory basis;

8.3.3.2 KirchPay TV allowing for the reception of third parties digitally transmitted services to be received by viewers on its proprietary set-top boxes;

8.3.3.3 the development, by KirchPay TV, of a standardised application programming interface (API) for its proprietary set-top boxes and the publication of the technical specifications for its proprietary set-top boxes;

8.3.3.4 the development and operation by KirchPay TV of simulcrypt arrangements with all digital access providers in Germany on reasonable commercial terms;

8.3.3.5 KirchPay TV agreeing, at the request of a competing platform provider, to retail its pay television services directly to subscribers via simulcrypt arrangements to digital television decoders other than its proprietary set-top box;

8.3.3.6 KirchPay TV agreeing to grant manufacturing licences for the production of its proprietary set-top boxes to interested manufacturers in a non-discriminatory manner and under standard industry terms and conditions;

8.3.3.7 KirchPay TV and BSkyB agreeing that bids for programming rights would not incorporate or extend to the other's pay television services.

8.4 **Italy**

8.4.1 In 2002, News Corporation ("**NewsCorp**") proposed to acquire the Italian pay television companies, Telepiů Spa and Stream Spa through the purchase of shares. The acquisition would allow the combined businesses to provide direct to home satellite pay television services to customers.[90]

8.4.2 One of the key interventions made by the European Commission in respect of the merger was curtail the exclusivity provisions in existing agreements with content suppliers. The effect of this requirement was to provide existing competitors and potential new entrants with the

[90] See Newscorp/ Telepiů Spa, Case No COMP/M.2876

opportunity to bid for content that would otherwise have been inaccessible due to existing long-term exclusive arrangements.

8.4.3 The European Commission allowed the acquisition to take place subject to the following commitments:

8.4.3.1 content suppliers being able to unilaterally terminate their contracts with Telepiů Spa and Stream Spa, without incurring any penalties;

8.4.3.2 NewsCorp waiving its exclusive rights and holdbacks under its existing content agreements with respect to all television platforms (i.e. terrestrial, cable mobile and Internet) other than DTH;

8.4.3.3 NewsCorp waiving its exclusive rights for PPV, VOD and near video on demand ("**NVOD**") on all platforms under its existing agreements with its content suppliers;

8.4.3.4 NewsCorp limiting the period of exclusivity for all future contracts for the acquisition of football rights to two years and to DTH transmission only. All other means of transmission would be required to be obtained on a non-exclusive basis;

8.4.3.5 NewsCorp limiting the period of exclusivity for all future contracts for the acquisition of content rights from studios to three years and to DTH transmission only. All other means of transmission would be required to be obtained on a non-exclusive basis;

8.4.3.6 NewsCorp agreeing to allow its contractual counterparts for the acquisition of football rights and other worldwide sports events to terminate such contracts on an annual basis;

8.4.3.7 NewsCorp agreeing not to include any holdbacks or black out rights in respect of DTH transmission in any of its future agreements for the acquisition of content;

8.4.3.8 NewsCorp agreeing not to acquire any exclusive rights for PPV, VOD and NVOD platforms in its future agreements for the acquisition of content;

8.4.3.9 NewsCorp agreeing to offer third parties, on an unbundled and non-exclusive basis, the right to distribute on platforms other than DTH, any premium content for the duration that the combined NewsCorp/Telepiů Spa offers such premium content to its subscribers. The offer to be made to such parties was required to be based on the retail minus principle;

8.4.3.10 NewsCorp agreeing to grant third parties and possible new DTH entrants access to its platform and access to its API according to a cost orientated, non-discriminatory formula based on: (i) the directly attributable costs of the services, a share of relevant technical costs (fixed and common costs) and a reasonable return over an appropriate period;

8.4.3.11 NewsCorp granting third parties on a fair and non-discriminatory price basis, licenses to use its CAS;

8.4.3.12 NewsCorp entering into simulcrypt agreements in Italy as soon as reasonably possible and no later than nine months from receipt of a written request from an interested third party; and

8.4.3.13 divestiture by Telepiů Spa of all is digital and analogue terrestrial broadcasting assets together with a commitment not to enter into any further DTT activities either as a network or retail operator.

8.4.4 On 20 July 2010, the European Commission, after having undertaken a market review and an assessment of competition, announced that it had relieved NewsCorp's Sky Italia from one of the commitments given in the context of the 2003 NewsCorp/Telepiu merger. The European Commission granted Sky Italia the right to operate one DTT mux to allow it to bid in the tender for the allocation of digital terrestrial TV multiplexes in Italy. The European Commission did impose a limitation, namely, that the bidding would only be in relation to one frequency. To the extent that Sky Italia won the tender, it would be on an exclusive basis for five years, in relation to FTA.

8.5 **France**

8.5.1 In 2006, TPS and CanalSatelite merged to create Canal+France, bringing together France's two major satellite television operators. TPS was both an acquirer of broadcasting rights and a distributor of satellite television services while CanalSatelite was active in satellite television distribution91.

8.5.2 France's competition and telecommunications regulators, determined that Canal+France would hold a dominant position at every level of the pay television value chain and that as a result there was a risk of market foreclosure and as a result, the merger raised significant concerns in relation to the acquisition of broadcasting rights for premium content

8.5.3 The merger was approved subject to the following commitments being agreed to by the parties:

8.5.3.1 Canal+France agreeing to unwind its exclusivity over existing content rights by negotiating in good faith with rights holders to permit the exploitation of exclusive PPV and VOD;

[91] OECD Roundtables - Competition Issues in Television and Broadcasting 2013.

8.5.3.2 a limitation being placed on the duration and exclusivity of future content rights agreements. Agreements for the acquisition of Hollywood movie and sports content were limited to a maximum duration of three years;

8.5.3.3 Canal+France being prohibited from entering into contracts with French producers for French movies and from negotiating separate contracts for the acquisition of different types and forms of broadcasting rights (i.e. VOD, SVOD and PPV), without the possibility of bulk purchasing; and

8.5.3.4 a requirement that wholesale premium channels be provided to other pay television operators by making channels available on transparent, objective and non-discriminatory terms and on a non-exclusive basis.

8.5.3.5 In 2011 the French Competition Authority withdrew its clearance of the Canal+France merger, as ten commitments were not complied with by the merged party. A fine of EUR30 million was imposed on Canal+France. It was ruled that commitments regarding non-discrimination and the unbundling of television channels were not followed in time. As Canal+ delayed these responsibilities, it could promote its "The New CanalSat", which contained premium content, to migrating TPS subscribers. This in turn meant that competitors could not provide a retail offering, consisting of some or all of Canal+'s seven channels, covered by the unbundling obligation. The quality of the channels, and its relationships with independent and third party channels were also highlighted by the Competition Authority as problematic. Furthermore, it was found that Canal+France did not meet its commitment to: "facilitate the acquisition of broadcasting rights by competitors…by putting an end to all the exclusive broadcasting rights it had under current contracts and by prohibiting *future acquisition of such exclusive rights"*. [92]

8.6 **United Kingdom**

Premium Entertainment Content

8.6.1 In 2010, Ofcom and the UK CC made a preliminary finding that Sky TV possessed market power in the pay television retail market which had the effect of raising barriers to the acquisition of first run pay television window movie rights. Of concern to Ofcom were the following aspects of the distribution and acquisition by Sky TV of movie rights from the Hollywood studios:

[92]A merger clearance decision withdrawn by the French Competition Authority. 11 October 2011. Hogan Lovells. Available at https://www.lexology.com/library/detail.aspx?g=884a22a7-f42e-4550-93e7-5bdecc943a49

8.6.1.1 the limited pool of content available from the major Hollywood studios;

8.6.1.2 the windows distribution release mechanism for movie content;

8.6.1.3 the exclusive licensing arrangements entered into between Sky TV and the major Hollywood studios;

8.6.1.4 other restrictions in the licensing contracts for rights in the first pay television subscription window;

8.6.1.5 the fact that rights were acquired by Sky TV for varying durations with the result that its contracts for the acquisition of premium content did not run in parallel resulting in the staggered availability of content rights;

8.6.1.6 Sky TV's conduct in acquiring rights to movies in the FSPTW from all of the major Hollywood movies and the aggregation of such rights by Sky TV into single wholesale offerings;

8.6.1.7 Sky TV's market power in the distribution of premium movie content which in turn gave it a high degree of negotiating power with the Hollywood studios in the upstream market; and

8.6.1.8 Sky TV's vertical integration across the entire pay television supply chain which in conjunction with its market power gave it an incentive to restrict the distribution of its core premium movie channels.

8.6.2 On 19 August 2011, the UK CC issued its provisional decision and found that Sky TV's contracts with the studios posed a significant barrier to entry to potential competitors and that the prices charged by Sky were too high. Pursuant to the finding that Sky TV's control of the acquisition and distribution of movie rights had an adverse effect on competition between pay television retailers, the UK CC sought remedial options aimed at lowering the barriers to the acquisition of FSPTW movie rights which included:

8.6.2.1 a restriction on the number of major movie studios from whom Sky TV could licence exclusive FSPTW movie rights;

8.6.2.2 a restriction on the range of exclusive rights that Sky TV could licence from the major Hollywood studios; and

8.6.2.3 the imposition of 'must offer' retail measures requiring Sky TV to acquire movies on a wholesale basis and to offer to its subscribers any movie channel containing FSPTW movie content created by a competitor.

8.6.3 In addition, the UK CC proposed the following supplementary remedies:

8.6.3.1 a wholesale 'must offer' obligation which essentially required Sky TV to offer other pay television operators some or all of its movie content containing FSPTW movie rights on regulated terms;

8.6.3.2 a reduction in the duration of the FSPTW movie rights acquired by Sky TV; and

8.6.3.3 the application of price controls to the prices charged by Sky TV to its subscribers.

8.6.4 In August 2012, the UK CC completed its investigation into movies on pay television concluding that there was no adverse effect in the market in relation to movies, due in part, to the launch of LOVEFiLM's and Netflix's SVOD services. It did, however, state that in its view competition in the pay television retail market as a whole was ineffective.[93]

Sports Content

8.6.5 Pursuant to a consultative process and an assessment of Sky TV's dominant market position both in the supply of sports channels and as a pay television retailer and a finding that limited distribution of the key sports content shown on Sky TV's sports channels has a detrimental effect on competition, in 2010, Ofcom imposed the following 'must offer' obligations on Sky TV by inserting the following conditions in the broadcast licences of Sky Sports 1 and 2 (and their HD versions):

8.6.5.1 Sky TV must offer to supply Sky Sports 1 and Sky Sports 2 to other retailers at wholesale prices set by Ofcom;

8.6.5.2 Sky TV must offer to wholesale high definition versions of Sky Sports 1 and Sky Sports 2. Ofcom did not set wholesale prices for the HD channels in order to promote future innovation. However, the HD channels had to be offered at prices which were fair, reasonable and non-discriminatory.

8.6.6 On 29 April 2010, BSkyB reached an interim agreement with Ofcom to offer its flagship sports channels at a lower wholesale cost to Top Up TV, Virgin Media and BT Vision. The interim agreement between BSkyB and Ofcom resulted in the three competitors having access to Sky Sports 1 and Sky Sports 2 at an Ofcom mandated wholesale 'must offer' price for carriage on digital terrestrial and cable platforms. The agreement was extended to include Real Digital in November 2010.

[93] OECD – Policy Roundtables: Competition Issues in Television and Broadcasting (2013).

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

8.7.1 Shorten exclusive contracts

8.7.1.1 The Authority has suggested that exclusive contracts be shortened as a possible pro-competitive licence condition. The Competition Commission is also of the view that regulatory intervention is required to ensure the shorter duration of exclusive contracts. Econet Media supports the proposal that exclusive contracts be shortened and believes that the approach adopted by the European Commission in limiting agreements for the acquisition of sports content to two years and agreements for the acquisition of premium entertainment content to three years, is an appropriate measure.

8.7.1.2 The shortening of exclusive contracts as a standalone measure will be ineffective in countering the potential anti-competitive effects stemming from MultiChoice's extensive acquisition of premium entertainment content from studios and independent content suppliers. As has been discussed in this submission, the very nature of an output licensing agreement is to enable the acquirer of the content to licence the entire product produced by the content supplier over the duration of the output licensing agreement. If, MultiChoice continues to enter into output licensing agreements with the Hollywood studios and other content suppliers, it will still be able to effectively block competitors from accessing premium entertainment content. It is for this reason that Econet Media proposes that the Authority considers a pro-competitive licence condition which would limit MultiChoice's (and its affiliates) ability to enter into output and volume licensing agreements to no more than two Hollywood studios. MultiChoice should also be prohibited from entering into any form of output licensing agreement with independent suppliers of content.

8.7.1.3 One of the concerns raised by Ofcom in its investigation into Sky TV's dominance in the pay television market was the existence of other restrictive contractual terms which had the effect of distorting or restricting competition in the pay television sector. Whilst, Ofcom did not identify the nature of the restrictive contractual terms, the types of contractual terms which would give rise to competition concerns if employed by a dominant pay television operator are automatic renewal clauses, rights of first refusal in respect of the licensing of new or additional content and any form of restraint placed on content suppliers or local producers by MultiChoice.

8.7.2 The introduction of unbundling

8.7.2.1 In order to leverage the value of sports rights, sports bodies and leagues have traditionally sold their television rights on a joint basis on behalf of their constituent members. The collective purchase and sale of sports broadcasting rights has raised several competition law issues. These arrangements were the subject of an investigation by the Competition Directorate of the European Commission who was concerned about the fact that the rights to the UEAF European Champions' League were being sold exclusively to a single broadcaster on a territory-by-territory basis in terms of long-term contracts. Following its investigation and decision, the European Commission set the following conditions for the sale of sports television rights:

8.7.2.1.1 an open tender process;

8.7.2.1.2 the 'unbundling' of the offer to allow for more than one buyer;

8.7.2.1.3 the limitation of exclusive contract terms to no more than three years; and

8.7.2.1.4 a prohibition on automatic renewals of the broadcast rights.[94]

8.7.2.2 The European Commission also investigated the broadcast selling arrangements for the EPL. After protracted negotiations between the parties, the EPL agreed that from 2007 onwards no single broadcaster would be able to buy all the rights of the centrally marketed live rights packages. Both the EPL (in respect of all matches) and the clubs (in respect of those matches in which they participated) have the right to provide video content on the Internet as of midnight on the night of the match. The clubs also have the right to provide mobile content as of midnight following the match. In addition, the EPL has agreed to increased radio broadcasting and for two matches to be broadcast live nationally on Saturday afternoons.[95]

8.7.2.3 A further investigation was undertaken by the European Commission in respect of the collective sale of broadcasting rights for the German Bundesliga. The same competition law considerations as in the UEFA and EPL cases were applied to the German Bundesliga case, namely:

8.7.2.3.1 the unbundling of rights into separate rights packages for television broadcasting and mobile platforms;

8.7.2.3.2 the possibility for individual clubs to exploit certain unsold rights and rights not used by the initial purchaser as well as the exploitation of deferred rights, Internet broadcasting and mobile broadcasting rights;

[94] Collective sale of sports television rights in the European Union: Competition Law Aspects - Ian Blackshaw.
[95] See Case 38173, OJC7.

8.7.2.3.3 the sale of the rights by way of a public tender process; and

8.7.2.3.4 the limitation of exclusive contracts to three football seasons.[96]

8.7.2.4 Econet Media supports the approach adopted by the European Commission in respect of the acquisition of sports rights. To the extent that these requirements are not implemented for the acquisition of local sports rights, the terms on which local sports bodies make their sports broadcast rights available for purchase should be regulated in a manner which is similar to the approach adopted by the European Commission and other countries such as Brazil.

8.7.2.5 The Authority has also referred to the bundling of subscription television services with discounted data services (para 6.5.4). Bundling can provide a range of benefits, including allowing service providers to exploit economies of scale and scope, offering consumers lower retail prices, quality improvements and lower transaction costs from consolidated billing arrangements. Bundling can, however, also give rise to competition concerns if an incumbent operator in the pay television market uses a content bundling strategy to gain increased market share and drive competitors out of the market. Where there is the potential for such an occurrence, then regulatory intervention to curb any anti-competitive effects arising from such bundling activities will be required.

8.7.3 <u>The imposition of rights splitting</u>

Another pro-competitive measure which Econet Media believes will be important to ensuring that the barriers to acquiring premium entertainment and sports content are lowered would be for the Authority to impose a requirement on MultiChoice thatprecludes it from acquiring DTT, Internet and mobile rights on an exclusive basis. This measure will ensure that other pay television operators are not faced with any impediments should they wish to make their pay television services available on DTT, Internet and mobile platforms. Of further concern to Econet Media is the fact that MultiChoice's acquisition of exclusive rights for premium entertainment and sports content are not confined to South Africa but extend to various other territories on the African continent. As the same anti-competitive effects arising from the exclusive acquisition of premium content in South Africa are likely to be replicated in the rest of Africa, Econet Media believes that this aspect of the exclusive acquisition of rights should be further investigated by the Authority, the Competition Commission and their respective counterparts on the African continent.

[96] See Case 37214, OJ 2005 L134/46.

8.7.4 Wholesale 'Must Offer' Remedies

8.7.4.1 We illustrated above that there exists a bottleneck in the wholesale market for premium content in South Africa, which makes it difficult for competing subscription television broadcasters to grow their viewership numbers. Without access to attractive content that viewers are willing to pay a premium for, subscription broadcasters are unable to grow into effective competitors. This problem is not unique to South Africa and in some countries wholesale 'must offer' regulations have been implemented to address the wholesale content bottleneck. Besides the 'must offer' regulations that were imposed on BSkyB's premium Sky Sports channels (also referred to by the Authority in para. 8.5.1), wholesale 'must offer' remedies have also been implemented in France, Italy, Spain and the US.[97]

8.7.4.2 'Must offer' regulations impose a "requirement for certain content providers (programme providers or aggregators) to offer their channels or channel packages to a network or platform operator or aggregator which is interested in distributing and/or marketing them"[98], often on regulated terms. These remedies are typically introduced to encourage competition in the broadcasting sector, for instance by facilitating entry and creating the conditions for expansion.[99]

8.7.4.3 However, subscription broadcasters, such as MultiChoice, rely on being the exclusive distributors of certain content to ensure that viewers will subscribe to their services. Exclusivity also acts as an incentive for broadcasters to invest in producing content, to the benefit of consumers. The question that needs to be considered is whether the adverse incentives that 'must offer' obligations may create for MultiChoice (e.g. through lowering its incentives to invest) will be outweighed by the enhancement of competition (and potentially lower retail prices) that could be brought about through 'must offer' remedies.

8.7.4.4 Access to rights to premium sport and premium entertainment content is especially important for a broadcaster to compete, and MultiChoice packages its premium sport channels through SuperSport and its premium entertainment channels under the M-Net and Vuzu Amp brands, which are exclusively available on DStv. As mentioned earlier, the ICASA Sports Broadcasting Regulations, 2003,[100] ("Sports Broadcasting Regulations") require subscription broadcasters who have acquired rights to listed national sporting events to inform FTA broadcasters that they have acquired these rights. This allows FTA

[97] Ofcom (2009). Wholesale must-offer remedies: International examples. April.
[98] Scheuer, A. & S. Schweda (2008). Progress in the must-offer debate? Exclusivity in Media and Communications. *Iris Plus.* October. (p. 3)
[99] Ofcom (2009). Wholesale must-offer remedies: International examples. April. (p. 2)
[100] ICASA Sports Broadcasting Regulations, 2003 published under Notice 1044 of 2005 in Government Gazette No 27728 dated 28 June 2005.

broadcasters to tender for these rights, but the Sport Broadcasting Regulations do not impose any obligations on subscription broadcasters to notify other subscription broadcasters in the same manner. As the Authority recognises the importance of ensuring that national sporting events are made available on FTA, Econet Media believes that this principle should be extended to the realm of pay television and that a pro-competitive licence condition should be imposed on pay television operators with market power to make national sporting events available to other pay television operators on fair and non-discriminatory terms.

8.7.4.5 The Competition Commission has recommended the imposition of a wholesale 'must offer' obligation as a pro-competitive licence condition.[101] Econet Media is in favour of the implementation of a wholesale 'must offer' obligation as it will unlock content which is currently subject to long term exclusivity arrangements and proposes that such an obligation be imposed on MultiChoice's premium entertainment and sports channels.

8.7.4.6 Wholesale 'must offer' obligations will only be effective, it they are subject to substantial regulatory oversight with regard to access, the terms of access and the resolution of disputes between the parties. In addition, there is a need for ancillary pro-competitive licence conditions to accompany the wholesale 'must offer' obligation. These obligations include an obligation that all channels which are made available to other pay television operators be offered on the same basis as those offered by MultiChoice to itself. In other words, there should be no disparity in respect of the rights, content and quality of the channels subject to the wholesale 'must offer' obligation. New entrants and other pay television operators who are the recipients of the wholesale 'must offer' should be entitled to sell their own advertising and insert their own promotional materials in the channels obtained through the wholesale 'must offer' and there should furthermore be a prohibition on any packaging restrictions being placed on such recipients by MultiChoice.

8.7.4.7 'Must offer' remedies can be implemented in various forms. They can be based on particular pricing rules (e.g. retail-minus or cost-plus) or impose less specific conditions, such as to make content available on non-discriminatory, fair and transparent terms. A dedicated study will be required to understand the full range of incentives and effects that imposing a 'must offer' obligation will have on the South African subscription broadcasting market.

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

8.8.1 In the United Kingdom, Ofcom has issued guidelines on access to Technical Platform Services ("**TPS**") thereby enabling other broadcasters to use Sky TV's digital satellite platform

[101] Competition Commission submission on the National Integrated ICT Policy Discussion Paper dated 11 February 2014. (p.47)

infrastructure for the distribution of channels to subscribers. The guidelines cover CAS access ("**CA**"), EPG access and access control services (i.e. access to certain application programming interfaces ("**APIs**") and access to remote computer hardware and software systems). Broadcasters and operators of interactive services who wish to gain access to viewers using Sky TV set top boxes can purchase TPS on regulated terms from Sky TV. The TPS guidelines require Sky TV to ensure that its terms, conditions and charges for providing access to TPS are fair, reasonable and non-discriminatory. The costs that Sky TV is entitled to recover from TPS customers must be restricted to costs which it reasonably, necessarily and efficiently incurs in the provision of TPS to customers or which it incurs to develop and operate its digital satellite platform. In terms of the TPS guidelines, Sky TV is entitled to recover its allowable costs and to make a risk adjusted return on its investment. In addition, Sky TV is required to publish its charges or its charging methodology and is further required to provide 90 days' notice prior to implementing amendments to its terms, charges and conditions.[102]

8.8.2 Econet Media is of the view that it would be feasible in the South African market for the Authority to put in place guidelines which are similar to Ofcom's TPS guidelines. In fact, such guidelines are an essential requirement to lowering existing barriers to entry and to the attainment of a level competitive playing field. There is also precedent for such interventions in the telecommunications sector and in this regard, Econet Media would like to refer the Authority to the carrier pre-selection requirements in section 42 of the ECA and the number portability requirements in section 68 of the ECA. These requirements in the ECA are aimed at removing technical barriers to market entry. In the case of carrier pre-selection subscribers to a service are able to access the services of another electronic communications licensee and number portability ensures that subscribers are easily able to switch between service providers by being able to port their numbers from one service provider to another. Whilst, these measures are statutorily mandated in the ECA with the requirement that the Authority give effect to their implementation through the making of regulations, the Authority is not precluded under the ECA from attaining the same objective in the broadcasting sector through the implementation of TPS guidelines as a pro-competitive measure once the process under section 67 of the ECA and as set out in the Discussion Document has been finalised by the Authority.

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

8.9.1 The Digital Interoperability Forum ("**DIF**") defines interoperability in the digital content space as:

[102] Ofcom Provision of Technical Platform Services Guidelines and Explanatory Statement - 21 September 2006

"The capability to deliver content across multiple platforms and devices based on commercial agreements and technological solutions which recognise the need for content protection."[103]

8.9.2 A number of international jurisdictions (including the European Union and the United Kingdom) have adopted interoperability measures in the broadcasting sector in order to eliminate barriers to entry by incumbent operators.

8.9.3 The Competition Commission of India has argued that interoperability gives rise to discernible pro-competitive outcomes or effects. These include a positive impact on consumer choice, innovation, ease-of-use, access to content and diversity. The pro-competitive gains arising from interoperability were summarised by the Competition Commission as follows:

"Interoperability is likely to foster or lead to increased innovation by reducing lock- in effects and lowering barriers to entry;

Interoperability is likely to lead to a heightened competitive environment, with the associated consumer welfare enhancing outcomes, as the open standards implemented by all market participants lead to interoperability between a number of different platforms or devices. In other words, customers are able to choose between a number of competitive products and therefore consumer choice flourishes and drives innovation; and

Interoperability increases access to content, encourages diversity in respect of the content provided as customers are able to easily switch between various broadcast platforms."[104]

8.9.4 With regards to the interoperability of set top boxes, the Competition Commission has emphasised that:

"the relative ease of switching between different Pay-TV service providers (or other content providers or platforms) by customers and the ability of potential or new entrants to reach customers are of critical competition significance. Accordingly, STB interoperability becomes an important consideration for potential entrants into the Pay-TV service segment, as it impacts on the ability of entrants to attract customers away from the incumbent Pay-TV service provider."[105]

8.9.5 In the South African context, pay television operators use different CAS's with the result that consumers are required to purchase different set-top boxes for different subscription services. In essence, this means that a subscriber to MultiChoice cannot use the same set-top box if he/she were to switch to an alternative pay television broadcasters. This increases the

[103] Flynn, B (2013), Interoperability: Myths and Realities – A White Paper for the Digital Interoperability Forum.
[104] Competition Commission Comments on the National Integrated ICT Policy Discussion Paper (11 February 2014) at para 7.6.1.5.
[105] Competition Commission Comments on the National Integrated ICT Policy Discussion Paper (11 February 2014) at para 7.6.1.6.

switching costs for the consumer. Investment in set-top boxes may also increase costs for new entrants, leaving them in a weaker position to spend on high quality content. Access to technology can create a barrier to entry through increasing the switching costs of subscribers, and market failure may arise in that these switching costs may allow an incumbent broadcaster to retain market power without the threat of entry.

8.9.6 The Competition Commission has stated 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."[106]

8.9.7 Econet Media endorses the approach adopted by the Competition Commission and believes that the Authority should consider the introduction of set top box interoperability together with TPS guidelines similar to those introduced by Ofcom.

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

8.10.1 We have set out the additional remedies which we believe should be considered by the Authority at paragraphs 8.7.1.2 and 8.7.1.3 above.

[106] Competition Commission Comments on the National Integrated ICT Policy Discussion Paper (11 February 2014) at para 7.6.2.1.

9 ANNEXURE A: LIST OF DSTV CHANNELS IN DIFFERENT BOUQUETS

CHANNEL	DSTV Premium	DSTV Compact Plus	DSTV Compact	DSTV Family	DSTV Access	DSTV EasyView	Exclusive/ Non-Exclusive in SA
MOVIES & ENTERTAINMENT							
M-Net							Exclusive
Vuzu Amp							Exclusive
M-Net Movies Premier							Exclusive
M-Net Movies Smile							Exclusive
M-Net Movies Action Plus+							Exclusive
Sundance TV							Exclusive
M-Net Movies All Stars							Exclusive
Studio Universal							Exclusive
Zee BollyMovies							Non-exclusive
M-Net City							Exclusive
Vuzu							Exclusive
Universal Channel							Exclusive
Telemundo							Exclusive
BBC First							Non-exclusive
BBC Brit							Exclusive
Comedy Central							Exclusive
ITV Choice							Exclusive
E! Entertainment TV							Exclusive
FOX							Non-exclusive
FOX Life							Non-exclusive
Sony Max							Non-exclusive
BET Africa							Exclusive
MTV							Non-exclusive
Lifetime							Exclusive
CBS Reality							Non-exclusive
TLC Entertainment							Exclusive
Discovery Family							Exclusive
TCM Movies							Non-exclusive
eMovies+							Unknown
M-Net Movies Zone							Exclusive
EVA							Exclusive
kykNET							Exclusive
kykNET & Kie							Exclusive
kykNOU							Exclusive
AfricaMagic Epic Movies							Exclusive
AfricaMagic Urban Movies							Exclusive
Africa Magic Family							Exclusive
SABC Encore							Exclusive
Mzansi Magic							Exclusive
Mzansi Wethu							Exclusive
Mzansi Bioskop							Exclusive
Ebony Life TV							Exclusive
Glow TV							**Unknown**
Zee World							Exclusive
ROK							Exclusive
DStv Explora Tutorials							Exclusive
M-Net Binge							Exclusive
M-Net Plus 1							Exclusive
DOCUMENTARIES & LIFESTYLE							
Discovery Channel							Exclusive
VIA							Exclusive
Crime & Investigation							Exclusive
Discovery IDX							Non-exclusive
BBC Lifestyle							Exclusive
Food Network							Exclusive
The Home Channel							Exclusive
Fashion One							Non-exclusive
Travel Channel							Non-exclusive
National Geographic Channel							Non-exclusive
Nat Geo Wild							Non-exclusive
Animal Planet							Non-exclusive
BBC Earth							Non-exclusive
History Channel							Exclusive
Ignition TV							Exclusive
Spice TV							**Unknown**
FREE TO AIR							
SABC 1							Non-exclusive
SABC 2							Non-exclusive
SABC 3							Non-exclusive

CHANNEL	DSTV Premium	DSTV Compact Plus	DSTV Compact	DSTV Family	DSTV Access	DSTV EasyView	Exclusive/ Non-Exclusive in SA
e-TV							Non-exclusive
e-TV HD							Non-exclusive
e-TV Extra							Non-exclusive
Soweto TV							**Unknown**
Bay TV							**Unknown**
1KZN TV							**Unknown**
Tshwane TV							**Unknown**
Cape Town TV							**Unknown**
Gau TV							**Unknown**
Lesotho TV							**Unknown**
SPORTS							
SuperSport Blitz							Exclusive
SuperSport 1							Exclusive
SuperSport 2							Exclusive
SuperSport 3							Exclusive
SuperSport 4							Exclusive
SuperSport 5							Exclusive
SuperSport 6							Exclusive
SuperSport 7							Exclusive
SuperSport 8							Exclusive
SuperSport 9							Exclusive
SuperSport 10							Exclusive
SuperSport 11							Exclusive
SuperSport Maximo							Exclusive
Telly Track							**Unknown**
Ginx Sports TV							Exclusive
KIDS & TEENS							
Cartoon Network							Exclusive
Boomerang							Exclusive
Disney							Exclusive
Disney XD							Exclusive
Nickelodeon							Exclusive
C-Beebies							**Unknown**
NickJr.							Exclusive
Nicktoons							Exclusive
Disney Junior							Exclusive
JimJam							Non-exclusive
eToonz+							Non-exclusive
Mindset							**Unknown**
MUSIC							
Channel O							Exclusive
Mzansi Music							Exclusive
MTV Base							Non-exclusive
VH1 Classic							Non-exclusive
Trace Urban							Exclusive
Trace Africa							Non-exclusive
Sound City							**Unknown**
1Gospel							Non-exclusive
RELIGION							
Dumisa							Exclusive
Faith							Non-exclusive
Day Star							Non-exclusive
TBN							Non-exclusive
God TV							Non-exclusive
ITV							Non-exclusive
NEWS & COMMERCE							
BBC World News							Non-exclusive
CNN							Exclusive
Sky News							Exclusive
eNCA							Exclusive
SABC News							Exclusive
ANN7							Exclusive
Al Jazeera							Non-exclusive
Russia Today							Non-exclusive
Parliamentary Service							Non-exclusive
CGTN							**Unknown**
CNBC Africa							Exclusive
Bloomberg							Non-exclusive
Business Day TV							Exclusive
NDTV 24x7							Non-exclusive
Weather24							Exclusive
Specialist/Foreign							
Rai Italia							Non-exclusive

CHANNEL	DSTV Premium	DSTV Compact Plus	DSTV Compact	DSTV Family	DSTV Access	DSTV EasyView	Exclusive/ Non-Exclusive in SA
Beste van Nederlands							Non-exclusive
RTPi							Non-exclusive
TV5 Monde Afrique							Non-exclusive
Deutsche Welle							Non-exclusive
CCTV-4							Non-exclusive
Interactive							
People's Weather							Exclusive

10 ANNEXURE B: DSTV CHANNEL EXCLUSIVITY

Only screened on DStv Premium (exclusive)	Basic (exclusive)	Basic (non-exclusive)	Basic (unknown)	FTA
M-Net	M-Net Movies All Stars	Zee BollyMovies	eMovies+	SABC 1
Vuzu Amp	Studio Universal	FOX	Glow TV	SABC 2
M-Net Movies Premier	M-Net City	FOX Life	Spice TV	SABC 3
M-Net Movies Smile	Vuzu	Sony Max	Telly Track	e-TV
M-Net Movies Action Plus+	Universal Channel	MTV	C-Beebies	e-TV HD
Sundance TV	Telemundo	CBS Reality	Mindset	e-TV Extra
BBC First (*non-exclusive*)	BBC Brit	TCM Movies	Sound City	Soweto TV
M-Net Binge	Comedy Central	Discovery IDX	CGTN	Bay TV
M-Net Plus 1	ITV Choice	Fashion One		1KZN TV
Discovery Channel	E! Entertainment TV	Travel Channel		Tshwane TV
BBC Earth (*non-exclusive*)	BET Africa	National Geographic Channel		Cape Town TV
SuperSport 1	Lifetime	Nat Geo Wild		Gau TV
SuperSport 2	TLC Entertainment	Animal Planet		Lesotho TV
SuperSport 5	Discovery Family	JimJam		
SuperSport 6	M-Net Movies Zone	eToonz+		
SuperSport 11	EVA	MTV Base		
Super port Maximo	kykNET	VH1 Classic		
Disney	kykNET & Kie	Trace Africa		
NickJr.	kykNOU	1Gospel		
Bloomberg (*non-exclusive*)	AfricaMagic Epic Movies	Faith		
	AfricaMagic Urban Movies	Day Star		
	Africa Magic Family	TBN		
	SABC Encore	God TV		
	Mzansi Magic	ITV		
	Mzansi Wethu	BBC World News		
	Mzansi Bioskop	Al Jazeera		
	Ebony Life TV	Russia Today		
	Zee World	Parliamentary Service		
	ROK	NDTV 24x7		
	DStv Explora Tutorials	Rai Italia		
	VIA	Beste van Nederlands		
	Crime & Investigation	RTPi		
	BBC Lifestyle	TV5 Monde Afrique		
	Food Network	Deutsche Welle		
	The Home Channel	CCTV-4		
	History Channel			
	Ignition TV			
	SuperSport Blitz			
	SuperSport 3			
	SuperSport 4			
	SuperSport 7			
	SuperSport 8			
	SuperSport 9			
	SuperSport 10			
	Ginx Sports TV			
	Cartoon Network			
	Boomerang			
	Disney XD			
	Nickelodeon			
	Nicktoons			
	Disney Junior			
	Channel O			
	Mzansi Music			
	Trace Urban			
	Dumisa			
	CNN			
	Sky News			
	eNCA			
	SABC News			
	ANN7			

Only screened on DStv Premium (exclusive)	Basic (exclusive)	Basic (non-exclusive)	Basic (unknown)	FTA
	CNBC Africa			
	Business Day TV			
	Weather24			
	People's Weather			

11 ANNEXURE C: PREMIUM ENTERTAINMENT CONTENT ON DSTV DURING 2016

Ranking	Movie	Studio	Exclusive to DStv
1	Rogue One: A Star Wars Story	Disney	Yes
2	Finding Dory	Disney	Yes
3	Captain America: Civil War	Disney	Yes
4	The Secret Life of Pets	Universal	Yes
5	The Jungle Book (2016)	Disney	Yes
6	Deadpool	Fox	Yes
7	Zootopia	Disney	Yes
8	Batman v Superman: Dawn of Justice	Warner Bros	Yes
9	Suicide Squad	Warner Bros	Yes
10	Sing	Universal	Yes
11	Moana	Disney	Yes
12	Fantastic Beasts and Where To Find Them	Warner Bros	Yes
13	Doctor Strange	Disney	Yes
14	Hidden Figures	Fox	Yes
15	Jason Bourne	Universal	Yes
16	Star Trek Beyond	Paramount	Yes
17	X-Men: Apocalypse	Fox	Yes
18	Trolls	Fox	Yes
19	La La Land	Lionsgate	Yes
20	Kung Fu Panda 3	Fox	Yes
21	Ghostbusters (2016)	Sony	Yes
22	Central Intelligence	Warner Bros (NL)	Yes
23	The Legend of Tarzan	Warner Bros	Yes
24	Sully	Warner Bros	Yes
25	Bad Moms	STX Entertainment	Yes
26	The Angry Birds Movie	Sony	Yes

Ranking	Movie	Studio	Exclusive to DStv
27	Independence Day: Resurgence	Fox	Yes
28	The Conjuring 2	Warner Bros (NL)	Yes
29	Arrival	Paramount	Yes

12 ANNEXURE D: SPORTS CONTENT BROADCAST ON SUPERSPORT CHANNELS

ITEM	CHANNEL	DESCRIPTION OF CONTENT
1.	SuperSport One	Domestic and International Rugby, 7s, Golf, Football, Variety and talk shows.
2.	SuperSport Two	Domestic and International cricket, Motorsport, Tennis, Cycling and Variety
3.	SuperSport Three	Football (predominantly EPL), UEFA Champions League, UEFA Europa League and FIFA Internationals
4.	SuperSport Four	ABSA Premiership football, Bafana Bafana, AFCON, CAF, FIFA Internationals, Telkom Knockout, MultiChoice Diski Challenge and Variety
5.	SuperSport Five	EPL, UEFA Champions League, UEFA Europa League, UEFA Youth League, Rugby and Boxing.
6.	SuperSport Six	Motor racing, Superbikes, Golf, Cycling, Cricket, Gymkhana, Rugby, UEFA Champions League, UEFA Europa League, Tennis and Boxing.
7.	SuperSport Seven	Spanish Football ("LaLiga"), German Bundesliga and Italian Serie A, CAF and FIFA Internationals
8.	SuperSport Eight	Hockey, Motorsport, Nascar, Horseracing, Rugby, Wrestling, Golf, Domestic cricket, Extreme Sports, Tennis 500s, Squash, Athletics, Gaming, Swimming and Fly Fishing.
9.	SuperSport Nine	Triathlon, Road Running, WWE, African domestic football, PSL, and variety shows.
10.	SuperSport Ten	PSL, Schools Rugby, Varsity Sports, Horse Racing, Netball, Squash, Cricket, Cycling, Fishing, Gaming, UEFA Champions League variety, Hockey, Tennis, and Football.
11.	SuperSport Blitz	News, information and highlights channel. Also shows Sky Sports News
12.	Maximo 1 (Portuguese Language Channel)	EPL, Superbikes, UEFA Youth League, UEFA Champions League, Swimming and Variety shows.
13.	SuperSport CSN	International rugby, Squash, Variety Sport, Motorsport, Cricket, Golf, Fly fishing, Swimming and Cycling.
14.	SuperSport Eleven	WWE, Football and Hockey, as well as live sports overflow
15.	SuperSport Twelve	UEFA Champions League, as well as live sports overflow
16.	SuperSport Play	A DStv Now Linear streaming channel
17.	Teletrack	Horseracing
18.	Ginx Esports TV	Gaming