International Benchmarking Report for the:

Inquiry into television subscription broadcasting

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evolut consulting

ICASA

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GLOSSARY

Basic pay TV	Entry level bundles of pay TV channels, often consisting of thematic channels providing entertainment, music and kids programming
BSkyB	European satellite pay TV provider with operations in the UK, Germany and Italy
DOJ	United States Department of Justice
DSAT	Digital satellite distribution
DStv	South Africa's largest pay TV provider, owned by Multichoice
DTT	Digital terrestrial television; a replacement for analogue TV distribution, which uses the spectrum more efficiently. South Africa is embarking on digital switchover; many countries have already achieved digital switchover
e.tv	Commercial TV free TV channel in South Africa
EU	European Union
FCC	US Federal Communications Commission
FTC	US Federal Trade Commission
ICASA	Independent Communications Authority of South Africa
IPTV	Internet Protocol Television; a web-based protocol for distributing content
Mbps	Megabits per second; a measure of broadband streaming speeds. Standard definition TV streams at about 2.5 Mbps
MDA	Media Development Authority of Singapore
M-Net	First recipient of a pay TV licence in South Africa in 1986. Now a pay TV brand under the Multichoice stable, which includes DStv and GOtv. Distributed on analogue and digital terrestrial and DSAT.
Ofcom	UK sector regulator

OTT	'Over the top' – internet services delivered to consumers across the public internet (as opposed to an end-to-end service supplied by an electronic communications company via its own managed network)
Premium pay TV	Content for which subscribers pay an additional monthly fee. Usually either live sport or first TV transmissions of recently released movies
SABC	The South African Broadcasting Corporation; state broadcaster in South Africa, providing 19 radio stations and 4 television channels to the general public
SMP	Significant market power
SSNIP Test	"Small but significant non-transitory increase in price". Used to identify substitute products, which are able to exert competitive constraints on the supply of a product by the hypothetical monopolist in the relevant market
STB	Set Top Box – contains the middleware and software to convert/unencrypt digital broadcast signals
SVOD	Subscription video on demand
UEFA	The Union of European Football Associations; the governing body of football in Europe

1. EXECUTIVE SUMMARY

1.1 Introduction

This report provides an analysis of the pay TV market in South Africa and benchmark territories including the UK, the US, Singapore and Kenya. The benchmark territories were selected in order to provide insights from markets at different stages of maturity and with different regulatory regimes. In the body of the report we provide an overview of the pay TV market in each territory, explore how pay TV markets are defined, review how national regulators identify significant market power, and describe a range of regulatory interventions which are applied to increase competition if market dominance is found.

This report provides one set of inputs to the inquiry into television subscription broadcasting in South Africa by the Independent Communications Authority of South Africa (ICASA). Other inputs include the findings of a survey of companies active in the pay TV market in South Africa.

1.2 Competition policy

Market-based competition policy sets out to prevent or remove two sets of anti-competitive behaviours:

- Agreements which prevent, restrict or distort competition
- Conduct which constitutes an abuse of a dominant position

Central to the determination of anti-competitive behaviour is the definition of the market in which an agreement has effect or an undertaking competes; it is only by defining the boundaries within which competition takes place that it is possible to determine if there is anti-competitive behaviour. Market definition typically has two dimensions: the product market and the geographical market.

A number of issues may complicate market definition. For example, content has different value in different time windows; a football match or the Olympics has a far higher value when it is live than when it is broadcast as a delayed or repeat programme. Consumers often purchase multiple products from the same supplier – pay TV broadcasters bundle premium sport and movies with basic pay TV – requiring consumers to subscribe to a basic tier product before they can subscribe to a premium package. This adds complexity to market definition.

Market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels. Having established the relevant market, the competition authorities then determine "appreciability" (does an agreement have an appreciable effect on competition) or dominance (does an undertaking have a dominant position in a market – i.e. does it have substantial market power?).

Typically, regulatory authorities consider that an undertaking with a market share lower than a particular threshold is unlikely to be dominant (in South Africa, for example, that threshold is 45 per cent). Above that concentration, an undertaking may or may not have a substantial market power, depending on other competitive constraints, such as the power of buyers in the market or barriers to entry.

In many jurisdictions, competition law gives the responsible regulatory bodies powers to intervene in order to protect consumers where there is evidence of antitrust agreements or significant market power. Legislation may enable remedies to be implemented, including structural remedies (splitting a vertically integrated undertaking into its respective value chain functions) and behavioural remedies – such as obliging a vertically integrated undertaking to make available certain services to competitors on fair, reasonable and non-discriminatory terms, or preventing it from tying consumers into long-term contracts.

1.3 The pay TV market in South Africa

ICASA is the regulatory authority in the electronic communications sector in South Africa. Its primary role is issuing and monitoring electronic communication licences, developing and implementing regulations, undertaking enquiries on matters within its jurisdiction, investigating complaints in the sector and managing radio frequency spectrum. The Competition Commission regulates competition in South African industries. Areas of overlap in responsibilities are managed through specific sections in both the Competition Act and the Electronic Communications Act.

Pay TV services in South Africa are primarily accessed through digital satellite (DSAT); indeed over 99 per cent of pay TV households receive the service via satellite, with only a small analogue terrestrial service offering an alternative delivery route.

DStv, a vertically integrated player, has a 90 per cent share of pay TV subscribers in South Africa. DStv has secured exclusive access to the most attractive sport and movies. There is one other significant provider of pay TV – StarSat; we surmise that lack of financial resources and limited access to premium content are the main reasons why other operators licensed by ICASA have not launched pay TV services.

1.4 Learnings from the benchmarking study

Market concentration and high prices

To put DStv's dominance of the pay TV market in perspective, it has the highest concentration of subscribers of any market we have reviewed. We estimate that DStv has more than 90% of the pay TV market in South Africa (5.4 million subscribers out of a total 5.9 million pay TV households) versus the next biggest – BSkyB in the UK which has a 66 per cent share (approximately 9.6 million households out of a total of 14.8 million pay TV households)[1]. Our review of competition policy in benchmark territories indicates that a market share above 60 per cent is often sufficient to raise concerns that an entity possesses significant market power.

We also found that South African pay TV prices are relatively high, compared with the offerings in benchmark countries, which may be indicative of an absence of competition.

Limited potential for supply side substitution

Evidence from our benchmark territories shows that new pay TV entrants can make inroads into concentrated markets. In the UK, BT has invested heavily in technology, content, and subscriber acquisition to build a pay TV offering focused on sport. In Singapore, Singtel's IPTV service, launched in 2007, now accounts for 46 per cent of the pay TV market.

Where broadband networks are robust enough to support TV services, traditional linear pay TV providers can come under pressure, as evidenced in the US, where pay TV subscriber numbers have fallen slightly as some subscribers revert to on demand services. It remains, however, a small part of overall pay TV provision.

[1] See footnote 7.

What are the prospects for new entrants to the South African market in the short to medium term? A majority of the providers licensed by ICASA in 2007 and 2014 appear to be finding it uneconomic to launch in the prevailing market conditions. South Africa's primary Telco, Telkom SA, appears unlikely to emulate BT and Singtel and launch an IPTV service, given its current financial and strategic challenges.

The rollout of DTT in South Africa may potentially offer a competing platform to DSAT for pay TV services, and offer capacity for prospective operators to enter the market. However, evidence from the benchmarking suggests that DTT is not in widespread use as a way of distributing pay TV. In the EU, for example, only 5 per cent of pay TV households receive subscription services via DTT.

Market definition issues

When formal market investigation takes place, an early step in the process is to define the relevant market. A key question in the definition of the product market might be the extent to which free TV provides a substitute for pay TV, or at least acts as a constraint on the ability of a pay TV provider to raise prices by too much.

In South Africa, there is a range of free TV services provided by the SABC and e.tv. The SABC is obliged to provide public service broadcasting including content in a range of local languages, which makes its output distinctive but which constrains its ability to respond with complete flexibility to consumer demand. e.tv, on a limited content budget, provides a schedule made up of locally made content and imports.

Comparing South Africa with other benchmark countries shows that free TV services are relatively underfunded compared with pay TV. Free TV channels are therefore competing for a smaller proportion of total TV revenue than in the other benchmark countries, which might suggest that it is less likely to provide a viable alternative to pay TV than in the other territories we have looked at. Overall therefore, in our view free TV offerings are unlikely to act as a significant constraint on pay TV providers.

Barriers to entry

Access to reliable distribution is key for any new pay TV entrant. DSAT is probably the cheapest and most readily available source of transmission capacity, but the associated set top box (STB) and dish installation costs are normally met by the provider as part of a subscriber acquisition spend, so a new provider needs significant funding to meet this expectation. A single incumbent provider with significant market power might respond to a new entrant by extending special offers to new subscribers, which make it more difficult for the new entrant to sign up subscribers and negatively impacts on its gross margins.

A second major barrier to entry is access to rights, and particularly to major sports content. Sector regulators in the UK and the EU competition authority have taken steps to limit the exclusivity of sports rights contracts and to limit the duration of those contracts. In the UK, BT's ability to fund the purchase of exclusive rights to football and rugby competitions has driven its consumer offering.

The Sports Broadcasting Rights Regulations in South Africa give free TV broadcasters access to national sporting events. It may be that further regulations to require sports rights holders to sell to more than one provider, to require (as in Singapore) that certain key rights be shared with other pay TV providers, and/or to limit the length of contract that a rights body and a pay TV provider can enter for sports rights, would open the availability of rights to new entrants.

We have observed from EU decisions that access to recent movie releases is less significant than sports rights, which is perhaps in part a reflection of the fact that subscription video on demand (SVOD) offers a more convenient means than linear pay TV for viewers to consume movies. A consumer survey could be used to test the extent to which this is the case in South Africa.

Sector specific regulation and concurrent powers

In certain of the benchmark states (the US, UK and Singapore) we found that the administration of competition policy in the TV sector is held concurrently by a national regulatory authority and a sector-specific regulator, which might also have responsibility for channel licensing and monitoring of broadcast obligations. Sector-specific competition powers tend to be introduced in markets where TV revenues are relatively high, although clearly with a limited set of benchmarks the evidence is not conclusive. Sector-specific competition powers, exercised by a dedicated media sector authority, may be an appropriate response to increased complexity in a market as it grows in size.

Weighed against this are the additional costs of regulation that might be introduced – both on the public purse and the legal and regulatory affairs budgets of commercial entities in the pay TV sector. Any new regulatory regime should be subject to a market impact assessment to determine whether the costs of administering the framework and compliance with obligations are commensurate with the resulting benefits.

This may suggest a debate about whether the South African TV market has reached a size where sector-specific competition powers – and the associated costs of implementation – are appropriate.

Sector-specific remedies

If significant market power is identified, various approaches to mitigate those effects, short of requiring the breakup of an entity, have been identified from among the benchmark countries. These are behavioural remedies – such as obliging a vertically integrated undertaking to make available certain services to competitors on fair, reasonable and non-discriminatory terms, or preventing it from tying consumers into long-term contracts. They might suggest approaches that could be applied in South Africa if any entity in the subscription TV market is found to be abusing significant market power, such as:

- Limiting the duration of rights agreements, or requiring sports bodies to split rights and sell to more than one broadcaster;
- Placing obligations on a broadcaster of premium sports to make certain key content available to viewers on other platforms. This can be achieved via wholesale must carry obligations (as proposed by Ofcom in the UK as a remedy against Sky Sports) which would require certain channels to be made available to competitor pay TV platforms at regulated wholesale prices, or cross-carriage obligations as in Singapore which apply to certain key content assets.
- Placing an obligation on a dominant provider to open their distribution infrastructure to other pay TV providers.

1.5 Conclusions

Clearly, the South African market has unique characteristics; an unusual socio-economic structure, many languages to cater for in broadcasts, the primacy of DSAT as a distribution platform for pay TV, and the high market share of DStv. These characteristics mean that learnings from the benchmark countries cannot automatically be applied in South Africa.

However, the benchmarking exercise gives some interesting insights for incorporation in ICASA's wider exploration of the competitive position in the subscription TV market in South Africa.

2. OBJECTIVES

The objectives of the International Benchmarking report are:

- To provide a foundation of information about how markets are defined and significant market power identified in pay TV markets in a range of countries outside of South Africa; and
- To identify a range of regulatory interventions which are applied in other markets to increase competition if any entity is found to have significant market power.

The report provides one set of inputs to the inquiry into television subscription broadcasting in South Africa by the Independent Communications Authority of South Africa (ICASA). Other inputs include the findings of a survey of companies active in the pay TV market in South Africa.

The rest of the benchmarking report is structured as follows:

Chapter 3 describes our methodology, including the rationale for selecting the territories for the benchmarking.

Chapter 4 provides a generic framework for defining and evaluating competition in market sectors, based on analysis of the benchmark territories. It identifies regulatory responses where significant market power is identified.

Chapter 5 provides an overview of the structure and competitiveness of the subscription TV market in South Africa, and existing competition policy provisions.

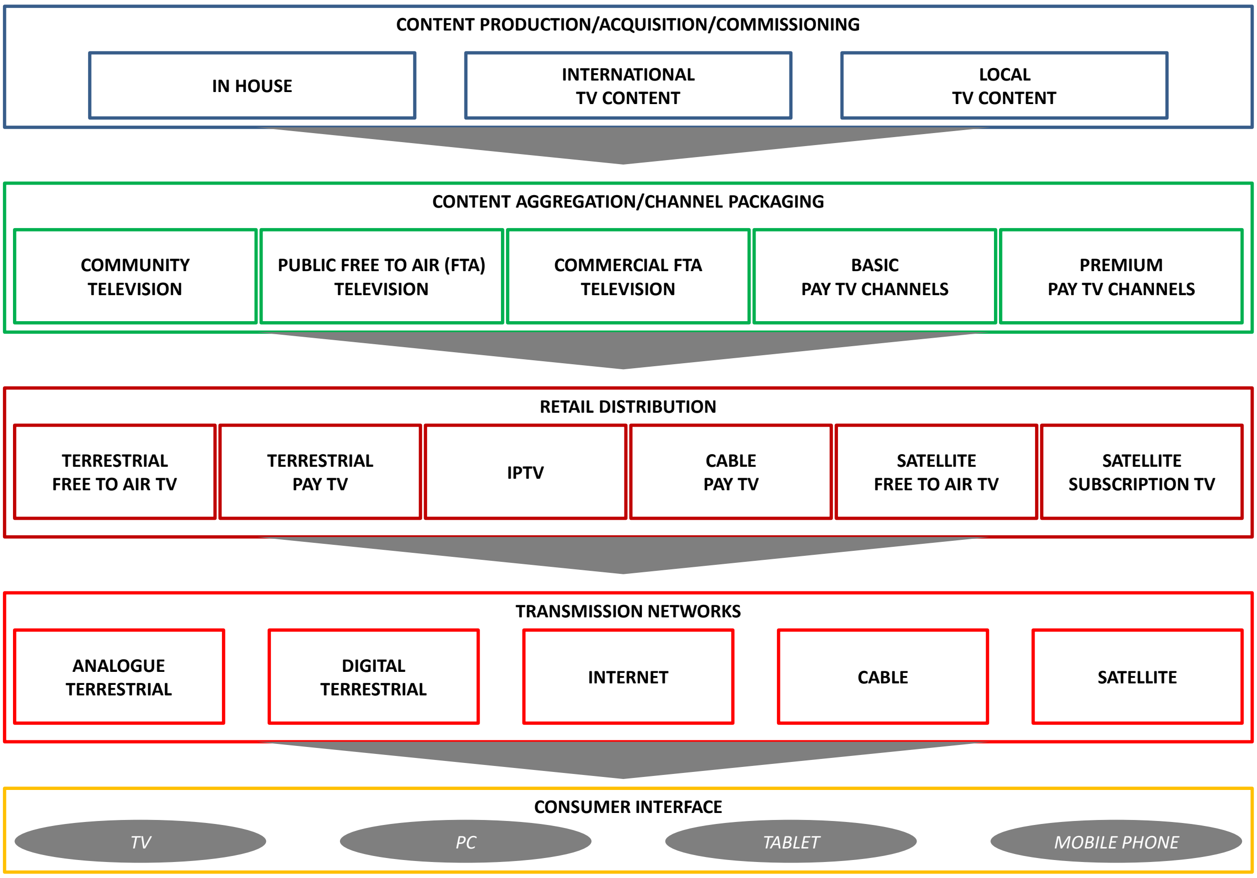
Chapter 6 describes the pay TV landscape in each of the benchmark territories, and identifies how subscription TV is regulated in those markets. For each market, we identify the major players and to define the market structure in which they operate.

The metrics we use to describe the market include the number of TV households, the ways that consumers can receive TV, the number of pay TV providers in the market and the number of pay TV subscribers.

In addition to describing the market in each of the benchmark territories, we identify the relevant regulatory structure in place. Specifically, we aim to understand the market definition and competition policy frameworks in place in each territory and any sector framework that applies specifically to the subscription TV market. We are also interested to tease out how concurrent powers are exercised in those territories where there are both generic and sector specific regulators.

We use the value chain illustrated in Figure 1 to describe each market. What is immediately apparent from the analysis of the South African TV market is that there is no cable transmission network, which is common to the other markets we examine.

Figure 1: Schematic Diagram of TV Distribution



In Chapter 7 we bring the preceding findings together, with the objective of identifying what is distinctive about TV access and the structure of the South African pay TV market, and what might be relevant to the future regulation of the pay TV sector, given the findings from the other benchmark territories. These insights inform the next stages of the project.

3. METHODOLOGY

We examine five benchmark regulatory regimes; the United States, the European Union, the United Kingdom, Singapore, and Kenya. These territories were selected in order to provide insights:

- From markets at different stages of maturity. In the EU, Singapore, the US and the UK the market is relatively well developed (there is high digital TV penetration and significant pay TV subscription spend, for example) whereas in Kenya the market is less developed (as an example measure suggesting a less developed market, TV penetration is below 50 per cent in Kenya, and a majority of household TV reception is still analogue). South Africa is midway between in terms of its TV market maturity.
- From different regulatory regimes. Some of the benchmarks have highly developed competition policy frameworks, with a sector-specific regulator holding some concurrent responsibilities for upholding competition law and investigating breaches, while in Kenya there is no sector-specific regulation.

The analysis deliberately includes another African country – Kenya – to enable comparison with another market at nascent stages, with similar developmental challenges to South Africa and sharing similar players and market structures.

In addition to Kenya we looked at other countries in sub-Saharan Africa but decided not to use them as benchmarks. For example; in Tanzania, the Electronic and Postal Communications Act empowers the Tanzania Communications Regulatory Authority (TCRA) to regulate competition in the telecoms, broadcasting and postal services markets. It also has a competition authority.

We chose not to use Tanzania as a benchmark because its market, players and regulatory framework are similar to Kenya's. Like Kenya, Tanzania has an established competition policy regime, although no TV specific cases have been investigated. More relevant is that it has low household penetration of TV: Approximately one in eight Tanzanian households have TV – compared with one in three in Kenya and four out of every five in South Africa – so Tanzania provides little read-across had we chosen it as a benchmark territory.

In Nigeria, competition in broadcasting is regulated and controlled by the National Broadcasting Commission, but there is no overarching competition authority so it does not provide a helpful benchmark to inform policy in South Africa.

The information and data on each country has been gathered from a variety of secondary data sources in the public domain, including:

- International organisations such as the World Bank and the Organisation for Economic Cooperation and Development (OECD);
- National regulatory authorities – both the competition authorities in the benchmark territories and sector-specific regulatory bodies where they exist;
- Individual company web sites and annual reports; and
- Commercial reports on market structure and sizing – however the extent of our access to these sources of information was constrained by the size of the project data budget.

The market information has been checked and analysed by the Evolut consulting team with the aim of creating a consistent dataset for each market comprising data for 2012 and 2015, and a market forecast in 2018 to give some sense of the market growth trajectory.

The research and analysis was conducted in April and May 2016 and best endeavours have been applied to ensure that it is up to date as of the first quarter of 2016.

A note on currencies; we have used the 2014 World Bank dataset for average annual GDP per head, which quotes in US dollars. All other revenues and costs are given in nominal terms in the local currency and also in US dollars, to allow comparison across markets. The US dollar equivalent is calculated using the market exchange rate at the time to which the sums relate. In one instance (Figure 15) we have compared revenue per head in US dollars at purchasing power parity.

4. COMPETITION POLICY

Market-based competition policy sets out to prevent or remove two sets of anti-competitive behaviours:

Agreements that prevent, restrict or distort competition

An example of an anticompetitive agreement (often termed coordinated conduct), might be a situation in which the only two pay TV services in a particular country consult with each other before setting their retail prices, thereby denying benefits to consumers which might arise through competition, such as lower prices. Another example of an anticompetitive agreement might be where broadcasters collude in bidding for sports rights, thereby reducing the fees earned by the body licensing the rights and denying consumers the product innovations that might arise where TV channels have to compete to secure rights.

Conduct that constitutes an abuse of a dominant position

It is not in itself an offence to be a dominant undertaking in a particular market; a subscription pay TV provider that has secured a majority of the pay TV subscribers in a particular market by pricing competitively, creating appealing channel bundles and marketing its services innovatively is not necessarily anticompetitive. However, it is an abuse of dominant position if an undertaking uses the advantages of substantial market power to charge higher prices to consumers, squeeze suppliers and/or prevent new competitors emerging. Such behaviour is also called unilateral conduct.

4.1 Market definition

Central to the determination of anti-competitive behaviour is the definition of the market in which an agreement has effect or an undertaking competes. Market definition is not an end in itself; but it provides a framework for competition analysis. It is only by defining the boundaries within which competition takes place that it is possible to determine if there is anti-competitive behaviour. Market definition typically has two dimensions: the product market and the geographical market.

Product market

The starting point for defining a product market is the narrowest potential market definition. In the subscription pay TV market a boundary might be drawn around linear pay TV services for which consumers pay a monthly subscription. However, it may be that consumers in the market consider a subscription video on demand service as a reasonable substitute if the price of linear pay TV were to increase. Alternatively, it is possible that consumers would substitute a broad free TV offering for pay TV if the latter were too expensive. Hence, the product market definition might be expanded to reflect consumers' behaviour in the market.

Geographical market

The product market may be defined by geography, which in the case of TV services are often national boundaries. This is because broadcasters buy content rights for a particular territory and are therefore unable to distribute their channels outside that country. Linguistic differences between countries may also serve to define the TV market – consumers tend not to consider broadcasts in a foreign language as a substitute for domestic broadcasts in their own tongue.

The hypothetical monopolist test

A hypothetical monopolist is able profitably to maintain a small but significant price increase – say 5 to 10 per cent above competitive levels – in a product (the "focal product") in its market. The SSNIP Test is a conceptual framework that is frequently employed to identify a hypothetical monopoly situation. SSNIP stands for a "small but significant non-transitory increase in price". The hypothetical monopolist in the relevant market uses the SSNIP test to identify substitute products, which are able to exert competitive constraints on the supply of a product. Where a substitute product exists, the market definition is expanded to include the focal product and its substitute, and the hypothetical monopolist is assumed to control both the focal product and the substitute; the SSNIP test is then repeated, until an undertaking controlling the focal product and all its substitutes can maintain a small but significant price increase.

The SSNIP test can be conducted empirically using consumer research to test responses to price changes and thereby to determine what products consumers might treat as substitutes for the focal product. More often, the SSNIP test is used as a conceptual framework, and judgement is brought to bear in market definition.

An undertaking may have substantial market power in a wholesale market; a pay TV platform, for example, may be able to increase the fees it charges to channels, which distribute on the platform for services such as encryption. If those channels have no other transmission option to reach consumers, the hypothetical monopolist would be able to maintain higher prices than would prevail in a competitive market with more than one TV distribution platform.

Supply side substitution

So far, market definition has been a static analysis. However, it is possible that a new supplier might enter a market in response to a small but significant price increase. For example, a satellite subscription pay TV provider may be constrained even if it is the dominant player in a market, if there is the potential that a new entrant would enter the market if prices were to increase. This might happen if, for example, an increase in the price of a DSAT pay TV offering improved the commercial viability of distribution via IPTV.

Price discrimination

Price discrimination describes the behaviour whereby a supplier can charge some customers more than others for the same product or service, where the difference is not a result of higher costs to serve one group or another. For example, a pay TV broadcaster could price discriminate between residential and commercial customers, thus creating separate markets for residential pay TV and commercial pay TV services.

Other issues

A number of other issues may complicate market definition:

- **Time:** Content has different value in different temporal windows. For example, the broadcast of a sport – be it a football match or the Olympics – has a far higher value when it is live than when it is broadcast as a delayed or repeat programme. In movie distribution on TV, some consumers place a high value on access to the first showing of a movie on TV. Hence it could be possible that a pay TV broadcaster which ties up exclusive access to certain premium sports and movies assets (English Premier League football, recently released Hollywood movies) has a significant advantage over other providers which may enable it to raise prices above competitive levels.

- **Substitutability between bundled and unbundled offerings:** Consumers often purchase multiple products from the same supplier – TV, broadband and phone for example. Pay TV broadcasters bundle premium sport and movies with basic pay TV – requiring consumers to subscribe to a basic tier product before they can subscribe to a premium package. This adds complexity to market definition.
- **Convergence:** Complicates analysis of supply-side substitution because internet based services offer routes to consumers for audiovisual content which did not exist twenty years ago. A sports body, for example, may be able to distribute content directly to fans, thereby reducing the market power of broadcast networks and pay TV providers.
- **Two-sided markets:** Broadcasting services provide a platform for viewers and advertisers – and hence there are two sides to the market. In defining a relevant market, the two sides of the market may have to be taken into account.

4.2 Assessment of market power

Market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels. Having established the relevant market, the competition authorities then determine “appreciability” (does an agreement have an appreciable effect on competition) or dominance (does an undertaking have a dominant position in a market – i.e. does it have substantial market power?).

There are multiple means of measuring market share in any market – two of the most relevant in pay TV might be revenue share and subscriber numbers. Judgment is necessary to determine the appropriate measure in any particular case.

Typically, regulatory authorities consider that an undertaking with a market share lower than a particular threshold is unlikely to be dominant (in South Africa, for example, that threshold is 45 per cent). Above that concentration, an undertaking may or may not have a substantial market power, depending on competitive constraints such as:

The power of buyers in the market

In pay TV the downstream buyer is typically a household, so a pay TV operator with large market share has relative power in the market compared with its customers. Upstream, the pay TV operator may buy original programming from a range of producers, few of which have substantial market power. For instance, large movie studios and sports associations with must-have sports rights have a more powerful negotiating position.

Barriers to entry

Barriers to entry in TV broadcasting have traditionally been high due to the need to build out a transmission network. There are then very low incremental costs of each new viewer. Access to programming and rights that consumers value highly also constrain new entrants – particularly where these rights are already tied up in multiyear contracts with an existing provider. Other barriers to entry to broadcasting might include access to terrestrial spectrum (particularly in markets where digital switchover is not complete), the high costs of marketing and transmission, and – in the pay TV market – the costs of subscriber acquisition and management. The ability of new entrants to use ‘Over the top’ (OTT) protocols to reach consumers using broadband internet networks may have lower capital investment needs than that of a traditional cable network, for example.

Switching costs

Contract length and bundling may create switching costs for consumers and thereby deter substitution.

High market shares do not necessarily mean that competition in the relevant market is not effective. In some cases, a high market share can be the result of persistently successful and innovative business strategies, rather than the exercise of market power. In such cases, the relevant undertaking's ability to exercise market power may be constrained if other entities could rapidly enter the market in response to an increase in price or a decrease in quality.

4.3 Regulatory responses

In many jurisdictions, competition law gives the responsible regulatory bodies powers to intervene in order to protect consumers where there is evidence of antitrust agreements or significant market power. Legislation may enable remedies to be implemented, including structural remedies (splitting a vertically integrated undertaking into its respective value chain functions) and behavioural remedies – such as obliging a vertically integrated undertaking to make available certain services to competitors on fair, reasonable and non-discriminatory terms, or preventing it from tying consumers into long-term contracts.

5. The pay TV market in South Africa

5.1 Introduction

South Africa is an upper middle-income country of 54 million people, with average annual GDP per head of working age population of about $6,500 per year[2]. South Africa has 15 million households, of which 12 million have access to television[3]. The size of the South African television industry measured in terms of revenue from pay TV subscriptions, licence fees and total advertising is expected to reach R35 billion (approximately US$2.6bn) in 2017[4] from the current R27 billion (approximately US$1.8bn). Advertising revenue grew from R6.2 billion in 2008 to R11.3 billion in 2012 ($0.8bn to $1.3bn) and is expected to reach R15 billion in 2017 (US$1.1bn at current exchange rates).

The national broadcaster, the South African Broadcasting Corporation, established in 1976, was the only broadcaster until the government issued the country's first subscription television licence in 1985[5]. Multichoice was the country's first subscription television and was owned by the country's big four newspaper groups[6].

Multichoice was the only subscription television service provider until TopTV launched in 2010. TopTV was subsequently acquired by the Chinese company Startimes, and renamed StarSat. The satellite subscription television market remains dominated by Multichoice (retailed under the DStv and M-Net brands) and StarSat. StarSat also competes with DStv in other African countries although DStv remains dominant in South

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2 Source: World Bank
3 Source: Statistics South Africa, 2013 report
4 PWC. South African entertainment and media outlook: 2013-2017
5 Source: Competition Issues in Television and Broadcasting- 2013, OECD
6 The Electronic Communications Act (ECA) does not allow the same company to own a television service and be a major player in newspaper service. Multichoice was given an exemption because the ECA was promulgated after Multichoice had been licensed

Africa; of a pay TV market of about 5.9 million households, we estimate that DStv has approximately 5.4 million subscribers (a greater than 90 per cent share of the pay TV market)[7]. Content ownership remains a challenge to new entrants in South Africa as DStv has rights to the majority of premium sports and movie content.

ICASA has sought to encourage competition in pay TV by licensing new applicants (in two rounds in 2007 and 2014). The licensing history is outlined in an appendix to this report. The failure of any new licensee except TopTV (now StarSat) to enter the market suggests that there are significant challenges in the way of a successful launch. These probably include access to the financial resources needed to launch a new service and grow market share, and securing distinctive content necessary to attract subscribers. This is a topic for exploration in the interviews and public hearings.

The free-to-air market has two major players, namely the SABC and the privately owned commercial broadcaster e.tv, and a variety of community broadcasters. Free-to-air broadcasting services are currently accessed through analogue terrestrial and the country is on the verge of moving towards DTT. The SABC is obliged to provide public service broadcasting including content in a range of local languages. e.tv, on a limited content budget, provides a schedule made up of locally made content and imports.

South Africa has 27 million internet users (put another way, 50% of the population is online)[8]. Both free-to-air and subscription television can be accessed through the internet on mobile and fixed broadband. A number of OTT service providers have recently launched in South Africa.

ICASA is the regulatory authority in the electronic communications sector and its primary role is issuing and monitoring electronic communication licences, developing and implementing regulations, undertaking enquiries on matters within its jurisdiction, investigating complaints in the sector and managing radio frequency spectrum, among other things. The Competition Commission regulates competition in South African industries. Areas of overlap in responsibilities are managed through specific sections in both the Competition Act and the Electronic Communications Act. The Commission and

7 Multichoice reports its total subscriber base at 31 March 2016 as 5.7 million subscribers; we have assumed conservatively that 300,000 of them take ShowMax or Gotv and not DStv.

8 Source: We are social, January 2015

ICASA signed a memorandum of agreement in 2002 which provides that the Commission will deal with complaints concerning restrictive practices and the abuse of a dominant position, and ICASA to deal with contraventions of telecommunications and broadcasting licence conditions and legislation[9].

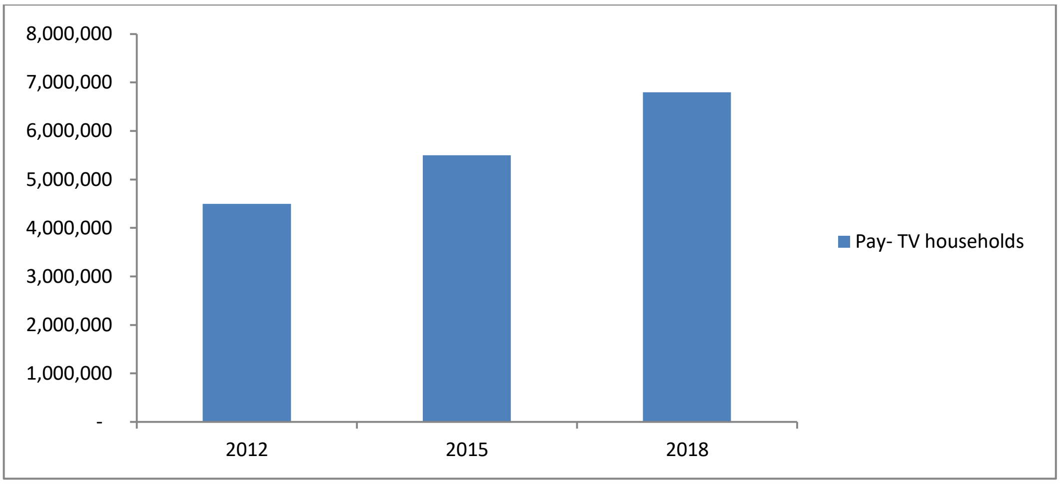
5.2 TV ACCESS

South Africans can access television services via IPTV, DSAT, DTT and analogue terrestrial network. Pay TV services are primarily accessed through DSAT while free-to-air is accessed through analogue terrestrial services. OTT content as well as IPTV have been growing in recent years, primarily driven by increased broadband access in South Africa. A number of OTT providers launched in South Africa recently, including Showmax (part of Multichoice) and Netflix, the US-based on demand service.

The impact of OTT is expected to remain small but noticeable in the foreseeable future. This is due to the slow broadband penetration in South Africa. Although a number of OTTs launched in South Africa recently, their impact will not be significant in the near future. We could not find specific estimates of the growth pattern.

Approximately 5.9 million households subscribed to a pay TV service; all but a few thousand receive pay TV via digital satellite (the remainder receive an IPTV service). We have estimated that 5.4 million pay TV households (over 90%) subscribe to DStv and fewer than one in ten (0.5 million) to StarSat.

FIGURE 2: SOUTH AFRICAN PAY TV HOUSEHOLDS, 2012-2018



[9] Source: Competition Issues in Television and Broadcasting- 2013, OECD

Migration to DTT

South Africa is at an early stage in transitioning its terrestrial TV transmission from analogue to digital, and missed the June 2015 deadline set by the International Telecommunications Union for switching off analogue television broadcasting. Although a deadline for migration to DTT has not been finalised, there have been developments within the legal and policy framework in preparation for the digital migration. For instance, the Department of Communications (DoC) gazetted the "Amendment of the Broadcasting Digital Migration Policy" on 18 March 2015 which was approved by the Cabinet. This amendment introduces a control system in the set-top-boxes, the exact specification to be defined when the final policy is published. The DoC has provisionally attached the following meaning to the STB control system[10]:

- control system does not mean a conditional access system nor does it mean an encryption of the signal to control access to content by viewers;
- control system refers to a security feature to encourage local electronic manufacturing sector;
- the STB must have minimal switching (on/off) security features to protect the subsidized STBs from theft or leaving SA borders; and
- it must have capabilities to enable the provision of government information and services.

DoC does not prohibit any broadcaster from including conditional access in provision of broadcasting services to its customers, however is of the view that broadcasters should make their own investment in the acquisition of conditional access systems.

The control system as defined currently is likely to keep STB costs low, which will encourage consumer uptake, but it may negatively impact on the prospects for a subscription TV service distributed via DTT, because providers would need to make their own investment in access control systems to encrypt/decrypt paid-for content.

There is an ongoing legal dispute between e.tv and the Department of Communications. e.tv is arguing that DTT set top boxes should be encrypted to provide security for content

[10] South Afica government programs website

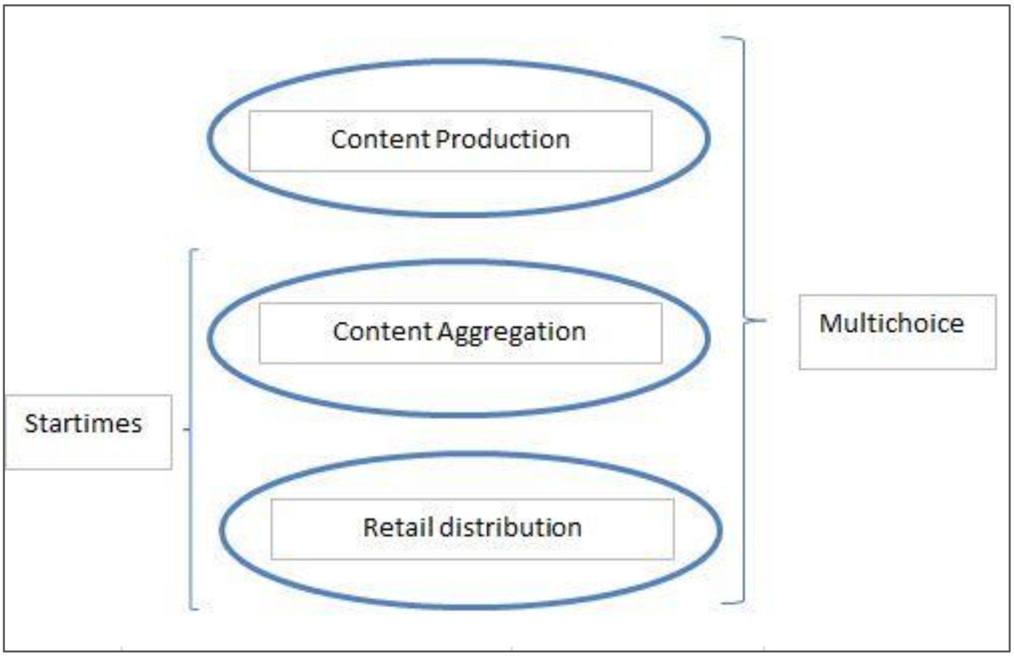
but the government is clear that non-encrypted boxes are the right choice for the country. The case has reached the Supreme Court of Appeals, which ruled against the government, after e.tv lost a case in the high court. The government's next step is to appeal the matter to the Constitutional Court.

5.3 Pay TV market structure

The pay TV market in South Africa was a monopoly since 1986, serviced by M-Net (now DStv), and became a duopoly since 2010 when TopTV (now StarSat) entered the market. Although several pay TV licences were issued by ICASA in 2007 and 2014, only TopTV launched.

Multichoice and StarSat occupy various levels on the subscription value chain. As per Figure 3, Multichoice is vertically integrated along the three-tier structure of the broadcasting service, while StarSat is mainly at aggregation and distribution level.

Figure 3: Vertical Structure in the pay TV market



M-Net was the first recipient of a pay TV licence and was launched by the big four newspapers at the time. The ownership of a TV network by newspapers was seen as a way of saving the Afrikaans press, whose revenues were eroded by TV advertising from the SABC[11]. M-Net was subsequently divided into two companies, with M-Net designated

[11] Source: Competition Issues in Television and Broadcasting- 2013, OECD

as a pure subscription television while Multichoice became a subscriber management, signal distribution and cellular telephone company. Multichoice's growth in revenue and subscriber base has been robust in recent years in spite of the introduction of a new pay TV operator. In 2015 DStv had 5 million subscribers and revenues of R27 billion.

Multichoice recently introduced Showmax, an OTT service, which provides unlimited access to movies and series for a fixed monthly fee. StarSat offers affordable pay TV services, which compete with the lower packages from DStv. Table 1 gives a flavour of the pay TV offerings from StarSat and DStv. Both operators have a range of English language thematic channels bundled in basic pay TV offerings. DStv has add-on services such as box office (for movie rentals). Channels are packaged from the basic "access" package to the "premium" package at different price points.

TABLE 1: EXAMPLE PAY TV CHANNEL OFFERINGS FROM DSTV AND STARSAT

Provider	Package	Tier	Channel count Monthly sub	HD?	Example Channels
DStv	DStv Family	Basic	52 TV channels at R219 (US$15) per month	√	Sony, Zee World, Telemundo, Universal Channel, Mnet Movies Zone, BET
	DStv Premium	Premium	119 TV channels at R759 (US$51) per month	√	Mnet, Mnet movies, Supersport channels, Discovery channel, BBC Earth, Disney, Bloomberg
StarSat	StarSat Special	Basic	47 TV channels at R99 (US$6.70) per month	√	Africa Movie Channel, BBC World News, AMC Series, CCTV 9 Documentary
	StarSat* Super	Premium	75 TV Channels at R199 (US$13.50) per month	√	Bloomberg, Box Africa, Discovery Science, Euro Sport News

*StarSat also has a Sport Plus additional bouquet that can be purchased separately.

5.4 COMPETITION POLICY AND PAY TV REGULATION

South Africa has sector specific regulations that govern television broadcasting service in general. There is concurrent jurisdiction between ICASA and the Competition Commission with respect to competition matters in the broadcasting sector. Competition policy is the responsibility of the Competition Commission. ICASA is the regulatory authority in the telecommunications sector, tasked primarily with licencing and monitoring of telecoms and broadcasting services.

Relevant Competition Cases in South Africa

The competition authorities have dealt with a number of cases involving players in the electronic communications sector, although no case involving subscription broadcasting has been adjudicated upon. The following two competition cases are of relevance to the definition of markets and market power:

Table 2: Relevant competition cases: South Africa

<table>
<tr><td>Case</td><td>Competition Commission vs. Telkom SA Ltd</td></tr>
<tr><td>Issue</td><td>Abuse of Market Dominance</td></tr>
<tr><td colspan="2">Lessons</td></tr>
<tr><td colspan="2">The Tribunal concluded that Telkom leveraged its upstream monopoly in the facilities market to advantage its own subsidiary in the competitive value added network market. Telkom’s conduct caused harm to both competitors and consumers alike and impeded competition and innovation in the dynamic VANS market.
Telkom also conceded that the facilities bought by VANS from Telkom amounted to ‘essential facilities’ as contemplated in the Competition Act
Telkom was fined R450 million (approximately US$55m) for its conduct</td></tr>
<tr><td>Case</td><td>Partial acquisition of Kaya FM by Primedia (Radio Broadcasting)</td></tr>
<tr><td>Issue</td><td>Market definition in a merger</td></tr>
<tr><td colspan="2">Lessons</td></tr>
<tr><td colspan="2">The Tribunal applied the hypothetical monopolist test to identify and rank competitors
Concluded that market definition is not only about identifying substitutes, but also ranking them
The acquisition was unconditionally approved by the Competition Tribunal</td></tr>
</table>

5.5 Concurrent jurisdiction in South Africa

When the Competition Act, No 89 of 1998 (the Competition Act) was promulgated a number of sector regulators had been dealing with competition issues long before the existence of the competition authorities. Soon after establishment, the Commission was confronted with a hostile takeover in the banking sector, between Nedcor and Stanbic, which provided the first test of the competition policy jurisdictional overlap in South Africa. Stanbic argued that the transaction had to be approved by the competition authorities, in accordance with section 3(1) of the Act which provided that the Competition Act applies to all economic activity within, or having an effect within, the Republic except acts subject to or authorized by public regulation. Nedcor on the other hand argued that the transaction was subject to the Banks Act No 94 of 1990 only, and had to be approved by the Minister of Finance and the Registrar of Banks. The High Court ruled that section 3(1)(d) of the Competition Act excluded the transaction from the jurisdiction of the competition authorities since it is an act subject to public regulation. Stanbic appealed this decision and lost at the Supreme Court of Appeal.

Realising that this interpretation was untenable the competition authorities sought an amendment of the Competition Act to reinforce its jurisdiction across all sectors of the economy, including those under sector specific regulators. Thus, section 3(1)(d) was deleted through the Competition Second Amendment Act of 2000 by inserting section 3(1A) stating as follows:

"In so far[12] as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct."

The Commission concluded a number of memoranda of agreement with various regulatory authorities, including ICASA, the Registrar of Banks and the then National Electricity Regulator, among others, in line with section 82 of the Competition Act.

In May 2002 the South African Vans Association (SAVA), a number of internet service providers and other value added network service providers filed a complaint with the Competition Commission against Telkom alleging price discrimination and abuse of dominance by the latter.

However, before the matter could be adjudicated upon by the Tribunal, Telkom challenged the jurisdiction of the competition authorities at the High Court, arguing that the conduct complained of was subject to the jurisdiction of ICASA, the sector regulator. According to Telkom, the concurrent jurisdiction envisaged by section 3(1A) was "in so far as" the Competition Act applies, and in this case it did not apply. The matter went all the way to the Supreme Court of Appeal, which ruled on 29 November 2009 that, among other things, the competition authorities have the required jurisdiction and are also the appropriate authorities to deal with the complaint referred.

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[12] Own emphasis

In the meantime the ECA was promulgated, Chapter 10 of which empowers ICASA to prescribe regulations to deal with competition matters in the sector. Section 67(9) of the ECA states that:

"subject to[13] *the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry"*

This section was interpreted by some as usurping the powers of the competition authorities in the electronic communications sector. Again, the competition authorities sought to have the issue clarified through the Competition Amendment Act No 1 of 2009 (Amendment Act), the schedule of which contains a consequential amendment to section 67(9) of the ECA, seeking to delete the phrase "subject to" and replacing it with the term "despite"[14].

Still, section 4 of the ICASA Amendment Act No 2 of 2014 provides further clarity to concurrent jurisdiction by providing that:

"(8) Before the exercise and performance of any of its powers and duties in terms of this section, the Authority must —

> *(a) consider whether or not, in terms of any concurrent jurisdiction agreement concluded between the Authority and any other authority or institution, it would be appropriate to refer an inquiry to such authority or institution; or*
>
> *(b) subject to section 67 of the Electronic Communications Act and the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Competition Commission, bear in mind that the Competition Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act.*

(9) Subject to the terms and conditions of the concurrent jurisdiction agreement or unless otherwise agreed to by the Authority and the other authority or institution in question, the Authority may not take any action where a matter has already been brought to the attention of and is being dealt with by that other authority or institution."

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[13] Own emphasis
[14] These sections of the Amendment Act have not come into effect

The two cases mentioned above and the various legislative amendments point to the complexities of managing concurrent jurisdiction in South Africa and the need for a closer working relationship and cooperation between the competition authorities and sector regulators, including ICASA.

5.6 Sports Rights Regulation

Section 60(1) of the Electronic Communications Act prohibits a subscription service from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest. Thus free-to-air broadcasters can access sporting events, although coverage might be delayed. ICASA[15] distinguishes between national sporting events and premium sport. “National sporting events” refers to an event of a national character and in public interest while premium sport refers to popularity of the sport.

Under the Sport Broadcasting Rights Regulations, 2010, a subscription broadcaster which has acquired rights to a national sporting event is required to inform free-to-air broadcasters, which may broadcast the event live, delayed live or delayed on payment of a sub-licencing fee.

There are no specific regulations for premium sport or even premium content in general in South Africa. The Subscription Broadcasting Services Regulations[16] provide for the regulation of subscription television with respect to licence charges and fees, procedures and conditions for channel authorisation and ensuring that the largest source of income for subscription broadcasters is not advertising or sponsorship or a combination thereof. However, Section 67 of the Electronic Communication Act, deals with pro-competitive licence conditions to be imposed on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments, including subscription broadcasting. In terms of the Act, ICASA may impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments. The table below indicates examples of premium content in South Africa and which broadcaster has rights to that content.

15 Findings and Reasons Document on the Sport Broadcasting Regulations
16 Government Gazette No 28452, General Notice 152 of 31 January 2006

Table 3: Key sports and movies rights: South Africa

Content	Category	Rights Owner
UEFA Champions League	Soccer	Multichoice
South African Rugby Union	Rugby	Multichoice
Cricket South Africa	Cricket	SABC
Premier Soccer League	Soccer	Multichoice
Hollywood Movies	Movies	Multichoice

5.7 Conclusions

The South African pay TV market is defined by the presence of a vertically integrated dominant player, which enjoyed more than two decades of monopoly. This long period of monopoly power resulted in significant barriers to entry, the most notable being access to premium content. The barriers to entry are demonstrated by the fact that only Startimes is the operational competitor after two rounds of pay TV licensing processes. Lack of financial resources and content are the main reasons why licensees fail to launch.

The growth in TV households and pay TV households indicate that the market is still developing and thus not stagnant. The country has not migrated to DTT although the migration process has been started. It is unlikely that full migration to DTT will be achieved by 2018. Migration to DTT may not create an opportunity for growth of the pay TV market as the entry-level STBs have no encryption and so pay TV providers will be responsible for their own conditional access.

The growth in broadband penetration and decreasing data costs provide an alternative platform for content distribution as noted by the launch of OTT providers such as Showmax and Netflix. The growing middle class will continue to fuel the demand for content and alternative access methods.

6. Benchmarks

In the following sections we explore market structures and competition policy and regulation in five benchmark territories: the United States, the European Union, Kenya, Singapore, and the United Kingdom.

6.1 United States of America

Introduction

The United States of America (USA) is a high-income country of 320 million people with average annual GDP per head of working age population of $48,374 per year[17]. It has high TV penetration and a majority of households have pay TV. The USA provides a helpful benchmark because of its dynamic pay TV market, which developed over time through consolidation of a number of regional pay TV players, development of alternative pay TV platforms and heightened competition within the sector.

There are some significant differences compared to the South African market. USA has a long history of television and pay television, with cable as the dominant distribution platform and high broadband penetration, which supports IPTV and OTT, services. USA is fully migrated to the DTT platform.

Cable is the dominant distribution platform for pay TV, followed by DSAT and then IPTV. There is no pay DTT. At the end of 2015, the thirteen largest pay TV providers represented almost 95% of the pay TV market (supplying pay TV services to about 94 million out of a total of just over 100 million pay TV households).

The United States Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) share responsibility for investigating and litigating cases under the Sherman Act and they both also review potentially anticompetitive mergers under the Clayton Act[18]. The Federal Communications Commission (FCC) is responsible for regulation of broadcast communication. One of the FCC's roles is to promote competition within the sector. The FCC also has the power to make rules for the sector that are either legislative, non-legislative, organisational or procedural rules. Competition in the USA is regulated at both Federal level and State level.

[17] Source: World Bank
[18] Source: Washington State, Office of the Attorney General

TV ACCESS

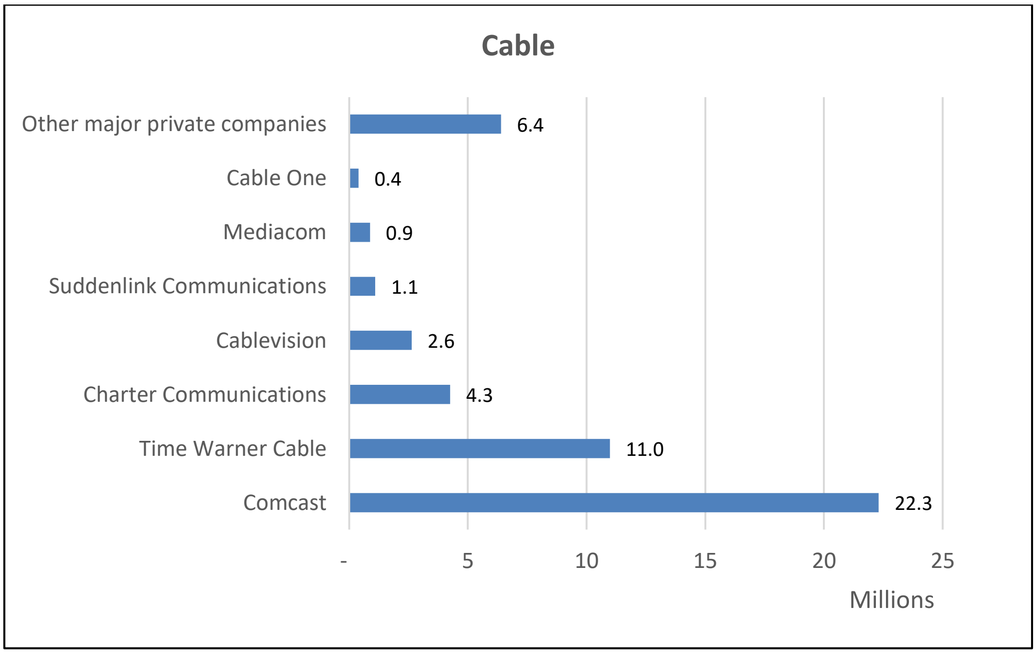
There are approximately 125 million households in the USA, of which 116 million have access to television. Just over 100 million TV households (about 83%) have pay TV.

The number of pay TV households is broadly flat, but there has been some migration of households from cable to IPTV. Cable is the dominant pay TV distribution platform, and about 55 million households (52% of pay TV households) subscribe to cable TV services. There are about 37 million households (36%) who receive pay TV via DSAT. The remaining 12 million or so pay TV households (12%) have migrated to IPTV services.

STRUCTURE OF THE PAY TV MARKET

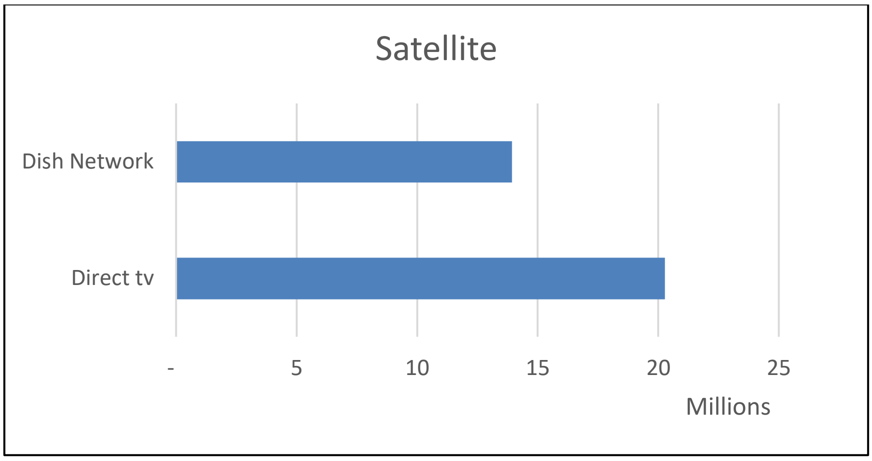
Comcast, the cable company, is the single largest provider of pay TV services in the US, with about 22 million subscribers (that is, about 22 % of the pay TV market). The number of subscribers to Comcast and other major cable providers is given in Figure 4; together the seven largest cable franchises provide services to 43 million subscribers and control over 40% of the pay TV market.

FIGURE 4: SUBSCRIBER NUMBERS OF MAIN CABLE PROVIDERS



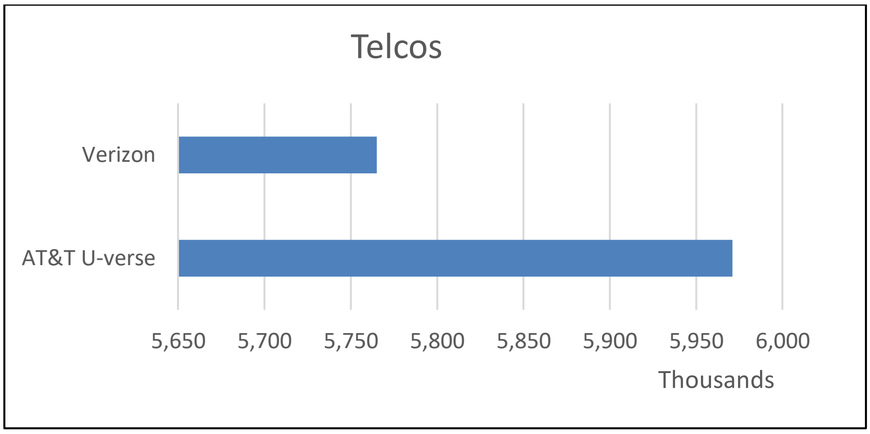
The DSAT pay TV market is a duopoly. Figure 5 shows the subscriber numbers of the two DSAT services, Direct TV and Dish Network. The larger of the two – Direct TV – has 20 million subscribers and so provides a competitor of broadly similar size to Comcast (although to some extent competition between platforms is limited because cable is strong in urban areas where the cable footprint is densest and where apartment dwellers cannot install DSAT.

FIGURE 5: SUBSCRIBER NUMBERS OF MAIN DSAT PROVIDERS



The smaller IPTV universe is also a duopoly, dominated by AT&T (Figure 6):

FIGURE 6: SUBSCRIBER NUMBERS OF MAIN IPTV PROVIDERS



The offerings of the largest pay TV players – Comcast and Direct TV – are shown in Table 4:

Table 4: Service offerings for Comcast (Cable) and Direct TV (Satellite)

Provider	Package	Tier	Channel count Monthly sub	HD?	Example Channels
Comcast	Digital Starter TV	Basic	Over 140 digital channels plus XFINITY OnDemand at US$29.99 per month	√	ESPN (HD), FSN (HD), NBC Sports Network, TCM ((HD), AMC (HD), Hallmark Channel, Discovery Channel
	Starter XF Triple Play	Premium	Basic package channels plus unlimited nationwide talk and text at US$89.99 per month	√	NFL Network, MLB Network, Encore
Direct TV	Select	Basic	+145 channels at US$50 per month	√	HBO, STARZ, Showtime and Cinemax channels included for 3 months only
	Premier	Premium	+315 channels at US$125 per month	√	HBO, STARZ, Showtime and Cinemax channels, ESPN (HD), ESPN 2 (HD) and Fox Sports

Competition policy and pay TV regulation

The United States Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) share responsibility for investigating and litigating competition cases under the Sherman Act[19]. Competition in the USA is regulated at both Federal level and State level[20]. Competition cases can be instituted by the federal government, individual state or private individuals. Individual state's competition policy laws generally mirror federal laws. Since South Africa does not have a federal government arrangement, the detail on the differences between federal laws and state laws will not be explored further.

The Sherman Act

The Sherman Act prohibits two broad categories of conduct. First, it declares to be illegal every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. Second, it prohibits efforts to "monopolize, attempt (s) to monopolize, or conspiracies to monopolize any part of the trade or commerce among the several States, or with foreign nations." The United States Supreme Court has interpreted the Sherman Act as applying only to unreasonable

[19] The Sherman Act was intended to combat the "business trusts" of the American economy during the late nineteenth century, and to this day it remains the bedrock of antitrust enforcement in the U.S

[20] The Federal Government refers to the custodian of constitutional matters while State Government is restricted to specific regional laws. The Federal Government has limitation on interference with State affairs. Both levels have their courts but the Federal courts are the custodians of the US Supreme law

restraints of trade. Penalties for violating the Sherman Act can be either civil or criminal in nature. Only the United States Department of Justice has the authority to criminally prosecute individuals for violating the Sherman Act.

Section 2 of the Sherman Act deals with definition of market and monopoly power: The first step is to determine what market the firm or firms are competing in. There are two dimensions to a relevant market: (1) a product market and (2) a geographic market. Once a market has been defined, the next step in the analysis is to determine whether a business possesses monopoly power within that market. Practically speaking, literal monopoly power is not required; what is required is that the firm be in a position to control prices or exclude competition within the market, which is simply referred to as "market power." Antitrust enforcers use a number of means to show that a business has market power:

- A firm may have market power if it has a high market share and if it exhibits price leadership without corresponding changes in its market share, or
- If it has actually excluded other competitors from the market.
- In addition, a key component to determining whether a firm has market power is whether the industry is such that new firms can enter the market relatively easily and compete with existing firms; if there are no such "barriers to entry," it is unlikely the case that a firm can really exercise market power

The next step in a Section 2 inquiry asks whether the firm has engaged in competitively reasonable or unreasonable conduct. If the firm has engaged in a form of conduct that is already recognized as illegal under antitrust laws (such as price fixing) the conduct can be easily deemed exclusionary.

The Clayton Act

In 1914, Congress enacted two new antitrust laws. First, Congress enacted the Federal Trade Commission Act, which created the Federal Trade Commission and gave it the authority to enforce U.S. antitrust laws. Second, Congress enacted the Clayton Antitrust Act, which was intended to supplement and strengthen enforcement of antitrust laws. It added new forms of prohibited conduct, such as "mergers and acquisitions where the effect may substantially lessen competition", and also gave state attorneys general the ability to enforce the federal antitrust laws. The Clayton Act has been amended several times over the years, first by the Robinson-Pitman Act of 1936, to ban certain forums of discriminatory business conduct, and then again by the Hart-Scott-Rodin Act in 1976, to require companies intending to merge to notify the federal government before consummating the transaction in order to enable enforcement agencies to review the competitive effects of the merger.

The Federal Communications Commission

The Federal Communications Commission's (FCC) is responsibility for promoting the public interest in the communications sector encompasses a mandate to foster competition. The FCC is not the only federal agency with an interest in competitive communications markets. The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), the nation's generalist antitrust enforcers, also seek to ensure that communications markets (and all other industries) perform competitively.

The FCC also has the power to make rules for the sector that are either legislative, non-legislative, organisational and procedural rules. The non-legislative rulemaking process includes prescribing fines for violation of the FCC's rules and resolving an industry behaviour that adversely affects consumers. The FCC can impose fines for contravention of its rules. The FCC also makes rulings on matters affecting competition in the sectors. The Federal Trade Commission Act, which created the Federal Trade Commission, gave the Commission the authority to enforce U.S. antitrust laws.

The FCC, FTC and DOJ have a concurrent jurisdiction over telecommunications.

Table 5: Relevant US competition cases

Case	Matter	Conclusion
Comcast: Petition for determination of effective competition in 18 Illinois Franchise Areas	Comcast claimed that its cable system serving the certain Communities is subject to effective competition and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc.("DIRECTV"), and DISH Network ("DISH")	The petition was granted by the FCC
Exclusive Cable Deals, 2007	Cable companies exclusive rights to provide service in apartment buildings and other multi-family dwellings. The exclusive contracts were considered a primary factor in the rapid rise of cable prices	The FCC concluded that exclusivity clauses cause significant harm to competition and are a barrier to new entry into the multichannel video market place. The case was taken to the Federal Court on appeal. The Federal Court upheld the FCC ban on exclusive cable deals

CONCLUSIONS

The USA subscription pay TV market is showing the first signs of shifting from a linear subscription market to an on-demand service, although with over 100 million linear pay TV subscribers this is a process that is not impacting immediately on competition in the sector. Broadband penetration and affordability play a major role in consumer choices towards alternative means of accessing content.

The USA has fully migrated to DTT but it has not developed into a pay TV platform. Thus migration to DTT does not necessarily mean that DTT can compete as an alternative platform for pay TV. It might well result in changed business models, with incumbent players repositioning themselves to take advantage of other platforms such as IPTV to deliver on demand services, with a core network TV offering available through DTT.

The cable TV market has consolidated through acquisition and consolidation of multiple players in the industry.

The country's antitrust agencies are the DOJ, FTC and FCC. There is concurrent jurisdiction of the communication sector as either of the agencies has the power to investigate anticompetitive behaviour. The main difference between the generalist antitrust agencies and the FCC is that the FCC not only investigates harm to competition, but also considers public interest. While the generalist antitrust agencies choose cases they wish to investigate, the FCC has to investigate all cases within the sector.

Assessment of market power is assessed through product market definitions and geographic market definitions. A SSNIP test is adopted as a measure of price sensitivity.

Two mergers within the pay TV market suggest that the product market can be defined by access platform instead of pay TV as a service offering. The merger between Comcast and Time Warner was terminated due to increasing regulatory and public pressure, with the main concern that the merger will result in one dominant player within cable television. On the other hand a merger between two pay TV players, AT&T (Telco) and Direct TV (Satellite) was approved, resulting in the largest pay TV player in the USA.

6.2 The European Union

Introduction

The European Union (EU) is a major population bloc of 508 million people. It is a free trade zone covering 28 member states, with certain regulation in specific legal and policy areas applying across the whole of the EU – including competition law. Average GDP per head in the EU varies between $8,000 in Bulgaria and $116,000 in Luxembourg, reflecting the relative prosperity of western European nations compared with more recent accession countries in the former communist Eastern Europe.

TV access

There is high TV penetration in the EU. DTT is the primary means of TV reception for more than a third of EU households. All EU member states have switched over to digital terrestrial reception with the exception of Romania, where about 0.5 million households still watch analogue terrestrial TV. Cable and digital satellite reception together account for about 60 per cent of primary TV reception in roughly equal proportion. Cable has largely transitioned to digital but there is still a significant analogue cable presence in Germany – the largest single TV market in the EU. Italy is unusual among EU member states in that is has no cable network. IPTV is a small but growing proportion of TV viewing.

The TV market in the EU remains national rather than pan-European, reflecting linguistic and cultural differences between member states. However, there is EU regulation of TV channels to support the creation of a single market in TV services. The EU Audiovisual Media Services Directive requires member states to coordinate their national legislation applying to both linear and on demand TV services. The Directive covers matters such as the proportion of content that is of European origin, rules applying to advertising and teleshopping, and protection of minors.

Pay TV market structure

Pay TV is mainly delivered over cable and satellite networks. Broadly, cable TV across Europe is a basic pay TV service with lower average revenue per user than digital satellite services, which provide premium pay TV.

Pay TV is largely national rather than pan-European in focus. In terms of market structure, there has been consolidation within member state pay TV markets over the last twenty years, and most markets are now concentrated around one satellite service and one main cable provider. So in Italy, for example, rival satellite providers Stream TV and Telepiu merged in 2003 to form Sky Italia and in France, CanalSat and TPS merged to create a single satellite provider in 2007. In the UK, rival cable companies Telewest and NTL merged in 2006 to form Virgin Media. National regulators have tended to accept these mergers where there is a strong alternative offering on an alternate platform (so for example BSkyB's satellite service provides major competition to the merged cable assets in the UK).

An exception to this is that the Stream and Telepiu merger was cleared despite creating a pay monopoly in Italy because it was argued that both companies faced chronic financial difficulties and that therefore a merger with conditions was preferable to the potential exit of one player from the market or its collapse. EU competition clearance is achieved because no merged pay TV entity yet has significant market power across the whole of the single EU market, although BSkyB now has a significant presence in three of the largest pay TV markets in the EU – Germany, the UK and Italy – and Liberty Global has cable assets across the UK and Ireland and several member states in continental Europe including Germany, Belgium, the Netherlands and Poland.

There is little pay DTT across Europe – it accounts for only about 5 per cent of pay TV subscriptions across the EU. This absence of pay DTT reflects the technical constraints of the platform itself – with limited spectrum the number of channels is constrained and particularly in high definition, making it a less competitive option compared with cable and satellite. There is also the cultural and policy aspects at work as governments control the spectrum on which DTT distributes and this enables them to influence how the spectrum is used to public service broadcasting ends. However in Italy, where there is no cable provision, DTT pay TV service Mediaset Premium accounts for about a quarter of pay TV subscriptions, and France's TNT (Télévision Numérique Terrestre) has a limited line-up of pay channels alongside the free TV offering.

There is no EU sector-specific regulation of media competition policy, but the EU's broad competition policy framework applies. EU competition policy begins from the premise that markets function effectively when companies act independently of one another but are subject to competitive pressure. Competition drives innovation and reduction in prices.

European Union competition policy comprises two broad areas – anticompetitive practices and abuse of dominance. Anticompetitive practices are defined as agreements between companies which prevent, restrict or distort competition – as for example price-fixing, market-sharing cartels, minimum resale price maintenance or margin squeeze. Abuse of dominance is defined as abusive conduct by companies that have a dominant position. A dominant position is not in itself illegal unless it's conduct that distorts competition such as requirements that buyers purchase all units of a product from the dominant company.

The relevant market is defined with reference to:

- The product: all products and services for which the consumer considers to be a substitute for each other due to their characteristics, their prices and their intended use; and
- The geography: an area in which the conditions of competition for a given product are homogenous.

Typically if a company has a market share less than 40% it is unlikely to be dominant. Other factors are relevant, including the ease of market entry for other companies to enter the market, the existence of countervailing market power and vertical integration. Where abuse of dominance is found, the EU has powers to obtain commitments from the parties or apply fines, and parties affected by the behaviour can claim for damages.

Competition law is enforced by national competition authorities, which have powers to stop agreements and practices that restrict competition and fine companies that break EU competition law.

The Commission has demonstrated a concern to intervene to prevent agreements between content owners and premium pay TV providers which reduces access to sports content for other pay TV providers or prevent consumers from accessing services.

Competition policy – sports content

Without intervention by the EU, leagues across the EU would generally sell media rights on an exclusive basis – i.e. live rights are pooled by the clubs competing in the league and the rights sold – often via an auction methodology – to a single broadcaster in each territory. The Commission adopted three decisions involving UEFA Champions League, the German football league and the English football league which have set policy in this area and ensured better access to premium sport rights content.

In 1999 The Commission objected to the joint selling by UEFA of rights to the Champions League. At that time, UEFA sold all Champions League TV rights in one package to a single broadcaster in each member state on an exclusive basis for up to four years at a time. The Commission noted that not all matches were seen live on TV and that Internet and mobile phone operators were denied access to the rights. The Commission therefore judged that UEFA's joint selling arrangement restricted competition between broadcasters and stifled the development of sport services on the Internet and mobile devices.

The Commission took the view that joint selling constitutes a horizontal restriction of competition which, while creating efficiencies by reducing transaction costs, may hinder competition between clubs in terms of the products they offer to fans.

In 2003 the commission approved new joint selling arrangements, whereby UEFA undertook to split the rights into two packages for a period no longer than three years at a time and that delayed rights revert to the clubs for exploitation.

In 2005 the European Commission intervened in the sale of Bundesliga rights, requiring that packages be split and that agreements last no longer than three years. The Commission also required that certain rights revert to the clubs for exploitation.

In 2006 the Commission concluded a similar agreement with the Premier League to enable it to continue selling joint rights. The commitments offered by the FA Premier League provide for more rights, including television, mobile and internet rights, to be made available and ensure that the rights are sold in an open and competitive bidding process subject to scrutiny by an independent Trustee. The live television rights were henceforth sold in six packages – both smaller and more balanced than previously - and no one buyer can buy more than five. The commitments also enhance the scope for individual clubs to exploit rights that are not sold by FAPL or used by the purchaser.

The Commission noted in the decision that it could impose a fine amounting to 10% of the FA Premier League's total worldwide turnover (the worldwide turnover of the English Premier League was £4.4 billion in the 2014/15 season (about $7bn at the time) – so a 10% fine would be about £0.4bn or $0.7bn)[21].

Competition policy – BSkyB and the Hollywood studios

The application of competition policy in pay TV markets by European competition authorities begins from the premise that access to premium content helps new platforms and market players to emerge, thereby increasing competition and consumer choice.

In mid-2015 the European Commission sent a statement of objections to Sky TV in the UK and the six major Hollywood film studios. The objection related to licensing agreements which prevent consumers in other EU countries from accessing Sky's pay TV services. Without these restrictions, according to the Commission, Sky UK would be free to decide on commercial grounds whether to sell its pay TV services to consumers across the EU. This geo-blocking – whereby platforms buy content rights for a certain territory and block access to their feed outside that territory to protect the value of the rights – is an established part of the pay TV landscape, but the EU has judged that it may act against the single market in broadcast services.

Convergence of Broadcasting and Telecoms

Over the last few years the telecommunications sector has experienced the development of bundled offers, notably triple-play offers (including internet access, fixed telephony and TV) and quadruple play offers (which tend to include fixed voice, fixed broadband, TV and mobile services). These bundled offers now coexist alongside the separate offers for each of these products. The development of these bundled offers varies significantly between Member States.

The Commission has tended to define separate national broadband retail markets and voice telephony markets. The Commission has also subdivided the latter into a market for mobile phone contracts and a market for fixed line contracts. However the Commission

[21] European Commission Case COMP/C-2/38.173 (2006); Deloitte (2016).

has left open the question of whether a separate market for "triple play" or "multiple play" products exists.

Conclusions

Broadly, the EU provides a framework for competition policy but no sector specific legislation. The EU competition authorities and member state regulators have permitted concentration in specific platform distribution (e.g. merger of competing cable operators and/or rival satellite distributors) but maintained competition between platforms. Measures to prevent providers tying up premium rights for long periods – particularly sport and movies – act as a brake on anticompetitive activity. A strong free DTT offering in several member states is another constraint on the ability of pay TV providers to raise prices.

6.3 United Kingdom

Introduction

The United Kingdom (UK) is the sixth largest economy in the world, comprising 65m people and average annual GDP per head of working age population of $46,000 per year[22]. It has a mature TV market with total revenues of $22.5 billion in 2014 (a spend on TV of approximately $290 per head of population per annum). Digital switchover was completed in 2012.

The pay TV market has historically been dominated by BSkyB, with a subscriber base of about 10m households to its satellite pay TV service. BSkyB has bid aggressively for premium sports and movie rights to secure and maintain a strong position in the subscription TV market. The cable market has consolidated into a single player – Virgin Media – with a footprint covering about 50 per cent of UK households, and a pay TV subscriber base of about 3.7m.

The pay TV market in the UK is probably more competitive today than it has been at any stage in the past 25 years, with the emergence of a new pay TV competitor in the shape of BT, the incumbent telecommunications provider. Sports rights (English Premier League [EPL] football rights in particular) have been an important driver of pay TV uptake, and BT

[22] Source: World Bank

has initiated a strategy of competing against BSkyB for these and other live sports rights to build its own premium content offering which it bundles with fixed line, broadband and mobile services.

The pay TV market is constrained by the UK's strong and well-funded free TV sector, with the BBC in particular recognised globally as an originator of high quality programming and authoritative news coverage. The existence of the BBC and commercial public service broadcasters ITV and Channel 4 moderates the ability of pay TV players to increase prices.

The Office of Fair Trading and the communications regulator – Ofcom – have concurrent functions in relation to the application of competition law in broadcasting. Either can refer market investigation references to the UK Competition and Markets Authority. Ofcom also exercises certain responsibilities under the European Common Regulatory Framework that apply to broadcasting.

TV ACCESS

UK Households access TV via digital terrestrial, digital satellite and cable. High-speed broadband growth is also supporting the development of IPTV services.

The digital terrestrial service – Freeview – has a wide range of free TV channels and provides the main means of TV reception for 40 per cent of UK households. The mainstay of the channel offering on Freeview is the public service channels of the BBC, ITV and Channel 4, and their respective secondary channels (Cbeebies, ITV2, E4 etc). Together, these channels provide broad general interest programming (drama, entertainment, documentaries etc), news and children's programming. FreeSat offers a similar channel line-up via digital satellite without a subscription.

The Freeview and FreeSat services are sufficiently broad-based that they exert some restraint on pay TV operators, because consumers have the option to spin down to free TV if pay TV subscriptions are priced too high.

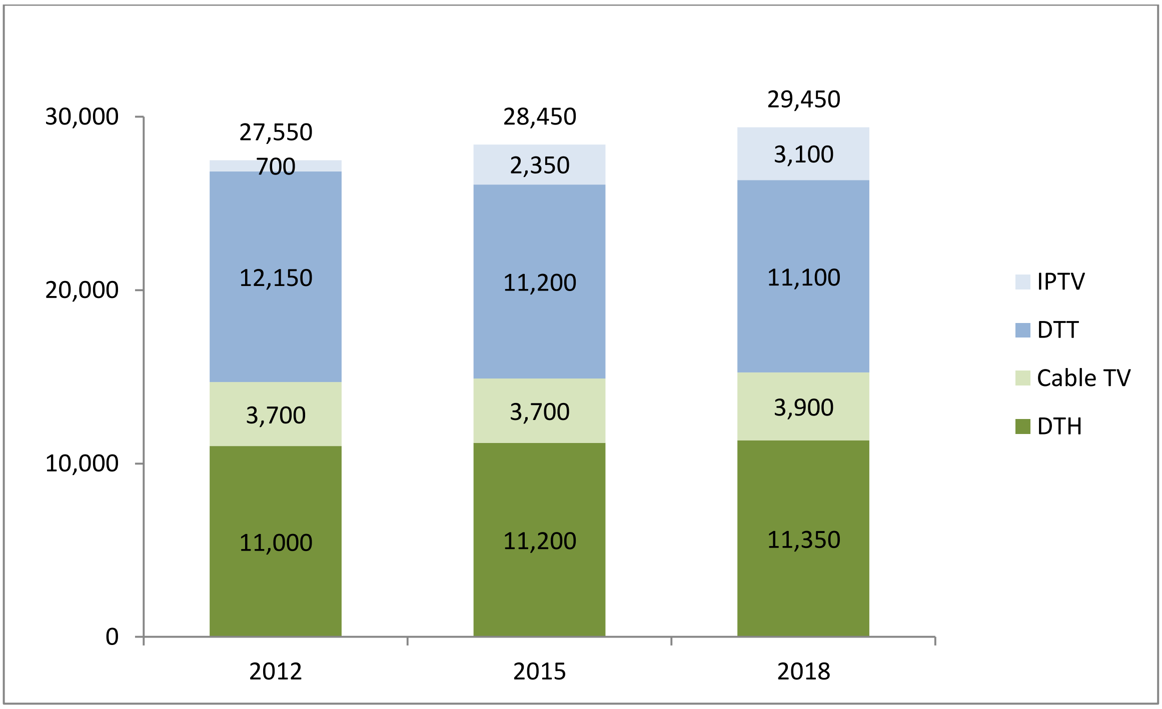
BSkyB provides a satellite digital TV service, with telco services provided over BT's fixed line network under local loop unbundling provisions in telecommunications competition legislation. BSkyB's Sky TV retail offering includes premium channels Sky Sports and Sky Movies. BSkyB wholesales Sky Movies and Sky Sports to Virgin Media for distribution on its cable network, and Sky Sports 1 and 2 to BT (commercial decisions not mandated by regulation).

Cable provides a quadruple-play bundle of pay TV, broadband, and mobile and fixed line telephone services to customers. Cable has a technical advantage in the delivery of on demand services, which it is exploiting by emphasising superior download and streaming speeds.

The UK has high broadband penetration and a growing fibre network (forecast to pass 95 per cent of households by the end of 2017[23]) which supports the distribution of audiovisual content via IPTV, and a majority of households now have smart TVs connected to the internet.

Although still a small overall part of the TV landscape, online TV services such as Netflix and Amazon Prime are growing rapidly. Free TV broadcasters also offer viewers online catch-up and download-to-own services.

FIGURE 7: TV PENETRATION IN THE UK BY ACCESS METHOD (2012-2018)

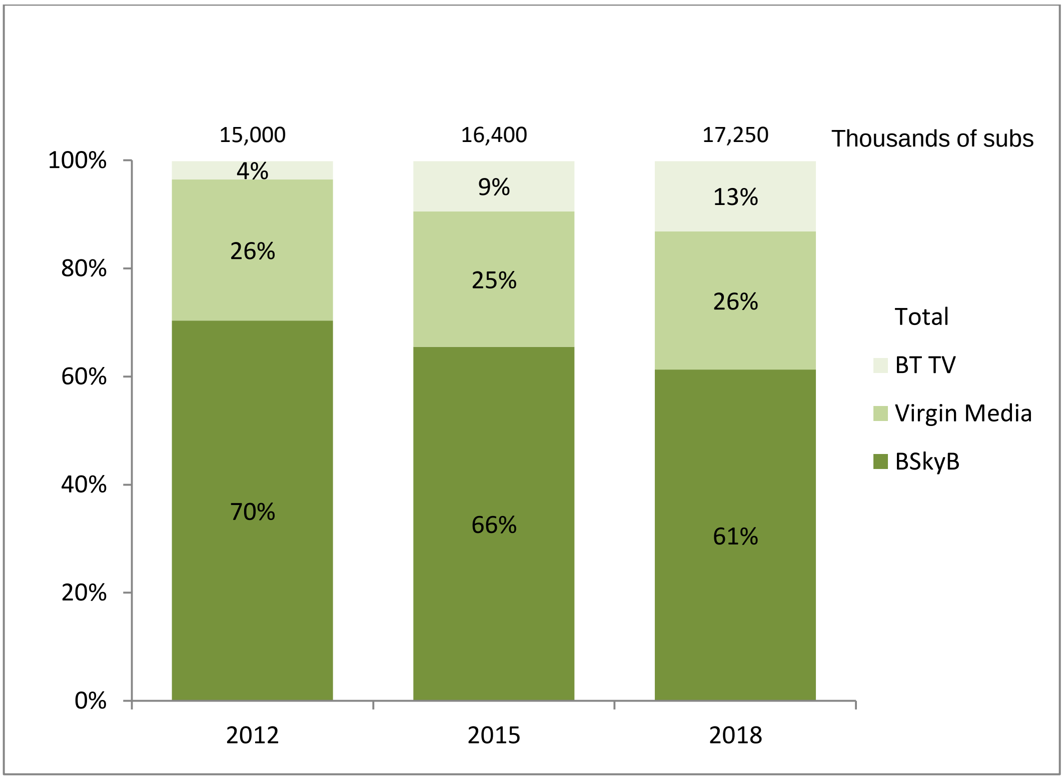


[23] BT Q3 2016 Financial Release.

Pay TV market structure

Pay TV distribution is primarily via two platforms – digital satellite and digital cable. BSkyB is a significantly larger entity than Virgin Media, serving 11 million households compared with 3.8 million cable households. BSkyB has two thirds of pay TV subscriptions in the UK, although this is declining.

Figure 8: Share of UK pay TV market by provider (2012-2018)

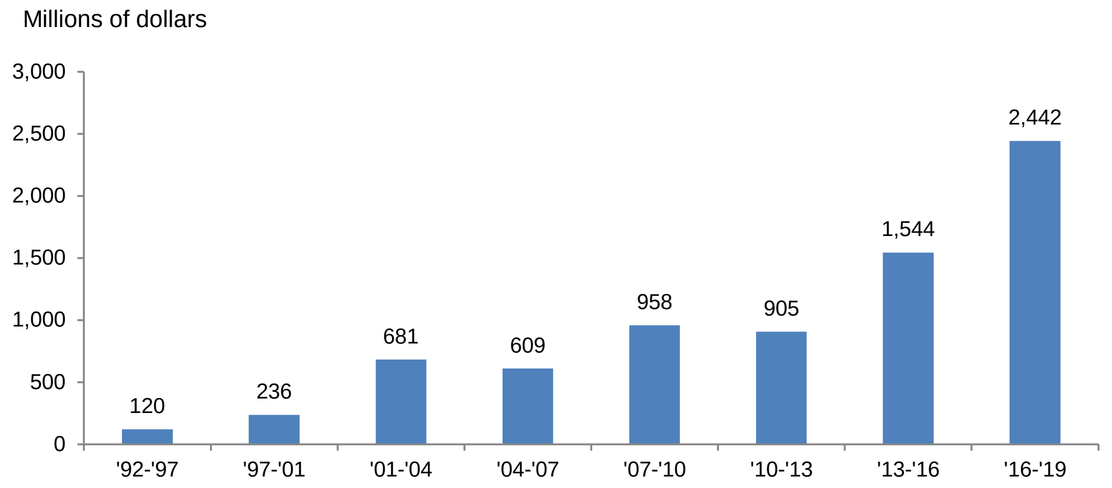


BSkyB's dominance has been based on securing exclusive access to premium sport and movies content. It has licensed English Premier League rights since the league was formed in 1992, complemented by other premium sports rights including international cricket and rugby. From 2019 it will have exclusive Formula 1 rights in the UK. Sky also has exclusive deals with the major Hollywood studios for first TV broadcast of new movies and subscription video on demand rights.

BT is well financed and has secured access to English Premier League football via a live package of 38 games (compared with 116 on Sky Sports). BT also has exclusive live UEFA Champions League and MotoGP content, all of which it aggregates into branded BT Sport channels. These are distributed for a small incremental fee with BT's broadband and fixed line bundles, which include BT TV, an IPTV service of freeview channels and on-demand programme and movie services.

BT Sport's entry into the premium sports pay TV market has increased competition for sports rights and pushed up fees earned by rights holders – particularly for EPL rights – indicating the importance of these rights to build pay TV subscriber numbers (Figure 9):

FIGURE 9: ENGLISH PREMIER LEAGUE RIGHTS FEES PER SEASON



Source: Ofcom; Evolut Consulting analysis

Virgin Media has largely exited the content business – selling its interest in the basic pay TV channel business UKTV – and concentrating on a bundled quadruple-play offer. Virgin distributes channel packages from Sky and BT Sport on its cable network, and Netflix content. Example pay TV bundles are shown in Table 6:

TABLE 6: EXAMPLE PAY TV CHANNEL OFFERINGS FROM BSKYB, BT AND VIRGINMEDIA

Provider	Package	Tier	Channel count Monthly sub	HD?	Example Channels
BSkyB	The Original	Basic	25 TV channels £20 (US$28) per month	√	Sky Atlantic, Fox, TCM
	The Complete Bundle	Premium	70 entertainment channels 7 sports channels 11 movie channels 350 'box sets' 1000+ movies on demand £80 (about US$112) per month	√	Sky Atlantic, Fox, TCM Discovery, Nat Geo, MTV Sky Sports Sky Movies
BT	Entertainment Plus	Basic	Free TV via DTT 30 basic pay channels £10 (US$14) per month	√	Discovery, Nat Geo BT Sport
Virgin Media	More TV	Basic	70+ channels 10 in HD (all free TV) £20 (US$28) per month	√	Free TV channels Sky 1

COMPETITION POLICY AND PAY TV REGULATION

Articles 101 and 102 of the Treaty on the Functioning of the European Union prohibit (1) agreements, which prevent, restrict or distort competition and (2) behaviour, which constitutes an abuse of a dominant position. The legislation is enacted in the UK through the Competition Act 1998 and the Enterprise and Regulatory Reform Act 2013.

MARKET DEFINITION

Market definition[24] is an important step in the process of establishing whether or not particular agreements or behaviours fall within the scope of competition rules.

Measures in the 1998 Act to prevent anti-competitive agreements apply when an agreement has as its object or effect an 'appreciable' prevention, restriction or distortion of competition. The appreciability test requires definition of a relevant market and demonstration that the agreement would have an appreciable effect on competition within that market. This is achieved by utilising the SSNIP test (explained in Section 4.1 above) to define a product market and a geographical market.

ASSESSMENT OF MARKET POWER

Typically, the UK authorities consider that an undertaking with a market share lower than 40 per cent is unlikely to be dominant. Above that concentration, an undertaking may or may not have a substantial market power, depending on competitive constraints such as the power of buyers in the market, the strength of existing competitors, and barriers to entry.

Competition law gives the responsible bodies powers to intervene where there is evidence of anti-competitive agreements or significant market power in order to protect consumers. Reasonable and proportionate remedies may be implemented, including structural remedies (splitting a vertically integrated undertaking into its respective value chain functions) and behavioural remedies – such as obliging a vertically integrated undertaking

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[24] Office of Fair Trading, 2004, *Market definition: Understanding competition law*, OFT403. Much of the description in this section is taken from this guidance. The OFT was superseded by the Competition and Markets Authority in 2014 but the guidance has been adopted by the CMA Board.

to make available certain services to competitors on fair, reasonable and non-discriminatory terms, or preventing it from tying consumers into long-term contracts[25].

Responsible bodies

In 2014 responsibility for the exercise of UK competition law passed to a newly established body called the Competition and Markets Authority (CMA) – and existing organisations the Office of Fair Trading and the Competition Commission were abolished. The CMA has a duty to promote competition for the benefit of consumers. Sector regulators such as the Office of Communications (Ofcom – the sector regulator for the electronic communications, broadcasting and postal sectors) hold concurrent powers with the CMA for the exercise of competition prohibitions and market investigations. The scope and exercise of concurrent powers may be of interest to ICASA, so it is covered in more detail in a separate section below.

Concurrent responsibilities

The Competition and Markets Authority (CMA) has responsibility for competition law across the whole economy. Ofcom – the sector regulator – has concurrent powers in certain areas of competition law in the electronic communications, broadcasting and postal sectors.

Competition prohibitions

Ofcom has powers to enforce prohibitions on agreements that prevent, restrict or distort competition, and to enforce prohibitions on the abuse of a dominant position.

Market provisions

Ofcom has powers to undertake market studies in relevant sectors and powers to make references to the CMA to conduct an in-depth market investigation under the Enterprise Act 2002. We describe below the market investigation into the pay TV market that Ofcom undertook between 2007 and 2010, leading to a reference to the Competition Commission, the predecessor organisation to the CMA.

In 2016 the CMA and Ofcom issued a Memorandum of Understanding, which describes how the two organisations will work together within the framework of competition law as it

[25] Competition Commission, 2013, *Guidelines for market investigations: Their role, procedures, assessment and remedies.* The Competition Commission was superseded by the Competition and Markets Authority in 2014 but the guidance has been adopted by the CMA Board.

applies in broadcasting and other communications sectors[26]. The MoU explains that the lead in the exercise of concurrent powers is taken by the organisation which is best placed to exercise those powers – based on factors including the previous experience of the respective organisations in dealing with similar issues, and whether the case involves one or more sectors. The MoU also identifies how information is shared and the way in which staff resources are pooled.

The MoU does not relate to regulatory appeals – which are the responsibility of CMA. In this role, the CMA may investigate an appeal by an entity affected by direct regulatory action taken by Ofcom, in which case the CMA needs to be able to demonstrate independence from Ofcom.

SECTOR-SPECIFIC INTERVENTION

The most significant sector-specific intervention in the UK occurred in 2007, when media regulator Ofcom established an inquiry into the subscription pay TV market. This led to a three year inquiry into the pay TV market and BSkyB's position in it, followed by two years of examination of Ofcom's findings by the Competition Appeals Tribunal and the Competition Commission (forerunner of the Competition and Markets Authority). No action resulted at the conclusion of these processes, which involved many thousands of pages of research, evidence and submissions, providing some indication of the complexity of sector-specific regulation and the difficulty in reaching firm and broadly accepted conclusions from theory and evidence.

Ofcom inquiry[27]

Pay TV providers BT, Setanta, Top-Up TV and Virgin Media approached Ofcom in 2007 to complain that competition in the subscription pay TV sector was not working properly. The resulting inquiry set up by Ofcom focused on two areas of concern: the distribution of premium pay TV sports channels and premium pay TV movie channels.

After a lengthy inquiry, Ofcom's issued a statement of its findings in 2010. It noted that pay TV had delivered substantial benefits to consumers but that BSkyB's hold on exclusive

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26 CMA, Ofcom, February 2016, Memorandum of understanding between the Competition and Markets Authority and the Office of Communications – concurrent competition powers

27 Ofcom, 2010, Pay TV statement

sport and movie rights was a constraint on effective competition in the sector. We examine each of these contentions in more detail below.

Ofcom and premium sports rights

Ofcom defined the market for premium sports channels as consisting of Sky Sports 1 and Sky Sports 2, which are wholly owned and operated by BSkyB. These channels together carry Sky's coverage of English Premier League football, which is a major driver of premium pay TV in the UK. Ofcom noted that Sky consistently held a 90% share of the premium sports channel market, and that its long-term hold on key rights – of which the English Premier League rights were the most important – were a barrier to entry and expansion for other providers. Finally, Ofcom saw Sky's high profitability as evidence that it was dominant in the wholesale market.

Ofcom argued that, while Sky was dominant at retail and wholesale level, it was at wholesale level where Sky had the strongest incentive to exercise market power. Ofcom's key concern was that Sky was able to use its market power in the wholesale market to restrict the wholesale supply of Sky Sports 1 and Sky Sports 2 to other retailers, which was prejudicial to fair and effective competition.

Ofcom's finding was based on Sky's behaviour in commercial negotiations with BT, Virgin Media and other pay TV providers. Ofcom took intelligence from competitors about Sky's negotiating practices as evidence that Sky did not engage constructively in negotiations and that it was withholding supply for strategic reasons. For example, Ofcom noted that Sky set high wholesale prices for standard definition channels and did not supply its high definition channels to competitors. Sky was, according to Ofcom, forgoing revenue for strategic reasons – to protect its own retail business in DSAT and to reduce the risk of stronger competition in the bidding for content rights.

Ofcom proposed a "wholesale must-offer" remedy whereby Sky would be required to supply its core premium sports channels wholesale to pay TV retailers on other broadcast platforms. Ofcom further required that the standard definition feed of these channels should be supplied at a regulated wholesale price to be determined by Ofcom. Ofcom stopped short of requiring a structural separation between Sky's platform and channel businesses, which, while removing many of the incentives to exercise market power at wholesale level to constrain competition, would have been highly disruptive to the business and therefore, in Ofcom's judgment, a disproportionate remedy.

What did Ofcom hope that the wholesale must offer remedy would achieve? Ofcom believed that it would increase consumer choices about which platform to subscribe to, and that it would promote competition in pay TV by encouraging new ways to bundle sports content. Ofcom further believed that it would increase competition in pay TV retailing, to the advantage of consumers, and that Sky itself would benefit from an expansion in wholesale revenues by making its content available to other retailers. The remedy was designed in such a way as to minimise the impact of the intervention on the value of rights licensed to broadcasters by sports bodies.

This finding was immediately challenged by BSkyB and others with an interest in the wholesale sports rights market, resulting in the Competition Appeals Tribunal (CAT) examining the remedy.

Competition Appeals Tribunal judgment on wholesale must offer provision

The Competition Appeals Tribunal reviewed the Ofcom statement and took evidence from interested parties. In a complex hearing involving multiple complainants, the core issue was a "root and branch challenge" by Sky of Ofcom's findings with regard to the wholesale supply of Sky Sports 1 and Sky Sports 2 to other pay TV platforms.

CAT examined the evidence presented and concluded in 2012 that Ofcom's sector analysis was flawed. In essence, the CAT found that Sky did in fact engage constructively with other pay TV platforms for the distribution of Sky Sport 1 and Sky Sports 2. CAT noted that, while for strategic reasons Sky had a preference for keeping the retail role when supplying channels to third parties, it was not opposed to wholesale supply. CAT observed for example that the standard definition versions of the channels were supplied to Virgin Media. As a consequence of this decision, the wholesale must offer obligation proposed by Ofcom was withdrawn.

Ofcom investigation of premium movie content

Ofcom defined the premium movies sector as comprising rights to the output of the six major Hollywood studios, and it found that Sky controlled the UK rights to the first subscription pay TV window of all six studios. Ofcom noted that Sky also acquired subscription video on demand rights to first run movies, although it was not at that time heavily utilising these rights.

Ofcom concluded that this was evidence that BSkyB had market power in the linear channel distribution of premium movies. And at a time when growing SVOD services were disrupting the pay TV market, Ofcom concluded that Sky's position in the market could also limit competition in on-demand services in the future.

As the sector-specific powers granted to Ofcom under competition law to investigate significant market powers are limited to the linear pay TV market only, and Ofcom's findings covered both linear TV and SVOD, Ofcom referred the premium movies market to the Competition Commission for investigation.

Ofcom identified two issues to the Competition Commission for examination. They are:

- The supply and acquisition of subscription pay TV movie rights
- The wholesale supply and acquisition of packages which include premium movies channels

Competition Commission examination of the pay TV movies sector

The Competition Commission inquiry into pay TV movies set out the hypothesis that Sky's market power in pay TV movies enabled it to control the windowing of first run movies on pay TV, adversely affecting competition between pay TV retailers and impacting negatively on consumers and suppliers.

In exploring this hypothesis, the Competition Commission found that movies play a relatively minor part in consumer decisions about which pay TV provider to subscribe to, and that intervention not was therefore justified in the retail market. It further found that the wholesaling of Sky Movies gave no sustainable source of market power to Sky in the wholesale market, and therefore there was no need for action on Sky's market power in the wholesale market.

The Competition Commission did note, however, that Sky's large subscriber base, high and stable level of concentration, low level of consumer switching between suppliers, the difficulty of large scale entry and expansion as a traditional pay TV retailer and the absence of countervailing buyer-power led to conclude that competition in pay TV is not effective. It further noted Sky's high profitability from its pay TV activities.

Other Ofcom intervention: technical platform services

Under the European Union framework for electronic communications networks and services, Ofcom has imposed regulatory conditions on Sky, which require it to provide certain technical platform services to broadcasters who wish to distribute their channels on Sky's DSAT platform. This is a pro-competition measure, which enables channels other than those in Sky's retail offerings to use Sky's digital infrastructure to broadcast, thus providing choice to consumers.

Technical platform services enable channels to make their content available on Sky's digital set-top-boxes and to charge for their content. TPS include:

- Conditional access, which enables pay-per-view and pay TV services by encrypting content and allowing those end-users who have paid for the service to unscramble it;
- EPG listing; the channel listing in the "electronic programme guide" that viewers use to browse TV listings. The EPG itself is subject to a code of practice to ensure that public service channels are given due prominence and that there is fair and effective competition in the way that channels are numbered – which can have a significant impact on channel discoverability and viewing share[28]; and
- Geographical masking – which enables broadcasters to limit the availability of their channels, for example if acquired content rights are limited to certain territories.

Under Ofcom's guidelines, Sky is required to ensure that its terms, conditions and charges for the provision of these technical platform services are fair, reasonable and non-discriminatory.

Conclusions

The UK has a well-developed competition policy regime, which incorporates EU provisions into domestic legislation and has sector specific provisions exercised by media regulator Ofcom. Several observations can be made about the operation of the competition policy

[28] Ofcom, Code of practice on electronic programme guides, Ofcom 2004

regime in the UK subscription pay TV sector, which may be relevant to regulation in South Africa:

First: The interpretation of a market can differ between statutory bodies – so that the Competition Appeals Tribunal overturned Ofcom's reading of the market for pay TV sport based on its own interpretation of evidence brought before it. This underlines the need for a mechanism that allows affected consumers and commercial parties to appeal an initial decision.

Second: Significant market power does not necessarily result in an adverse effect on competition; BSkyB has a high market share of the subscriber pay TV market and yet CAT did not find that it was using this market power to disadvantage competitors in the way it wholesaled its core premium sports channels.

Third: Pay TV movie rights may be becoming less important in the battle between pay TV providers for subscribers. The Competition Commission noted in its findings that only a small proportion of consumers consider watching movies in the first subscription pay TV window as an important determinant of their pay TV subscription decisions. The Competition Commission also observed that the growing reach of high-speed broadband networks and the ability of consumers to access movie content via over the top services such as Netflix and Amazon Prime is reducing the consumer appeal of linear movie channels.

Fourth: In a rapidly changing market, sector-specific competition legislation can become obsolete because new technology developments emerge which are not captured by the law as drafted. This was the case with Ofcom's sector-specific powers, which meant it had no jurisdiction over subscription video on demand services.

Fifth: Competition inquiries can place substantial burdens on regulatory authorities, affected parties and other participants in the process.

Sixth: Technical interventions can create the conditions in which competitor offerings are better able to take on a dominant pay TV provider. Under Ofcom's guidelines on technical platform services, wholesale prices for services are regulated.

6.4 Singapore

Introduction

Singapore is a wealthy state of 5.6 million people with average annual GDP per head of working age population of $56,000 per year[29]. It has high TV household penetration and a majority of households have pay TV. Singapore provides an interesting benchmark because it has a well-structured, sector-specific regulatory regime and an interventionist regulatory authority.

There are some significant differences compared with the South African market. Singapore has a high population density and a large cable footprint, and it has high broadband penetration, which supports IPTV. Private satellite dish ownership is prohibited.

The pay TV market is a duopoly but it is more competitive than it was a decade ago because of the launch in 2007 of an IPTV service to compete with the monopoly cable provider. The IPTV service, with a strong parent company in Singtel, now accounts for 46 per cent of the pay TV market and so, while both providers might be characterised as having significant market power, they are broadly matched in terms of their market share; the growth of IPTV is taking share from cable TV provider StarHub.

The regulatory authority, The Media Development Authority of Singapore (MDA), was created in 2003[30]. The MDA has a Code of Practice for Market Conduct in place to enable and maintain fair market conduct and effective competition in Singapore's media industry. The MDA has further encouraged competition in pay TV by introducing cross-carriage requirements that each provider must make available exclusive content to its competitor's pay TV subscribers.

TV access

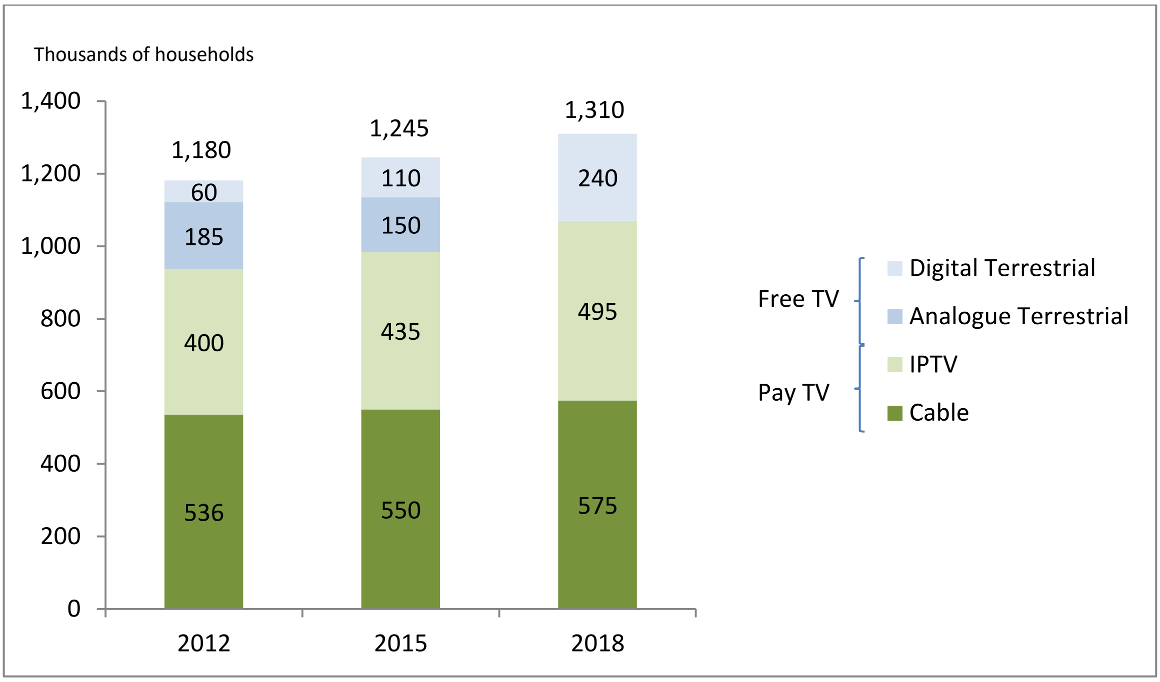
There is 100% TV penetration in Singapore's 1.25 million households. About 985,000 households subscribe to a pay TV service; pay TV is delivered by StarHub over its cable network and by SingTel over its broadband internet network. 250,000 households receive a free TV service broadcast over terrestrial networks. Digital terrestrial is likely to overtake

[29] Source: World Bank
[30] Media Development Authority (2003) Code of Practice for Market Conduct in the Provision of Media Services, MDA

analogue as the primary means of receiving free TV in the next year or so and digital switchover might be completed by 2018.

As Figure 10 shows, 80 per cent of Singapore households (1 million out of 1.25 million) have pay TV, delivered either through cable or IPTV. IPTV was launched in 2007 and has grown rapidly, facilitated by high broadband penetration across Singapore. Digital terrestrial transmission is rapidly replacing analogue terrestrial as the transmission mode for free TV services.

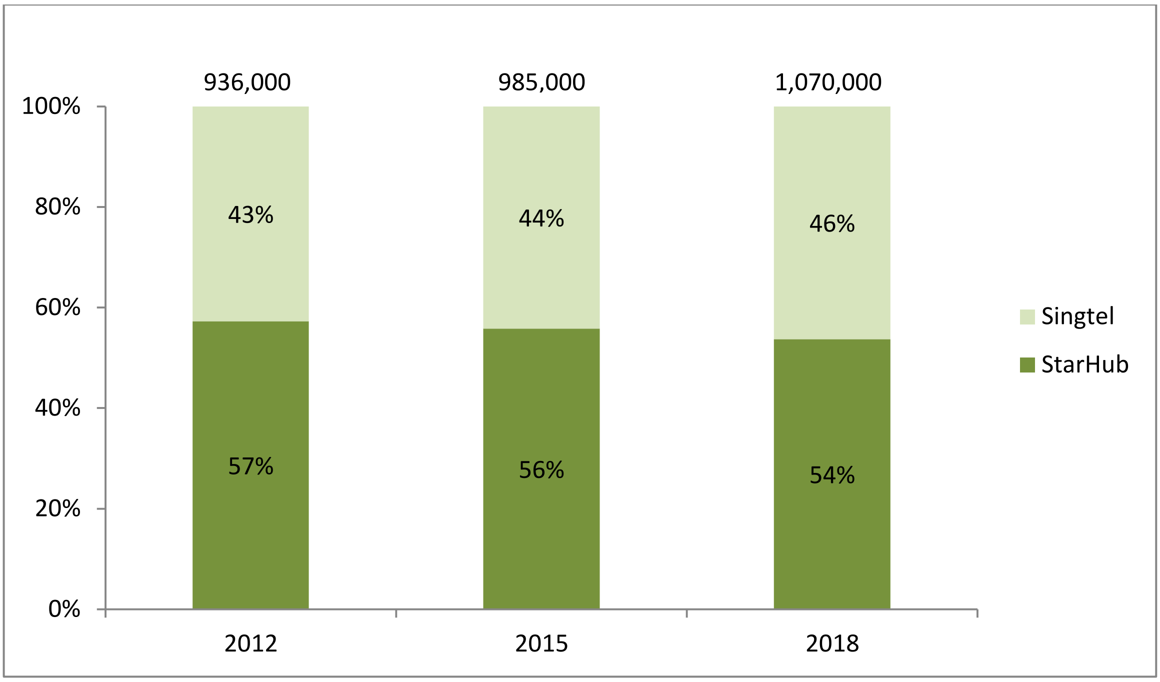
Figure 10: TV penetration in Singapore by access method (2012-2018)



PAY TV MARKET STRUCTURE

The pay TV market is a duopoly (Figure 11):

FIGURE 11: SHARE OF SINGAPORE PAY TV MARKET BY PROVIDER (2012-2018)



Singtel began life as the state telephony provider and has grown to be a major international telecommunications company, with interests in 21 countries across Asia Pacific, the Middle East, Europe and the USA. The business, which is still majority-owned by the Singapore government, generated operating revenue of $17.2bn (US$12.7bn) in 2015[31].

Singtel launched its pay TV offering Mio TV in 2007 and the service – offered in combination with fixed line telecoms, broadband and mobile services – has 435,000 customers generating $302m (US$220m) attributable revenues. The service, now renamed Singtel TV, is distributed over Singtel's broadband network via an IPTV platform.

StarHub offers quadruple-play bundling of cable TV, broadband and fixed line telephony delivered over a hybrid fibre-coaxial (HFC) network, and 4G mobile services. It is listed on the Singapore Exchange. The business has total turnover of $2.4bn (US$1.75bn), of which $391m (US$290m) is attributable to pay TV. While pay TV subscribers have grown from

31 Source: company annual report and website

about 536,000 subs in 2012 to 550,000 in 2015, revenue from pay TV has been flat since 2012, reflecting growing competition from SingTel and the revenue impact of bundling additional services (the number of triple-play households has grown from 214,000 in 2012 to 245,000 in 2015)[32].

Table 7 gives a flavour of the pay TV offerings on Singtel and StarHub. Both operators have a range of English language thematic channels bundled in basic pay TV offerings, and add-on packages of ethic channels including Indian and Mandarin Chinese channels (not shown). Premium movies and sports channels are available for purchase as a buy-through from the basic pay TV channel packages.

TABLE 7: EXAMPLE PAY TV CHANNEL OFFERINGS FROM STARHUB AND SINGTEL

Provider	Package	Tier	Channel count Monthly sub (Singapore $)	HD?	Example Channels
Singtel	Family Starter	Basic	91 channels $34.90 (US$26) + $4.90 HD STB and Singtel telephone line ($29.43 [US$21.65] per quarter)	√	Cartoon Network, Disney Channel, Discovery, Fox News, FX, National Geographic, Nickelodeon, Starworld
	Mio Stadium +	Premium	9 channels $59.90 (US$44) buy-through from a starter package	√	English Premier League football incl. on-demand
StarHub	3 basic thematic packages	Basic	39* (+12 free) $33.17 (almost US$25) + $4.00 SD STB	X	BBC Entertainment, Cartoon Network, Disney Channel, Fox, FX, Nickelodeon, STAR World
	Supreme Box Office	Premium	14 channels $28.90 (about US$21) buy-through from a starter package	√	CINEMAX, FOX Movies Premium, HBO, DreamWorks Channel

* For consumers who choose entertainment, Kids and Lifestyle packages. 19 HD and on-demand channels available on payment of $5.00 HD Basic Upsize

Cross-carriage obligations (considered in more detail below) remove much of the advantage which accrues to a particular platform arising from access to exclusive content offerings. For example, as a consequence of cross-carriage obligations, Mio Stadium + is also available on Starhub. This regulatory intervention is considered in more detail below.

COMPETITION POLICY AND PAY TV REGULATION

Sector-specific regulation is the responsibility of the Media Development Authority of Singapore. The MDA's mission includes the formulation of clear and consistent regulatory

[32] Source: company websites

policies, which ensure fair market conduct and effective competition, and safeguard consumers' interests.

In 2013 the MDA published Guidelines on Market Definition & Assessment of Market Power following a public consultation. The MDA notes that only when the market has been defined can the market share attributable to relevant undertakings be calculated – and that market share is typically the starting point for assessing market power.

MARKET DEFINITION

The MDA follows usual practice by identifying that market definition should comprise a product market and a geographical market.

The definition of the product market includes consideration of demand-side substitution, supply side substitution and price discrimination.

The MDA identifies the SSNIP test (small but significant non-transitory increase in price) as a means of defining the product market. The MDA also notes that the SSNIP test can also be used to define a geographical market (which is usually the whole of Singapore). The MDA does not propose the use of the SSNIP test mechanically but rather using it as a conceptual framework for analysis. The MDA commits first to conduct a detailed qualitative analysis of the relevant market to explore the characteristics of the relevant market and the structure of suppliers and customers in that market before deciding if detailed quantitative or econometric analysis is needed.

The MDA notes that there are other factors to consider in defining pay TV markets:

- Bundling: Can consumers buy the individual elements in a bundled offering separately? This adds complexity to market definition because the relevant market might comprise the bundled product (say basic pay TV and premium movie channels), or the bundle and a standalone movie package or standalone basic pay TV package. The availability of movies via SVOD adds an additional layer of complexity to market definition.
- Convergence: the ability of suppliers to provide similar services over different network platforms may increase content bundling, and the ability of an existing pay TV operator to deploy IP based distribution of on-demand services may have implications for supply-side substitution if it prevents new entrants.

- Windowing: the relevant market may be “temporal” – in the case of live sport or movies for example. For some consumers, the screening of a recent Hollywood blockbuster movie on pay TV and the same movie shown on pay TV one to two years after its release may not be substitutes.

The MDA’s guidelines set out a clear process of market definition, which provides the foundation for assessment of market power.

ASSESSMENT OF MARKET POWER

The MDA assesses Significant Market Power (SMP) with reference to market share and other factors.

The MDA notes that there are multiple means of measuring market share – two of the most relevant of which in pay TV might be revenue and subscriber numbers – and that judgment is necessary to determine the appropriate measure. There is an assumption that an entity with a market share greater than 60 per cent has SMP, and that one with market share lower than 40 per cent does not have SNP. In between these upper and lower limits, the MDA may initiate a closer review to determine whether SMP exists.

Other factors in determining SMP in addition to market share used by MDA include barriers to entry and switching costs.

- Barriers to entry in TV broadcasting have traditionally been high due to the need to build out a transmission network. There are then very low incremental costs of each new subscriber. The ability of new entrants to use OTT protocols to reach consumers over broadband internet may be reducing the high capital investment needs, but access to content may be tied up by existing providers.
- Switching costs: Contract length and bundling may create switching costs for consumers and thereby deter substitution.

The MDA recognises that high market shares do not necessarily mean that competition in the relevant market is not effective. In some cases, a high market share can be the result of persistently successful and innovative business strategies, rather than the exercise of market power. In such cases, the relevant undertaking's ability to exercise market power may be constrained if other entities could rapidly enter the market in response to an increase in price or a decrease in quality.

Sector-specific intervention

In addition to the market definition guidelines, the MDA has implemented a cross-carriage measure, under which pay TV retailers with exclusive acquired content are required to offer that content to competitors' subscribers at the same price. The measure is designed to reduce the extent to which Singtel and StarHub compete on content and thereby encourage competition in terms of quality and innovation. Singtel's English Premier League contract for the period 2013 to 2016 is designated as Qualifying Content and hence Mio Stadium + (the channel package in which Singtel distributes live coverage of Premier League games) is available to StarHub subscribers, who can access the content using their existing HD set top box but are invoiced separately by Singtel for the package. Singtel's coverage of the 2014 FIFA World Cup was also available cross-carriage.

Conclusions

The MDA has developed a robust competition framework for media regulation based on the 2003 Code of Practice, which has been updated periodically – for example to incorporate the cross-carriage obligations. While both StarHub and Singtel TV have market shares in the region 40-60 per cent which might trigger a market review to determine whether either has significant market power, the fact of active competition between the two – plus active oversight by the regulator – negates the need for a formal inquiry into market power.

The MDA has competition powers but it also has a role in promoting the development of the media sector in Singapore. While outside the scope of this report, it is conceivable that this dual role could create conflicts of interest – for example were the regulator to consider a competition matter involving domestic and international competitors.

6.5 Kenya

Introduction

The Republic of Kenya is an East African lower middle-income country of 45 million people with average annual GDP per head of $1,360 per year[33]. Kenya forms part of the East African Community (EAC) and is the most developed market in the region with 12 million households.

The Kenyan competition regime is regulated by the Competition Act of 2010 (the Act), which came into operation in 2011. The Competition Authority of Kenya (CAK) and the Competition Tribunal were established in terms of the Competition Act and their powers and functions are provided for in the Act. Kenya also has a Ministry of Communication and Technology and the broadcasting sub-sector falls within their jurisdiction.

Kenya provides an interesting study as, unlike South Africa, it has more pay TV access platforms and the pay TV market is competitive with multiple players, including South Africa's Multichoice. Kenya's regulatory structure is similar to South Africa.

TV access

One third of Kenyan homes have access to TV (roughly 4 million households out of 12 million in total). Terrestrial analogue remains the primary reception technology, although DTT penetration is growing. Approximately 0.6 million households subscribe to pay TV.

Kenya's digital switchover to DTT started in January 2015, beginning in Nairobi and extending to other parts of the country. Kenya has five pay TV operators with Star-Times, DStv and Zuku as the major providers.

Pay TV in Kenya is distributed on DTT and DSAT, the former in about 300,000 homes and the latter in about 250,000 homes. Together, they account for 95% of pay TV reception. A few thousand cable homes in urban areas make up the remainder of the pay TV market[34].

Multichoice and Zuku operate on multiple platforms. Multichoice operates as DStv on satellite and as GOtv on DTT, while Zuku is distributed on cable and DSAT. There were

[33] Source: World Bank
[34] Source: Dataxis.com, accessed 08 April 2016

2.6 million pay TV set-top-boxes on the DTT platform at the end of 2015[35]. The table below illustrates the TV access platforms by different pay TV providers:

TABLE 8: PAY TV ACCESS PLATFORMS IN KENYA, BY PROVIDER

Provider	DTT	Satellite (DTH)	Cable
Startimes	X	X	
Multichoice (DSTV & Go TV)	X	X	
Zuku		X	X
Market Share*	**53%**	**43%**	**4%**

*based on 2014 figures

PAY TV MARKET STRUCTURE

In 2015, Startimes surpassed Multichoice as the market leader in pay TV. StarTimes, which distributes over DTT and DSAT, has approximately 40% of the pay TV market (220,000 subscribers). The major competitors have a similar structure in terms of content offering. The premium bouquets usually have more sports channels, with DSTV offering a large number of sports channels from SuperSport, which has most of the English Premier League rights. Startimes remains cheaper on both DTT and DTH.

35 Source: Communications Authority of Kenya

TABLE 9: EXAMPLE PAY TV CHANNEL OFFERINGS FROM STARTIMES, DSTV AND GO TV

Provider	Package	Tier	Channel count Monthly sub (USD)	HD?	Example Channels
Pay DTT					
Startimes	Basic Bouquet	Basic	38 + channels 499 KES (about $5)	√	Al Jazeera, BBC News, CCTV 9 Documentary, e.tv, Nickelodeon, Zee Cinema
	Unique Bouquet	Premium	74 + channels. 1,499 KES (about $15)	√	BBC News, BET networks, Discovery Science, Fox News, Fox Sport, Trace Sport, Euro Sport, NBA TV football incl. on-demand
Go TV	GOtv Lite	Basic	12 channels 160 KES (less than $2)	X	e.tv Africa, Al Jazeera,
	GOtv Plus	Premium	33 channels 399 KES (about $4)	X	CNN International, MTV Base, Nickelodeon, Disney Junior, Supersport, Mnet Movies, ED, Nat Geo Wild

Provider	Package	Tier	Channel count Monthly sub	HD?	Example Channels
DTH					
Startimes	G	Basic	35 + channels 399 KES (about $4)	X	CCTV 9 Documentary, CCTV News, AMC Movies, Da Vinci Learning
	Super	Premium	100 channels, 04 HD channels and 25 audio channels. 1,499 KES (about $15)	√	Bloomberg TV, Fox, Discovery Science, MTV Base, ST Sports Premium, ST Series, Fox Sports
DSTV	Access	Basic	98 channels 1,050 KES (about $10)	X	Zee World, Mnet Movies Zone, Telemundo, Supersport Select, CNBC Africa, BBC World News
	Premium	Premium	168 channels 9,400 KES (almost $95)	√	Supersport HD, BBC Lifestyle, Discovery IDx, CNN International

COMPETITION POLICY AND PAY TV REGULATION

Kenya does not have a sector specific competition policy. Competition issues are handled by the Competition Authority of Kenya guided by the generic competition policy. The Communications Authority of Kenya is responsible for licencing and monitoring of broadcast services.

MARKET DEFINITION

The Competition Authority follows usual practice by identifying that market definition should comprise a product market and a geographical market. The definition of the product market includes consideration of demand-side substitution and supply side substitution[36].

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36 Guideline on Relevant Market Definition, Competition Authority of Kenya

The Authority identifies the SSNIP test (small but significant non-transitory increase in price) as a means of defining the product market. The Authority also notes that the SSNIP test can also be used to define a geographical market.

Assessment of market power

The Authority assesses Significant Market Power (SMP) with reference to market share and other factors. The definition of market power has been mainly applied in consideration of competition issues in mergers and acquisitions. The definition has not been applied to the broadcasting industry.

Conclusions

The Communications Authority of Kenya (CA) regulates telecommunications, postal and broadcasting services in Kenya. Insofar as broadcasting is concerned the CA's function is to, among other things, promote the development of a wide range of broadcasting services in the public interest, promote diversity and plurality of views for a competitive marketplace of ideas, handle complaints in the sector, protect the right of privacy of all persons. Kenya does not have a specific regulatory body for the pay TV market and thus competition issues in the industry are dealt with using general competition regulations. The competition regulations have been applied largely on mergers and acquisitions. South Africa could learn from the structure of the Kenyan anti-trust laws in market and market power definitions.

The pay TV market is still in developing stages and has seen substantial growth in recent years. The growth in TV households, particularly in rural areas, will contribute to the continued growth in TV households and the economic development should boost the pay TV market. Competition within the Kenyan pay TV market resulted in decline in pay TV prices resulting in wider pay TV access.

Multichoice has exclusive rights to sports which other players consider anti-competitive. Zuku TV lodged a complaint against Multichoice on long term exclusive contracts. The matter has not been finalised but it is important to note that Multichoice's exclusive contracts are a subject of legal disputes in the East African Community countries and they appear to be Multichoice's competitive advantage.

7. SUMMARY OF RELEVANT FINDINGS

This chapter pulls together relevant observations from the benchmark territories.

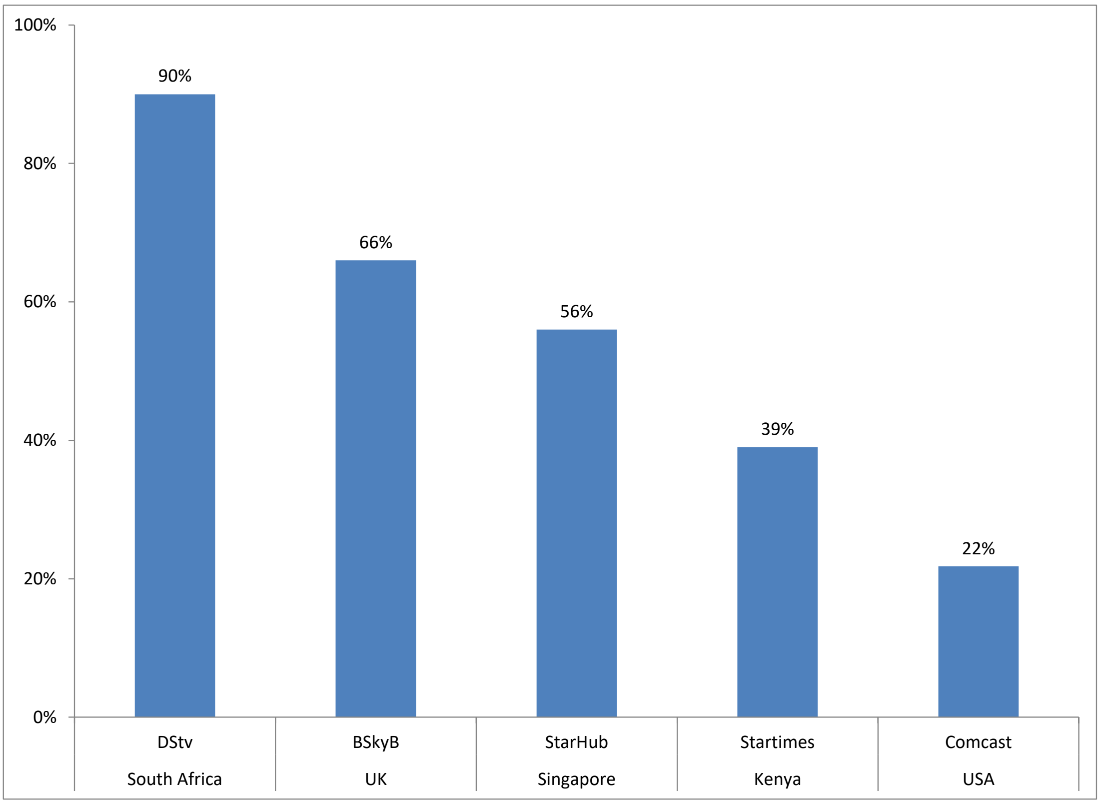
7.1 A CONCENTRATED MARKET

In Chapter 5 we identified two distinctive features of the South African pay TV market which tend to suggest that it is a concentrated market:

The first feature is that DSAT is the only platform delivering linear pay TV at scale. South Africa has no cable network and DTT is at an early stage of introduction. There are nascent SVOD offerings available OTT from Netflix and others but there is no evidence that these are taking linear pay TV subscribers or spend – i.e. consumers do not treat these services as a substitute for subscription linear pay TV.

The second distinctive feature is that linear pay TV is dominated at the channel packaging and retail distribution levels by Multichoice, whose DStv brand is the choice of over 90 per cent of pay TV subscribers. To put this in perspective, Figure 12 shows the market share of the largest provider of subscription pay TV in the benchmark countries, and DStv in South Africa has the highest concentration of subscribers in any of the markets we have reviewed.

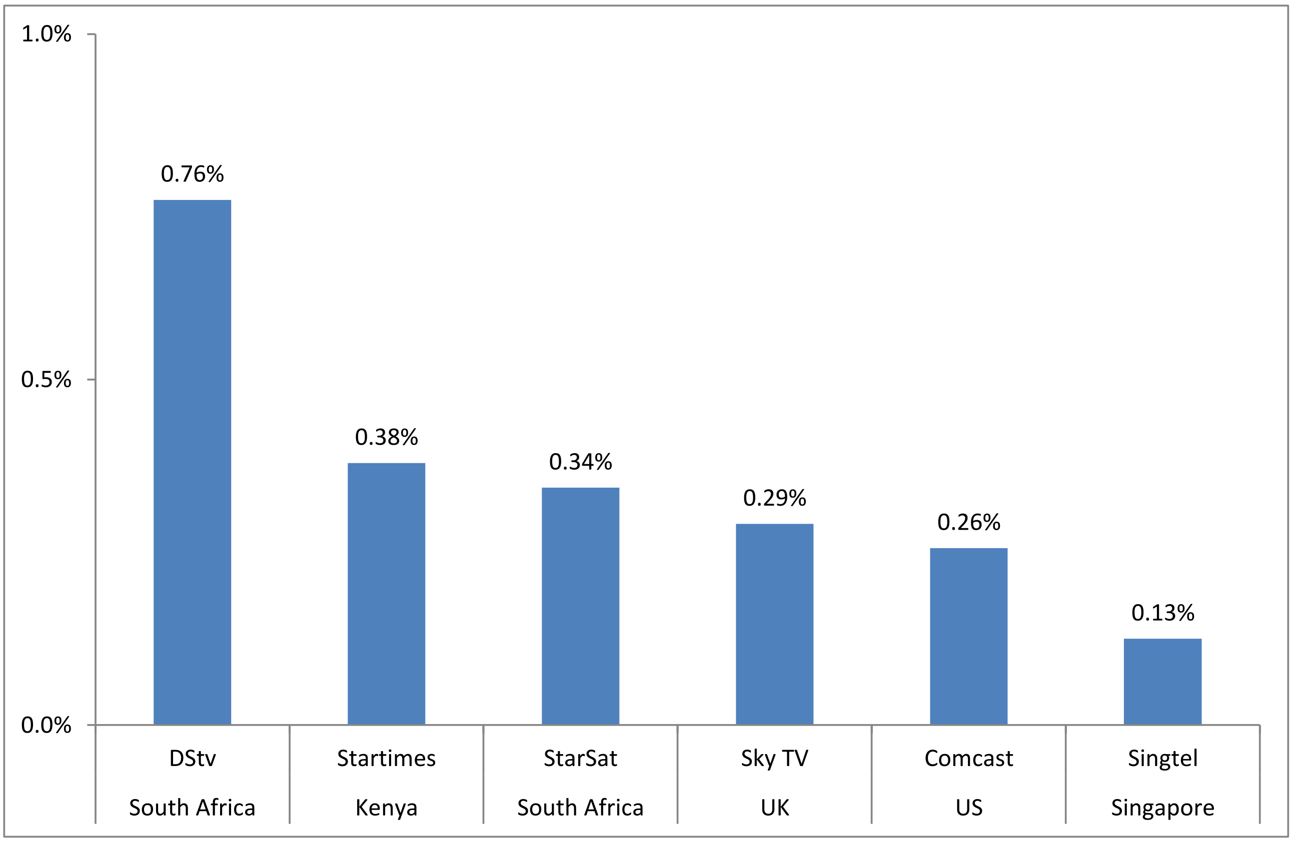
FIGURE 12: MARKET SHARE OF LARGEST PAY TV PROVIDER IN EACH BENCHMARK COUNTRY



Our review of competition policy in benchmark territories (Chapter 6) indicates that a market share above 60 per cent is often sufficient to raise concerns that an entity possesses significant market power. While Figure 12 shows only one dimension of market share (another dimension might be share of revenues), it provides a starting point for a debate about the competitive dynamics in the South African market.

Another comparison is to look at the retail price of a pay TV subscription as a proportion of GDP per head in each country, to provide some evidence about affordability. This is presented in Figure 13, which is calculated by taking the retail price of the basic pay TV offering from each provider (ignoring any seasonal or new-subscriber offers, or any associated fixed telephone line costs) and multiplying it by 12 to give an annual pay TV cost to the household. This is then converted to US dollars. We use gross domestic product per household as a rough measure of household income; to calculate it we have used World Bank data for GDP in each country (2014 data in US dollars), divided by the number of households per country. Dividing the annual retail price of pay TV by household GDP gives an indication of the relative cost of a basic pay TV bundle as a proportion of household income.

FIGURE 13: ANNUAL COST OF BASIC PAY TV AS A PERCENTAGE OF PER HOUSEHOLD GDP



This calculation is indicative, but suggests that South African pay TV prices are relatively high, which may be indicative of an absence of competition.

We explored the competitors to DStv in South Africa, observing that in two rounds of licensing new pay TV operators in 2007 and 2014, only StarSat has launched to date. We further noted that StarSat occupies a different positioning to DStv, focusing on entry-level packages.

Therefore, the pay TV market in South Africa might be characterised today as exhibiting a high market concentration without a strong competitor to the largest provider.

7.2 LIMITED POTENTIAL FOR SUPPLY SIDE SUBSTITUTION

Evidence from our benchmark territories shows that new pay TV entrants can make inroads into concentrated markets. In the UK, BT has invested heavily in technology, content, and subscriber acquisition to build a pay TV offering focused on sport. BT uses its fixed broadband network and DTT capacity for distribution. This has created a major competitive challenge for BSkyB, whose Sky TV service is the largest provider of pay TV services in the UK. In Singapore, Singtel's IPTV service, launched in 2007, now accounts for 46 per cent of the pay TV market.

What are the prospects for new entrants to the South African market in the short to medium term? A majority of the providers licensed by ICASA in 2007 and 2014 appear to be finding it uneconomic to launch in the prevailing market conditions. South Africa's primary telco, Telkom SA, appears unlikely to emulate BT and Singtel and launch an IPTV service, given its current financial and strategic challenges.

In theory, IPTV offers a platform to distribute pay TV that is a lot cheaper than rolling out a new network. A key issue for any IPTV player however is the reach and robustness of the broadband network for delivering a reliable service. Standard TV services stream at about 2.5 megabits per second, and network resilience is necessary to prevent live broadcasts breaking up or freezing as the service buffers.

It may be a question to ask of industry experts during the consultation as to whether they see the broadband network in South Africa (fixed and/or mobile) as a viable platform for linear TV services. If not, then broadband will remain a platform for OTT offerings on demand, where pre-viewing buffering or download-to-view options provide mitigation against latency in broadband networks.

Where broadband networks are robust enough to support TV services, traditional linear pay TV providers can come under pressure, as evidenced in the US, where pay TV subscriber numbers have fallen slightly as some subscribers revert to on demand services. It remains, however, a small part of overall pay TV provision.

The roll-out of DTT in South Africa may potentially offer a competing platform to DSAT for pay TV services, and offer capacity for prospective operators to enter the market. However, evidence from the benchmarking suggests that DTT is not in widespread use as a way of distributing pay TV. In the EU, for example, only 5 per cent of pay TV households receive subscription services via DTT. This is because DTT has limited capacity which disadvantages it compared to DSAT as a means of distributing pay TV. Also, the DTT spectrum is owned by governments who tend to licence DTT to achieve certain public policy objectives such as public service broadcasting and to secure the widespread availability of a range of free TV services.

In South Africa, DTT roll-out has been subject to delay, which will dissuade investors from committing to pay TV services on DTT until the take-up of the platform is proven. An additional concern for investors is that the conditional access specification in the entry level set top box is likely to be insufficient for secure distribution of pay TV services; new operators would therefore need to subsidise the cost of box upgrades or persuade potential subscribers to buy a new box to receive encrypted pay TV channels. Hence the prospects for new DTT pay TV offerings launching in South Africa in the short to medium term are limited.

7.3 Market definition issues

When formal market investigation takes place, an early step in the process is to define the relevant market. In the context of a subscription TV market, we have observed from the benchmarking certain pertinent questions around the definition of the product market and geographical market.

Product market

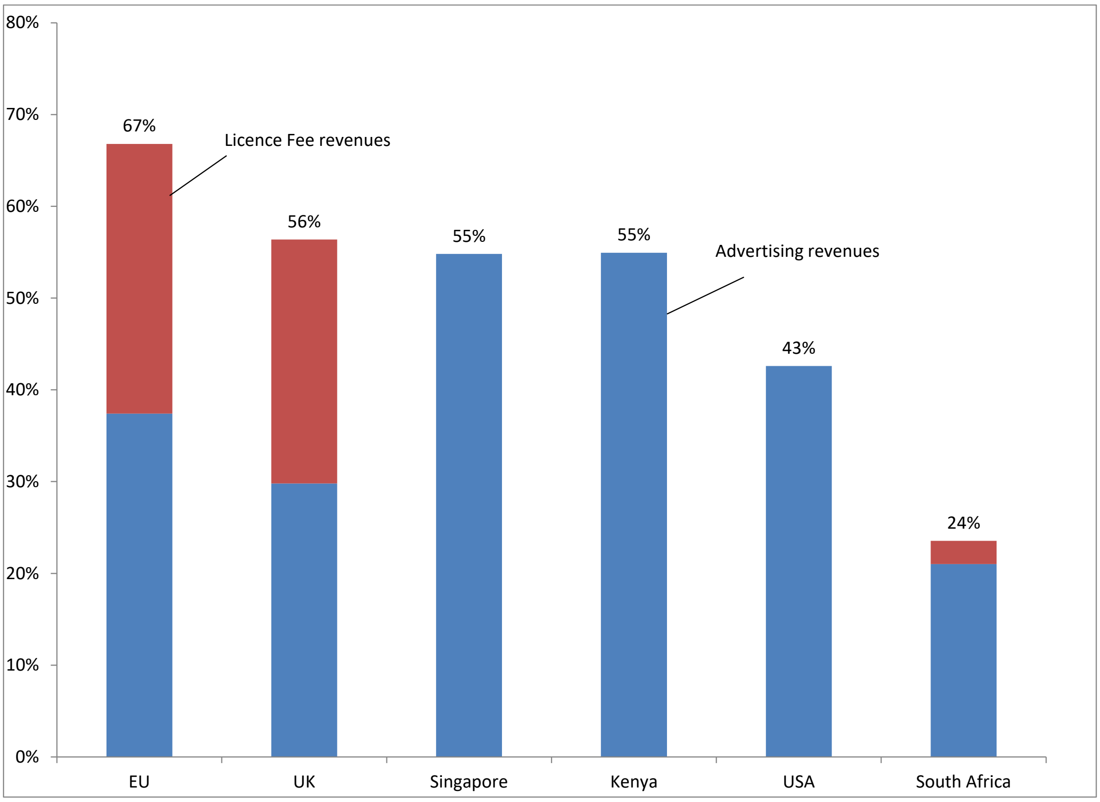
A key question in the definition of the product market might be the extent to which free TV provides a substitute for pay TV, or at least acts as a constraint on the ability of a pay TV provider to raise prices by too much.

In South Africa, there is a range of free TV services provided by the SABC and e.tv. The SABC is obliged to provide public service broadcasting including content in a range of local languages, which makes its output distinctive but which constrains its ability to respond with complete flexibility to consumer demand. e.tv, on a limited content budget, provides a schedule made up of locally made content and imports.

An analysis of South Africa compared with other benchmark countries show that free TV services are relatively underfunded compared with pay TV.

Figure 14 below shows share of TV sector revenues represented by licence fee income and advertising revenue in each benchmark country, which broadly represents the income to free TV services (a proportion of the advertising revenue will be earned by pay TV channels but the bulk is earned by high reach free TV channels, so the analysis is likely to be directionally correct). The graph shows that free TV channels in South Africa are competing for a smaller proportion of total TV revenue than in the other benchmark countries, which might suggest that it is less likely to provide a viable alternative to pay TV than in the other territories we have looked at.

FIGURE 14: APPROXIMATE FREE TV SHARE OF TV REVENUES



Overall therefore, in our view free TV offerings are unlikely to act as a significant constraint on pay TV providers. DStv in particular is insulated from the threat of free TV substitution because it holds rights to a majority of the sports content that is most highly valued by viewers. Viewer attitudes to free TV – and the extent to which is it a substitute for pay TV services – might be tested via a consumer survey. However, consumer opinion might change if free DTT services are rolled out successfully, which would enhance range and choice in free TV.

GEOGRAPHICAL MARKET

The appropriate geographical area at which to apply competition analysis is likely to be a national market – i.e. the whole of South Africa. We have observed, for example, that the EU tends to treat national markets as distinct geographical units in competition policy terms. However there is a question about whether Multichoice's operations in neighbouring territories – Namibia, Botswana and Mozambique for example – impact on competition in the South African pay TV market, or even if its activities across sub-Saharan Africa including Uganda, Nigeria, Kenya and Tanzania are relevant.

BUNDLING

We have seen that legislators in Europe recognise the challenges that bundling of more than one service creates for market definition. Currently bundling does not appear to be a major feature of the TV and telecommunications market in South Africa.

7.4 BARRIERS TO ENTRY

We have noted in the sections on benchmarking that investment in distribution networks, access to content, and bundling of services have been identified as potential barriers to entry for new pay TV operators in our comparator markets.

Access to reliable distribution is a key issue for any new entrant, and we have already discussed above some of the platform challenges around DTT and broadband internet. DSAT is probably the cheapest and most readily available source of transmission capacity, but the associated STB and dish installation costs are normally met by the provider as part of a subscriber acquisition spend, so a new provider needs significant funding to meet this expectation. A single incumbent provider with significant market power might respond to a new entrant by extending special offers to new subscribers, which make it more difficult for the new entrant to sign up subscribers and negatively impacts on its gross margins.

A second major barrier to entry is access to rights, and particularly to major sports content. We have explored how the sector regulator in the UK and the EU competition authority have taken steps to limit the exclusivity of sports rights contracts and to limit the duration of those contracts. In the UK, BT's ability to fund the purchase of exclusive rights to football and rugby competitions has driven its consumer offering.

We have identified the existence of Sports Broadcasting Rights Regulations in South Africa which give free TV broadcasters access to national sporting events. It may be that further regulations to require sports rights holders to sell to more than one provider, to require (as in Singapore) that certain key rights be shared with other pay TV providers, and/or to limit the length of contract that a rights body and a pay TV provider can enter for sports rights, would open the availability of rights to new entrants.

We have observed from EU decisions that access to recent movie releases is less significant than sports rights, which is perhaps in part a reflection of the fact that SVOD offers a more convenient means than linear pay TV for viewers to consume movies. A consumer survey could be used to test the extent to which this is the case in South Africa.

Multichoice has content production capabilities – for example producing local versions of international formats like Masterchef and Pop Idol. This requires investment in studio facilities and also in content ideas – for example writers and producers. It provides a competitive advantage because audiences identify with locally produced programming more than with imported content. Access to local original ideas and content might be a barrier to new entrants if they need to invest to build their own content production capabilities.

Regulatory intervention might concentrate on supporting the development of a local independent production sector, for example by offering tax breaks for programme production or by placing obligations on broadcasters to buy a certain amount of their output from independent suppliers. A healthy independent production sector would be a source of locally made content for new entrants which did not oblige them to invest heavily in production infrastructure.

7.5 Interoperability of set-top-boxes and dishes

ICASA asked us specifically to consider what regulatory measures are in place in benchmark countries with regard to interoperability of set-to-boxes. In this discussion we consider first, what is meant by interoperability; and second what is going on in two markets – the US and UK.

The STB is the access point for viewing programming. It contains the software necessary to convert broadcast signals into viewable content, and conditional access functionality to enable pay TV providers to protect their content and limit its availability to paying users. Increasingly STB's also provide a range of other functionality, such as enabling digital recording and playback, integrating broadcast content and streamed on-demand content, and supporting gaming and other interactive services.

Typically, a pay TV provider supplies a STB to each new subscriber and a viewing card to enable the user to access paid-for content. The pay TV provider may not charge for the

STB upfront but instead lock the user into a multiyear contract during which the initial STB cost can be recouped.

STBs supplied commercially tend not to be “interoperable”; that is, a consumer cannot use their existing STB to access the services of a competing pay TV provider. This inability to swap between pay TV providers using existing equipment might impede consumers swapping between pay TV providers and therefore act against a new provider entering the market.

There are sound commercial and technical reasons why STBs might not be interoperable:

The pay TV business model relies on the operator having control over who can access content and preventing piracy. Additionally, Pay TV providers must be able to convince content owners such as sports bodies or Hollywood studios that content assets are being distributed securely. The STB is the key step in facilitating conditional access to encrypted content. Design and ownership of the STB is very important for pay TV providers to achieve this level of control over the distribution of content.

Pay TV providers compete by innovating in new services, which might be delivered using proprietary middleware installed in their STBs; the user experience cannot be guaranteed if the provider does not have control of the STB

Historically, TV has been distributed using different protocols over cable, satellite and terrestrial transmission – so there are technical challenges around achieving interoperability (although convergence around IPTV distribution may remove this impediment to interoperability in time).

Hence, the industry is typified by STBs that are specific to each pay TV provider and do not work if the consumer moves to another provider.

Digital satellite dishes are specified and positioned with regard to the satellite from which they are receiving, so issues of interoperability between competing DSAT pay TV providers are less pertinent than whether they are distributing using the same satellite.

7.6 BUNDLING, "BUY-THROUGHS" AND A LA CARTE CHANNELS

Economic theory suggests that bundling of goods is to the benefit of both supplier and consumer, including in the case of TV channels[37]. While the consumer may receive a range of channels (not all of which they watch), the bundle is priced at a point where most consumers enjoy a surplus from the pricing due to the presence of some channels in the bundle which they value highly. For the provider, bundling is a convenient means of pricing and no less efficient a way of capturing value added than other pricing strategies.

It is not clear that regulatory intervention to enable a customer to purchase individual channels in a pay TV bundle would increase competition. It might even result in reduced efficiency if bundling theory does hold in the TV sector.

Arguments can be adduced for splitting the "buy-through" – a feature of the pay TV market whereby a consumer has to subscribe to a basic channel bundle in order to be able to access premium channels such as sport or movies.

One such argument might be that where a basic channel bundle is highly profitable, the pay TV operator can redirect some of that surplus to the purchase of premium sport or movie rights. In other words, it can outbid other bidders whose bids are based only on the value generated by the rights themselves. Of course, intervention by a regulator to reduce this ability of a pay TV operator to cross-subsidise premium rights would impact on the rights owners in the form of lower revenues for rights, and savings in rights costs might not be passed on to consumers.

Not all channels are bundled; an *a la carte* channel is one that can be purchased on a standalone basis. Many pay TV providers carry *a la carte* channels – although the consumer is often required to purchase an entry-level or basic pay TV bundle before being able to subscribe to an *a la carte* channel. *A la carte* channels may be owned and managed by a media business that is independent of the pay TV operator, but they use the pay TV operator's distribution infrastructure, conditional access services and subscriber management to reach consumers and bill for the channel. In the UK, channels can distribute on the Sky platform outside of a Sky channel bundle by using regulated access to Sky's technical platform services. This potentially gives new entrants the

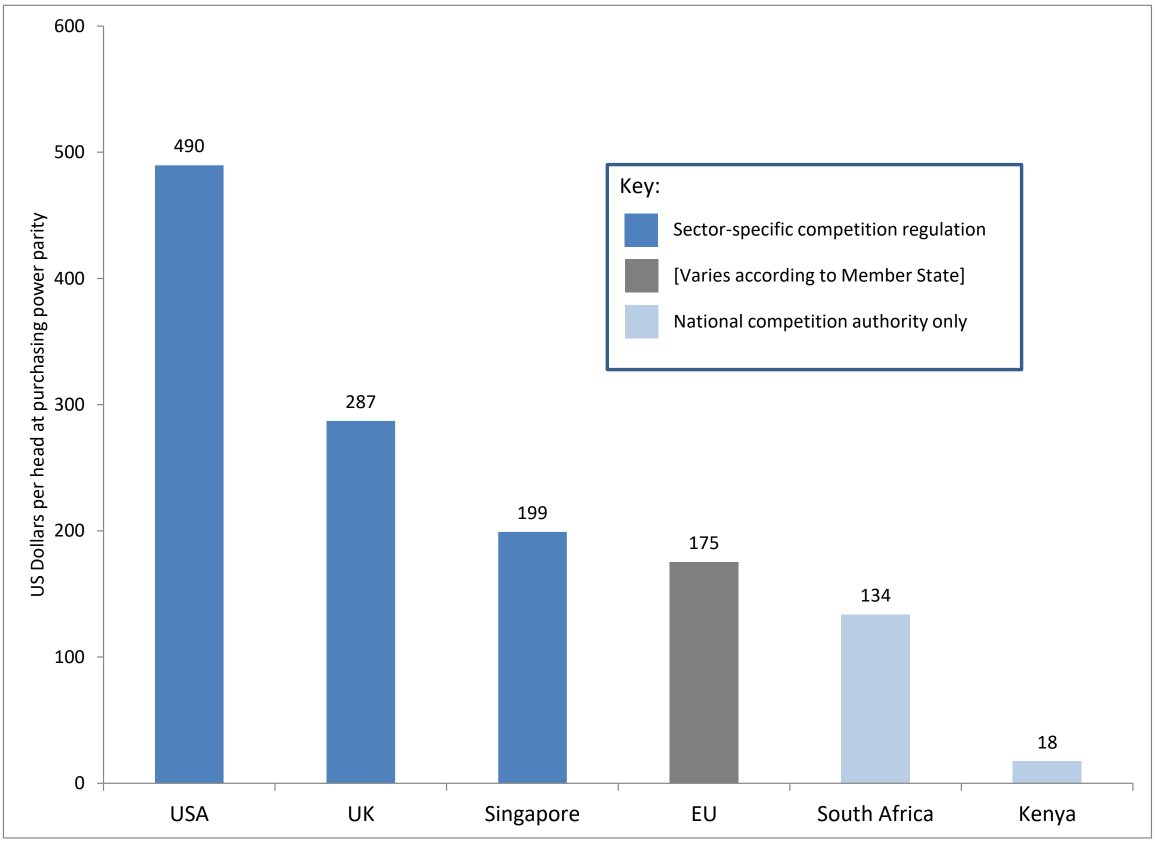
37 See for example Crawford and Yurukoglu (2011).

possibility to distribute without investing to create their own pay TV infrastructure. Despite the regulatory intervention in the UK, there has not been widespread distribution of *a la carte* channels on the Sky platform outside of Sky's marketing, distribution and billing infrastructure.

7.7 Sector specific regulation and concurrent powers

In certain of the benchmark states (the US, UK and Singapore) we found that the administration of competition policy in the TV sector is held concurrently by a national regulatory authority and a sector-specific regulator, which might also have responsibility for channel licensing and monitoring of broadcast obligations. In Figure 15 below, we have mapped TV services revenue per head of population against the presence or otherwise of sector-specific regulation.

Figure 15: TV services revenue per head and sector specific competition regulation



The graph provides some evidence that sector-specific competition powers tend to be introduced in markets where TV revenues are relatively high, although clearly with a limited set of benchmarks the evidence is not conclusive. Sector-specific competition powers, exercised by a dedicated media sector authority, may be an appropriate response to increased complexity in a market as it grows in size.

Weighed against this, additional costs of regulation might be introduced – both on the public purse and the legal and regulatory affairs budgets of commercial entities in the pay TV sector. Any new regulatory regime should be subject to a market impact assessment to determine whether the costs of administering the framework and compliance with obligations are consistent with the benefits that are secured as a result.

This may suggest a debate about whether the South African TV market has reached a size where sector-specific competition powers – and the associated costs of implementation – are appropriate.

If it were determined that South Africa would benefit from sector-specific competition regulation, best practice from the UK and Singapore suggests that a memorandum of understanding (MoU) between the relevant national competition authority and the sectoral regulator be prepared. The MoU sets out the procedures for co-working on market investigations and the application of competition policy in the sector.

7.8 Sector-specific remedies

If significant market power is identified, various approaches to mitigate those effects, short of requiring the breakup of an entity, have been identified from among the benchmark countries. These are behavioural remedies – such as obliging a vertically integrated undertaking to make available certain services to competitors on fair, reasonable and non-discriminatory terms, or preventing it from tying consumers into long-term contracts. They might suggest approaches that could be applied in South Africa if any entity in the subscription TV market is found to be abusing significant market power, such as:

- Limiting the duration of rights agreements, or requiring sports bodies to split rights and sell to more than one broadcaster;
- Placing obligations on a broadcaster of premium sports to make certain key content available to viewers on other platforms. This can be achieved via wholesale must carry obligations (as proposed by Ofcom in the UK as a remedy against Sky Sports) which would require certain channels to be made available to

competitor pay TV platforms at regulated wholesale prices, or cross-carriage obligations as in Singapore which apply to certain key content assets.

- Placing an obligation on a dominant provider to open their distribution infrastructure to other pay TV providers. Technical interventions can create the conditions in which competitor offerings are better able to take on a dominant pay TV provider. In the case of Ofcom's guidelines on technical platform services, channels are able to distribute direct to the consumer using BSkyB's digital satellite platform infrastructure because they have regulated access to BSkyB's services including conditional access, and they have certainty about how the channels will be listed on the EPG. Under Ofcom's guidelines, prices for these services are regulated. In this way, competition may be enhanced by creating the circumstances for a new entrant to utilise existing infrastructure, thereby lowering barriers to entry.

Clearly, the South African market has unique characteristics; an unusual socio-economic structure, many languages to cater for in broadcasts, the primacy of DSAT as a distribution platform for pay TV, and the high market share of DStv. These characteristics mean that learnings from the benchmark countries cannot automatically be applied in South Africa. However, the benchmarking exercise gives some interesting insights for incorporation in ICASA's wider exploration of the competitive position in the subscription TV market in South Africa.

Appendix and Bibliography

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ICASA

APPENDIX - PAY TV LICENCES ISSUED BY ICASA

LICENSING PROCESS

ICASA issued pay TV licences in 2007 to four potential entrants to the pay TV market. TopTV, now StarSat, obtained a licence during the 2007 cycle. Another cycle of pay TV licences was concluded in 2014 where an additional five pay TV players were granted licences subject to conditions. These conditions were mainly around funding and corporate structure. None of the issued licences, other than StarSat, are currently operational and thus cannot be considered as credible competition to DStv in the subscription TV market.

2007 LICENSING ROUND

ICASA began the process of licensing new pay-tv broadcasters by issuing an Invitation to Apply in January 2006. Public hearings were held in June 2007 and in September 2007, ICASA awarded pay TV licences to four new players, out of 18 applications received. Multichoice had also applied, albeit as a formality to regularise its position in terms of legislation. Licences were granted to On Digital Media, Telkom Media, E-Sat, and Walking on Water. This created anticipation in the market, in the face of what was regarded as steep pricing by Multichoice. The following section provides a short description of each licensee.

STARSAT

On-Digital-Media (ODM) planned to invest R1.7-billion (about US$240m) in a pay-tv service and launch with an entry-level service of 10 channels costing R150 (about US$21) a month. ODM began broadcasting on 1 May 2010 as TopTV, offering 7 bouquets ranging in price between R99.00 (US$13) and R249.00 (about US$33). Its target market was middle income consumers in the LSM 5-8. This strategy took into account the fact that Multichoice had traditionally targeted subscribers in the high income bracket, leaving an untapped sweet-spot of middle income households. TopTV quickly signed up about 200 000 subscribers by December 2010[38].

[38] PWC. South Africa Entertainment and Media Outlook: 2012-2016

However, by October 2012 ODM had run out of cash and was placed under business rescue. It secured funding from StarTimes who subsequently acquired a controlling stake in the business. The pay-tv licence was transferred from ODM to StarTimes Media South Africa and the StarSat brand replaced TopTV in October 2013.

Telkom Media

Telkom Media was majority owned by Telkom Ltd, following a trend that has been taking shape internationally where telecoms operators venture into broadcasting to offer quadruple play services, along the lines of BT in the UK and PCCW in Hong Kong. Telkom Media intended to offer seven channels with a focus on entertainment, education, movies, music and shopping targeting consumers in the LSM 5-10 range. The monthly subscription pricing would start R100 (US$14). In 2009, after investing about R500 million (about US$65m), Telkom decided to focus on its core business and sold its stake in Telkom Media to Shenzhen Media.

E-Sat

E-Sat is a sister company of e.tv, both wholly owned by Sabido Investments (Pty) Ltd, who is in turn majority owned by Hosken Consolidated Investments (Pty) Ltd. Its strategy was to provide a 21-channel pay TV package offering movies, sport and a 24-hour news channel, targeted at consumers in LSM 5-10. Its experience in broadcasting coupled with a solid shareholder base put E-Sat in a strong position to be a credible contender in the pay-tv market. It had argued that the South African pay-tv market cannot sustain more than two players. When ICASA awarded four licences E-Sat changed its strategy to focus on being a content provider, launching a 24-hour news channel broadcast on the DStv platform.

Walking on Water

WoWtv applied for a composite single Christian channel offering ‘safe’, family-oriented television content. Despite having applied for a single channel, WoWtv recently applied and was granted authorisation to broadcast 19 television channels and 8 sound broadcasting channels.

2014 Licensing round

In 2012 ICASA issued an Invitation to Apply for new commercial pay TV licences, and licences were granted to five applicants, conditional upon their confirming details of their proposals including equity ownership, funding requirements, further research, and confirmation of programming content agreements. The five successful applicants were:

- Close-T Broadcast Network Holdings, targeting the lesbian, gay, bisexual and transgender (LGBT) community
- Kagiso TV, targeting consumers in the LSM 5-7
- Mindset Media Enterprises, a social enterprise
- Mobile TV, targeting tech-savvy professionals
- Siyaya Free to Air, offering built around club football

Close-T and Siyaya have so far been issued with licences, meaning they have the permission to launch their services:

Close-T

Close-T's target market is the lesbian, gay, bisexual and transgender (LGBT) community. Its proposed channels include general entertainment, lifestyle, local and international movies, culture, travel, education and documentaries. Close-T's content partners include Out TV Group, Logo TV and the Out in Africa Film Festival. Its intention is to offer consumers options to either pay only for the bouquets that are of interest to them, or "pay-per-view" demand based services.

Siyaya Free to Air (Pty) Ltd

Siyaya wants to offer a satellite bouquet that retails for R70 (about US$6) per month. Soccer will be one of Siyaya's main draw cards, with plans to show club football from South Africa and the continent. Other content partners include Showtime, National Geographic, Zula, Warner Brothers, Fox and Sony Entertainment.

Its target market consists of consumers above 30 years old who earn between R4000 (about US$350) and R10,000 (almost US$900) a month - a market that Siyaya estimates has about 1 million potential viewers. Siyaya plans to break even in their fourth year of operations, but will need 300 000 viewers by then to do so.

The applicants that ICASA granted – but has not as yet received the additional information required in order to issue the licences – are:

Kagiso Media

Kagiso Media's target audience are consumers in the LSM 5-7 with a potential audience of 3.5 million to 6.5 million households. In its application Kagiso set a target of 1 million subscribers by the sixth year of operation, the point at which it aims to break even.

Mindset Media Enterprise (Pty) Ltd

Mindset is a social enterprise with an intention to earn revenue from advertising, sponsorship and government contributions and therefore charge very low subscription fees. Its proposed channels include parenting and early childhood development, primary and secondary school curriculum-aligned lessons, medical, wellness and environment channels.

Mindset is the commercial arm of the Mindset Network, which specialises in education and health content and currently produces shows for Multichoice's DStv platform, On Digital Media's Top TV platform and Sentech's Vivid platform. Mindset wants to launch channels of similar content.

Mobile TV (Pty) Ltd

Mobile TV's target market includes professionals above and including the age of 25 in the LSMs 8 and above, technology-savvy adults within LSMs 6-7, commuting workers in the LSM 5 as well as the youth. Its strategy is to offer a free-to-air "basic" package and a paid-for "premium" package including additional premium content channels. These include sports, news, music, movies, comedy, series, radio, betting and gaming as well as mobile channels.

Mobile TV's plan is to introduce mobile television services in SA using South Korea's digital multimedia broadcasting (DMB) standard. It is also planning to introduce South Africa's first digital audio broadcasting (DAB) radio stations — seen potentially as an eventual replacement to FM radio — as well as "visual radio" services, which offer visuals over normal radio broadcasts.

Conclusion

ICASA has sought to encourage competition in pay TV by licensing new applicants, but the failure of any new licensee except TopTV (now StarSat) to enter the market suggests that there are significant challenges in the way of a successful launch. These probably include access to the financial resources needed to launch a new service and grow market share, and securing distinctive content necessary to attract subscribers. This is a topic for exploration in the interviews and public hearings.

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