TABLE OF CONTENTS

GLOSSARY OF TERMS

2017 submissions	MultiChoice and M-Net's written submissions to ICASA's Discussion Document, dated 4 December 2017
2018 hearings	The public hearings held by ICASA in this Inquiry during 7 to 11 May 2018
2018 supplementary submissions	MultiChoice and M-Net's supplementary written submissions arising from the public hearings, dated 8 June 2018
2019 ICT Sector Report	The state of the ICT sector report in South Africa, March 2019, published by ICASA
5G	Fifth generation – is the next standard for high-speed wireless communication for mobile devices
ADSL	Asymmetric Digital Subscriber Line is a technology for transmitting data at a high bandwidth on copper telephone lines
Amazon/Amazon Prime	Amazon Prime Video, an American VOD service owned and operated by Amazon.com Inc.
BRC	The Broadcast Research Council of South Africa: which oversees the delivery of radio and television audience measurement research for broadcasters, as well as the advertising and marketing industry
Broadband	High data rate connection to the internet. Broadband includes several high-speed transmission technologies, such as digital subscriber line, cable modem, fibre, wireless, satellite and broadband over power lines
Broadcasting	Provision of a unidirectional electronic audio-visual service to the public or subscribers over electronic communications networks

Bouquet	Collection of linear channels packaged together by a traditional TV broadcaster and offered to the public or subscribers as a retail service
Cell C	Cell C (Pty) Ltd: a mobile network operator which has individual electronic communications service and electronic communications network service licences, and which also offers a VOD service
Channel packaging	Process of selecting and scheduling separate audio-visual programmes into a branded channel
Consumer Survey results	Results from the Consumer Survey commissioned by ICASA, comprising the focus group discussions ("Phase 3" of the market research) and the quantitative online survey of 1,002 respondents ("Phase 4" of the market research). A reference to "**Phase 3 Report**" or "**Phase 4 Report**" will be applicable when referencing results from that particular phase of the Consumer Survey
Cord-cutting	Consumer practice of terminating a traditional Pay TV subscription altogether, often in favour of one or more other electronic audio-visual services (e.g. OTT services, FTA TV or a combination)
Cord-nevers	Consumers who have never subscribed to a traditional Pay TV service
Cord-shaving	Consumer practice of downgrading to a lower-priced traditional Pay TV service and replacing parts of that service with other electronic audio-visual services (e.g. OTT services, FTA TV or a combination)
Cord-stacking	Consumer practice of subscribing to a traditional Pay TV service, often after having engaged in cord-shaving, together with one or more other electronic audio-visual services

Discussion Document	Discussion Document: Inquiry into Subscription Television Broadcasting Services published by ICASA and gazetted under Notice 642, Government Gazette No. 41070 of 25 August 2017
Downgrade	When a consumer moves from a higher priced paid-for electronic audio-visual service to a lower-priced service
Draft Findings	Draft Findings Document: Inquiry into Subscription Television Broadcasting Services published by ICASA and gazetted under Notice 573, Government Gazette No. 42391 of 12 April 2019
DTH	Direct-to-home: delivery of a traditional TV service to a consumer's premises via satellite
DTT	Digital Terrestrial Television is a traditional broadcasting service where the signal is in digital format and is delivered over a land-based network of transmitters
EC	European Commission
ECA	Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended
Econet	Econet Media Ltd, a television broadcasting service operating across sub-Saharan Africa
Electronic audio-visual service	Audio-visual content service which is delivered over electronic communications networks
EPL	English Premier League
Establishment Survey	A survey conducted by the BRC into media usage across all media types by all major demographics. The Establishment Survey data is released twice a year, during March and September

e.tv	e.tv (Pty) Ltd is a company within the eMedia Group which has a licence to provide a commercial FTA TV service, which service was launched in October 1998
FSPTW	First Subscription Pay TV window
FTA	Free-to-air: provision of a traditional TV service to consumers without payment of a subscription fee
FTTH	Fibre-to-the-home is the deployment of optical fibre to homes and businesses to provide high speed internet access
Guideline	Guideline for Conducting Market Reviews issued by ICASA on 8 March 2010
HD	High Definition is audio-visual content of a high resolution and quality, typically 1080i
HMT	The hypothetical monopolist test: where the question posed is whether a hypothetical monopolist can profitably impose a SSNIP for the focal product as defined
ICASA	Independent Communications Authority of South Africa established by s3 of the ICASA Act
ICASA Act	Independent Communications Authority Act of South Africa, 2000 (Act No. 13 of 2000), as amended
ICASA's Consumer Survey	The survey and market research commissioned by ICASA after the 2018 hearings, and conducted by Pulse, for the purposes of determining the actual and potential competitive demand-side substitutability between Pay TV and other broadcasting and VOD services
Initial Gazette	Initial Gazette in which ICASA gave notice of its intention to conduct the Inquiry, Notice 401, Government Gazette No. 40133 of 11 July 2016

Inquiry	ICASA Inquiry into Subscription Television Broadcasting Services, notice of which was given by ICASA in its Initial Gazette
IPTV	Internet Protocol Television: provision of electronic audio-visual services to consumers over IP-based networks which are usually privately managed
Kwesé	Television service comprising both FTA and Pay TV, provided by Econet Media Ltd on DTH and DTT platforms in sub-Saharan Africa. Kwesé Play was the VOD service previously on offer in SA.
Kwesé Free TV	The entity issued with a FTA DTT licence by ICASA on 19 March 2019. Kwesé Free TV is a consortium consisting of Econet Media (20%), Royal Bafokeng (45%) and Mosong Capital (35%)
Linear TV	Traditional TV service where a viewer can only watch a programme at the time it is broadcast
Local content	Audio-visual content produced in-country and usually featuring local actors and languages
LSM	Living Standards Measure is a widely-used marketing research tool which has ten segments, namely LSM1 (with the lowest living standard) through to LSM10 (with the highest living standard)
LTE	Long Term Evolution is a standard for high-speed wireless communication for mobile devices. It is often referred to as "fourth generation" or 4G
M-Net	Electronic Media Network Ltd, a subsidiary of MultiChoice SA, which has a licence to provide a Pay TV service
MTN	MTN Group Ltd, a mobile network operator: certain of its subsidiaries in SA have individual electronic

	communications services and electronic communications network services licences
MultiChoice	MultiChoice (Pty) Ltd, which has a licence to provide a Pay TV service
MultiChoice's presentation	The presentation by MultiChoice and M-Net, together with its appendices, provided to ICASA during the public hearings on 11 May 2018
MultiChoice SA	MultiChoice South Africa (Pty) Ltd, the holding company of M-Net, SuperSport and MultiChoice
Ofcom	Office of Communications – the communications regulator in the UK
OOH	Out-of-home is viewing by consumers of electronic audio-visual services at establishments such as pubs, clubs, restaurants or the homes of friends or family
OpenView	OpenView HD is a DTH multi-channel FTA TV service offered by Platco Digital (Pty) Ltd, a sister company of e.tv and part of the eMedia Group
OTT	Over the Top: provision of electronic audio-visual service to consumers via the open internet, where anyone with an internet connection can access the service
PAJA	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), as amended
Pay TV	Provision of a traditional Pay TV service to subscribers upon payment of a subscription fee
PC	Personal computer
PSL	Premier Soccer League of South Africa
Pulse	Pulse Research Proprietary Limited, the research and marketing agency engaged by ICASA to conduct ICASA's consumer survey

PVR	Personal video recorder is a device which enables a consumer to record electronic audio-visual content to a hard disk which is built into a STB
Questionnaire	Questionnaire referred to in the Initial Gazette which all relevant stakeholders were invited to complete and submit to ICASA by 12 August 2016 (subsequently extended to 15 September 2016)
SA	South Africa
SABC	South African Broadcasting Corporation (SOC) Ltd, being the public broadcasting service in SA
SARU	South African Rugby Union
SEM	Socio-economic measure, the new market segmentation tool set to replace LSMs
Sky / BSkyB	Sky UK Ltd (formerly known as British Sky Broadcasting Limited)
SMP	Significant Market Power
StarTimes/StarSat	Pay TV broadcaster operating in Africa. In 2013 StarTimes acquired the business of On Digital Media (Pty) Ltd, which was issued a licence by ICASA in July 2008 to provide a Pay TV service in SA. The Pay TV service is branded as StarSat. StarTimes ON is the SVOD service provided in Africa, including SA
Sub-Saharan Africa	Sub-Saharan Africa, including the adjacent Indian Ocean islands
SSNIP	Small but significant non-transitory increase in price
STB	Set Top Box is a device which decodes a broadcast signal for display on a TV set and which may also be used to enable authorised viewers to access content. STBs may also be used to enable a TV set to connect to the internet

Stream/streaming	Use of an internet connection to "stream" or instantly send electronic audio-visual content straight to an internet enabled device
SuperSport	SuperSport International (Pty) Ltd is a subsidiary of MultiChoice SA and an aggregator of sports content
SVOD	Subscription video-on-demand – a type of VOD service which requires payment of a subscription fee
Telco	Company which traditionally has provided voice telephony and data services over electronic communications networks
Telkom	Telkom SA (SOC) Ltd, which has individual electronic communications service and electronic communications network service licences, and which also offers an online audio-visual streaming service, branded Telkom LIT
Traditional TV	Linear broadcasting service, transmitted via terrestrial frequencies or satellite
TVOD	Transactional video-on-demand – a type of VOD service which requires a fee for each piece of electronic audio-visual content e.g. a fee to rent a movie
UEFA	Union of European Football Associations
UK	United Kingdom
UKCC	UK Competition Commission
Upgrade	When a consumer upgrades from a paid-for electronic audio-visual service to a higher-priced service
VOD	Video-on-demand is an electronic audio-visual service where the user selects when to view the content and the content is made available only when selected by the user
Vodacom	Vodacom (Pty) Ltd, which has individual electronic communications service and electronic communications

	network service licences, and which also provides a VOD service
WMO	Wholesale must-offer is a remedy imposed by a regulator compelling a vertically integrated broadcaster to make one or more of its channels available to a competing broadcaster, usually at a regulated price

INTRODUCTION AND EXECUTIVE SUMMARY

INTRODUCTION AND OVERVIEW OF CONCERNS

1 In its 4 December 2017 response to the Discussion Document, MultiChoice provided ICASA with detailed and extensive information, data and other evidence[1] that electronic audio-visual consumption patterns – worldwide and in South Africa – had been turned on their heads. The growth and improvement of broadband infrastructure and connected smart devices, changes in electronic audio-visual consumption patterns, and the emergence of new business models and competitors in the form of OTT service providers had, over the preceding five years, brought massive change in the electronic audio-visual services sector, and substantial disruption to traditional Pay TV broadcasting services.

2 By the end of 2017, consumers had an extensive array of electronic audio-visual content to choose from, which they could view whenever and wherever they wished – not only on TV sets but on a range of mobile devices. At that time there was also ample evidence of expectations for the near future: rapid and significant technological developments and changes in consumer behaviour indicated an irreversible trend in the provision and consumption of electronic audio-visual services. Moreover, South Africa already had in place the infrastructure and characteristics for broadband to be an alternative platform: the necessary speeds for transmission and streaming consumption of electronic audio-visual content, the availability of connected smart devices, and continually falling data prices.

3 By the time that the 2018 hearings took place, only five months later, there was already further evidence supporting MultiChoice's submissions. This was addressed in MultiChoice's oral submissions at the 2018 hearings, as well as supplementary written submissions arising out of the 2018 hearings. These developments ought not to have been surprising. They had been outlined and were anticipated in MultiChoice's 2017 submissions and a number of other parties had also highlighted the same trends: the importance of OTT, its negative

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[1] In the remainder of this document, a reference to "evidence" is a reference to information, data and other evidence provided to ICASA in this Inquiry.

impact on traditional broadcasters, and the role of "*rapid (and often unforeseeable) changes in technology*". Those parties also advised ICASA to give further consideration to these developments in its assessment of the relevant markets.

4 Subsequent to the 2018 hearings, dramatic, rapid and irreversible changes have continued in the provision and consumption of electronic audio-visual services. They are unmistakable and impossible to ignore.

5 However, in its Draft Findings, ICASA inexplicably reaches the conclusion that OTT does not pose a significant constraint on Pay TV, effectively excluding OTT from its findings in the Inquiry. In doing so, ICASA has failed to engage with the extensive and compelling submissions and evidence provided by MultiChoice and other parties.[2] Instead, ICASA has made material findings based on flimsy, anecdotal, and unsubstantiated information and, in many instances, on supposition. Submissions of other parties that are consistent with or support MultiChoice's submissions have been ignored or superficially dismissed, while ICASA references, as support for its findings, a handful of hollow and unsubstantiated claims that OTT is not a competitive threat.

6 ICASA also relies on the results of the Consumer Survey which it commissioned after the 2018 hearings. The Draft Findings record that ICASA has relied on the results of the Consumer Survey, in particular for its analysis of the relevant markets.

7 The Consumer Survey, however, suffers from significant methodological and substantive flaws, casting doubt on whether it can be relied upon as a rational basis for ICASA's findings. Even if the results of the Consumer Survey are accepted, they do not provide an evidential basis for the findings and conclusions for which ICASA claims their support.

2 In these submissions, MultiChoice refers to evidence provided to ICASA in prior submissions, including prior submissions by MultiChoice and other third parties. Cross-references to such evidence are provided for convenience. Where any evidence provided to ICASA in the course of this Inquiry is not referenced in these submissions, that is not an indication that such evidence is not relevant to this Inquiry.

8 First, the Consumer Survey did not ask the questions required for a direct assessment of market definition under standard approaches. Indeed, it did not ask any question at all in relation to respondents' likely reactions to a price increase in Pay TV services. Regardless of the content of the Consumer Survey results, it cannot support ICASA's market definitions.

9 Second, the market definition <u>and</u> other conclusions that ICASA purports to have drawn from the Consumer Survey are <u>not</u> supported by the results of the Consumer Survey, because there is no apparent basis in the Consumer Survey results for many of the propositions which ICASA claims are drawn from those results.

10 Third, ICASA has drawn selectively from the Consumer Survey, ignoring or overlooking many of the Consumer Survey results that are <u>consistent</u> with MultiChoice's submissions.

11 The consequence is that many of ICASA's conclusions do not reflect a balanced, fair and robust analysis of the evidence provided to it in the course of the Inquiry.

12 Having failed to conduct a robust and holistic assessment and analysis of conditions in the electronic audio-visual sector (which is necessary in order to reach rational market definitions), ICASA's preliminary findings reflect significant and fundamental errors in respect of the definition of markets and the assessment of competition in the relevant markets.

13 This is a serious failure to meet the constitutional and statutory standards that govern ICASA's conduct of the Inquiry. ICASA must make findings that are based on an open-minded, rigorous evaluation of the evidence as a whole, rationally related to accurate and reliable evidence. The preliminary findings do not meet those requirements. The findings are in some instances unsubstantiated, in some instances substantiated by reference to "evidence" that is inaccurate or unreliable, and in many instances contradicted by clear and compelling evidence provided to ICASA.

14 Furthermore, ICASA's final findings will be judicially reviewable on the grounds of unlawfulness, procedural irrationality and procedural unfairness if ICASA fails, in separate, sequential steps, each involving consultation with interested persons, to make final findings on the issues of (a) relevant markets and effectiveness of competition and (b) thereafter, remedies, if necessary. ICASA has previously been provided with MultiChoice's submissions, supported by senior counsel's opinion, on this issue.

15 MultiChoice responds to the Draft Findings as follows:

15.1 Part A (Overview and dynamics of electronic audio-visual services) sets out the respects in which ICASA's assessment of the role of OTT and the provision and consumption of electronic audio-visual content is superficial, not based on evidence and inaccurate. Since ICASA has also failed to properly conduct a forward-looking analysis in its assessment, Part A sets out further developments that have occurred over the past sixteen months that confirm the submissions made by MultiChoice in the 2017 submissions and the 2018 supplementary submissions, regarding the dynamic nature of the market.

15.2 Part B (ICASA's Consumer Survey) analyses the Consumer Survey and ICASA's reliance on it.

15.3 Part C (Market definition) addresses the methodological and analytical flaws in ICASA's approach to market definition as set out in the Draft Findings, addresses ICASA's conclusions on so-called "premium" content, and details the lack of evidential support for the various premises on which ICASA's market definitions appear to be based.

15.4 Part D (Effectiveness of competition) identifies the deficiencies in ICASA's assessment of whether competition is effective, and the reasons why ICASA's findings do not support the conclusion that competition is ineffective.

15.5 Part E (Pro-competitive licence conditions) addresses some of the reasons why a consideration of remedies is premature, and details further concerns with the remedies proposed by ICASA.

15.6 Part F (Constitutional issues raised by the Draft Findings) sets out MultiChoice's legal submissions regarding the inadequacy and irrationality of ICASA's preliminary findings, the process applied by ICASA to date and the appropriate process going forward.

EXECUTIVE SUMMARY

ICASA has disregarded significant developments in the provision and consumption of electronic audio-visual content, and misunderstood important features of the market

16 ICASA has conducted its inquiry into Pay TV in the midst of a period of dramatic and rapid change and disruption. In particular, the rapid development of the broadband ecosystem, coupled with changing consumption patterns towards online video content has led to the emergence and rapid growth of OTT services. OTT service providers have considerable resources, access to attractive content, and have developed packages to cater for a wide variety of South African consumers. As such they are fundamentally challenging and constraining traditional broadcasters.

17 ICASA, however, cursorily dismisses these fundamental changes along with other important market dynamics based on a superficial, selective and incomplete consideration of the market context in which competition occurs.

Audio-visual consumption patterns have changed

18 The rapid roll-out of broadband infrastructure and connected smart devices has led to dramatic changes in electronic audio-visual consumption habits in recent years. Viewing patterns have shifted, and continue to shift, from traditional TV sets to other devices, and from consumption of linear TV to internet based non-linear/on-demand viewing. This has also supported an explosion in the amount of varied, quality electronic audio-visual content. MultiChoice has provided

ample evidence of these trends, which ICASA has either given insufficient recognition to or disregarded altogether.

19 These changes in consumption patterns are particularly evident among MultiChoice subscribers. This is critical because these subscribers are the focal point for an assessment of market conditions and competitive constraints in a Pay TV Inquiry, a fundamental economic (and, in fact, self-evident) point that ICASA continues to overlook. MultiChoice's 2017 submissions already showed that [redacted] MultiChoice has experienced, and continues to experience, the effects of these changes in viewing behaviour and the alternatives that consumers have, [redacted].

<u>Continued growth of OTT service providers</u>

20 OTT entry and expansion is fundamentally reshaping the South African competitive landscape for electronic audio-visual entertainment. OTT entrants follow a powerful and competitive business model: they are able to leverage off the existing broadband ecosystem, are unencumbered by regulation, are often well-resourced and have access to attractive and often exclusive content including movies, series, sports, news, linear channels, local content and a host of other offerings. Accordingly, these service providers draw viewership and spend away from MultiChoice and other traditional broadcasters.

21 Global OTT service providers have continued to grow in their scale and content acquisition activities, which include the acquisition of sports content and the commissioning of their own local content. There has been yet further new entry announced: Apple TV+ (a new Apple streaming service carrying original content produced/commissioned by Apple) will be available in South Africa by November 2019. Advertising-based BigTech platforms such as Google/YouTube,

Facebook and Twitter have also continued to leverage their existing platforms to compete for eyeballs by providing electronic audio-visual content to their extensive existing user bases, including South African consumers.

22 Low cost entry and easy content distribution has continued to support entry by regional and local OTT service providers. New or expanding OTTs include Vodacom Video Play (which had 869,000 active users by March 2019), a StarTimes video streaming service (launched in November 2018) and Viu (launched in SA in February 2019, garnering more than 1 million downloads in four months). Other OTT service providers available locally include iROKOtv, Digital Entertainment on Demand, Trace and THD24.

23 There have also been significant further developments in regard to direct-to-consumer streaming services by content owners, including the imminent launch of Disney+ in South Africa in November 2019. WarnerMedia and NBCUniversal have also announced new streaming services that will launch in 2020. A number of sports federations and related content providers have also proceeded with direct-to-consumer offerings. These include the WWE Network, FINAtv, NBA TV Formula One (which is expected to be available in SA in the next rights cycle), and GOLFTV (which includes PGA Tour coverage and is expected to be launched in 2012). UEFA has also indicated an intention to launch a direct-to-consumer streaming offering.

24 Some of these developments, which were outlined and predicted by MultiChoice in the 2017 submissions – yet apparently ignored by ICASA – have continued in ways that are directly relevant to ICASA's assessment of the competitive landscape and MultiChoice's position in the market on a forward-looking basis.

The evident role of OTT

25 In light of these developments (and others highlighted in MultiChoice's various submissions), ICASA's assertion that there are broadband limitations in SA, differences in content and viewer preferences preventing OTTs from acting as a constraint on traditional broadcasters, lacks a factual basis and disregards the rapid and overwhelming developments occurring worldwide and in SA. There is ample evidence (referenced in MultiChoice's prior submissions and in these

submissions) of changes that have occurred, and that are continuing to occur, at a rapid rate in SA. ICASA's view of claimed limitations on OTTs in SA, informing its assessment that OTTs do not pose a constraint on Pay TV, is invalidated by the above developments and the array of offerings available to consumers, in particular MultiChoice's subscribers.

26 Submissions by a broad range of other parties also indicated the significance of OTT and technological developments. For example:

26.1 Telkom stated that "*[a]ny service provider of Broadband is in some way or another competing with subscription TV and FTA broadcasting <u>as OTT content directly competes with traditional TV content</u>.*" In its submissions it also acknowledged, as MultiChoice has argued, that *"consumers who subscribe to premium television content are likely to also have access to sufficient broadband speeds required to utilise OTT services"*.

26.2 The SABC stated that this Inquiry is taking place in the context of the *"proliferation of … OTT … players using broadband infrastructure."*

26.3 Cricket South Africa expressed the view that the rapid growth of broadband within SA in the near future will unlock new opportunities in respect of live streaming and that this may result in new revenue streams for sports bodies.

<u>Significant growth of fixed and mobile broadband penetration, and falling data costs</u>

27 ICASA suggests that there are broadband limitations in SA (in terms of usage and affordability) which limit the constraint faced by MultiChoice from OTT. However, this is inconsistent with the facts and evidence before ICASA.

28 The evidence demonstrates that growth in broadband data usage is mostly attributable to electronic audio-visual content. Moreover, this growth in data consumption, and the widespread entry of, and investment by, OTT service providers in SA, indicates that the South African broadband eco-system is already adequate to facilitate the provision of OTT services.

29 ICASA's 2019 ICT Sector Report details substantial growth in fixed broadband subscriptions and smartphone penetration while mobile and fixed data costs have, as outlined by MultiChoice in its 2017 submissions, continued to fall. Effective prices per megabyte for South Africa's largest mobile network operator (Vodacom) decreased by almost 40% from April 2018 to March 2019 alone. ICASA takes the view that data costs will only reduce "gradually", but it does not assess actual data costs and ongoing reductions and it ignores MultiChoice's evidence based on independent third party sources. This is also a failure to conduct the forward-looking analysis mandated by section 67(4A) of the ECA.

30 Importantly, in its assessment ICASA overlooks that the relevant consumers are Pay TV subscribers. Internet penetration among Pay TV subscribers is well above the national figures. Accordingly, the cost of OTT to a significant proportion of these consumers does not include the costs of a broadband subscription, because they already have broadband.

31 ICASA's conclusions regarding broadband and data costs are fundamentally incorrect and do not reflect a balanced assessment of the evidence.

The role of local content, FTA services and other important local and regional dynamics

32 In the Draft Findings, ICASA claims that MultiChoice has applied data from other countries to market dynamics in the SA context. This is incorrect. In respect of the provision and consumption of OTT services, MultiChoice has provided third party research, as well as the results of MultiChoice's own research and MultiChoice's industry experience with regard to South African dynamics. MultiChoice has also made extensive submissions regarding important local and regional market dynamics relevant to assessing constraints on Pay TV in SA. ICASA appears not to have considered this evidence of local and regional conditions.

33 Instead, it is ICASA that has relied disproportionately on views which emerge from largely historical decisions in developed countries, predominantly Western Europe, that at some point in time concluded that first-window Hollywood movies and popular sports rights are the drivers of Pay TV subscriptions.

34 MultiChoice identified key reasons (supported by evidence) why this view is not applicable in SA, including –

34.1 significant demand for local content by viewers in SA. Local content (drama, soapies and reality series) is recognised as important for building audiences for electronic audio-visual services in SA (and elsewhere in Africa). This has been overlooked in the Draft Findings;

34.2 substantial demand for lower-priced bouquets in SA. The substantial market opportunity for lower-priced bouquets (coupled with the popularity of local content) has provided opportunities for the entry and growth of Pay TV services on the African continent – demonstrating that serious operators with credible business plans can enter, and grow, on the back of providing initial basic offerings; and

34.3 the expansion and improvement of an already competitive FTA TV offering. FTA channels have well-established positions which are strongly associated with its provision of highly popular local content, and the significant availability of sports on FTA. OpenView has now surpassed 1.5 million activations, an increase of <u>50%</u> since October 2017.

<u>Competitive responses by MultiChoice</u>

35 The market dynamics outlined above collectively present a huge challenge to MultiChoice and are evidence of the constraint they place on its business. Further evidence can be seen in MultiChoice's competitive responses, which were detailed in the 2017 submission. ICASA, without any assessment or rationale, appears to view these responses as evidence of strategic behaviour aimed at preventing or undercutting entry. However, MultiChoice's competitive responses are entirely consistent with competitive conduct that is both legitimate and beneficial for consumers. Indeed, many of its responses are precisely directed at responding to changing consumer demand patterns by seeking to mirror OTT functionality.

36 Since providing the 2017 submissions, MultiChoice has continued to face increased competition and threats to its business, leading to further competitive responses. The most recent impact on its business from OTT has been a need for cost-cutting and retrenchments, necessitated directly by consumer behaviour evolving towards digital service, self-service, and consumption of content on digital platforms.

ICASA's Consumer Survey

37 ICASA commissioned the Consumer Survey in order to understand consumer behaviour with respect to television broadcasting and video-on demand services, apparently for the primary purpose of informing its definition of the relevant markets.

38 The Consumer Survey is, however, methodologically flawed, raising doubts about the accuracy and reliability of conclusions drawn from its results.

39 The survey was not designed to answer the key questions under consideration. The research methodology, weighting and sample selection applied in constructing the survey are not in line with best practice, and the survey results are not representative of actual and potential subscribers to Pay TV services.

40 The Consumer Survey results in any event do not provide any evidence that allows for a direct assessment of the hypothetical monopolist test (HMT) which is standard in market definition – and which ICASA accepts and purports to apply in its market definition exercise. There is also no evidence for estimating the price elasticity of demand for Pay TV services, despite ICASA's conclusion that "price is in-elastic" (which MultiChoice assumes is meant to be a suggestion that demand for Pay TV is inelastic with respect to price). Inexplicably, given ICASA's reliance on the Consumer Survey for its market definitions, survey respondents were not asked the standard SSNIP question – how they would react to a hypothetical 5 to 10% price increase – or any question at all in relation to their likely reactions to a price increase in Pay TV services. The survey questions that were asked were too broad and vague to elicit the information required to inform a market definition exercise.

41 The Consumer Survey does not support at least thirteen fundamental findings – outlined below – made in the Draft Findings pertaining to consumer behaviour, viewing preferences and substitutability:

41.1 Viewers' subscription decisions depend on the availability of a specific content genre within a specific service.

41.2 Specific boundaries can be circumscribed around free-to-air, basic tier, middle-tier, premium and OTT viewers based on SEM levels, and the services offered or targeted at each income level belong in distinct relevant markets.

41.3 49% of basic-tier Pay TV subscribers cite affordability as the reason for not moving up into a mid-tier bouquet.

41.4 It is highly unlikely that enough viewers would switch from Pay TV services to FTA services in response to a small but significant price increase in Pay TV services.

41.5 Pay TV subscribers would not be satisfied with an FTA offering.

41.6 FTA viewers are highly unlikely to consider OTT services as an alternative based on affordability.

41.7 The cost of data and access to high speed internet limit the ability of viewers to migrate to OTT offerings.

41.8 Non-premium subscribers would only change their packages when something more valuable is added to the more expensive packages.

41.9 Cord-shaving occurs only when prices change drastically.

41.10 There is a limited extent of cord-cutting.

41.11 Insignificant changes in subscription price do not affect premium Pay TV, as the price is in-elastic.

41.12 The significance of live sport content to premium Pay TV subscribers, and the high preference for linear television as a mode of electronic audio-visual content consumption in the South African context, limit the current ability of OTTs to be reasonable or credible substitutes.

41.13 By and large, South African viewers tend to take up OTT services to complement rather than substitute Pay TV services.

42 In contrast with the conclusions that ICASA purports to draw from the Consumer Survey, an objective reading of the survey results reveals that, with respect to those consumers surveyed, the consumer survey is consistent with a number of MultiChoice's submissions which ICASA has rejected, including those listed below:

42.1 Survey respondents that subscribe to Pay TV services value a wide range of content, not just movies and sports content. Local content, in particular, is important to a large proportion of those surveyed.

42.2 Bouquet decisions tend to be a compromise, with the desire to entertain or satisfy children being a primary factor in the decision to subscribe to a Pay TV service.

42.3 There is a large uptake of OTT services, particularly among respondents that subscribe to DStv.

42.4 The uptake of OTT services has been enabled by both the penetration of smartphones as well as the rollout of the fibre network, and these developments are changing how survey participants consume content both inside and outside their home, resulting in cord-cutting and cord-shaving.

43 ICASA's reliance on the Consumer Survey results therefore reflects selective interpretation and application of the survey results. Notably, while ICASA appears to be dismissive of "cord-nevers", "cord-cutters" and "cord-shavers", the results of the consumer focus group discussions reveal that the adoption of OTT services and the willingness of consumers in the focus groups to use alternative

devices to watch TV has led to cord-shaving and cord-cutting. Participants in those focus groups report cord-shaving from Premium to Compact and from Premium and Compact to DStv basic bouquets and StarSat. Cord-cutting is also a consideration among focus group subscribers to Dstv Premium.

44 This is consistent with the observations of the consumer survey research company engaged by ICASA (Pulse), based on desktop research and expert interviews, that there is evidence of cord-cutting (driven by data affordability, increasing free WiFi locations, increasing incidence of smartphones and the growth of WhatsApp and Facebook) as well as cord-shaving (primarily as a result of OTT being used to top up Pay TV packages). Overall, Pulse considered that cord-cutting and cord-shaving is likely to increase as a result of the rollout of the fibre network.

ICASA's assessment and definition of the relevant markets

45 MultiChoice explained in the 2017 submissions that MultiChoice competes in a highly competitive and dynamic electronic audio-visual services market that includes services via all distribution technologies (including OTT), and linear as well as non-linear services. The market includes electronic audio-visual services (free and paid-for) without distinction by content genre or price point.

46 Three fundamental features of the South African electronic audio-visual sector were identified, each of which is significant for the relevant markets in which ICASA must assess the effectiveness of competition:

46.1 First, the rapid roll-out of broadband infrastructure and connected smart devices, together with changing consumption patterns. OTT services are firmly within the relevant retail market having regard to established market definition principles and a forward-looking assessment of the effectiveness of competition. That assessment cannot be conducted without appreciating the significance of the OTT constraint.

46.2 Second, FTA TV in SA broadcasts large amounts of popular sport as well as compelling local dramas and soap operas. These are particularly popular in South Africa and are a compelling alternative to Pay TV services if prices rise or quality falls by a small but significant amount.

46.3 Third, seismic shifts have occurred in recent years in relation to electronic audio-visual sector content. The major Hollywood studios are now less important. Other studios and production houses have muscled in, including Netflix. There has been a proliferation of highly valued series, documentary, movie and reality TV content developed by and for OTT services, and local content is recognised as important for building audiences. Similar trends are appearing for sport, with new competitions developing that electronic audio-visual services providers can bid for and OTT players also acquiring rights to sports content traditionally purchased by broadcasters. Accordingly, the range of content that can be used to build audiences for electronic audio-visual services is much broader than it used to be. Relevant content markets are therefore equally broad: for the purposes of defining relevant markets there is no relevant distinction between content traditionally considered to be "premium" and other content, and there is also no relevant distinction by genre.

47 The overall effect of these constraints on traditional Pay TV services can be seen in the significant fall in quality-adjusted prices for DStv bouquets over recent years.

48 These factors call for a single retail market. However, ICASA's Draft Findings defines four separate retail markets for, respectively: (i) the distribution of analogue FTA TV services; (ii) basic-tier Pay TV and satellite-based FTA TV services; (iii) "premium" Pay TV services; and (iv) video-on-demand services. It also defines separate upstream wholesale markets for the supply and acquisition of "premium" content and "non-premium" content. These narrow market delineations are the result of flawed methodological approaches to market definition and flawed analysis, and are at odds with the present-day dynamics of

competition in the provision of electronic audio-visual services in SA. The analysis of relevant markets also lacks an evidential foundation and largely ignores the evidence provided by MultiChoice.

49 Markets that have been defined narrowly will not capture all relevant competitive constraints and effects.

50 It is not rational to define a market narrowly and, at the same time, adopt a position that the competitive effects assessment analysis "hinges on" the defined market or that "*market definition allows the analysis to be confined to the relevant goods or services that pose a competitive constraint on each other within a defined geographical area*".

51 If markets are defined narrowly – as ICASA has defined them – the better approach is to recognise that constraints that fall outside of the defined markets may yet be significant and need to be given careful consideration. Instead, ICASA adopts a narrow assessment of the effectiveness of competition in a manner that largely ignores evidence of constraints that are outside of the arbitrarily narrow markets defined by ICASA.

Methodological and analytical flaws

52 Defining the relevant market requires the identification of close substitutes and competitive constraints for a focal product, and their inclusion in the relevant market. The application of the HMT, which is often referred to as the "SSNIP" test, is standard economic practice.

53 The focus on close constraints, and whether a hypothetical monopolist of the focal product would be constrained from profitably imposing a small but significant price increase (i.e. a "SSNIP"), has a number of well-understood implications, including that –

53.1 constraints should be considered in aggregate, rather than one-by-one;

53.2 the relevant responses are those of marginal consumers: whether marginal consumers would switch away from the focal product in response to a SSNIP in sufficient numbers as to render the SSNIP unprofitable;

53.3 differences in product characteristics, prices and business models do not necessarily imply that products belong in separate markets. Such differences may be taken into account, but the ultimate question is whether there would there be enough substitution away from the focal product, in aggregate, in response to a SSNIP, to render the SSNIP unprofitable for a hypothetical monopolist. Significant substitution may occur to differentiated products notwithstanding the differences;

53.4 products that make a significant indirect contribution to aggregate constraints, through a chain of substitution, should be included within the relevant market;

53.5 markets should not be prejudged based on suspicions of market power; and

53.6 markets should be judged on the basis of a rigorous assessment of the factual circumstances of the sector, in the country in question, and at the time of the inquiry.

54 ICASA has failed to apply these principles:

54.1 ICASA erroneously considers alternatives to Pay TV services (terrestrial FTA, satellite FTA and VOD) one-by-one, instead of considering the aggregate loss of customers to the various alternatives.

54.2 ICASA in many instances considers responses of consumers that it refers to generically (e.g. "a" consumer and "typical" consumers), instead of marginal consumers. ICASA consistently fails to ask the fundamental market definition question: whether a sufficient number of marginal consumers would be likely to switch away from a hypothetical monopolist in response to a SSNIP in relation to the focal product, so as to make that SSNIP unprofitable.

54.3 Much of the analysis in the Draft Findings focuses on arbitrary and selective differences in product characteristics, prices and business models, without demonstrating that those differences translate into limited constraints.

54.4 ICASA misunderstands and misapplies the concept of chains of substitution, and does not engage with MultiChoice's submissions on chains of substitution.

54.5 ICASA in several instances prejudges relevant markets with reference to MultiChoice's alleged "control of the market", and MultiChoice's behaviour, prices and profits, indicating an inclination to draw conclusions against MultiChoice, rather than engage in a rigorous market definition analysis, including an objective evaluation of the evidence.

54.6 ICASA places some reliance on historical international experience and precedents, without demonstrating any basis on which those precedents are applicable to the South African context at the current time.

Flawed analysis of "premium" content and services

55 MultiChoice has submitted that the term "premium" does not provide a robust basis for market definition. In the Draft Findings, ICASA accepts that the term "premium" is subjective and "fluid", but continues to rely on it, with the result that ICASA's market definitions are subjective and vague.

56 ICASA's market definitions have also not been determined in accordance with the accepted economic principles of defining markets. Broad reference to content that is subjectively labelled as "premium" content in a market definition exercise lacks analytical rigour. This is not an application of the HMT question and does not seek to understand the strength of constraints on a focal product.

57 In the absence of a rigorous application of economic principles (including an engagement with MultiChoice's application of the relevant principles), and the absence of an evidential basis for the proposed distinction between so-called premium and non-premium content, ICASA's findings are not rational. ICASA justifies its position "*in light of the contradiction between what MultiChoice states in its public pronouncements on the issue of 'premium content' and what is contained in its business plans*". However, this is not a sound basis for ICASA's position. Business plans and other internal documents are drafted by business people and not regulatory or competition law experts. The fact that business people may refer to certain content as "premium" does not make it a useful or relevant term of distinction for delineating relevant markets for the purposes of ICASA's inquiry. "Premium" is a subjective and inherently vague term that defies any clear and objective definition. In fact, as is clear from the submissions made by various third parties that participated in the Inquiry, the term "premium" is not even capable of a definition that is widely agreed upon.

58 In any event, ICASA has ignored the current market reality that the importance of content that may traditionally have been referred to as "premium", has declined. MultiChoice has provided ample evidence regarding the proliferation of high quality and varied international and local drama, reality series and new popular sporting events (such as IPL).

59 Moreover, ICASA has failed to define "premium" content by reference to objective criteria, instead listing a number of specific content rights that it alleges to be premium. This is a subjective and unsupportable approach to market definition.

60 As a result of the manner in which it seeks to define, and thereafter rely on, "premium" content in its analysis, ICASA ignores or understates the weight of information that contradicts its views around premium content.

Flawed analysis of FTA services

61 ICASA's findings regarding FTA services also suffer from a number of methodological and analytical flaws.

61.1 ICASA assesses the strength of constraints imposed on Pay TV by terrestrial and satellite-based FTA sequentially (i.e. separately), instead of assessing these constraints in aggregate, with all other alternatives for viewers (including OOH-viewing, legal free and paid-for OTT services, and pirated electronic audio-visual content).

61.2 ICASA considers the propensity for FTA viewers to switch to a Pay TV service and the rate of such switching. However, since Pay TV is the focal product, ICASA should be seeking to understand the likelihood and extent of switching from the opposite direction: the propensity for Pay TV subscribers to switch to FTA in response to a SSNIP in subscription prices.

61.3 ICASA focuses on different product characteristics, prices and business models, and fails to apply the HMT.

62 As a result of these fundamental errors, ICASA –

62.1 fails to apply the correct economic principles;

62.2 fails to identify the evidence that is relevant to the application of the correct economic principles, while relying on, or interpreting outcomes from, evidence that is not relevant; and

62.3 reaches conclusions that have no rational theoretical or factual basis.

Flawed analysis of OTT services

63 A number of methodological and analytical flaws are evident in ICASA's findings regarding OTT services:

63.1 ICASA assesses the strength of constraints from OTT services separately from constraints from other alternatives to Pay TV services, rather than assessing constraints in aggregate.

63.2 ICASA focuses on the likely behaviour of generic subscribers, rather than on whether there would be sufficient switching by marginal subscribers to render an attempted SSNIP unprofitable.

63.3 ICASA focuses on usage data and on assertions of product and price differences between OTT services and Pay TV services that do not directly address the HMT question.

63.4 ICASA's assessment of constraints from OTT services is not forward-looking.

63.5 ICASA fails properly to understand the current nature, quality and usage of OTT offerings in South Africa, and overstates differences between Pay TV services and OTT services. As a consequence, ICASA paints a misleading picture of the current significance of OTT offerings as substitutes for, and constraints on, Pay TV services.

63.6 ICASA misunderstands the significance and implications of OTT services as a complement to Pay TV services, and the relationship between cord-stacking and cord-shaving.

63.7 ICASA adopts a flawed approach to its consideration of the relative costs to consumers of OTT services and Pay TV services, and significantly overstates the costs to consumers of OTT services.

64 ICASA has misconstrued the relevance of evidence it relies on, relied on selective evidence, made factually incorrect assertions, and ignored evidence that MultiChoice has provided on the impact of OTT services on DStv Premium.

Flawed analysis of the supply and acquisition of channel markets

65 MultiChoice has explained, and continues to assert, that there is no separate market for the wholesale supply and acquisition of channels. ICASA's assertion to the contrary is apparently on the basis of its observation that there are wholesale channel supply agreements between channel producers and retailers. However, markets should not be defined around activities along a supply chain. They should be defined by reference to whether a hypothetical monopolist of the focal product, in this case the wholesale supply of channels, could profitably impose a small but significant price increase. ICASA accordingly fails

to apply the HMT and to consider the constraints on a hypothetical monopolist of the focal product, in this context, wholesale channels.

66 There is accordingly neither a basis to define a wholesale channel market nor the parameters or scope of any such market. ICASA's attempts to define the scope of such a market by genre and/or by its "premium" versus "non-premium" distinction are incorrect, based on speculation and lack any evidential basis, analysis or application of the appropriate economic principles. ICASA also does not engage with MultiChoice's previous critique. MultiChoice notes that, notwithstanding unsubstantiated views and conclusions, ICASA indicates that it does not deem it necessary to conclude on the wholesale market for channel provision. Its views, with which MultiChoice disagrees, ought therefore to be disregarded.

Flawed analysis of the market for content

67 The Draft Findings contains a range of flawed findings and conclusions regarding the market for content.

68 As MultiChoice has explained, there is today a single relevant upstream market for the acquisition of content (including channels), without distinction in terms of the price, quality or genre of the content. In particular, there is no relevant distinction, for market definition purposes, between "premium" and "non-premium" content. This term is subjective, vague and does not provide a reliable basis for definition of the relevant market. Furthermore, electronic audio-visual retailers and channel packagers do not require access to any particular content to compete because they can build offerings from a variety of content, including local content, to attract subscribers. Additionally, content that may traditionally have been labelled "premium" has evolved significantly, as the range and volume of content that is attractive to viewers (including local content) has proliferated in recent years.

69 Certain of the further propositions in the Draft Findings (for example, distinctions between types of premium content) are based solely on subjective observed differences in characteristics of these different types of content, without applying standard economic principles to defining all products that fall within a market, based on whether sufficient consumers would switch from the focal product in response to a small but significant increase in price.

70 The Draft Findings reflects a fundamental misconception of the nature of exclusivity in content rights deals, and its implications for the relative bargaining powers of broadcasters and content producers. ICASA suggests that the sale of sports rights on an exclusive basis is illustrative of limitations faced by content rights owners and constraints on their bargaining power, given limited buyer alternatives. This is at odds with the evidence of MultiChoice and rights holders that made submissions in the Inquiry.

Lack of evidential basis for ICASA's market definition premises

71 ICASA's market definitions are based on premises for which there is no evidential basis.

72 ICASA's proposed market definitions are unsustainable, and there is accordingly no foundation for ICASA's findings on the issues of whether there is ineffective competition, and whether any licensee has significant market power, in the relevant markets.

Effectiveness of competition

73 In the 2017 submissions, MultiChoice submitted that the assessment of competition, which is central to the Inquiry, must –

73.1 in terms of ICASA's own Guidelines and international best-practice, be forward-looking;

73.2 involve a holistic rather than a structural assessment evaluating the dynamic character and functioning of the market; the market characteristics; the nature of actual entrants and their scope for expansion; the threat of potential competitors and technological developments; and convergence in the provision of electronic audio-visual services; and

73.3 be evidence-based.

74 The assessment of effectiveness of competition in the Draft Findings fails to meet these fundamental requirements.

75 ICASA has adopted a largely static and structural approach to the assessment of barriers to entry. ICASA fails to recognise that factors that may be structural in nature must still be considered in a dynamic and forward-looking manner. Consequently, ICASA has not assessed the strength of entry and dynamic changes in the market that have significantly reduced barriers.

76 ICASA's approach to barriers to entry is to list potential difficulties which an inappropriately-resourced entrant may face. ICASA fails to consider evidence of actual entry and the range of potential entrants for whom entry is feasible. ICASA continues to engage in an abstract assessment of barriers and fails to practically assess the likelihood of entry, and consequently fails to establish that barriers to entry in any of the markets that it defines are sufficiently high to deter efficient new entry.

77 ICASA has also adopted a structural approach to assessing market dynamics, assuming that only significant changes in market shares would result in effective competition. In consequence, ICASA has assessed the competitive constraints on MultiChoice statically, rather than dynamically. Contrary to ICASA's flawed belief, it is not necessary, in order for an incumbent to be constrained, that there be evidence of a significant loss in subscribers and a resulting decline in market shares. Even concentrated markets may be highly contested. An assessment of the effectiveness of competition, based on whether there is evidence of a material loss of customers, fails to take account of MultiChoice's actions in actively seeking to mitigate and prevent customer losses, which have ramped up

in recent years given the intensity of competition faced. The fact that a firm can be successful in competing does not imply that it is not facing constraints from actual or potential competitors.

78 ICASA has not given any consideration to whether competition in the relevant markets has delivered positive outcomes for consumers, including competitive prices, better product and service quality, increased variety, and innovation.

79 Despite ICASA's apparent recognition of some of the difficulties with the label "premium", ICASA's reliance on the vague, imprecise and subjective concept of "premium" content – unsupported by evidence provided to it in this Inquiry – leads it to incorrectly assume that this content is an essential input required by providers of electronic audio-visual service. As indicated, the evidence before ICASA clearly shows that it is not.

80 ICASA's market definitions are fundamentally flawed due to methodological, analytical and factual misconceptions. Nevertheless, even assuming that the markets are as ICASA has sought to define them, ICASA has failed to demonstrate that competition in those markets is ineffective.

ICASA has not established that competition in the "'market" for the retail distribution of basic-tier Pay TV services and satellite-based FTA services is ineffective

81 ICASA has not established that barriers to entry are high and insurmountable. Its short two-page assessment is superficial, and its conclusions are not based on sound analysis or evidence.

82 Contrary to ICASA's claims –

82.1 switching costs are not high;

82.2 brand loyalty does not act as a barrier to entry;

82.3 an entrant does not have to enter more than one stage of the value chain to be effective, and access to capital does not represent a barrier to entry; and

82.4 vertical integration is not a concern.

83 ICASA appears to acknowledge that the question whether vertical integration gives rise to actual concerns requires robust, evidence-based investigation. However, ICASA merely observes that MultiChoice's vertical integration – referencing in-house content production and channel packaging capabilities – can weaken competitive constraints. This is no basis for the finding that competition in this market is ineffective.

84 The evidence furnished by MultiChoice demonstrates that it is not necessary for electronic audio-visual services providers to have the in-house capabilities that ICASA relies on for its vertical integration concerns, namely channel packaging and content production. The proliferation of content means that there is no shortage of content for a potential entrant to acquire (as opposed to producing in-house), while the most common practice when producing own content is, in any event, to commission that content from independent providers.

85 ICASA's assessment of market dynamics is also flawed and superficial. It does not establish that competition is ineffective, currently or on a forward-looking basis. ICASA does not assess competitive dynamics on a holistic and forward-looking basis, but rather cites a range of arbitrary factors that it has considered under "dynamics". These factors, individually or in combination, do not establish that competition is ineffective. In particular, ICASA's assessment is based on speculation and a number of factually incorrect assertions regarding MultiChoice's conduct in the market and the potential role of DTT (considering only potential Pay TV DTT platforms and ignoring FTA DTT platforms).

86 ICASA has no basis to conclude that MultiChoice's share of the market is likely to remain constant within the review period and beyond. MultiChoice's market share bears no relevance for assessing the effectiveness of competition. Low market shares of entrants reflect only the recent nature of their entry rather than the competitive significance of the entrants. ICASA has conducted a structural assessment of market shares, overlooking pertinent evidence in respect of a dynamic market, such as the range of constraints and the trend in the number and strength of competitors (including the proliferation of lower-tier OTT offerings and the growth of OpenView), set out by MultiChoice in previous submissions.

<u>ICASA has not established that competition in the "'market" for the retail distribution of premium Pay TV services is ineffective</u>

87 ICASA's assessment of barriers to entry in this market is based on the same three factors which underpinned its assessment of barriers to entry in the market for basic-tier Pay TV services. The deficiencies in that analysis have been outlined above.

88 An additional factor cited as a barrier to entry in this market is bundling. However, the first bundle identified by ICASA (bundling of discounted data with Pay TV or VOD subscriptions) is not a bundle that MultiChoice is able to offer. The second bundle identified (the availability of Showmax, Explora and DStv Now to DStv Premium subscribers) is an important feature of MultiChoice's competitive response and is a benefit to consumers that improves customer value. As ICASA recognises, bundling is ubiquitous and is often beneficial to consumers. It is likely to give rise to concerns only in very specific circumstances. ICASA has not identified any such circumstances or even demonstrated that competitors and new entrants are unable to invest or innovate to offer the same or other value-added benefits to consumers.

89 ICASA's assessment of market dynamics in the retail premium Pay TV market is also flawed and does not establish that competition is ineffective, whether currently or on a forward-looking basis:

89.1 ICASA expresses the unsubstantiated view that "strategic" behaviour by MultiChoice in "taking advantage" of technological changes (including through the launch of Showmax and the introduction of DStv Now) was aimed at protecting its market position. This proposition is superficial and does not support a finding that the introduction of these services has prevented entry or given rise to anti-competitive effects, or that, as a result, competition is ineffective. As MultiChoice has explained, innovation and the introduction of new products is consistent with legitimate competitive conduct, benefits consumers and is evidence of the competitive constraints from OTT that ICASA does not recognise.

89.2 ICASA's consideration of OTT as a source of potential competition is superficially based on the contention that the decline in the DStv Premium subscriber base is due to market saturation, rather than competition from OTTs. This is inconsistent with the available evidence. Moreover, while saturation can affect lack of subscriber <u>growth</u>, it does not explain <u>decline</u>. [redacted]

89.3 ICASA does not consider all the factors that are relevant to a finding of whether competition is effective or ineffective, and it does not consider whether OTT is a constraint on a forward-looking basis.

89.4 ICASA's finding that there will be no changes to the relative market shares of competitors in the market is not supported by any evidence. On the contrary, the decline in MultiChoice's DStv Premium subscriber base and the significant growth in OpenView's, Vodacom Video Play's and Netflix's SA subscriber numbers show ongoing change. Furthermore, the finding is based on the mistaken assumption that only a substantial decline in market shares constitutes evidence of effective competition. ICASA has also ignored the considerable evidence provided by MultiChoice regarding technological developments, changes in consumption patterns, and the rapid pace of change. ICASA has given no consideration to –

89.4.1 the proliferation of electronic audio-visual services;

89.4.2 the strength of actual and potential competitors, and their ability to expand rapidly; or

89.4.3 MultiChoice's response to the competitive threats posed, including evidence of increasing consumer value, real decreases in prices for DStv Premium, and marginal increases for DStv Compact Plus and Compact.

ICASA has not established that competition in the "'market" for the wholesale acquisition of premium content is ineffective

90 In the Draft Findings, ICASA agrees with MultiChoice's submission that it is only necessary to assess effectiveness of competition at the wholesale level for purposes of ex ante regulation if competition in the retail market downstream is ineffective. Since MultiChoice has explained why ICASA has not demonstrated that competition downstream is ineffective, no further inquiry is needed into wholesale markets.

91 ICASA's assessment of the upstream market follows the same format as its approach in respect of the retail market, identifying barriers to entry before assessing the market in a superficial manner, based on unsubstantiated assertions and speculation.

92 As MultiChoice demonstrated in its prior submissions, there is no scarcity of content that can be used by new entrants to build an audience, and ICASA's identification of scarcity of content as the main barrier to entry has no foundation in fact.

93 ICASA has also focused exclusively on the rights held by MultiChoice, without considering the full scope of available rights. MultiChoice has demonstrated that there is a wide range of content which is available and which, through investment and promotional activities, can be used to attract audiences. The Draft Findings does not reflect any consideration of, or engagement with, the examples and evidence provided by MultiChoice.

94 ICASA has focused on Hollywood movies, series and sports. It has failed to recognise other providers, or other genres of popular, quality content that is not necessarily costly to acquire or produce, including local content (in respect of which there is no scarcity of supply and no barriers to entry) and the increasing popularity of short-form content.

95 ICASA also finds that the increasing cost of "premium" content is beyond the reach of many broadcasters and new, smaller local OTT service providers. However, ICASA has not established that actual costs are prohibitive, and it provides no evidence that FTA broadcasters and other electronic audio-visual service providers are unable to contest for rights, including sports rights. In any event, as MultiChoice has explained, the cost of content is not a barrier to entry.

96 ICASA's continued reference to the "vicious cycle" theory is without merit. It largely repeats the vicious cycle argument set out in the Discussion Document. MultiChoice previously responded to that by pointing out that the theory relies on two necessary conditions which are not met in these circumstances. These are that –

96.1 first, exclusive distribution of certain content can substantially increase the size of the distributor's subscriber base, and this cannot be achieved through other content; and

96.2 second, the size of a distributor's subscriber base prior to a content rights tender significantly increases its chances of success in that tender relative to smaller rivals due to the fact that it can more readily monetise the rights over an existing subscriber base.

97 There is no content (such as so-called "premium" sports rights) to which access is required in order for a broadcaster to grow its subscriber base substantially, and success in a content rights tender does not depend on the size of the bidder's subscriber base prior to the auction. Even if those conditions did apply (which MultiChoice does not accept), this would benefit telcos and global OTT players, who have large existing customer bases, access to significant financial resources, and opportunities for complementary revenue streams that are unavailable to MultiChoice.

98 ICASA has not demonstrated that incumbency of special relationships results in barriers to entry. Without any evidence or analysis, ICASA claims that content suppliers and advertisers wish to do business with an established operator instead of a new entrant.

98.1 The claim is based on an unsubstantiated, untested assertion made by a third party with reference to a 1998 EU merger decision. There is no foundation for ICASA's adoption of statements from a foreign decision as evidence of supposed incumbency advantages in South Africa, two decades later.

98.2 Furthermore, none of the sports bodies which have engaged ICASA in this Inquiry indicated that they are "*loath to do business with service providers that have no track record in the market*", as claimed by ICASA. In fact, the PSL and SARU stated that the sale of their rights is subject to an open and competitive process which is available to any interested buyer.

99 ICASA has omitted to consider market dynamics, including a forward-looking assessment, of the wholesale market for the supply and acquisition of premium content. Instead, ICASA's assessment focuses exclusively on factors related to the strength of competition from OTT at the retail level, which is irrelevant to market dynamics in this wholesale market.

99.1 In this regard, ICASA concludes that, since churn out rates have decreased and MultiChoice's premium segment is saturated, there is no direct link between OTTs and cord-shaving in SA. ICASA ignores evidence before it demonstrating [redacted], and misunderstands the concept of market saturation.

99.2 Since ICASA's analysis of the wholesale market is based on the strength of competition from OTTs at the retail level, ICASA's assessment of the wholesale market suffers from the same problems identified in the assessment of the retail segment of the analysis: it fails to assess OTT as a competitive constraint on a forward-looking basis, and has not considered factors that are critical to an assessment of competitive dynamics, including entry, the nature of competitors, and MultiChoice's response to competition.

100 Lastly, ICASA has no basis to conclude that MultiChoice is likely to maintain its current market position into the foreseeable future. ICASA has not engaged in an assessment of the market dynamics on a forward-looking basis.

100.1 The mere fact that MultiChoice currently holds a number of sports rights for SA is not indicative that the rights are not contestable, or that there is ineffective competition for such rights. Market shares in the context of bidding markets provide no meaningful information as to the true extent of competition in such markets, and reveal nothing as to contestability.

100.2 ICASA has ignored evidence before it that demonstrates that new entrants and smaller rivals have successfully contested for content rights globally and in sub-Saharan Africa.

100.3 In addition, ICASA has failed to consider that –

100.3.1 a number of OTT service providers have bid for and won the electronic audio-visual rights to an increasing range of content genres, including live streaming content such as sport; and

100.3.2 other Pay TV broadcasters, in SA and the rest of Africa, have already been successful in contesting for a number of sports rights across the continent in competition with MultiChoice. These include rights that ICASA has labelled as "premium".

Pro-competitive licence conditions

101 Before proposing, and consulting on, "*appropriate and sufficient pro-competitive licence conditions*" that may be imposed on licensees, ICASA is required to determine finally –

101.1 the relevant markets;

101.2 that there is ineffective competition in the relevant markets; and

101.3 that a licensee has significant market power in such markets.

102 ICASA's preliminary findings on appropriate licence conditions are premature, and fall to be disregarded on the grounds of unlawfulness, procedural irrationality, and procedural unfairness.

103 The remedies proposed by ICASA are in any event flawed, as a matter of principle and in terms of their appropriateness.

104 MultiChoice has pointed out that –

104.1 ex ante regulation would be inappropriate, and risk significant unintended consequences, given the extraordinarily dynamic nature of the electronic audio-visual services market; and

104.2 even if the electronic audio-visual services market were susceptible to ex ante regulation, ICASA would be required to conduct a detailed and robust regulatory impact assessment comparing the proposed remedies against the likely counterfactual in terms of costs and benefits.

105 ICASA does not appear to have conducted any robust assessment of the anticipated impact of the remedies which it has proposed.

106 Nevertheless, since ICASA has included proposed remedies in the Draft Findings, and has further particularised these – albeit with insufficient detail on the nature and substance of the envisaged remedies – MultiChoice has taken the precaution of providing high-level comments on the proposed remedies.

107 In the Draft Findings, ICASA proposes the following remedies –

107.1 reducing contract duration and prohibiting automatic renewal of contracts;

107.2 unbundling of rights by mode of distribution;

107.3 splitting rights into multiple packages and selling these to more than one distributor;

107.4 limiting the number of Hollywood movie studios contracts that may be concluded;

107.5 imposing wholesale must-offer obligations; and

107.6 set-top box interoperability.

No rational basis for the proposed remedies

108 There is no rational connection between the proposed remedies and the harm identified by ICASA in the Draft Findings.

109 ICASA proposes reducing the duration of exclusive contracts because it concludes that long-term exclusive contracts are a barrier to entry into the wholesale market for the supply and acquisition of premium content for distribution in South Africa. However, ICASA disregards the evidence which establishes that there has been an explosion of varied, high-quality content, both internationally and within South Africa, as a result of which a competitor does not need to wait for particular rights to become available before it is able to build an attractive portfolio of content with which to compete for consumers.

110 ICASA proposes, arbitrarily, that contracts should be limited to a duration of only three years, without providing any explanation of why three years is an appropriate duration.

111 ICASA proposes prohibiting the automatic renewal of exclusive contracts on the basis that it constitutes a disguised extension of the term of exclusivity. It does so without any investigation of the commercial reasons for the renewals.

112 ICASA proposes unbundling rights by platform in order to allow different buyers to acquire rights to the same match, movie or other content, without considering or understanding how the rights-selling process works. Using PSL matches as an example, ICASA states that there is no reason why OTT rights should be bundled with other distribution rights. ICASA's presumption that PSL rights are offered for sale as a bundle is factually incorrect. ICASA has also not detailed the harm that unbundling of rights is intended to address. In the face of the large volume of attractive content available, it is unclear what benefits, if any, would

follow from granting multiple operators access to particular content. Furthermore, ICASA does not appear to consider the role, in competition between operators, of differentiation in content offerings: offering the same content as a competitor does not generate strong competition between electronic audio-visual service providers. Additionally, ICASA ignores consumer consumption patterns involving multi-platform viewing. ICASA's proposal would limit the ability of electronic audio-visual service providers to respond to consumer demand by restricting them to one platform, which would also increase costs to consumers who would need multiple subscriptions to access content on different platforms.

113 ICASA proposes splitting content rights into packages, and selling these packages subject to a rule that no buyer can acquire all (or more than a given number) of the packages. ICASA speculates that this remedy will "*[i]n the long run, ... enhance overall competition in the market.*" ICASA provides no objective evidence to substantiate this view, and does not demonstrate that the "lack of entry" that it perceives, results from matches being sold as a bundle or to a single buyer. Once again, ICASA ignores the large volume of varied, high-quality content, available both internationally and within South Africa, and the evidence that there is no content that is so essential that the rights need to be shared between two or more broadcasters. Moreover, while ICASA acknowledges the consumer detriment that results when complementary content (such as matches within the same series or competition) cannot be obtained from a single provider, it has conducted no impact assessment to demonstrate that the alleged benefits outweigh such consumer harm.

114 ICASA proposes that a licensee with SMP should be able to enter into agreements with (at most) half of the six major Hollywood movie studios at a time, in order to free up the other half to competitors. ICASA bases this remedy on its assertion that first subscription pay TV window (FSPTW) Hollywood movies constitute premium content. However, there is no evidence that the failure of Pay TV licensees is due to a lack of access to content. Moreover, ICASA accepts that two of the six Hollywood studios have no contracts with MultiChoice, but has not investigated why other Pay TV licensees have not acquired this content.

115 ICASA proposes the imposition of a wholesale must offer obligation (WMO). However, ICASA does not indicate what competition harm this remedy is intended to address. ICASA cites the imposition and subsequent removal of a WMO obligation by Ofcom in the UK, but does not appear to have considered the numerous drawbacks of such an obligation that have been pointed out by the UK Competition Commission.

116 ICASA proposes STB interoperability in order to facilitate consumers switching from one service provider to another without needing to acquire a new STB, and potentially other equipment. ICASA does not evaluate the cost of STBs – and whether or not they are considered to be high – and does not rely on any objective evidence that a lack of STB interoperability is a significant barrier to switching and, by extension, to competition.

Adverse consequences are likely to flow from the remedies proposed by ICASA

117 The conditions proposed by ICASA not only lack a rational connection to any competition harm, but are likely themselves to give rise to competition and consumer harm.

118 Several of the proposed conditions are likely to lessen broadcasters' incentives to invest in the marketing, promotion and (where relevant) production of content:

118.1 Restricting the duration and renewal of exclusive contracts will reduce broadcaster investment incentives and also disincentivise the development and pursuit of new and distinctive quality content, as payback periods will necessarily be shortened.

118.2 Unbundling rights by platform is likely to raise broadcaster costs due to the loss of synergies (a match need only be filmed once to be shown via multiple distribution modes).

118.3 A wholesale must-offer obligation (WMO) reduces incentives for a broadcaster to invest in the quality and marketing of the channel as it knows that such investments will benefit other retailers as well as itself.

119 Several of the proposed conditions are likely to have a negative impact on rights values and to undermine investment by rights owners, resulting in less innovative and quality electronic audio-visual content being provided to consumers:

119.1 Restricting the duration and renewal of exclusive contracts will shorten the period over which the rights owner's revenues are guaranteed, increasing uncertainty over the returns to investment.

119.2 Unbundling rights by platform or into packages would, by diluting exclusivity and forgoing complementarities (e.g. between matches within a series), diminish the value of the rights to the buyer and hence the price paid to the rights owner.

119.3 A WMO is likely to reduce the value of the constituent content rights by reducing the amounts bid for those rights by broadcasters.

120 Some of the proposed remedies may bring about additional consumer harm:

120.1 Unbundling rights by platform may restrict the range of services offered by a single operator, for example preventing a DTH operator from also offering OTT mobile services, reducing benefits to consumers.

120.2 Splitting rights into packages and/or limiting the number of Hollywood movie studio contracts may require consumers either to accept the restricted range of content available from one broadcaster, or to incur additional costs (such as the costs of fees and receiving equipment) and the inconvenience of taking out multiple subscriptions to obtain access to related content (such as matches within a series or a range of movie genres).

121 Some of the proposed conditions may raise transaction costs (e.g. by restricting contract durations, and requiring negotiations to take place more frequently) and/or involve implementation difficulties (e.g. restricting the number of movie studio contracts, as studios are separate entities that sell their rights at different times, and may merge or undertake corporate reorganisations).

122 STB interoperability poses a number of specific difficulties:

122.1 It is difficult to implement, requiring industry-wide action, and may involve compromises on security.

122.2 Free-riding by rival operators is likely to reduce investment in the development and rollout of new STB technology by both the licensee and its rivals.

122.3 Free-riding may also discourage broadcasters from subsidising STB costs, increasing the upfront costs borne by consumers.

122.4 If STB interoperability is required within a single distribution technology (e.g. between DTH providers only), this may interfere with competition between distributors on different technologies (e.g. DTH and OTT).

CONCLUSION

123 As indicated in the Introduction to these submissions, ICASA's Draft Findings has failed to meet the constitutional and statutory standards that govern the Inquiry. ICASA has failed to conduct a robust assessment of the evidence before it and the issues relevant to the Inquiry.

124 ICASA's assessment of the relevant markets and competition within those markets ignores clear evidence of a dynamic and evolving electronic audio-visual services market. ICASA has failed to conduct a holistic, robust and evidence-based assessment, including having ignored information in ICASA's 2019 ICT Sector Report and ICASA's Consumer Survey which is consistent with MultiChoice's submissions. This confirms the selective approach applied by ICASA.

125 These deficiencies are addressed in the body of these submissions. In the light of ICASA's failure to give due consideration to the evidence already furnished to it by MultiChoice and other participants in the Inquiry, these submissions will include reference to pertinent evidence already furnished to ICASA, as well as further evidence that is consistent with and supports MultiChoice's original submissions.

PART A: OVERVIEW AND DYNAMICS OF ELECTRONIC AUDIO-VISUAL SERVICES

INTRODUCTION

126 ICASA has conducted its inquiry into Pay TV in the midst of a period of dramatic and rapid change and disruption. One of these changes, namely the rise of OTT services, is the single most important development since the advent of Pay TV, surpassing in significance the introduction of satellite as a delivery technology.

127 Both in its 2017 submissions and its 2018 supplementary submissions, MultiChoice provided extensive information, data and other evidence[3] regarding this rise of OTT and the related phenomena which have led to, and have facilitated, that development. In the Draft Findings, ICASA has disregarded or misconstrued key aspects of that evidence, resulting in findings on market dynamics which have no rational connection to the evidence before ICASA, or any accurate or reliable evidence. ICASA also appears to consider the fundamental changes in the Pay TV landscape as a future prospect of interest but of little current relevance. This is an error.

128 In light of ICASA's disregard of the evidence in MultiChoice's previous submissions, MultiChoice explains, in this Part A, how industry and market changes have already redrawn the competitive landscape:

128.1 The way in which South Africans find and consume electronic audio-visual entertainment, and how they pay for it, has already changed. According to ICASA's own data more than half of South Africans already have access to the internet. As indicated in the 2017 submissions, and in further information provided below, this figure is even greater for MultiChoice's subscribers (the relevant group for assessing constraints on Pay TV) at over 80%.

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3 In the remainder of this document, a reference to "evidence" is a reference to information, data and other evidence provided to ICASA in this Inquiry.

128.2 These new delivery and business models have already captured more than half of the time South African adults with access to the internet spend watching television and other forms of electronic audio-visual entertainment. Many of the major new competitors are global firms such as Netflix, Amazon and Apple which have scale and resources that dwarf those of MultiChoice. A large number of other competitors have already crowded into the market, with many more poised to enter in the short term.

129 Consequently, in the first section of this Part A we draw ICASA's attention both to relevant information previously provided to it and updated information (notable market developments have occurred even in the short space of time since MultiChoice's 2017 submissions) which is consistent with these previous submissions and inconsistent with ICASA's findings. This evidence demonstrates that South Africans (and Pay TV subscribers in particular) are able to access a wide array of electronic audio-visual content online via OTT services and that the use of such services is widespread. This has wholly changed the electronic audio-visual consumption patterns of consumers.

130 In particular we demonstrate that:

130.1 Access to electronic audio-visual content has been facilitated by the rapid development of the broadband eco-system in terms of access (coverage and penetration) availability of necessary speeds and connected devices as well as falling data prices. As a result, and contrary to ICASA's findings mobile and fixed data traffic attributable to video content has grown at an extraordinary pace.

130.2 Second, this has fundamentally changed the way South Africans are consuming electronic audio-visual content. The world in which electronic audio-visual services was watched predominantly on a traditional TV set is changing. There has been a dramatic rise in the propensity for consumers of traditional Pay TV services to engage in "cord-cutting" or "cord-shaving" behaviour, and there have been significant increases in "cord-nevers" that are not subscribing to Pay

TV in the first place. Increasingly these consumers do not consider that they need to subscribe to such services given the quality and availability of OTT services together with FTA and OOH viewing alternatives. The overall effect of this can be seen starkly [redacted]

130.3 Third, traditional FTA and particularly Pay TV services now compete with a significant and increasing number of new OTT entrants in South Africa. These players have considerable resources, access to attractive content, and have developed packages to cater for a wide variety of South African consumers. They are also not encumbered by regulation and licence conditions nor do they require a local presence to operate.

131 Further, not only have significant changes already occurred, but these trends continue, and are unmistakable and impossible to ignore. Cisco predicts that internet traffic in South Africa will grow at a compound annual rate of 24% over the next 2 years and that by 2021 79% of this traffic will be video content.[4] Consequently, <u>within</u> the period of review there will be further significant changes challenging the position of traditional broadcasters, namely MultiChoice and the FTA providers. This has not been considered by ICASA.

132 It is evident from ICASA's assessment of market dynamics, market definition, the effectiveness of competition and SMP that it has failed to consider the impact of these changes. If it had, its findings in all those respects would have been materially different.

133 In the second section of this Part A, we summarise a number of the deficiencies in ICASA's approach and conclusions with respect to electronic audio-visual consumption patterns, broadband usage and the role of OTT by reference to the information and evidence provided to ICASA by MultiChoice and third parties. In

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4 Cisco, VNI Complete Forecast Highlights: https://www.cisco.com/c/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/South_Africa_2021_Forecast_Highlights.pdf

the context of the information provided to it, ICASA's approach is difficult to understand as it is superficial, selective and dismissive of the real and present changes in market dynamics.

134 The aforementioned developments in OTT are complemented by sharpened local and regional competitive dynamics through both FTA and Pay TV which, as demonstrated for South Africa and elsewhere in Africa, act as a competitive constraint on MultiChoice. It is not evident that ICASA has taken into consideration MultiChoice's evidence of its real market experiences in this regard, which was provided to ICASA as evidence of consumer demand characteristics specific to SA and sub-Saharan Africa.[5] ICASA has failed to consider these relevant local and regional competitive dynamics in coming to its preliminary findings. These dynamics are canvassed in the third section of this Part A. ICASA has also not considered the evidence submitted by MultiChoice regarding its responses and the responses of other traditional broadcasters (including FTA) to the market dynamics and competitive threats, even though this is critical for understanding the scope and context of competition, and assessing the effectiveness of competition and consumer outcomes.[6] MultiChoice and other traditional broadcasters have had to proactively respond in order to improve customer value and retain business by, among other things, expanding their online presence. MultiChoice's submissions regarding its own competitive responses are summarised in the fourth section of this Part A.

135 Overall, this Part A demonstrates that ICASA has conducted a superficial, selective and incomplete consideration of the market context in which competition occurs. In particular, ICASA –

135.1 overlooks or ignores substantial evidence provided by MultiChoice;

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5 ICASA accuses MultiChoice of "citing" data from other countries and "transposing" that to the South African context. ICASA states that in its view "*South Africa exhibits different market dynamics with different market outcomes*" (Draft Findings, para 5.12.44). However, ICASA seems to overlook or ignore actual evidence provided by MultiChoice of its local and regional experiences of the SA market relevant to South African consumption preferences.

6 See MultiChoice 2017 submissions p. 279-301 and Appendix B, 2018 supplementary submissions, para 567-603.

135.2 does not conduct a fair or balanced assessment of third-party submissions. ICASA often accepts bald and unsubstantiated claims with an inadequate, and often no, attempt to interrogate or test the claims nor balance them against the weight of evidence provided by MultiChoice; and

135.3 haphazardly cites ad hoc information from third party sources. Again, ICASA fails to balance this against the weight of other evidence provided to it in the course of the Inquiry. ICASA also cites selectively from a number of sources and misrepresents the data.

136 This affects ICASA's ability to properly define the relevant markets. ICASA's findings of ineffective competition and SMP are similarly not based economic analysis and on a proper consideration of the facts in terms of relevant market developments which are outlined in this Part A. A proper consideration of the relevant facts demonstrates that the licence conditions proposed are unrelated to current market circumstances and, in fact, run the significant risk of disempowering MultiChoice from competing with local competitors and the global giants that are now a significant part of the South African electronic audio-visual landscape.

DEVELOPMENTS IN THE MARKET FOR ELECTRONIC AUDIO-VISUAL CONTENT AND THE EMERGENCE OF OTTs

137 In the Draft Findings, ICASA reaches a number of conclusions regarding the access and cost of broadband internet, content differences and consumer preferences and viewing patterns with very little, and in some instances no, analysis or evidence. These conclusions are inconsistent with current market dynamics and the evidence at hand.

138 In the following section, MultiChoice draws on information previously provided and more recent developments consistent with the prior submissions that demonstrate and describe:

138.1 How the rapid growth in broadband infrastructure and connected devices has facilitated widespread consumer access to and viewing of online video content.

138.2 How electronic audio-visual content consumption patterns of South Africans have changed dramatically, placing significant constraints on traditional broadcasters and Pay TV providers.

There are a plethora of OTT entrants in South Africa, including global giants like Netflix, Google/YouTube, Amazon, Apple and Facebook, well-resourced domestic telcos, and other notable local and regional OTT players. These content providers are advancing their streaming platforms, demonstrating that streaming delivery of electronic audio-visual services is clearly disrupting traditional TV.

Growth in broadband access and declining data costs

139 Globally, the development of the broadband ecosystem and connected devices has created an alternative and low-cost distribution platform for the provision of electronic audio-visual content to individual consumers and households. This can be observed from the growth in traffic over these networks which has been driven by video content. According to Ericsson, "*traffic growth is being driven by both the rising number of smartphone subscriptions and an increasing average data volume per subscription, fuelled primarily by more viewing of video content*" [7]

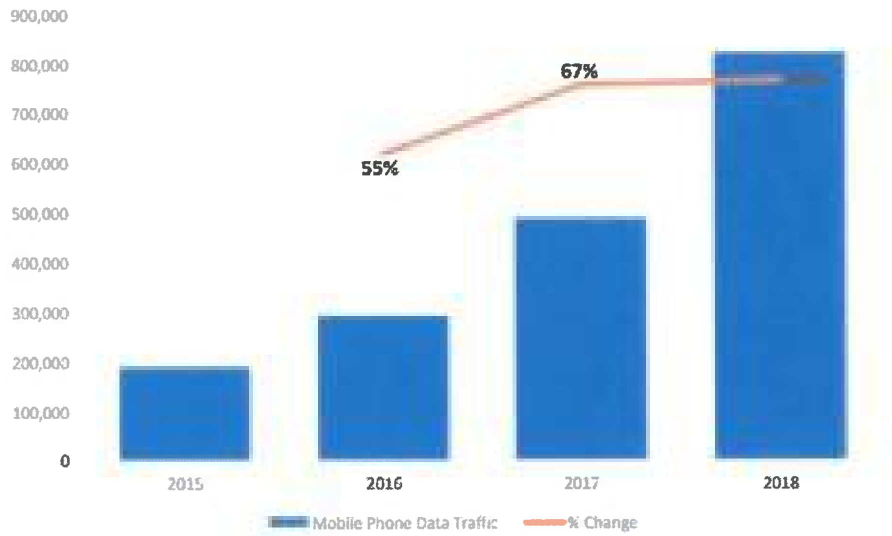
140 South Africa is no exception. Contrary to claims made by ICASA, the South African broadband ecosystem now supports large-scale consumption of online audio-visual content.

141 The figure below (from ICASA's 2019 ICT Sector Report) demonstrates mobile data traffic within South Africa has experienced average annual growth of 63% over the past four years alone. It is notable that even the *rate* of growth has increased over this period. Most of this growth is attributable to video traffic.

7 Ericsson Mobility Report June 2019, p. 14

According to Cisco, in 2016 video traffic already constituted 64% of all IP traffic; it predicts that by 2021 video will constitute 79% of all IP traffic.[8]

Figure 1: Mobile data traffic in terabytes for the 12-month period ending 30 September each year



Source: 2019 ICT sector report, *Graph 32.*

142 These trends confirm that, in contrast to claims by ICASA, broadband is already a viable delivery platform. The necessary speeds, falling data prices and ubiquity of connected smart devices are all in place. MultiChoice previously demonstrated that this and the information provided below demonstrates that this has continued, as MultiChoice asserted.

142.1 <u>Mobile broadband penetration.</u> With respect to mobile broadband, 3G population coverage is almost universal at 99.5% whilst LTE (4G) population coverage is 87.5%.[9] Moreover, mobile usage is ubiquitous in South Africa. According to ICASA's figures, mobile phone data subscriptions increased by 22% in the year to September 2017 and a

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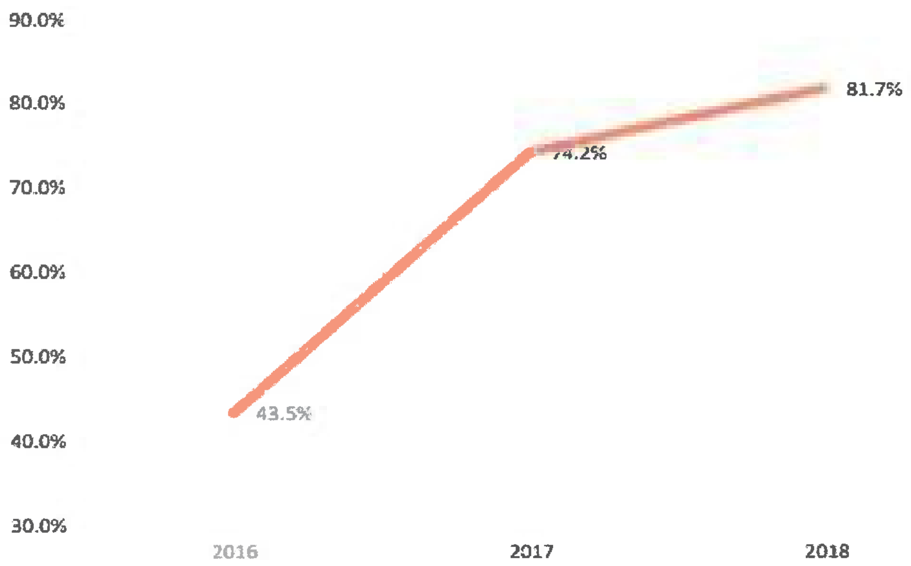
8 Cisco, VNI Complete Forecast Highlights: https://www.cisco.com/c/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/South_Africa_2021_Forecast_Highlights.pdf

9 2019 ICT Sector Report, p. 22.

further 7% in the year to September 2018, and totalled more than 65 million in September 2018.[10]

142.2 This also aligns with the reported significant growth in smartphone penetration shown below. As of 2018, smartphone penetration was 81%. Vodacom alone reported 19.9 million active smart devices on its network.[11]

Figure 2: Smartphone penetration, as at 30th September each year



Source: 2019 ICT Sector Report, *Graph 18*

142.3 Fixed broadband penetration. According to ICASA's own figures, fixed broadband subscriptions totalled around 4.7 million in September 2018.[12] This exceeds the number of DStv Premium, Compact Plus, Compact, Select and Family subscribers [redacted] While FTTH is not needed for good quality electronic audio-visual services, it represents a large proportion of the fixed broadband homes at around 1.7 million households.[13] ADSL and FTTH

10 2019 ICT Sector Report, p. 31

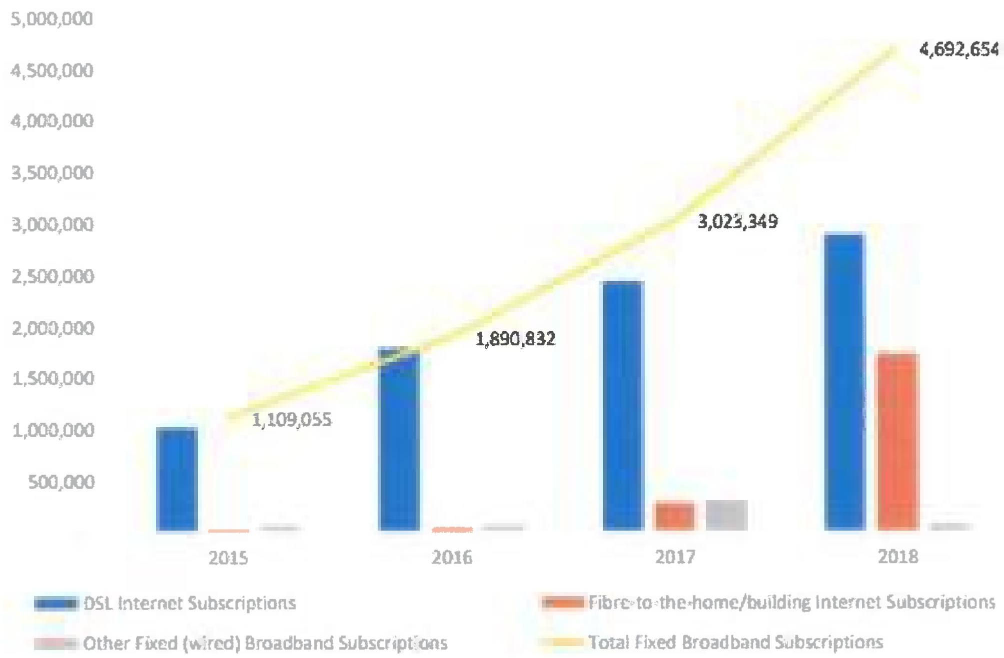
11 Vodacom Integrated Report 2019, p. 11

12 2019 ICT Sector Report, p. 33.

13 2019 ICT Sector Report, p. 33.

connections are both growing rapidly having grown, collectively, by 55.2% between 2017 and 2018 alone.[14]

Figure 3: Fixed broadband subscriptions, as at 30th September each year



Source: ICASA (2019), The state of the ICT sector report in South Africa, *Graph 26*

142.4 Broadband speed. The broadband speed requirement for live streaming of electronic audio-visual content is low. HD content can be streamed from any service above 1.5Mbps connection speed and the lowest quality SD can be streamed at 300Kbps. Netflix recommended speeds are 3 Mbps for standard definition and 5 Mbps for HD.[15] The requisite speed is generally satisfied by the standard 3G mobile

14 2019 ICT Sector Report, p. 33.

15 Netflix Internet Connection Speed Recommendations: https://help.netflix.com/en/node/306

offering, and easily exceeded by the latest LTE (4G) services.[16] When considering the video experience of their users on the MTN and Vodacom networks, OpenSignal states that they enjoy *"fast loading video times and almost non-existent stalling, even at higher resolutions"*.[17] While, for fixed broadband, the majority of ADSL lines operate at 4 Mbps or more, FTTH operates at speeds well in excess of the minimum required. In the Draft Findings, ICASA acknowledges that average internet speeds are above 5 Mbps.[18]

142.5 The rapid rate of technological progression means that whilst broadband speeds will become significantly faster, streaming speed requirements are decreasing:

142.5.1 The progression from 4G to 5G will significantly increase mobile speeds and improve the streaming experience. By way of example, although the download times associated with 4G are low, it is expected that 5G will allow feature length HD films to be downloaded in a matter of seconds.[19] For example on a 5G network the Lion King could be downloaded in HD 1080 in 42 seconds and in SD 576 in 14 seconds.[20]

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16 Opensignal reported that South Africa's download speeds over mobile networks are on average 14.8Mbps based on data for the 12 months ending March 31 2019. (See https://www.iol.co.za/business-report/technology/sa-smartphone-users-experience-faster-download-speeds-on-mobile-than-wifi-20950545). According to a recent Open Signal Mobile Network Experience Report (February 2019) average 3G download speeds were at 5mps or above across all mobile operators: https://www.opensignal.com/reports/2019/02/southafrica/mobile-network-experience. In late 2016 Vodacom reported that average 3G download speeds in SA were on a par with the USA at 7.85Mbps on average and 20.7Mbps for LTE: Fin24, 7 November 2016: http://www.fin24.com/Tech/News/sa-lte-3g-speeds-on-par-with-us-report-20161107

17 https://www.opensignal.com/reports/2019/08/southafrica/mobile-network-experience

18 Draft Findings, para 4.2.1.

19 https://gizmodo.com/what-is-5g-and-how-will-it-make-my-life-better-1760847799

20 This assumes a 5G speed of 600Mbps. Estimate based on Vodacom's announcements that 5G based technology deployed in South Africa (but not yet available to the public) is achieving speeds of more than 700Mbps. (see https://techcentral.co.za/vodacom-launches-commercial-5g-in-lesotho/83317/).

142.5.2 There have already been material developments in 5G coverage in South Africa. In September 2019, Rain announced that its commercial 5G offering has been made available to selected existing customers. It is currently focusing on building its 5G network in parts of Johannesburg and Tshwane[21] and has indicated that coverage will expand to Cape Town, Durban and other as-yet unnamed metropolitan areas by 2020.[22]

142.5.3 Improvements in compression technology also mean that the speed and data requirements for streaming video have become lower and will continue to decline in the future improving the accessibility of online audio-visual content. For example: StarTimes reports that through data saving codec technology its video streaming app saves consumers up to 40% of data costs and even supports 2G network coverage.[23] There have also been huge advancements in video encoding technology which will reduce the required broadband speed even further in the next two years: the AV1 royalty-free video coding format[24] developed by Netflix, Microsoft, Google and others improves capacity by 30%. Coupled with new artificial intelligence encoding[25] MultiChoice estimates that this is likely to halve streaming requirements within the next two years.

142.6 Mobile and fixed broadband data costs. In addition to the fact that advancements in video encoding technology will significantly reduce data usage requirements and hence the cost of viewing content, MultiChoice previously demonstrated that data prices were decreasing

21 https://www.itweb.co.za/content/xA9POvNYNplqo4J8

22 http://www.capetalk.co.za/articles/361348/rain-rolls-out-ultra-fast-5g-internet-in-parts-of-jozi-and-tshwane

23 https://play.google.com/store/apps/details?id=com.star.mobile.video

24 https://www.csimagazine.com/csi/Netflix-AV1-is-our-primary-next-gen-codec.php

25 https://qz.com/920857/netflix-nflx-uses-ai-in-its-new-codec-to-compress-video-scene-by-scene/

and the information provided above demonstrates that this has continued, as MultiChoice submitted would occur. Data costs have fallen sharply for both mobile and fixed broadband.

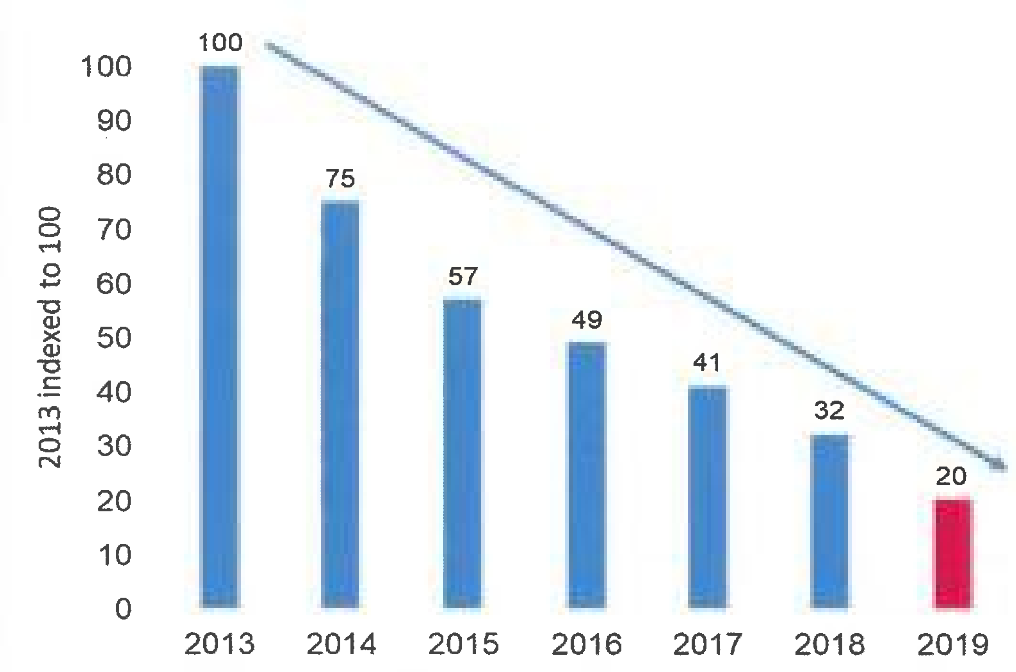
142.6.1 The figure below shows the decline in the average price per MB of data for Vodacom until its financial year end of March 2019. Notably, the effective price per megabyte reduced by almost 40% in the 2019 financial year alone. Out of bundle rates were reduced by a further 50% and big data tariffs were reduced by 40%.[26] Overall, Vodacom's average price per MB of data has declined by 80% since 2013.

142.6.2 In addition, MTN has reported that its effective rate per megabyte dropped by 87% between 2011 and 2017, Cell C's decreased by 20% in 2016, 36% in 2017 and 28% in the first half of 2018. Telkom has also reported that its data prices have dropped, particularly in the past three years to August 2018.[27]

26 http://vodacom.com/pdf/sens/2018/annual-results-for-the-year-ended-31032018.pdf

27 https://www.fin24.com/Companies/ICT/special-report-data-costs-are-falling-say-vodacom-mtn-cell-c-telkom-20190115-2

Figure 4: Decrease in average effective price per MB of data for Vodacom



Source: Vodacom Annual Reports 2013-2019

142.6.3 Telcos now also support electronic audio-visual content through zero-rating data costs (i.e. providing free data for video services) or providing it at highly discounted rates. For example: Telkom Mobile has stated that its Telkom LIT Video and Music Streaming Data Bundles "*have been developed to provide Telkom Mobile customers with affordable data to stream content available from all Telkom Content Partners.*"[28]

142.6.4 The fact that the bulk of data traffic passes through mobile networks, and the bulk of this is electronic audio-visual traffic,[29] itself indicates that cost is not a prohibitive barrier to electronic audio-visual consumption via mobile broadband as ICASA suggests, without it actually having engaged with market developments.

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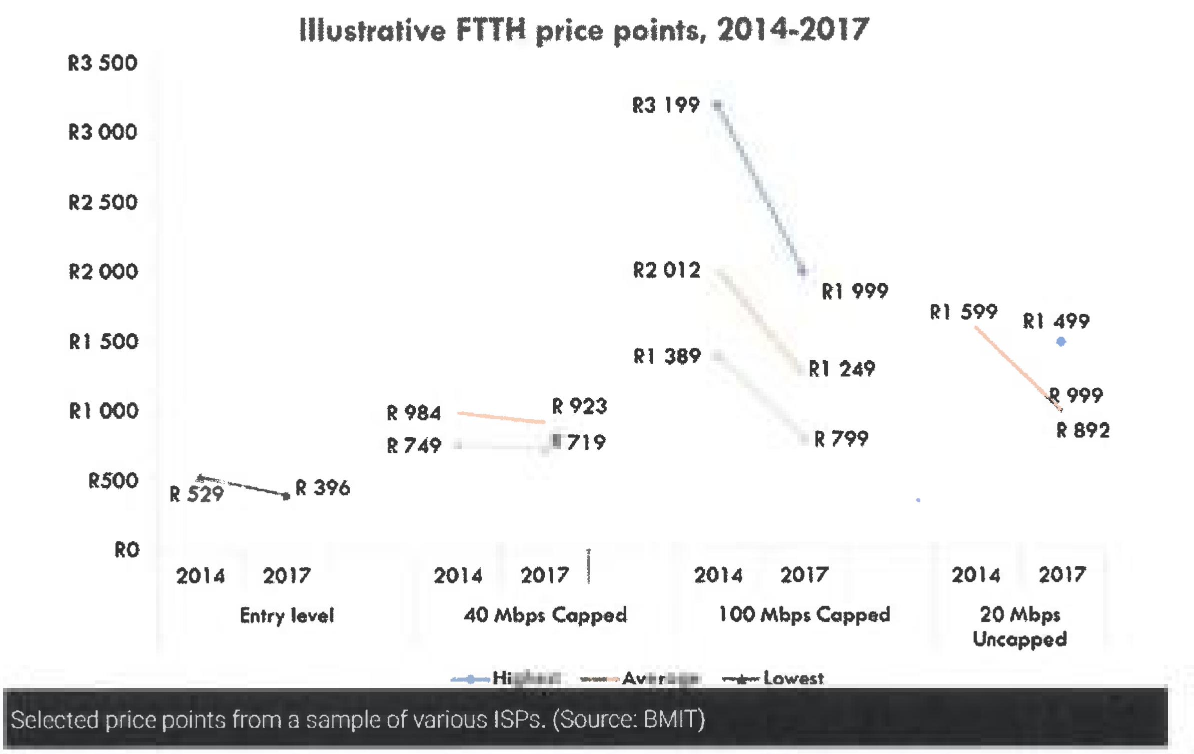
28 https://secure.telkom.co.za/today/shop/plan/telkom-lit_Mobile/

29 See for example https://www.cisco.com/c/en_za/about/press-releases-south-africa/archive-2015/mobile-data-traffic-growth.html

142.6.5 Fixed broadband data costs have also fallen. The Figure below shows the fall in prices for FTTH from 2014 to 2017 across a number of ISPs. According to BMIT, entry-level prices "*have declined to the extent that they are now affordable to most broadband households*". They observe that there has been a large shift in prices at the upper level of the market, "*both for very high-speed capped services and for typical 20Mbps uncapped services, where average prices have fallen by a third*".[30]

Figure 5: Decrease in FTTH prices for a sample of ISPs (2014 – 2017)



Source: BMIT, as reported in https://www.itweb.co.za/content/VKA3WwqdmWZvrydZ

142.6.6 Consistent with these trends, it has been reported that fibre prices have continued to decline in South Africa falling by up to 24% from 2018 to 2019 alone.[31]

30 https://www.itweb.co.za/content/VKA3WwqdmWZvrydZ

31 https://www.businessinsider.co.za/cheapest-fibre-internet-provider-south-africa-2019-4

142.6.7 The downward trend in data prices is expected to continue given the various initiatives and offers by telcos to reduce the price of data (and there are no indications that this will not continue into the future). For example, a network sharing agreement between Vodacom and Telkom is expected to result in reduced network deployment costs for Telkom and cost savings for Vodacom, which will contribute to lower data prices.[32] Furthermore, the 3 major network operators have stated that they expect data prices to fall once the government starts releasing additional spectrum.

142.6.8 Additionally, consumers do not need to have access to the fixed broadband access at home as they can, and do, use Wi-Fi at work or in public spaces to access content over the internet. *As noted by the new OTT provider Viu:*

> "*The download-and-watch-later functionality also addresses the requirement for convenience by Gen Z, with many downloading shows at Wi-Fi hotspots, to watch at home. Viu also enables viewers to choose screen resolution and save on data.*"[33]

142.6.9 This is consistent with evidence provided by MultiChoice to ICASA showing that downloading activities for DStv Now occur between 8am and 2pm.[34]

143 The widespread entry and investment by international, regional and local OTT service providers confirms that South Africa's broadband eco-system is suitable to OTT with respect to both coverage and cost. For example, Kwesé regards OTT as the future distribution mode for all electronic audio-visual content:

32 https://www.businessinsider.co.za/telkom-can-now-use-vodacoms-network-2018-11

33 https://themediaonline.co.za/2019/08/viu-lights-the-way-in-video-on-demand-with-increased-uptake-of-local-content/

34 Appendix B to the 2018 supplementary submissions, Figure 1, p. 5.

"On observing global changes being driven by the internet, technology and globalisation, and their impact on business models, consumer preference and behaviour patterns, we have taken the strategic decision to refocus the business based on market trends.

All we have done is to de-emphasise our satellite service and redirect our efforts and resources towards a future-proof business model, which recognises the global shift by consumers towards connected digital services."[35]

and

"We have seen a noticeable shift in consumer viewing habits in recent years namely; increased video consumption on mobile phones, and growing popularity of OTT services across our markets. It is with these changes in mind, that Econet Media has taken the strategic decision to refocus efforts towards a digital product offering. We believe that the future of TV in Africa is the internet, and the home of the internet in Africa is mobile."[36]

144 [redacted]

144.1 [redacted]

144.2 [redacted]

144.3 [redacted]

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35 https://www.herald.co.zw/econet-media-clears-air-on-kwese/

36 https://www.kwese.com/leading-digital-entertainment-africa.php

Figure 6: DStv subscriber internet access

[redacted]

145 A large proportion of MultiChoice's subscriber base at all levels has ready access to OTT audio-visual services alternatives. This makes MultiChoice acutely vulnerable to OTT competition. As the next section demonstrates, viewers make a direct choice every day – and even several times a day – between watching content via traditional broadcasting platforms or via an OTT provider.

Audio-visual content consumption patterns have changed

146 In contrast to just five years ago, consumers are now able to choose from an extensive selection of electronic audio-visual content which can be viewed whenever and wherever they choose, and not only on TV sets but on a wide array of devices including smartphones, tablets and PCs. Viewing behaviour by younger audiences, who represent an ever-growing share of the market, indicate that these changes will be even more pronounced in the future.

147 The most important shifts in electronic audio-visual consumption in South Africa were outlined in MultiChoice's 2017 submissions:[37]

147.1 Viewing has shifted from traditional TV sets to other devices, especially mobile ones.

147.2 Viewers are increasing their consumption of alternative electronic audio-visual content including VOD as well as short form electronic audio-visual content such as YouTube and pirated content. Viewers, and younger viewers in particular, are increasingly abandoning live TV watching in favour of short-format viewing across a range of devices.

147.3 Viewers are increasingly engaging in multi-homing (or multi-service) behaviour whereby they construct their viewing content from multiple sources. All viewers are consuming electronic audio-visual content in a far more fragmented manner: from different service providers across different platforms and for different amounts of time.

148 Subsequent to MultiChoice's 2017 submissions, a variety of studies have continued to demonstrate these changes in consumption patterns among South African consumers.

149 In May 2018, shortly before the commencement of the public hearings in this inquiry, GfK (a global research company) published its International Viewscape Survey (2018) which, for the first time, covered South Africa and surveyed 1,250 people representative of urban South African adults with internet access. The survey found that linear broadcasting's share of daily video content viewing time has significantly declined in favour of various forms of online viewing.

149.1 Broadcast television accounts for just 42% of the time South Africans spend in front of a screen.

37 MultiChoice's 2017 submissions, para 91-104.

149.2 Consumers in South Africa spend nearly as much of their daily viewing time – 39% of the total – watching free digital video from sources like YouTube and Facebook as they do on linear television.

149.3 90% of South African online adults[38] make use of at least one online video service and just over half pay to view digital content online.

149.4 Just over a third of South African online adults use Subscription Video On Demand (SVOD) services such as Netflix, with 16% of SVOD users subscribing to multiple services.

149.5 23% of online South African adults use pay-per view platforms and 10% download pirated content from the internet.

149.6 Approximately 20% of those who sign up for SVOD services are cord cutters. That is, they sign up with the intention of cancelling their Pay TV subscription.[39]

150 PWC's 2019 Global Consumer Insights Survey finds that: [40]

150.1 Cord-cutting trends among South Africans have increased.

150.2 22.9% of South African consumers stream movies daily.

150.3 23.9% of South African consumers stream music daily.

150.4 These figures are closer to 50% for younger generations.

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[38] Online adults are defined as urban South African adults with Internet access.

[39] https://www.gfk.com/en-za/insights/press-release/viewscape-study-linear-broadcastings-share-of-screen-time-shrinks-in-sa/ and attached press release

[40] https://businesstech.co.za/news/media/308732/cord-cutting-is-on-the-rise-in-south-africa/

151 Although somewhat older and hence not fully reflective of how far such trends have progressed, the results of the South African leg of the 2017 Deloitte Global Mobile Consumer Survey[41] also show how consumers are increasingly using mobile devices to access video content. The report states that –

> "*In 2017 there was a significant turning point in the mobile industry in South Africa. It was the year where the smartphone clearly emerged as the most popular communication device for consumers, relegating the feature phone to history. South Africans are now among the top users of smartphones globally and are adept at using it to access the applications and services it offers.*"[42]

152 The findings of the survey included the following:

152.1 63% and 38% of urban and rural respondents respectively had access to a 4G/LTE network whilst 83% of survey respondents had access to a 3G network or better.

152.2 23% of consumers surveyed reported owning a smart TV whilst 17% owned a video streaming device.

152.3 93% of respondents had ready access (at home or work) to a smartphone, 66% to a laptop computer, 57% to a tablet and 47% to a desktop computer.

152.4 More than 60% reported watching short videos via the internet, between 23% and 37% (depending on the age category) watched video news stories on news apps and between 18% and 25% (depending on the age category) reported streaming films and/or TV series.

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41 The survey comprised 1 000 respondents across age groups, genders and socio-economic clusters and focuses on how consumers are use their mobile devices.

42 Deloitte Global Mobile Consumer Survey 2017: The South African Cut, p.1.

153 As indicated in MultiChoice's 2018 supplementary submission,[43] the Interactive Advertising Bureau (IAB) has also found that social media is playing a huge role in online audio-visual content in SA, with over half of South Africans finding video content on social media platforms:

> *"Interestingly, social media now consumes the second highest amount of bandwidth globally after online video, and the two are very closely linked – the IAB survey points out that 53% of South Africans found video content via social media. Some 13 million South Africans are on Facebook – which now places huge emphasis on video content – with 77% of them accessing the site via mobile. This gives marketers and advertisers access to a huge and targetable audience."*[44] (emphasis added)

154 This is also confirmed by the popularity of alternative sources of electronic audio-visual content in SA such as YouTube which is the most opened non-search website (and third overall if Google.com and Google.co.za are included) and has 12.1 million unique visitors in SA in a month.[45] 20-25% of all smartphone users in South Africa are active *daily* users of YouTube.[46] This makes it the biggest source of electronic audio-visual content in South Africa. Further, research also shows that the younger generations are becoming more familiar with satisfying their electronic audio-visual needs by using OTT services such as YouTube rather than traditional TV. As can be seen in the Figure below, teenagers in SA between the ages of 13 and 16 are already more engaged with sites such as YouTube than they are with traditional TV. This means that OTT video consumption trends are only expected to intensify in the future.

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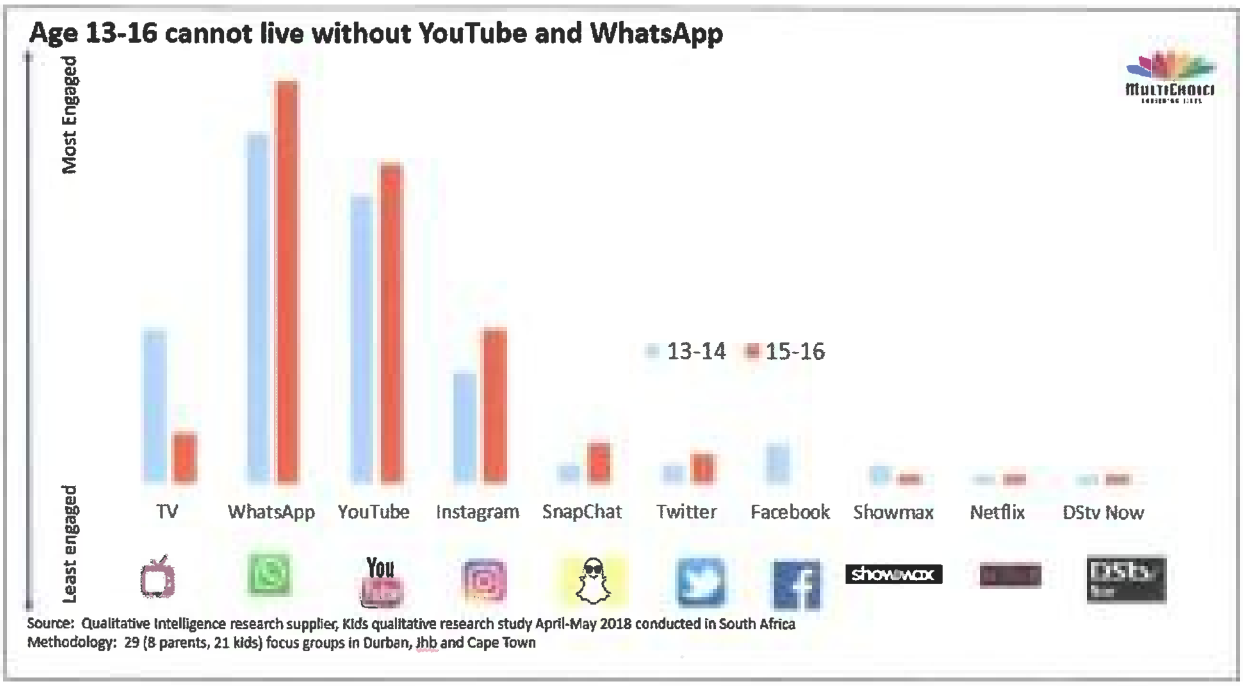
43 Appendix B to the 2018 supplementary submissions, para 39.

44 The Media Online, 8 July 2016, SA showed second highest growth in mobile video globally: http://themediaonline.co.za/2016/07/sa-showed-second-highest-growth-in-video-globally/

45 SimilarWeb data for March 2019-August 2019.

46 MultiChoice's presentation to ICASA (11 May 2018), slide 41. Figures based on SimilarWeb data.

Figure 7: Engagement of teenagers in SA across various electronic audio-visual content platforms



155 This phenomenon is not limited to Pay TV but also has a significant impact on how FTA is consumed. Catch-up services of FTA broadcasters are also enormously popular in SA, enabling viewers to view content on-demand. YouTube has been used extensively for catch-up services by FTA viewers. On average, a full episode of Generations on the SABC YouTube page generated 141 000 views.[47]

156 Finally, it is also worth noting that as previously outlined by MultiChoice in its 2017 submissions,[48] the ubiquity of basic internet connectivity has significantly accelerated the growth of the piracy of electronic audio-visual content which is posing a huge threat to traditional Pay TV services. For example, MultiChoice estimates that over the last 12 months to August 2019 there were more than 3.5 million views of full pirated versions of the series and movies available on DStv per month in SA. Piracy in sports is also pervasive. Whilst MultiChoice's 2017 submissions indicated that South Africa has a high number of illegal

47 Tubular YouTube views for the year ending 26 September 2019.

48 MultiChoice's 2017 submissions, para 151-154.

downloads of series and movies,[49] and as of August 2019, [redacted].[50] This suggests that, contrary to ICASA's claims, piracy is and will continue to be a significant issue in South Africa.

MultiChoice subscribers mirror electronic audio-visual consumption trends

157 ICASA's Inquiry concerns Pay TV. Accordingly, when considering constraints from alternative electronic audio-visual platforms on Pay TV services, it is the preferences of Pay TV subscribers that matter. Evidence from MultiChoice's own subscribers shown below repeats and updates the data provided in its prior submissions, which ICASA has superficially ignored or dismissed in the Draft Findings. ICASA cannot rationally ignore this evidence on the basis of unsubstantiated claims to the contrary.

158 [redacted]

159 The figure below shows the percentage of DStv households that use certain devices to watch TV/video content based on the 2019 MultiChoice Video Entertainment Survey.

159.1 [redacted]

159.2 [redacted]

49 See MultiChoice's 2017 submissions, para 153.

50 Irdeto Statistics.

[redacted]

Figure 8: DStv Household device used to watch video content

[redacted]

160 [redacted]

160.1 [redacted]

160.2 [redacted]

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51 [redacted]

160.3 [redacted]

161 The global trend towards "cord-nevers", "cord-cutting" and "cord-shaving" is evident among MultiChoice subscribers and potential subscribers.

161.1 [redacted]

161.2 [redacted]

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52 21% of DStv subscribers already have a paid VOD services and in 52% use some kind of VOD (free or paid for) service.

Figure 9: Survey of potential cord-cutting and cord-shaving by DStv households

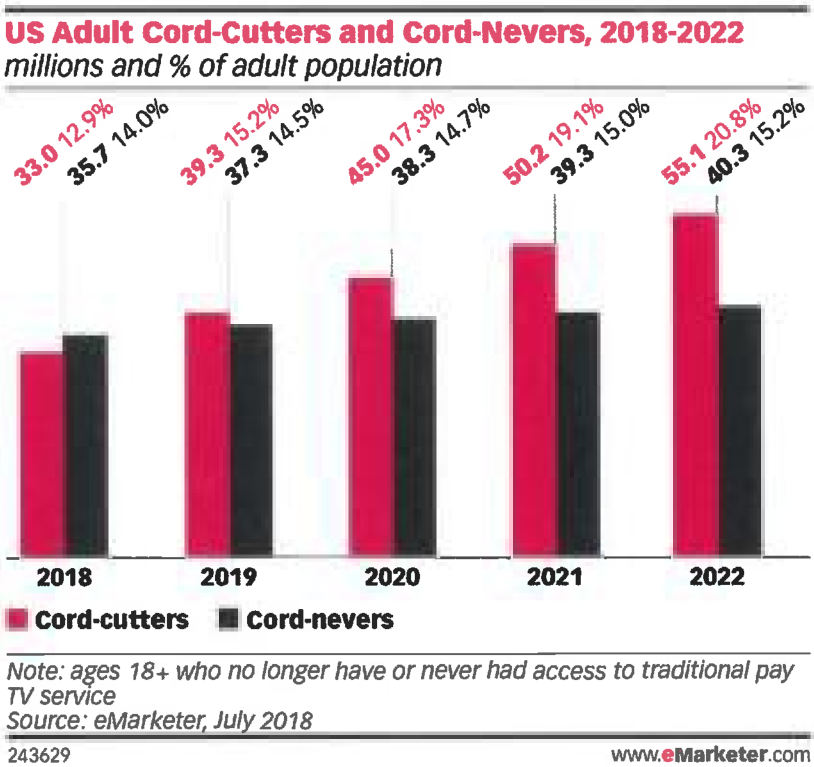
[redacted]

161.3 [redacted]

162 MultiChoice has made submissions demonstrating that trends in South Africa are consistent with global trends. The popularity of online video content has led to significant cord-cutting in the US and UK. As leading indicators of global digital trends, this demonstrates the expected trend for other countries (including South Africa).

162.1 As shown in the figure below, in 2018, 33 million US adults (or 13% of the adult population) were cord-cutters, and this number is expected to grow rapidly over the next few years (a 67% increase in just 4 years). In addition, there is also an increase in the number of individuals who have never subscribed to traditional Pay TV services (the "cord-nevers").

Figure 10: Number of individuals that do not access traditional Pay TV services in the U.S, 2018



Source: https://www.emarketer.com/chart/224703/us-adult-cord-cutters-cord-nevers-2018-2022-millions-of-adult-population

162.2 In the UK, according to Ofcom:

> "*Thirty-six per cent of SVoD subscribers claim to have dropped a premium aspect of pay-TV (sometimes known as 'cord shaving') while 14% say they have stopped paying for it altogether ('cord cutting').*"[53]

163 The disruptive impact of these changes in viewing behaviour is also acknowledged by regulators. Ofcom's website summarises the findings of its 2018 Media Nations Report as follows:

> "*The report highlights a competitive shift within the UK television industry, driven by the rise of the major global internet companies and the changing habits and preferences of UK audiences. With more choice for viewers than ever before, UK broadcasters are competing for viewers in an increasingly fragmented landscape.*"[54]

164 Its chief executive further stated that:

> "*Today's research finds that what we watch and how we watch it are changing rapidly, which has profound implications for UK television.*
>
> *We have seen a decline in revenues for pay TV, a fall in spending on new programmes by our public service broadcasters, and the growth of global video streaming giants. These challenges cannot be underestimated.*"[55]

165 As recently explained by Disney's CEO, Bob Iger, these changes mean that traditional bouquet packages with a large number of channels are increasingly becoming less attractive to consumers:

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53 Ofcom, Media Nations: UK, July 2018, p.18.

54 https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2018/streaming-overtakes-pay-tv

55 https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2018/streaming-overtakes-pay-tv

"There's much more competition in the world today for people's time and money..."

"[W]hen [people] look at a 150-plus channel package... they realise they're buying a lot of TV channels that they may never find or may not have any interest in watching – I think today's consumer doesn't look as positively at that as they once did."[56]

166 The implication of the above for competition is profound: it is not necessary for individual electronic audio-visual content offerings to replicate the entire traditional TV offering to compete for viewers. In fact, Disney believes it is a disadvantage. In a forward-looking inquiry, ICASA cannot simply ignore and/or wish away these trends which MultiChoice has already shown are relevant to South Africa.

Continued emergence of formidable OTT competitors

167 MultiChoice's 2017 submissions set out details on the different OTT business models and OTT players that have entered SA.[57] In this section, MultiChoice further elaborates on the OTT landscape holistically, which is necessary for any understanding of the electronic audio-visual services market and the constraints faced by Pay TV service providers.

168 OTT entry is fundamentally reshaping the South African competitive landscape for electronic audio-visual services.

169 A significant number of OTT service providers now operate in South Africa. These include:

169.1 Global subscription-based OTT service providers (e.g. Netflix, Amazon Prime Video and soon Apple TV+);

56 See FN6. https://www.channel24.co.za/TV/News/disney-takes-over-hulu-plans-to-launch-streamer-globally-20190515-2

57 Refer to MultiChoice's 2017 submissions, para 105-154; para 488-525; para 685-690 as well as and Appendix 2, which is dedicated entirely to describing the growth and competitiveness of OTT services.

169.2 Global ad-based OTT platforms and social media platforms (e.g. YouTube, Facebook, Twitter and Snapchat);

169.3 Strong regional OTT players (e.g. DEOD and iROKOtv); and

169.4 Local telco OTT offerings (e.g. Vodacom Video Play, Telkom LIT and Cell C black[58]).

170 Since MultiChoice's 2017 submissions, a number of players have entered, or announced their intention to launch, online video content services in South Africa. These include Vodacom Video Play[59], StarTimes On, Viu, Apple TV+, YouTube Premium and the SABC.

171 OTT entrants follow a powerful and competitive business model.

171.1 Entrants simply leverage off existing telecommunications broadband infrastructure and public internet to provide their services. As the Netflix founder Reed Hastings famously stated *"creating a TV network is now as easy as creating an app".*[60]

171.2 Entrants are not subject to the regulations and licence conditions that constrain traditional TV broadcasters in South Africa (including the ones such as those proposed by ICASA) and do not even need a local presence.

171.3 Entrants are often well-resourced multinationals with large pre-existing global or regional subscriber bases over which costs can be spread.

171.4 Entrants often have access to attractive and often exclusive content including movies, series, sports, news and a host of other offerings.

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58 Cell C recently announced that it is reviewing the channel options for its streaming service in light of the financial difficulties the operator is experiencing.

59 Vodacom has offered a video service since 2015 but announced the launch of this "new video content service" in May 2018.

60 The Guardian, 18 July 2017, Netflix tops 100m subscribers as it draws worldwide audience: https://www.theguardian.com/media/2017/jul/18/netflix-tops-100m-subscribers-international-customers-sign-up

171.5 Entrants are investing in the development of local content, which is highly popular among South African audiences.

171.6 Entrants generally offer lower-priced offerings – either because of their vast scale, or to cater for the large number of lower-income consumers.

172 Not all entrants will succeed in this highly contested and competitive environment. Offerings such as PCCW's Ontaptv, Vidi, Kwesé Play and Cell C black have faced financial difficulties or exited the market. However, firms clearly continue to view entry as a highly attractive opportunity and, as is discussed further below, many OTT service providers are making important inroads in the South African electronic audio-visual market. Some of those that exited have already sought to re-enter, with PCCW adopting a different business approach and now entering with its Viu service offering[61].

173 These service providers draw viewership and spend away from MultiChoice and other broadcasters. Such service providers are, without a doubt, viewed as significant current competitors by MultiChoice. MultiChoice's 2018 business plan and budget submitted to ICASA show this to be the case:

[redacted]

[redacted]

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61 https://www.digitaltveurope.com/2019/03/04/pccw-launches-viu-in-south-africa/

62 [redacted]

63 [redacted]

174 In light of these statements in recent business plans, ICASA's cursory finding that MultiChoice does not see OTTs as competitors is incorrect.[64] It appears to be primarily based on a statement in MultiChoice's 2016 business plan that MultiChoice [redacted]. However, this does not mean that MultiChoice does not compete with Netflix, or other SVOD service providers. Indeed, MultiChoice clearly sees these players as competitors which informs their entire business model and operations.

175 Furthermore, submissions made by other parties to ICASA recognise the importance of OTT and the negative impact on revenues for both FTA and Pay TV service providers. However, these are not referred to in the Draft Findings, nor are they dealt with in any meaningful way in ICASA's own analysis.

175.1 According to e.tv:

> *"The participation of Over-the-Top (OTT) players in the advertising market which is unregulated is beginning to erode the revenue base for the FTA and subscription-television."*[65]

175.2 Vodacom states clearly that demand for content via LTE is a crucial development that shapes the market for digital content and challenges the regulatory regime.[66] This development means that content can be delivered via multiple substitutable transmission platforms at both the wholesale and retail levels.

175.3 According to the SABC:

> *"Just under 10% of all adult video media consumption for performance period is allocated to non-TV in Ariana:2016 audience research. Most of this would be OTT services, so there <u>has been a significant impact</u>. In addition, particularly at upper LSMs, it <u>has fundamentally changed the media ecology, impacting on</u>*

64 See the Draft Findings at para 5.12.43 and para 5.13.7.

65 e.tv submission, para 12.

66 Vodacom submission, para 56.

consumption patterns and expectations around content delivery. As bandwidth becomes cheaper and more accessible, the impact of these new services will become more profound and wide ranging as the experience of more developed markets shows."[67]

(emphasis added)

175.4 According to Telkom:

".... Any service provider of Broadband is in some way or another competing with subscription TV and FTA broadcasting as OTT content directly competes with traditional TV content."[68]

(emphasis added)

"Convergence and digitalisation will impact increasingly on the way that audiences access and engage with television and television-like content."[69]

175.5 The Association of Community Television – South Africa (ACT-SA) states:

"Convergence has dramatically changed the way in which consumers access and watch electronic audio-visual services, and it can be provided over multiple platforms – traditional analogue broadcasting or Digital Terrestrial Television (DTT), satellite, digital cable, Internet Protocol Television (IPTV) and Over-The-Top (OTT) Television. ...

... we believe OTT as a force of digital disruption cannot be ignored by the regulator when determining current and future relevant markets."[70] (emphasis added)

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67 SABC response to question 1.4 of the Questionnaire.
68 Telkom response to question 1.3 of the Questionnaire.
69 Telkom letter to ICASA dated 22 July 2016.
70 ACT-SA submission, paras 1.5, 1.7 and 1.8.

176 It is notable that Netflix itself has also acknowledged that it competes with subscription broadcasting. This is in contrast with ICASA's conclusion – based on an isolated statement by Netflix's CEO (during a media interview and taken out of context) – that Netflix is not a "competitive constraint on subscription broadcasting" because Netflix does not intend to supply sports and news[71]

177 However, Netflix's recent annual reports and letters to shareholders state that –

"*consumers continue to migrate away from linear viewing*";[72]

"*[w]e compete against other entertainment video providers, such as multichannel video programming distributors, internet-based content providers (including those that provide pirated content) … and more broadly other sources of entertainment that our members could choose in their moments of free time*";[73] and

"*[t]he market for entertainment video is intensely competitive and subject to rapid change. Through new and existing distribution channels, consumers have increasing options to access entertainment video. The various economic models underlying these channels include subscription, transactional, ad-supported and piracy-based models.*"[74] (emphasis added)

178 ICASA has not adequately considered the role that such service providers are playing, the pace at which they are growing or the fact that they are outpacing growth in subscribers to traditional Pay TV services. MultiChoice's 2017 submissions provided details on the different OTT business models and OTT players that have entered SA.[75] Since ICASA appears to have ignored much of the evidence provided by MultiChoice, in the next section we further elaborate

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71 Draft Findings, para 5.12.15.

72 Netflix Letter to shareholders, dated 16 April 2019, https://s22.q4cdn.com/959853165/files/doc_financials/quarterly_reports/2019/q1/FINAL-Q1-19-Shareholder-Letter.pdf

73 https://s22.q4cdn.com/959853165/files/doc_financials/annual_reports/2018/Form-10K_Q418_Filed.pdf, p. 1.

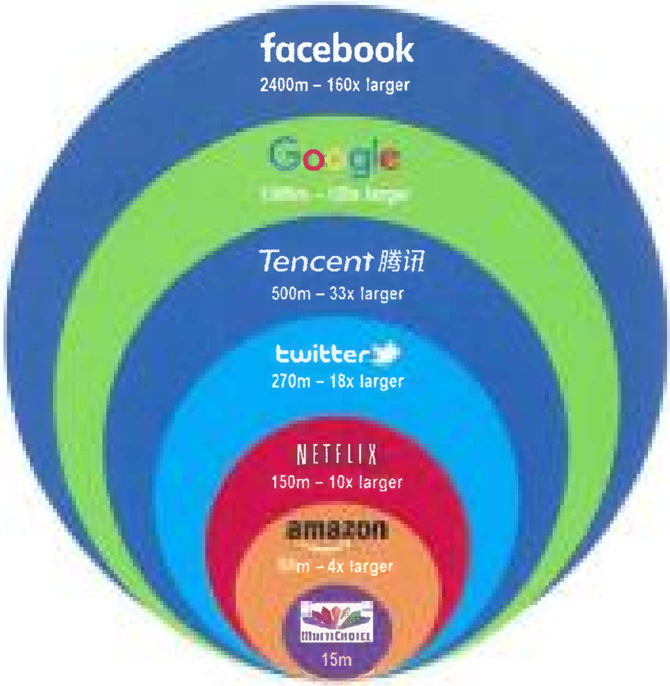
74 https://s22.q4cdn.com/959853165/files/doc_financials/annual_reports/2018/Form-10K_Q418_Filed.pdf, p. 3.

75 See MultiChoice's 2017 submissions, p. 57-80 and Appendix 2.

on the various OTT business models and OTT service providers that have entered SA.

179 **Global OTT services.** These comprise of massive OTT content/aggregator services based on either paid for (Netflix, Amazon and Apple) or advertising (Google/YouTube, Facebook, Twitter) business models. As can be seen below the scale of these players dwarfs MultiChoice's pan-African subscriber base.

Figure 11: Size of Video User Base relative to MultiChoice



Source: Yahoo Finance, Financial Times, IHS, Digital TV Research. Company reports. News reports.

180 In the case of global pay OTT service providers such as Netflix, Amazon and Apple, their global subscriber base provides them with enormous scale and revenue streams to invest in and produce their own exclusive content. They are also well-placed to acquire the global rights to the best international sport and other content from studios and independent producers. For example:

180.1 Netflix spent $12 billion (approximately R 159 billion[76]) on content in 2018 and this is expected to increase to $15 billion (approximately R 215 billion[77]) in 2019.[78] Amazon is planning to spend approximately $7 billion (R 100 billion)[79] on content in 2019 for its Amazon Prime Video service, which is also available in South Africa.[80] Such investments in content have driven the proliferation of varied, quality content.

180.2 In addition to international content, these players have also been highly successful in investing in, and producing, local content which has traditionally been a strength of FTA channels. For example, in 2015 Netflix invested in its own telenovela content called "narconovelas" to compete with the Mexican FTA broadcaster Televisa's specialty of Spanish telenovelas. While Netflix's subscriber base has grown significantly, Televisa's advertising revenue has declined by 43% and its net profit has dropped by 52% over the last five years.[81]

180.3 OTT service providers are also investing in the acquisition of sport rights. For example, sports rights purchased by Amazon include live streaming in the United Kingdom of the US Open Tennis, 20 English Premier League football matches per season (with exclusive rights

76 Conversion based on an average rand dollar exchange rate in 2018 of 13.234 as per the SARB Historical Macroeconomic Timeseries Information.

77 Conversion based on an average rand dollar exchange rate for January to August 2019 of 14.298 as per the SARB Historical Macroeconomic Timeseries Information.

78 https://variety.com/2019/digital/news/netflix-content-spending-2019-15-billion-1203112090/

79 Refer to previous footnote.

80 https://www.cnbc.com/2019/04/26/amazon-on-pace-to-spend-7-billion-on-video-and-music-content.html

81 Televisia Annual reports Digital TV Research and Wall Street Journal, 23 April 2018, Netflix Breaks Up Audience Romance with Telenovela.

over these matches) and the ATP (Men's) and WTA (Women's) Tennis Tours.[82]

181 As is clear from the above, global OTTs enter rapidly, grow exponentially and disrupt. Netflix's entry into South Africa is a case in point.

181.1 Netflix entered with a fully developed content offering including many popular originals, and has experienced rapid growth in its subscriber base. Since its 2017 submissions, MultiChoice estimates that its subscriber base has doubled to almost 800 000 subscribers.

181.2 South African local content is already being streamed on Netflix in SA,[83] including the much-anticipated Netflix original local series Shadow.[84]

181.3 Netflix has further commissioned two South African series (Queen Sono and Blood and Water).[85] This offering competes directly with the local content offerings of South African broadcasters, both Pay TV and FTA.

181.4 The figure below provides a comparison of the annual increase in the number of subscribers for Netflix relative to that of DStv Premium subscribers since just after the launch of Netflix. It demonstrates the significant growth that Netflix is experiencing. MultiChoice estimates that between March 2016 and March 2019 Netflix gained approximately 613 000 subscribers, while DStv [redacted] Premium subscribers.

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82 See the following: (i) https://media.sportbusiness.com/2017/12/us-open-the-beneficiary-with-amazon-adding-to-tennis-content/; (ii) https://media.sportbusiness.com/news/amazon-takes-wta-tour-uk-rights-from-bt-sport/; (iii) https://media.sportbusiness.com/2017/12/us-open-the-beneficiary-with-amazon-adding-to-tennis-content/ and (iv) https://www.theguardian.com/media/2018/jun/07/amazon-breaks-premier-league-hold-of-sky-and-bt-with-streaming-deal

83 See https://www.businesslive.co.za/bt/business-and-economy/2018-05-26-netflix-frees--bantustan-broadcasting and https://theculturetrip.com/africa/south-africa/articles/11-films-and-shows-about-south-africa-to-watch-on-netflix/

84 https://www.pulse.ng/bi/lifestyle/shadow-netflix-releases-its-first-original-south-african-series/z4hxp4h

85 See https://tbivision.com/2019/02/25/netflix-signs-up-second-south-african-series/ and https://www.pulse.ng/bi/lifestyle/shadow-netflix-releases-its-first-original-south-african-series/z4hxp4h

Figure 12: Year-on-Year net increase/(decrease) in subscribers for Netflix and DStv Premium

[redacted]

182 In 2015 SA was among the 100 countries where Apple launched its music streaming service, Apple Music, which included a significant catalogue of electronic audio-visual content. The company also launched an Apple TV device which, like Google's Chromecast, provides an Apple portal for accessing online audio-visual content (such as Apple Music) via a TV.

183 Significantly, Apple has now also entered the paid-for streaming OTT space, recently announcing that its streaming service Apple TV+ will be available from November 2019 in 100 countries including South Africa.[86] Apple's focus is on original, rather than syndicated, content. It has invested more than $1 billion in the production of a significant amount of high-quality original content with stars like Jennifer Aniston, Reese Witherspoon, Steve Carell, Oprah Winfrey and Jason Momoa signed up to be involved.[87] The Apple TV+ subscription price is

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86 https://www.channel24.co.za/TV/News/5-things-you-need-to-know-about-apple-tv-coming-to-south-africa-20190911

87 https://www.thesouthafrican.com/lifestyle/streaming-service-apple-tv-plus-launch/ and https://www.cnet.com/news/every-apple-tv-plus-show-series-announced-streaming-service-app/

reported to be below that of Netflix.[88] Apple has also stated that customers purchasing an iPhone, iPad, Mac or Apple TV will get one year's subscription free.[89]

184 In addition to Netflix, Amazon Prime Video and Apple TV+, the advertising-based bigTech super-platforms, such as Google/YouTube, Facebook and Twitter also leverage their existing online platforms to provide electronic audio-visual content to their extensive existing user bases. These service providers target Pay TV audiences with services and content similar to those provided by traditional Pay TV. As such, despite their advertising-based revenue model, there is intensive competition for viewers (referred to in the industry as "eyeballs") between these and more traditional television services.

184.1 Google has developed Google Play Movies which allows users to rent or purchase the latest movies from all the major Hollywood studios. It also owns the social media platform YouTube. YouTube is the most popular website in SA by a huge margin and receives on average almost 78 million visits monthly from South Africans.[90] As can be seen from the figure below, it has also contributed to the explosion of user-generated video content with 500 hours of content uploaded per minute in May 2019.

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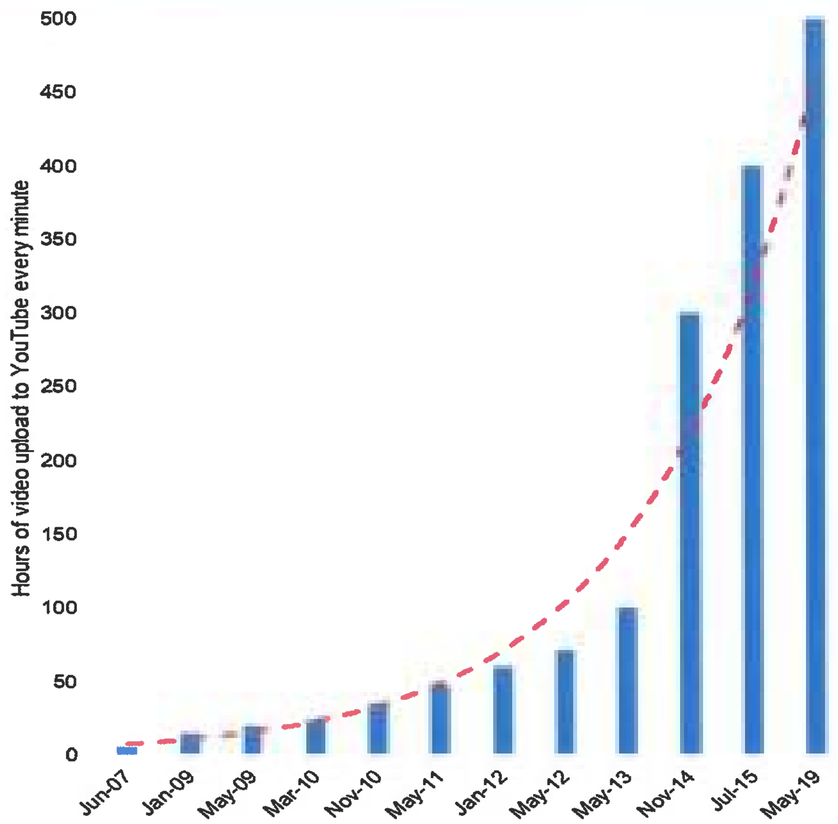
88 Apple have indicated that its service will cost $4.99 per month in the US which is below the cost of Netflix in the US. Converted to South African currency, $4.99 is approximately R 71 which is also below Netflix's current price in South Africa R99 per month.

89 https://www.techradar.com/news/apple-tv-plush and https://www.techradar.com/news/apple-tv-plus-vs-netflix-could-apple-eclipse-its-biggest-rival

90 We are Social Digital 2019: South Africa, slide 25 (based on Similar Web data).

Figure 13: Number of hours uploaded to YouTube per minute



Source: Statista 2019.

184.2 YouTube recently launched YouTube Premium in South Africa[91] and has partnered with the NBA Africa to provide live streaming of the NBA games[92] as well as with other service providers to show video-on-demand sports highlights packages.[93]

184.3 Facebook has moved rapidly into streaming electronic audio-visual content to its global user base – it is the largest social media platform in SA, with an estimated 16 million users (constituting 30% of the population).

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91 YouTube Premium is a paid for service that provides advertising-free streaming of all videos hosted by YouTube as well as access to YouTube Original movies and series. Currently YouTube Premium in South Africa does not include access to YouTube Original content.

92 https://www.fin24.com/Companies/nba-strikes-youtube-deal-for-dedicated-african-channel-20190320

93 https://www.channel24.co.za/TV/News/youtube-to-stream-live-sport-in-sa-20190702

184.4 Twitter streams a range of content, including news, events and a variety of sports content.[94] Also see Figure 23 in Part D for more on sports rights that Twitter has access to. All of these services are available in SA. It should also be noted that more than half of Twitter's advertising revenue comes from video content.[95]

184.5 Ad-based bigTech service providers are also acquiring global rights to sports content. For example, Twitter acquired the global rights to distribute nearly 140 hours of the PGA Tour across 28 tournaments and will also stream the live NBA finals in India.[96] Facebook has acquired live rights for the English Premier League, UEFA Champions League, La Liga and 8 tournaments from the PGA Tour, among others.[97]

185 **Direct-to-consumer content providers.** Content providers are also increasingly launching their own direct-to-consumer OTT offerings, giving rise to a wider range of OTT services and increased competitive constraints on traditional Pay TV services. A number of the global content providers that currently provide channels or content to the DStv bouquets are already providing electronic audio-visual content direct-to-consumers in other countries. [redacted] This is another relevant market development which ICASA has not dealt with at all in the Draft Findings.

94 https://variety.com/2019/digital/news/twitter-2019-newfronts-live-streaming-video-viacom-espn-live-nation-univision-1203200239/ and https://blog.twitter.com/marketing/en_us/topics/product-news/2017/new-premium-video-content-coming-to-twitter.html

95 https://mybroadband.co.za/news/it-services/264929-twitter-showing-strong-growth-in-south-africa.html

96 See the following: (i) https://www.pgatour.com/company/2019/01/07/twitter-expand-multiyear-agreement-to-offer-free-global-live-streaming-pga-tour-live.html, and (ii) https://media.sportbusiness.com/news/facebook-twitter-youtube-to-stream-nba-finals-in-india/.

97 See the following (i) https://www.engadget.com/2018/08/16/facebook-streaming-champions-league-in-latin-america/,(ii) https://media.sportbusiness.com/2018/08/sony-retains-laliga-coverage-via-facebook-sublicensing-deal/ and (iii) https://www.engadget.com/2018/06/20/facebook-watch-tab-exclusive-pga-tour-streaming-deal/?.

MultiChoice addressed this issue in its 2017 submissions[98] and, five months later (in the public hearings in May 2018) there had been further significant developments. [99]

186 Since then there have been yet further significant developments with respect to direct-to-consumer offerings, demonstrating the rapid rate of change:

186.1 A number of sports federations and related content providers have proceeded with direct-to-consumer offerings.

186.1.1 The WWE Network was launched in 2014 in the USA. The platform provides access to every live WWE pay-per-view event and hours of on-demand programming including from the WWE archive.[100] It is now available around the world including in South Africa.[101]

186.1.2 FINAtv is a direct-to-consumer platform providing all International Swimming Federation (FINA) events such as the FINA World Championships, FINA Water Polo World League, FINA Diving World Series, FINA Swimming World Cup and FINA World Men's & Women's Junior Water Polo Championships which can be viewed on the platform. The content is available worldwide (including South Africa and has the option of monthly and yearly subscription fees).[102]

98 MultiChoice's 2017 submissions, paras 150 and 505 – 507.

99 Appendix A: New developments in the electronic audio-visual markets, paras 35-38 to MultiChoice's presentation in the 2018 hearings.

100 WWE Network: https://www.wwe.com/wwenetwork

101 WWE Network, International Availability: https://help.wwe.com/Answer/Detail/166

102 https://www.finatv.live/en

186.1.3 NBA TV is run by Turner Sports, a subsidiary of AT&T's WarnerMedia and is available in South Africa. Alongside live match streaming, NBA TV also offers features, interviews, and full replays of previous matches.[103] A variety of annual, monthly and weekly packages are available.

186.1.4 The Pro14 rugby union competition (involving teams from Ireland, Scotland, Wales, Italy and South Africa) launched its own OTT Pay TV services platform in May 2019 (although not yet available in South Africa).[104]

186.1.5 GOLFTV is an international streaming service provided by Discovery (a traditional linear channel provider) that contains live PGA Tour coverage and is expected to be launched in South Africa in 2021.[105] This is a direct-to-consumer offering from Discovery that bypasses traditional Pay TV platform distribution.

186.1.6 UEFA has also indicated an intention to launch direct-to-consumer platforms.[106]

186.1.7 Formula One, a popular motorsport which MultiChoice currently has access to, is now available on an OTT streaming basis direct from Formula One in a number of territories worldwide (and will be available throughout sub-Saharan Africa in the next rights-cycle). Formula One has stated that:

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103 https://watch.nba.com/channel/nbatvlive

104 https://sportcal.com/News/Search/125855

105 https://variety.com/2018/tv/news/discovery-unveils-golftv-streaming-brand-1202987918/

106 See: https://www.gamesradar.com/disney-streaming-service-price-release-date-movies-tv-shows/, https://www.broadbandtvnews.com/2019/02/08/uefa-to-launch-ott-channel/, https://www.standard.co.uk/sport/football/live-football-streaming-service-premier-league-could-launch-netflix-of-football-and-treble-earnings-a4061036.html

> "*We would love to make all our content available to fans around the world, however, some limitations are in place due to the nature of our pre-existing media rights contracts. Over time we will be looking to increase the number of countries where F1 TV is available and to also provide an ever-increasing amount of live video content along with historical races from our archive.*"[107]

186.2 Disney not only purchased Hotstar, an Indian video streaming service with 300 million active users, last year[108] but has also recently completed its merger with Fox and taken operational control over the Hulu SVOD service in the United States. It has subsequently indicated its intention to launch Disney+ and make Hulu as a video streaming service available internationally.[109] [redacted] Disney's direct-to-consumer offering is expected to be a formidable competitor not only due to its line-up of original Disney-owned programming (including Marvel, Pixar and Star Wars), that has been extremely successful and popular[110]but also because it is able to offer such content at highly affordable rates (lower than those of Netflix[111]) as outlined by Bob Iger (the CEO of Disney):

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107 https://f1tv.formula1.com/en/content-schedule

108 https://edition.cnn.com/2019/04/12/tech/hotstar-india-streaming-disney-netflix/index.html

109 https://www.channel24.co.za/TV/News/disney-takes-over-hulu-plans-to-launch-streamer-globally-20190515-2

110 Disney+ will offer thousands of family-friendly movies and TV shows from Disney proper, Pixar, Marvel and the Star Wars franchise, along with new Fox acquisitions, National Geographic and The Simpsons. It will include a new Star Wars series (The Mandalorian), three new Marvel shows (Ms. Marvel, Moon Knight and She-Hulk) and an Obi-Wan Kenobi serial starring Ewan McGregor. They join a stable of other offerings from both universes, as well as Disney+ originals including a live-action Lady and the Tramp, Monsters, Inc and others: https://time.com/5662647/disney-plus-streaming-tv-launch/

111 https://bgr.com/2019/08/27/disney-will-not-make-r-rated-content-available-to-subscribers/

"A lot of the product that is on that service is being made for another platform and being monetized for that platform. If you look at all the movies, put aside the library, just say Captain Marvel which is the first original movie that will be available on that platform. That will have over a billion dollars in global box office, probably well over, by the time it becomes available. So the cost of that product has been borne by its initial foray into the marketplace."[112]

186.3 WarnerMedia has also announced it will be launching its direct-to-consumer streaming service, HBO Max, in autumn 2020 whilst NBCUniversal will launch its streaming service called Peacock in April 2020.[113] Although it is not yet clear when these will be made available in South Africa, these services will pose a significant competitive threat to traditional broadcasters in South Africa, particularly given that, as already noted, consumer preferences are moving away from large linear channel bouquet type offerings.

187 **Domestic telco OTT services.** The entry by telcos in SA (including Vodacom Video Play, Telkom LIT and Cell C black) reflects a global trend. Telcos have been powerful entrants in many markets, given the complementarities with their existing businesses. The provision of electronic audio-visual content reduces churn in their mobile offering and drives data revenue growth. Vodacom has noted, for example, that its OTT platform strategy is designed to stimulate data consumption.[114] The large telcos have access to significant resources, a large existing subscriber base and the ability to offer bundled services to customers, such as triple-play or quadruple-play options.

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112 CNBC Television Interview with Bob Iger, 12 April 2019: https://www.youtube.com/watch?v=g46uMnmizv4&t=29s

113 https://www.businessinsider.com/disney-plus-hbo-max-nbc-streaming-comparison-price-release-content-2019-7?IR=T

114 https://techfinancials.co.za/2019/05/13/vodacom-video-play-is-gaining-traction-with-close-to-a-million-users/

187.1 Vodacom has leveraged its existing mobile customer base to rapidly expand its video-content subscriber base boasting 869 000 active users on its Video Play platform as of March 2019.[115] The Video Play platform offers different packages ranging from R5 to R25 and include Nollywood, Bollywood and Hollywood movies, spiritual content, kids content, gaming and festival content as well as health and fitness content. It also acquired the rights to live stream the FA Cup in South Africa.[116]

187.2 Telkom's OTT service offering, LIT, is an app which allows users to enjoy live TV and on-demand content. LIT channels include a local South African music channel, a sports arena channel, China global news, YouTube, ForestTV as well as Bollywood shows. LIT provides discounted data bundles which can also be used to stream DStv Now and Showmax by DStv subscribers.[117]

187.3 Black, Cell C's online entertainment offering, offers different packages from R69 p/m for 18 channels, to R189 p/m for 60 channels. The service offers a range of content including movies, children's programmes and series including local content. Cell C partnered with Vubiquity, a leading global provider of content and marketing services, connecting customers to over 650 suppliers of content.

188 **Regional OTT services.** Low cost and easy distribution has supported entry by a number of regional and local OTT services, often backed by large electronic audio-visual or telecoms companies. These regional players tend to focus on region-specific and niche content offerings to penetrate specific audience groups across a number of countries. For example:

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115 https://techfinancials.co.za/2019/05/13/vodacom-video-play-is-gaining-traction-with-close-to-a-million-users/

116 https://www.dailysun.co.za/News/Entertainment/vodacom-video-play-secures-rights-to-live-stream-2018-19-fa-cup-20190125

117 Telkom Website: Lit, 2019: http://www.telkom.co.za/LIT/

188.1 iROKOtv is a VOD platform focusing exclusively on African content. It is available in 178 countries,[118] including in SA.[119] It is a subscription-based service which offers mostly Nollywood movies and telenovela series. iROKOtv has a growing catalogue of current content, including original titles from its production company, Rok Studios.

188.2 Digital Entertainment On Demand (DEOD) is Discover Digital's OTT service, launched in SA on 4 May 2017. It offers a mix of SVOD content, live TV channels, and TVOD rentals of recent cinema releases and library titles. Content includes series, kids' content, teen content, local music, sports, news and free TV. The subscription options are broken down into different content genres, allowing the customer to build their own content offering.[120] DEOD has also leveraged off the existing customer bases of telcos in other countries (such as Zimbabwe and Botswana) through partnerships with such players where it provides the 'white label' content for these providers platforms.

188.3 TracePlay is a subscription-based service dedicated to urban and afro-urban music and entertainment. It offers 10 live TV channels, 30 live radio stations and over 2 000 on-demand programs which includes original as well as syndicate content.[121] In South Africa, TracePlay is available for R39 per month or R399 per year.[122]

188.4 Kwesé iflix and Kwesé Play provided regionalised access to live sport, entertainment, an assortment of local and international series and movies, and some first-to-market exclusive programming.

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118 WIPO Magazine, October 2017, iROKOtv: delivering Nollywood content to the world: http://www.wipo.int/wipo_magazine/en/2017/05/article_0002.html

119 iROKOtv, South African payment gateway: https://irokotv.com/users/payment/ZA

120 DEOD, FAQ: https://za.deod.tv/en/about/faq

121 Trace corporate website, 2017, About Us: https://trace.company/about-us/

122 IOL, 22 February 2018, Afro Urban Music, film, doccies and series at your demand: https://www.iol.co.za/entertainment/music/afro-urban-music-film-doccies-and-series-at-your-demand-13428930

188.4.1 Recently, Kwesé's Pay TV business was placed into business administration. Kwesé is a subsidiary of Econet Media, a Zimbabwean company which has stated that its financial difficulties are due to an inability to raise the foreign currency required to pay its international creditors as a result of the macro-economic climate and changes in the currency regime in Zimbabwe.[123]

188.4.2 However, it is MultiChoice's understanding that this does not affect the iflix service, which was fully acquired by Econet Global Limited in about December 2018. This occurred in line with the Econet Group's revised business strategy to focus on connected services. Of this acquisition, Econet Global's CEO Hardy Pemhiwa had this to say:

> "*The conclusion of our acquisition of Iflix Africa, is a natural progression for our revised business strategy as a group.... With the immense growth and positive uptake of VOD and OTT services across the continent, we believe connected services – particularly mobile – is the future of broadcasting in Africa*"[124]

188.4.3 Although iflix is not yet available in South Africa, the service is available in Ghana and Kenya among others.[125]

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[123] https://www.fin24.com/Companies/zimbabwes-econet-wireless-shuts-african-pay-tvpay-tv-unit-amid-crisis-20190804._ A statement from Econet indicates: "*Regrettably, with the current macroeconomic conditions in Zimbabwe, which is the company's primary source of funding, the company has been seriously affected by the currency regime.*" https://techcentral.co.za/broke-econet-media-racked-up-r1-8-billion-in-debt/90763/

[124] https://weetracker.com/2019/01/03/iflix-sells-african-business-to-econet/ and https://www.digitaltveurope.com/2019/01/02/iflix-exits-africa-to-focus-on-core-asian-markets/

[125] http://nextvafrica.com/iflix-is-now-available-in-ghana/

188.5 Kwesé's business administration due to financial management and foreign currency issues does not detract from the fact that barriers to entry are generally low (as it evident from the numerous OTT entrants) and that the proliferation of OTT services evidences that OTT is a critical platform for the consumption of electronic audio-visual content.

189 **Continued entry.** Indeed, in addition to the OTT players listed in MultiChoice's 2017 submissions there have been a number of further notable entrants since.

189.1 Within a week of the public hearings in May 2018, Vodacom announced that it would launch its own video streaming service.[126] (see above).

189.2 StarTimes launched its video streaming service (StarTimes ON) in late November 2018. This service provides more than 150 live African and international TV channels (a number of which are free) and also boasts a significant library of VOD content. It also offers significant sporting content including the 2018/19 UEFA Europa League, Bundesliga, Ligue 1, ICC and Coppa Italia, covering live matches, catch-up and highlights. Notably, many of these are live rights which ICASA regards to be "premium". The most expensive subscription package is R59/month (with daily and subscription packages of R5/day and R19/week also available). According to the Google Play store, the StarTimes ON app has been downloaded more than 5 million times across the countries in which it is available.[127]

189.3 Viu launched its streaming service in South Africa in February 2019. Viu is operated by PCCW the international operating division of Hong Kong telco HKT. Viu provides OTT services in 16 countries across Asia and the Middle East and had approximately 30.7 million active users on a monthly basis at the end of December 2018. While Viu offers some

[126] https://mybroadband.co.za/news/cellular/260015-vodacom-to-launch-new-video-content-service-soon.html; https://mybroadband.co.za/news/cellular/260015-vodacom-to-launch-new-video-content-service-soon.html. Vodacom has offered a video service since 2015 but announced the launch of this "new video content service" in May 2018.

[127] https://play.google.com/store/apps/details?id=com.star.mobile.video

content for free (with adverts), users can also sign up to its Premium Plan (R69/month, R20/week or R5/day) to access exclusive shows. Its target market is South Africans in LSM 6 and below.[128] The offering includes Bollywood films, African series and movies and South Asian shows. Viu SA has emphasised a specific focus on investing in developing local content. It has also announced partnerships with e.tv (actively marketing the fact that it carries the English Premier League FTA football package which OpenView HD has acquired) and SABC, gaining exclusive digital rights to selected SABC titles and library content (which Viu refers to as "premium" library content).[129] MultiChoice's research suggests that in just the four months since its launch, the Viu app has been downloaded more than 1 million times in South Africa.

189.4 In July 2019, Thabo Molefe launched a new video on demand offering, THD24.[130] THD24's main focus is South African-focused content[131] which is free and accessible through the website, THD24.com, with a mobile application set to follow. THD24 has partnered with the Gauteng Film Commission to train film graduates and stream local content produced by residents of Gauteng.[132]

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128 https://mybroadband.co.za/news/broadcasting/297846-how-viu-plans-to-take-on-netflix-with-sabc-and-etv-shows.html and https://themediaonline.co.za/2019/08/viu-lights-the-way-in-video-on-demand-with-increased-uptake-of-local-content/

129 http://www.sabc.co.za/sabc/sabc-and-viu-sa-announce-strategic-partnership/

130 https://themediaonline.co.za/2019/07/tbo-touch-launches-sa-focused-video-on-demand-offering-thd24/

131 https://thd24.com/thd24/project-cat/tv-show/

132 http://www.gautengfilm.org.za/2019-news/268-july/1836-partnership-between-the-gauteng-film-commission-and-thd24-the-netflix-of-south-africa

189.5 YouTube Premium (previously branded YouTube Red) was launched in South Africa in March 2019. The additional content offering in South Africa is initially focused on music. However, YouTube Premium also has an original TV series and films offering which is likely to become available to South African users in the near future.[133]

189.6 Apple TV +, as already discussed above, is set to launch in South Africa in November 2019.

189.7 Vox Telecom has announced its intention to launch a specialist internet VOD service targeting niche markets. Its product will be based on an app for smartphones, tablets and smart TVs, meaning (as with all OTT products) there is no need for a STB.[134]

189.8 In addition to its partnership with Viu, SABC also launched a news app in April 2019. The app includes live streaming of the SABC News channel (currently only available on DStv) and news videos. These efforts reflect the SABC's recognition of changing viewing habits and the importance of having an online presence to remaining competitively relevant, as stated in its media statement:

> *"The SABC is cognisant of the fact that accessibility, immediacy and audience engagement are fast becoming the essence of broadcasting. Therefore, the SABC News app will allow for greater interactivity, anytime and anywhere…*
>
> *We are very proud to have taken yet another step in positioning the SABC within the multi-platform and multi-device broadcasting environment."*[135] (emphasis added)

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133 https://mybroadband.co.za/news/internet/299094-youtube-premium-launched-in-south-africa.html

134 Appendix A: New developments in the electronic audio-visual market, paras 6-7 to MultiChoice's presentation in the 2018 hearings.

135 SABC Media Statement, 12 April 2019, SABC Launches News app: http://www.sabc.co.za/sabc/sabc-launches-news-app/

189.9 Finally, Sentech also announced that it has been trialling an OTT over DTT solution which allows devices such as mobile phones and tablets to view OTT content without connecting to the internet. This is done by allowing access to such content via the DTT network.

> *"SENTECH has been exploring an innovative solution to deliver data and OTT content over DTT network for quite some time now... This will really sweat the DTT infrastructure, already commissioned in South Africa and the rest of Africa, allowing both rural and urban to have the same experience of OTT offerings."*[136]

ICASA'S ASSESSMENT OF OTT DEVELOPMENTS IS DEFICIENT

190 In its 2017 submissions and 2018 supplementary submissions (elaborated upon above), MultiChoice showed how OTT services are dramatically disrupting the electronic audio-visual consumption landscape and emphasised that a consideration and understanding of such dynamics is imperative for the purpose of defining markets or market segments and assessing whether competition is effective.

191 While ICASA claims to have considered these developments, in reality it has not engaged with the substance of the OTT dynamics and trends outlined above and previously submitted by MultiChoice. Instead it largely discounts the role of OTT services on the basis of a review of OTT developments that is superficial, selective and incomplete.

192 In particular, ICASA's approach sets out a superficial summary of purported differences in content between Pay TV and OTT and relies on selective quotations.[137] This is a highly specious approach to adopt in an evidence-based inquiry. ICASA should be assessing the market holistically, on the basis of a robust economic analysis and weighing-up of the evidence provided to ICASA.

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[136] https://www.multichannel.com/pr-feed/sentech-and-broadpeak-to-demonstrate-ott-multiscreen-video-delivery-via-dvb-t2-at-africacom-2018

[137] MultiChoice's Supplementary Submission, Appendix B, p. 1-25 and MultiChoice's 2017 submissions, p. 42-95.

193 Below we summarise a number of the deficiencies in ICASA's assessment of OTT developments to show that there is no factual basis for the claims made by ICASA with respect to broadband limitations, viewing patterns or product offerings being the primary bases for ICASA's dismissal of competitive constraints from OTT. Given these deficiencies in ICASA's underlying and unsubstantiated premises, it cannot reasonably be concluded that OTT services do not compete with MultiChoice.

No factual basis for broadband to limit OTT as a constraint

194 ICASA concludes that there are broadband limitations in SA, in terms of access, speed and affordability, that limit the constraint faced by MultiChoice from OTT services. This is inconsistent with the facts and evidence provided by MultiChoice.

195 ICASA argues that fixed and mobile broadband penetration is too low.[138]

195.1 However, ICASA has used outdated figures that do not provide an accurate picture of current fixed and mobile broadband penetration. This is despite more recent data reported in its 2019 ICT Sector Report.

195.2 ICASA has also not considered the rapid rate at which penetration is growing – again, as evidenced by its own data.

195.3 Furthermore, ICASA errs in contending that the constraint faced by MultiChoice depends on overall broadband penetration. It is self-evident that what matters is the penetration of broadband and OTT among DStv households which, as MultiChoice has shown,[139] is high and is increasing. It is unclear why ICASA has overlooked this fundamental consideration as to which consumers matter when assessing constraints on a Pay TV broadcaster such as MultiChoice, given that this was explained and addressed by MultiChoice in its

[138] Draft Findings, para 5.12.17-5.12.18.

[139] Appendix B to the 2018 supplementary submissions, para 6.

submissions and, thereafter, formed the subject of a joint submission by two expert economists.[140] Broadband penetration among MultiChoice's subscribers is what is informative of constraints on MultiChoice, not broadband penetration among the population more generally.

195.4 Finally, access to OTT services is not completely reliant on having a broadband connection at home or via a mobile phone. Consumers make use of increasingly widespread public Wi-Fi[141] and broadband connections at work to stream or download content to view later. Evidence previously provided to ICASA in this respect has been ignored.[142]

196 ICASA claims that smartphones are not the best platform for streaming content.[143]

196.1 ICASA provides no substantiation for this claim.

196.2 Evidence presented above (and in previous MultiChoice submissions) is unambiguous that a massive amount of video is watched on smartphones.

196.3 ICASA's assertion also contradicts the evidence available to it from its own quantitative consumer survey which suggests that a significant proportion of respondents or their family members use cell phones for watching TV (see Part B).[144]

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140 MultiChoice's 2018 supplementary submissions, Appendix A: Joint Memorandum by Genesis Analytics and Charles Rivers & Associates, para 13.

141 Wi-Fi is becoming widespread and will continue to expand, particularly as the roll-out of free Wi-Fi___33 countrywide is a key objective for the government: https://www.techcentral.co.za/free-wi-fi-must-be-rolled-out-countrywide-anc-resolves/80398/, https://businesstech.co.za/news/it-services/288214/liquid-telecom-to-increase-free-public-wi-fi-hotspots-across-the-western-cape/ and https://www.htxt.co.za/2019/03/20/cell-c-unveils-first-public-wifi-hotspot-at-university-of-western-cape/

142 Appendix B to the 2018 supplementary submissions, para 8.

143 Draft Findings, para 5.12.28.

144 Pulse Research November 2018, Research Report: Consumer Online Survey Phase 4 Report, p. 34.

197 ICASA claims that the cost of broadband is too high. ICASA makes this unsubstantiated claim immediately after referring to (but not analysing or otherwise dealing with) MultiChoice's evidence pointing to decreasing data costs. Thereafter, ICASA states without evidence, that costs are decreasing at a rate slower than "elsewhere in the world" and that SA data costs are higher than the data costs in the cheapest African country whose costs were surveyed by ICT Research Africa and by reference to other BRICS countries.[145]

197.1 Not only does this relative "comparison" (which is highly superficial) fail to consider whether there is a proper basis for comparison between the SA Pay TV market and that of the countries selectively identified but, in any case, such a "comparison" says nothing about the constraints on Pay TV in SA. ICASA fails to deal with or consider the fact that, as shown in MultiChoice's prior submissions and in paragraphs 142.6 to 143 above, broadband prices in SA (fixed and mobile) –

197.1.1 had been declining dramatically by the time MultiChoice made its 2017 submissions;

197.1.2 had continued to decline further by the date of the public hearings; and

197.1.3 have continued to decline thereafter, and are likely to continue to do so in the next two to three years.

197.2 ICASA also fails to acknowledge that the cost of mobile data for electronic audio-visual consumption is generally lower than mobile data costs more generally. *All* the telcos are now actively supporting electronic audio-visual content take-up through zero-rating data costs

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145 Draft Findings, para 5.12.19 and para 5.12.22.

(i.e. providing free data for video services) or providing it at highly discounted rates.[146]

197.3 Most importantly, mobile data usage has grown by over 60% in the last year, with the growth largely attributable to video content consumption. This demonstrates that costs are not as significant a constraint on consumption of such services as ICASA seeks to make out. It is inexplicable that ICASA could arrive at the conclusion that data is too expensive for electronic audio-visual consumption in the face of evidence that there is significant increased consumption of electronic audio-visual content through mobile broadband.

198 ICASA also continues to rely on misleading and incorrect submissions by Econet regarding alleged "total cost of OTT" when MultiChoice clearly set out the fallacies in those submissions by Econet. ICASA adopts Econet's submissions by stating that "*when the total cost of OTT (subscription fee + internet) is compared to the cost of subscription-TV (subscription fee) it is higher than most subscription-TV packages, even when using conservative estimates for OTT costs.*"[147]

198.1 As already submitted, this analysis is deeply flawed.[148] Consumers thinking about OTT subscriptions (and many who already have OTT subscriptions) typically have, or have had, broadband for a variety of reasons unrelated to watching TV. Hence, the incremental cost of access to OTT services will, in those cases, simply be the OTT subscription fee, not the OTT subscription fee plus the full cost of a broadband subscription.

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[146] See Appendix B to the 2018 supplementary submissions, para 7 and the cross-references to other MultiChoice's other submissions contained therein. Also see Telkom and Netflix plans for free Netflix data as part of Telkom LIT services: https://mybroadband.co.za/news/broadband/283866-telkom-and-netflix-partner-for-new-streaming-data-services.html

[147] Draft Findings, para 5.12.24.

[148] Appendix D to the 2018 supplementary submissions, paras 38.7 to 38.7.2.

198.2 As shown in paragraphs 144 to 144.3 above, this is particularly the case for MultiChoice's subscribers since their internet penetration and fixed broadband penetration, in particular, is well above the national figure, and these are the consumers who matter when considering competitive constraints.

199 ICASA claims that speed requirements inhibit OTT usage[149] and that a 10Mpbs fibre/ADSL internet package is required for a good speed fixed-line internet connection.

199.1 Broadband internet speed requirements for live streaming of electronic audio-visual content are 3 Mbps for standard definition and 5 Mbps for HD. As demonstrated above (and in previous MultiChoice submissions)[150] most mobile and broadband connections operate at this level or better. The Draft Findings also confirms that average internet speeds are above 5Mbps.[151]

199.2 ICASA's claim regarding the adequacy of average internet speed also selectively ignores information contained in ICASA's quantitative survey which, as discussed in Part B, suggests a significant number of respondents watch video or electronic audio-visual content over fibre or ADSL and/or use mobile broadband connections.[152] It is unclear on what basis ICASA ignores both evidence provided by MultiChoice as well as data in the consumer survey commissioned by ICASA.

199.3 Further, compression improvements, adaptive bitrate technologies and video quality selection options are continually reducing these requirements.

149 Draft Findings, para 5.12.28.
150 MultiChoice's 2017 submissions, paras 89.3-89.6.
151 Draft Findings, para 4.2.1.
152 Phase 4 Report, p. 37, responses to quantitative survey question 10.

200 Finally, in all of the claims above, ICASA ignores two further key considerations:

200.1 First, the significant growth in data consumption and the widespread entry of, and investment by, OTT service providers indicates a broadband eco-system which is already sufficiently developed to facilitate the provision and consumption of OTT services.

200.2 Second, the rapid pace at which the broadband ecosystem is improving points to significant improvements occurring within the near future, and at most within 3 years. ICASA's data shows that fixed and mobile broadband subscriptions more than doubled between 2016 and 2018, while smartphone penetration increased from 43.5% to 81.7% over the same period.[153] Such rapid developments cannot reasonably be ignored as part of any forward-looking analysis.

No factual basis for viewing patterns and product offerings to limit OTT as a constraint

201 ICASA concludes that viewing patterns and key differences in the nature of the offerings limit the constraint faced by MultiChoice from OTT. However, these conclusions do not survive scrutiny.

202 ICASA argues that South African consumers have a clear preference for linear television viewing and that streaming content on a TV set or other devices is low. ICASA largely relies on the BRC March 2018 Establishment Survey (which includes TAMS data)[154] and We Are Social January 2018 data for this conclusion.

202.1 The use by ICASA of that data to reach these conclusions is not appropriate. The Establishment Survey questions are related to "TV" viewing and are therefore not reflective of viewing/consumption patterns more generally. The claim that only 3% of the population watch online video content is incorrect as the Establishment Survey question

[153] 2019 ICT Sector Report, Graph 18 and Graph 32.
[154] Draft Findings, para 5.12.3 and para 5.12.39-5.12.40.

did not ask about the consumption of video and electronic audio-visual content generally.[155]

202.2 ICASA should not have relied on this information because it does not ask the correct question/s, a matter which MultiChoice had previously pointed out to ICASA. However, ICASA also should not have relied on this information because other data points to different conclusions. It was accordingly not rational and selective for ICASA to rely on this information and it does not indicate why it does so to the exclusion of the weight of information to the contrary.

202.2.1 ICASA's own consumer survey evidence, for example, also contradicts the Establishment Survey results.[156]

202.2.2 The vast majority of the evidence (including surveys conducted by independent research companies) shows that South Africans, and the youth in particular, spend *more* time viewing online video content than they do watching TV. This was covered in paragraphs 149 to 149.1 and 160 to 160.3 above and in previous submissions by MultiChoice.[157] ICASA does not appear to have engaged with the information which has been provided to it.

202.2.3 The evidence provided by MultiChoice relating to the electronic audio-visual consumption patterns of its subscribers, and Premium subscribers in particular, also demonstrate the contrary. This is the critical group for the purposes of assessing competitive constraints and whether competition is effective.

202.3 That ICASA has been selective in its use of data relied upon is also demonstrated by the following: in contrast to the January 2018 We Are

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155 Establishment Survey Questionnaire July – December 2018, p. 7.

156 See Part B below.

157 MultiChoice's 2017 submissions, December 2017, para 102-103.

Social Report used by ICASA, the more recent January 2019 report indicates that 48% of South African internet users stream TV content via the internet, a significant increase from the 6% in the January 2018 report. The January 2019 report found that 97% of South African internet users watch videos online.[158]

203 ICASA states that 'cord-stacking' behaviour means that OTT services are complements and not substitutes for subscription TV services, and claims that this is supported by DStv's launch of Showmax.[159]

203.1 ICASA fails to acknowledge the extensive evidence put forward by MultiChoice[160] on cord-cutting and cord-shaving and, in particular, the high propensity for MultiChoice subscribers to engage in such behaviour (see paragraphs 161 to 161.3).

203.2 ICASA's approach also adopts an overly simplistic view of cord-stacking trends. Cord-stacking does not preclude cord-shaving behaviour (which is also a source of constraint on Pay TV services). Subscribers may downgrade their Pay TV services in conjunction with adding an OTT service. Further, there is a limit to how much stacking can realistically take place – consumers have limited time to spend consuming electronic audio-visual content and, therefore, will not cord stack indiscriminately.

203.3 ICASA fails to recognise that, despite cord-stacking behaviour, the presence of significant cord-shaving and cord-cutting trends has led international jurisdictions to include OTT in the market with traditional TV, precisely because they are constraints.[161]

203.4 The launch of Showmax does not suggest that OTT is a complement. As will be discussed later, Showmax is a competitive response to OTT.

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158 We are social. Digital 2019: South Africa: https://datareportal.com/digital-in-south-africa?utm_source=Reports&utm_medium=PDF&utm_name=Digital_2019&utm_content=Country_Link_Slide

159 Draft Findings, para 5.13.1-5.13.6.

160 MultiChoice's 2017 submissions, December 2017, para 158-163.3.

161 MultiChoice's 2017 submissions, , para 102-103, 284, 293-295 and 365.

MultiChoice has to provide its own OTT service in an effort to retain customers and dissuade them from switching and to attract the increasing number of consumers who are cord-nevers.

204 ICASA also states that there are key differences in content (news and sports in particular) and characteristics (linear versus on-demand) that limit the extent of competition from OTTs.[162]

204.1 ICASA appears to have based much of this assessment on a single selective quote from Netflix – which purportedly "puts paid" to whether OTTs are a competitive constraint on Pay TV. As MultiChoice explained in its 2017 submissions, competition in electronic audio-visual services occurs through differentiation. Accordingly, Netflix seeking to differentiate itself on content is completely consistent with competition in the electronic audio-visual services market.

204.2 In any case this quote has been taken out of context and evidences selective quotation on the part of ICASA. The article in which it appears explicitly recognises the existence of competition between OTT and Pay TV (and between Netflix and MultiChoice, in particular). In a paragraph appearing between the two portions which ICASA quotes, the article refers to how the emergence of VOD operators has "disrupted" the media landscape and impacted on MultiChoice's subscriber numbers through cord-shaving and cord-cutting behaviour.[163] It also states the following:

> "*It may have started out as a better way to rent movies, but now Netflix is revolutionising the US film and TV industries. That's not news. The next big shift, however, is likely to be the transformation of content production worldwide, and Africa is squarely in the Netflix sights.*

162 Draft Findings, para 5.12.

163 Business Times, 24 March 2019, Arthur Goldstuck "We're not replacing MultiChoice"

...

For traditional pay-TV providers such as MultiChoice's DStv, this strategy poses a far bigger challenge than endless TV series and cheap binge-watching – which already pose a massive threat in themselves.

Years ahead of DStv

Though DStv has rolled out massive infrastructure to support more than 13 million satellite subscribers across Africa, Netflix is able to leverage the networks build by numerous internet service providers and mobile operators.

...

And [local South African and Nigerian content] *is just the beginning, as Netflix begins to make these two key MultiChoice markets its own."*[164]

204.3 In any case, as demonstrated in the preceding sections, in addition to series and movies, OTTs in South Africa can, and do, offer attractive linear content, live sports and/or news channels. For example, StarTimes ON offers linear channels, news channels and live sports content.

204.4 Furthermore, the fact that MultiChoice has announced plans to stream the DStv channel bouquets in future demonstrates that the traditional differences between linear broadcast and on-demand streaming are becoming increasingly blurred. [165]

204.5 ICASA has neglected to adequately analyse and understand the vast array of OTT services in the market, their different positioning and formidable commercial offerings.

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164 Business Times, 24 March 2019, Arthur Goldstuck "We're not replacing MultiChoice".

165 https://mybroadband.co.za/news/broadcasting/297660-dstvs-streaming-plans-for-2019.html

205 ICASA's finding that MultiChoice does not see OTTs as competitors is also incorrect.[166] [redacted]

205.1 As MultiChoice explained in its 2017 submissions, a key component of competition in the electronic audio-visual services market occurs through differentiation[167] ICASA's Guideline itself records product differentiation as a potential indicator that a market is dynamically competitive:

> "*Dynamic characteristics of the market: high levels of growth, innovation and product/service differentiation cumulatively indicate a market that is dynamically competitive as different licensees enter/exit offering different services at different prices within the same market.*"

205.2 [redacted]

206 ICASA concludes that OTT services are too expensive for consumers to switch from basic tier bouquets based on "substantially different price points".[168]

206.1 It is not clear how ICASA reaches this conclusion. No price comparisons or economic analysis have been provided, nor does ICASA indicate which OTT prices it has compared.

206.2 This also fails to take into account the fact that there are a number of OTT offerings that have strategically focused on middle to lower-end consumers who represent a large portion of the population in South

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166 See the Draft Findings at para 5.12.43 and para 5.13.7

167 MultiChoice's 2017 submissions, para 454.3. Also see para 483 and para 697ff

168 Draft Findings, para 5.12.8.

Africa. For example, Viu states that its target market in South Africa is LSM 6 and below.[169]

207 Overall, ICASA ignores the rapid changes in viewing patterns and significant new entry by OTT players – trends that are acknowledged by other players and stakeholders (see paragraphs 175 to 177 above) and which must be considered in any forward-looking analysis.

Selective reliance on statements in MultiChoice's business plans

208 In its Draft Findings, ICASA seeks to rely on statements made in MultiChoice's business plans in an attempt to validate certain of ICASA's conclusions and ostensibly establish that MultiChoice's internal strategy "contradicts" the various submissions that MultiChoice has made during this Inquiry. The scenario that ICASA attempts to sketch in this regard is misleading.

209 ICASA selectively quotes and/or references in isolation statements from MultiChoice's business plans, disregards numerous other statements contained in the business plans that support MultiChoice's submissions in this Inquiry and ignores the overall context of the business plans. In particular, ICASA concludes that the assertions that OTT services are a major threat to Pay TV are overstated and MultiChoice is accused of engaging in a "threat inflation" tactic.[170]

210 [redacted]

[169] https://mybroadband.co.za/news/broadcasting/297846-how-viu-plans-to-take-on-netflix-with-sabc-and-etv-shows.html

[170] Draft Findings, para 5.12.44.

210.1 [redacted].[171]

210.2 [redacted].[172]

210.3 The following telling statements, from MultiChoice's business plans, have been ignored by ICASA:

> [redacted];[173] (emphasis added)
>
> [redacted][174]
>
> [redacted][175]

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171 [redacted]

[redacted][176]

[redacted][177]

[redacted][178] (emphasis added)

[redacted]

176 [redacted]
177 [redacted]
178 [redacted]

[redacted][179] (emphasis added)

[redacted][180]

[redacted][181] and

[redacted][182]

211 ICASA has failed to take into account the impact that OTT services have had on MultiChoice's costs and disregards the following statements in MultiChoice's business plans:

[redacted]

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179 [redacted]
180 [redacted]
181 [redacted]
182 [redacted]

[redacted][183] (emphasis added)

[redacted][184] (emphasis added)

[redacted][185] (emphasis added)

212 ICASA has disregarded statements in the business plans that demonstrate that MultiChoice has had to adapt its content strategy, manage price increases and improve customer experience in order to respond to the entry of OTT services:

[redacted][186]

[redacted][187]

183 [redacted]
184
185
186
187

[redacted][188] and

[redacted][189] (emphasis added)

ICASA does not provide a fair or balanced assessment of third-party submissions

213 In stark contrast to its disregard of MultiChoice's evidence (including evidence relating to the behaviour of its own subscribers),[190] ICASA relies on unsubstantiated submissions by third parties in the Draft Findings, without interrogation. Furthermore, ICASA fails to recognise or engage with the fact that MultiChoice has already addressed these submissions and explained why they are flawed and should not be relied on. This includes repeating arguments made by Econet which are summarised by ICASA in paragraph 5.11.3 of the Draft Findings. As previously pointed out by MultiChoice, these arguments are based on flawed logic and are ultimately uninformative as to the competitive constraints faced by MultiChoice.

214 Econet notes that a much higher proportion of households have a TV set than internet access at home, Econet therefore concludes that few subscribers are able to substitute to OTT.[191] Whether or not more households have TV versus internet access does not say anything about the constraint that OTT places on traditional Pay TV.

188 [redacted]
189

190 Appendix B to the 2018 supplementary submissions, para 1-61.

191 Kwesé presentation to ICASA, 10 May 2018, slide 33.

214.1 All TV households do not have Pay TV. Therefore, any observation generally of TV households is uninformative of Pay TV households.

214.2 Furthermore, it is not necessary for all households to have access to the internet in order for OTT to be a constraint on Pay TV. What matters for ICASA's market definition assessment is whether a sufficient number of marginal subscribers would switch to OTT (from Pay TV).

214.3 MultiChoice has shown that a high proportion of its subscribers have access to the internet. Further, even the figures used by Econet (56% of households with access to the internet at home and 96% with cell phone access) demonstrate the high potential for switching. In addition, consumers do not need access to the internet at home. Many can and do use Wi-Fi at work or in public spaces to access content over the internet.

215 Econet states that internet penetration in SA is lower than in other countries.[192] This is a pointless exercise as this relative penetration rate does not say anything about constraints on Pay TV in SA. The lower penetration rates observed in SA than in some other countries may also reflect the lower income levels in SA, where the penetration of Pay TV subscribers will also be lower. In contrast, for MultiChoice's addressable market, internet penetration is high. This is what matters when considering constraints and the propensity of consumers to switch.

216 Similarly, showing that internet speeds are slower in SA than in more developed countries (notably the countries which are all in the top 15 in terms of broadband penetration rates) does not prove that OTT should be excluded from the market.[193] What is relevant is whether the broadband speeds that are achieved in SA are capable of supporting OTT services. Even based on the information put up by Econet (an average connection speed of 6.7Mpbs) this is evidently the case.[194] It becomes even more evident when it is noted that Econet's data is out-

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192 Kwesé presentation to ICASA, 10 May 2018, slides 43-45.

193 Kwesé presentation to ICASA, 10 May 2018, slide 34

194 Netflix's recommended speeds of only 3 Mbps for SD channels and 5 Mbps for HD channels.

dated, being up to the first quarter of 2017. Average speeds have increased since then.

217 Econet provides a further comparison between the cost of broadband in SA to other developed countries.[195] Once more, these comparisons are irrelevant and even misleading as Econet –

217.1 compares SA to selected countries where broadband is relatively cheap; and

217.2 does not disclose that the costs in SA are in fact significantly below the world average provided by the ITU.

218 More importantly, these costs do not reflect the cost of broadband for electronic audio-visual content. MultiChoice has shown that data costs for broadband are significantly discounted and often zero-rated (i.e. free)

219 Econet estimates the cost of broadband in SA for OTT, in an attempt to show that the total cost of OTT (broadband costs plus the OTT subscription) is higher than the cost of Pay TV. The purpose of this is to suggest that consumers would not switch to OTT.[196]

219.1 This exercise is, again, meaningless as it does not recognise that OTT uses the existing ecosystem of existing devices, and consumers generally have broadband in any event for other uses. As such, the incremental cost of broadband associated with switching to OTT is not the full cost of a broadband subscription, as has been applied in Econet's estimations.[197] In fact, given the plethora of discounted, or zero-rated, data for electronic audio-visual content, the incremental

195 Kwesé presentation to ICASA, 10 May 2018, slide 36.

196 Kwesé presentation to ICASA, 10 May 2018, slides 37-41

197 MultiChoice does not deal with the actual estimations and assumptions of their estimation as the exercise has no logical value and so there is no point in addressing the estimations provided. This should not be interpreted to mean that Econet's estimations, even on its flawed framework, are correct.

costs of broadband for electronic audio-visual content is discounted or zero for many consumers.

219.2 Econet attempts to deal with this problem by asserting that, while households might already have access to broadband, some of these connections would not be fast enough, some may have insufficient data, or there might not be an optimal device for watching OTT content. These are mere assertions, unsupported by any evidence. In fact, the evidence put up by Econet on speeds and the high proportion of households who do in fact already have internet access at home directly contradicts this assertion. Zero-rating also minimises circumstances in which anyone can claim to have insufficient data. MultiChoice has shown that, for its own subscribers, broadband penetration is high, which shows that consumers already have broadband and can readily switch to OTT services without incurring the costs computed by Econet.

220 Econet asserts that OTT is a complement, and not a substitute, citing international papers.[198] Econet, and ICASA in turn, fail to acknowledge the body of evidence put forward by MultiChoice on the extent of cord-cutting and cord-shaving internationally and how this is also evident in SA. Econet, and ICASA in turn, fail to recognise that in foreign jurisdictions, the trend is to include OTT in the market with traditional TV, precisely because they are constraints. Even if customers cord-shave (as opposed to cord-cut), this is a competitive constraint as MultiChoice has to compete to try to prevent this and the associated revenue loss from occurring. As indicated above, the launch of Showmax does not suggest that OTT is a complement – Showmax is a competitive response to OTT. ICASA's view in this regard reveals a lack of understanding of competitive responses in these markets as well as how the nature of competition is evolving.

221 Econet also provides data for those with access to a TV versus a smart phone in "poor households" (SEM1) and "rich households" (SEM10), comparing those

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[198] Kwesé presentation to ICASA, 10 May 2018, slide 42.

who watch TV relative to those who access the internet.[199] This segmentation analysis is irrelevant for determining constraints for market definition and the role of marginal consumers in exerting a constraint.

221.1 As already outlined above, Pay TV households are a subset of total TV households, especially in SEM1 where income levels mean few households will even have Pay TV. Therefore, a focus on the difference in TV versus internet access to make inferences on Pay TV is meaningless.

221.2 The fact that 1.5% of viewers of a specific DStv channel fall in SEM1 and that internet access for SEM1 might be low, does not mean that OTT is not a constraint. The argument that *"for some of these [viewers], the total cost of OTT will be too high to switch"*[200] does not provide a basis for excluding OTT from the market. As MultiChoice has explained, it is not necessary that all consumers must have access to broadband, or a smartphone, in order for OTT to be a significant constraint and belong within the same relevant market. Econet also does not recognise the role of FTA as a constraint on the lower end of the market, including free OTT services.

221.3 For the high end, Econet shows that access to the internet and smartphones is in fact very high. In that context, Econet's argument that "*not all rich households have the devices necessary to switch to OTT*" and "*some of these households will not want to spend the additional money*"[201] demonstrates that Econet fails to appreciate that not all rich households need to have a smart phone for OTT to be a constraint. Instead, Econet wrongly focuses on the behaviour of <u>certain groups of</u> subscribers rather than marginal subscribers, which is what matters for assessing constraints.

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199 Kwesé presentation to ICASA, 10 May 2018, slides 43-45.
200 Kwesé presentation to ICASA, 10 May 2018, slides 46.
201 Kwesé presentation to ICASA, 10 May 2018, slides 46.

222 ICASA therefore relies on seriously flawed logic with respect to the cost of OTT relative to Pay TV concluding that: "*Thus we agree with Econet Media that when the total cost of OTT (subscription fee + internet) is compared to the cost of subscription-TV (subscription fee) it is higher than most subscription-TV packages, even when using conservative estimates for OTT costs.*"[202] MultiChoice pointed out in its 2018 supplementary submissions that this analysis is flawed as it does not recognise that OTT uses the existing ecosystem of devices and that consumers generally have broadband in any event for other uses. Hence, the incremental cost of access to OTT services will in most cases simply be the OTT subscription fee, not the OTT subscription fee plus the full cost of a broadband subscription. No evidence is presented to show that existing broadband subscriptions are inadequate for OTT.[203]

223 ICASA's failure to engage with, or reflect, MultiChoice's submissions regarding the same matters in the Draft Findings, does not reflect a fair or balanced assessment of the evidence and submissions made to ICASA. In fact, ICASA's seeming failure to engage at all with the deficiencies in Econet's submissions suggests that ICASA may not have read or understood critical aspects of MultiChoice's submissions, relevant economic principles and key evidence regarding the nature and functioning of the relevant market.

224 Finally, it is also important to note that MultiChoice's submissions are not the only ones which recognise the importance of OTT. Numerous other submissions to ICASA's Discussion Document recognise the role of OTT as well as the negative impact on revenues for both FTA and Pay TV service providers. These are detailed in Appendix B of MultiChoice's 2018 supplementary submissions to ICASA following the 2018 oral hearings.[204] However, these are not referred to in the Draft Findings or in any meaningful way in ICASA's own analysis, demonstrating ICASA's selectivity.

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[202] Draft Findings, para 5.12.24.
[203] Appendix B to the 2018 supplementary submissions, paras 38.7 to 38.7.2.
[204] Annexure D to the 2018 supplementary submissions, para. 40.1-40.6.

225 In the above sections, MultiChoice has focused on relevant considerations pertaining to the role of OTT and why ICASA's approach to the assessment of OTTs is deficient. MultiChoice also provided ICASA with evidence of other local and regional competitive dynamics (including the role of FTA and the nature of regional and local demand for Pay TV services), which have important implications for the nature of constraints on MultiChoice. Since ICASA appears to have disregarded or given insufficient weight to these relevant considerations, MultiChoice addresses these considerations below, followed by evidence of MultiChoice's competitive responses.

IMPORTANT LOCAL AND REGIONAL MARKET DYNAMICS

226 A view which emerged historically in some decisions in developed jurisdictions (particularly Western European) was that subscriptions to Pay TV services were primarily driven by first-window Hollywood movies and popular sports rights.

227 As MultiChoice has explained in various submissions, not only are these largely historical (and often outdated) decisions but they also do not adequately reflect relevant local and regional market considerations and dynamics.

228 Indeed, the nature and dynamics of consumer demand in SA and the rest of sub-Saharan Africa challenge this view of traditional Pay TV services. The key differences that challenge this view include:

228.1 The significant demand for lower-priced bouquets in South Africa and the rest of sub-Saharan Africa.

228.2 The significant demand for local content.

228.3 The successful entry and growth of numerous Pay TV services across sub-Saharan Africa.

228.4 The expansion and improvement of an already competitive FTA TV offering.

228.5 The rise of OTT services and the associated proliferation of local and international content.

229 On the one hand, ICASA criticises MultiChoice for "citing" data from other countries and "transposing" that to the South African context,[205] allegedly in contrast with ICASA's view that "*South Africa exhibits different market dynamics with different market outcomes*". On the other, however, when MultiChoice provides extensive evidence of its experiences of market conditions and consumer demand in SA and the rest of Africa – which pertain directly to market conditions – ICASA fails to consider and weigh up that evidence, choosing instead a desktop application of its interpretation of market definitions from foreign, historical cases.

230 The real-world considerations relevant to an Inquiry into Pay TV in South Africa were presented by MultiChoice and is re-iterated below. It would be inappropriate and irrational for ICASA to simply ignore this information and evidence. MultiChoice notes that certain of its submissions on these issues are consistent with submissions provided by other stakeholders while no stakeholder has provided substantiated submissions which contradict the remaining submissions made by MultiChoice.

The significance of lower-priced Pay TV services

231 Average income levels in Africa, including SA, are low by global standards. These differences result in differences in consumer demand for electronic audio-visual content, including Pay TV. In Africa, including SA, only a certain percentage of the population can afford the more expensive content on the higher-priced bouquets. The vast majority of households are only able to afford lower-priced bouquets.

231.1 In response, MultiChoice has over the past ten years progressively introduced less expensive bouquets. Those bouquets have become the largest component of MultiChoice's business. In African countries where DTT has been launched, MultiChoice's biggest growth has come

[205] Draft Findings, para 5.12.44.

from its GOtv bouquets (on the DTT platform) which are similar in price and content to the lower-end DStv Access and EasyView bouquets.[206]

231.2 The submission that the majority of households are only able to afford lower-priced bouquets is demonstrated by the fact that, as previously indicated by MultiChoice, the largest growth in the past five years has been the DTT bouquets.[207] Further, DStv's Premium bouquet makes up [redacted] of subscribers across sub-Saharan Africa, whilst lower-end bouquets account for [redacted] The majority of the market – and the source of growth – in SA and the rest of sub-Saharan Africa is not the higher-priced bouquets, but rather the lower-priced bouquets.

The significance of local content

232 Audiences enjoy content reflecting their cultures and languages. This means that international electronic audio-visual content does not necessarily always have broad appeal in sub-Saharan Africa, including SA. Local content plays an important role in the consumption of electronic audio-visual content and the Pay TV subscription decisions of households in SA and the rest of Africa. This is because local content meets unique viewing needs related to culture, representation, language and geography that cannot be fulfilled by acquired international content.

233 As a result, investment in local content is an important means of competing and growing a subscriber base, particularly at the lower end of the market. Indeed, the popularity of local entertainment content on FTA TV is a key factor which renders FTA TV a constraint on Pay TV.

233.1 The overwhelming popularity of local entertainment content, including that aired on FTA TV channels, was demonstrated through viewership and channel ranking information in MultiChoice's 2017 submissions, which has been entirely overlooked in the Draft Findings.[208]

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206 MultiChoice's 2017 submissions, paras 180-182.
207 MultiChoice's 2017 submissions, paras 181-183.
208 MultiChoice's 2017 submissions, para 185-190.

233.2 As MultiChoice demonstrated in its 2017 submissions, SABC and e.tv, as established FTA TV broadcasters, have particularly strong local content offerings in terms of soap operas, game shows, talk shows, drama series, sitcoms and local news. Indeed, SABC 1 has some of the country's most viewed programmes in the form of local dramas and soapies.

233.3 eMedia Holdings (owner of e.tv) attributes the increased market share of its eChannels in 2018 to investment in additional local content in the form of Open News (now rebranded as News & Sports), the addition of Afrikaans programming on eExtra and eReality in the last quarter of 2018.[209]

233.4 OTT players are also investing in local content. As previously outlined Netflix has commissioned a number of locally-produced series and Vodacom recently introduced the first major local title on its platform in the form of Riaad Moosa's comedy special Life Begins.[210] Cell C's Black Access package has a local content focus, whilst Viu has acquired the exclusive digital rights to certain SABC titles. THD24 is solely focused on local content, the rationale for which the founder explains as follows:

> *"In South Africa we are beginning to appreciate our local content. That's why Afrikaans movies outsell most movies on cinema. We're not excited about Black Panther, as we're excited about our own. We're not going to lose our mind over content we don't see ourselves in. It's important for us to appreciate ourselves to such an extent that we're even prepared to pay to go and see local content. Local used to come secondary, but now it is king."*[211]

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209 eMedia Holdings Annual Results, 2019, p. 2.

210 http://ipo.org.za/first-major-local-title-to-be-released-on-vodacoms-video-play-platform/

211 https://themediaonline.co.za/2019/07/tbo-touch-launches-sa-focused-video-on-demand-offering-thd24/

234 Submissions by third parties also recognised the value of local content. In fact, at the hearings the SABC stated that local content is extremely popular,[212] Econet Media also identified local content as being especially important in the South African context.[213] ICASA itself also considered that OTT service providers are less competitive due to an alleged inability for these service providers to, amongst other things, offer local content[214]

235 Despite this, ICASA largely proceeds to ignore local content as an important factor of competition in South Africa that differs from the Western European case precedent it relies upon. This is both inconsistent and a failure to acknowledge the experience and submissions of traditional broadcasters and OTT service providers.

Availability of sports on FTA and OOH viewing

236 Significant amounts of sports content on FTA TV and the popularity of OOH viewing in SA and the rest of Africa provide alternative means for consumers to view sports content, outside of Pay TV. As a result, for households wishing to gain access to sports content, there is less of an imperative in SA for households to subscribe to a Pay TV bouquet containing sports content than is the case in some other countries.

237 The MultiChoice 2017 submissions detailed the extensive range of sports available to FTA TV.[215] As far as MultiChoice can discern, ICASA has not taken this into account in the Draft Findings.

237.1 SABC has access to the major international/continental multiple- sport tournaments (Olympics, Commonwealth Games, All Africa Games), the major international and continental soccer tournaments (FIFA World Cup and Africa Cup of Nations), the major ICC cricket tournaments (ODI and T20 World Cups), and the World Rugby, Rugby World Cup. The listed soccer events include matches from the main

212 SABC Transcription, p. 57, line 21 to 23.

213 This was recorded by ICASA in the Draft Findings, para 5.7.3.

214 Draft Findings, para 5.13.14.

215 MultiChoice's 2017 submissions, para 191

national knock-out tournaments (MTN8 Cup, Telkom Knockout, Nedbank Cup) and Africa "leagues" (CAF Champions League and Confederation Cup). For cricket, it is primarily the domestic one-day tournament (Momentum Cup). For rugby, matches are included from the domestic Currie Cup and Super Rugby.

237.2 In addition to the listed sports events, the SABC has the right to broadcast the following events:

237.2.1 A large number of PSL games including the most popular matches and derbies. These are available to the SABC through a sub-licensing arrangement with SuperSport.

237.2.2 All Bafana home and away matches, including the FIFA World Cup and the Africa Cup of Nations, the CAF Confederations Cup and the other CAF tournaments.

237.2.3 The 2018 FIFA World Cup and all other FIFA events for the two years prior to this which SABC acquired. The SABC also acquired the FTA TV rights to the 2016 UEFA EURO Championships through a sub-license agreement with SuperSport.

237.2.4 All international cricket played by the South African national team (the Proteas) in South Africa in all formats of the game (i.e. test cricket, One Day Internationals and Twenty20 matches). SABC also has exclusive rights to the international Twenty20 tournament (the Mzansi Super League) by virtue of direct agreements with Cricket South Africa.

237.2.5 In respect of rugby, the SABC and SuperSport have recently entered into a three-year agreement for the sub-licensing to the SABC of all international test matches played by the Springboks in SA.

237.3 The SABC has recently acquired rights to broadcast the popular Extreme Fighting Championships (EFC).

237.4 In fact, the SABC has access to a lot more sports content than it is able to schedule. This has been primarily due to capacity constraints on its three analogue channels (SABC 1, 2 and 3).

238 Sports rights are also being acquired by other FTA providers. OpenView HD in particular has recently acquired the FTA rights to EPL matches in South Africa (previously held by the SABC), which are also carried on the Viu App and has indicated that its intention is to acquire more sports rights in the future.[216]

239 OOH viewing (i.e. out-of-home viewing by consumers of electronic audio-visual services at restaurants, clubs, pubs[217] or in friends' or families' homes) in South Africa and the rest of Africa is prolific. For example, research by TNS in South Africa suggests that OOH viewing comprises more than 50% of viewership for certain PSL games (which ICASA considers to constitute "premium" rights). A similar ratio of OOH to in-home viewership emerged for other soccer leagues.[218] FTA is therefore a constraint on bouquets that include soccer league content because, for many consumers, FTA together with OOH viewing is a good alternative for those seeking to watching sport such as PSL matches.

216 https://businesstech.co.za/news/media/333915/new-openview-live-sports-channel-to-show-english-premier-league-games/

217 DStv Commercial subscriptions accounted for 284 788 subscriptions as at August 2017.

218 MultiChoice's 2017 submissions, para 192 and 193.

240 The above clearly demonstrates that, insofar as ICASA places emphasis on the need for access to sport (misplaced or otherwise), ICASA fails to recognise: (i) the ample availability of sport on FTA and via OOH viewing; (ii) the ability of SABC to acquire some of the additional content highlighted above and (iii) the high prevalence of OOH viewing, all of which are constraints on Pay TV. This in turn means that FTA and OOH viewing are significant contributors to the constraints faced by Pay TV providers contrary to the stance adopted by ICASA in the Draft Findings.

FTA TV continues to be an important source of competitive constraint on Pay TV services

241 FTA TV is a significant constraint on Pay TV services in SA, given its strong competitive offering and its ability to attract viewers. This is in large part due to the fact that FTA TV has a well-established position in the market which is strongly associated with its provision of popular local content, including entertainment, news and sports. The strength of the FTA TV offerings was demonstrated fully in MultiChoice's 2017 submissions.[219] In particular:

241.1 FTA TV programmes are among the most popular in terms of viewer numbers in South Africa. The SABC and e.tv offer extensive, popular local content, in a context where South African viewers have particularly strong preferences for high quality local content.

241.1.1 Local programming screened on the SABC and e.tv channels include several popular soap operas, dramas, talk shows, local news and variety shows.[220] SABC 1, in particular, has entrenched its position as having some of the country's most

219 MultiChoice's 2017 submissions, paras 185-193, 206-210, 526-539and Appendix 4, which provides the details of the local content and sports offerings on FTA TV in SA.

220 SABC 1's flagship prime time programme is a locally produced soap opera known as "Generations The Legacy". The language differences on SABC 2 are reflected in its two local soap operas, an Afrikaans-language soap opera known as "7de Laan" and the Venda-based soap, "Muvhango". SABC 3 has its own locally produced soap opera, "Isidingo". e.tv soap operas are "Rhythm City" and "Scandal".

viewed programmes with local soap operas and drama featuring as the most popular genres.

241.1.2 The SABC also broadcasts a wide range of popular local and international sport. In a multi-channel DTT environment, the SABC would be in a position to broadcast more of the rights available to it.

241.2 In 2013 e.tv launched OpenView HD, a multi-channel FTA DTH broadcasting service. The target market for OpenView is the LSM 4-8 segments of economically active South Africans.[221] OpenView broadcasts 16 FTA channels[222] containing a variety of programming, including the SABC and e.tv main channels and a number of other channels operated by e.tv which include foreign and local content.

241.2.1 With a number of channels across a range of genres, OpenView is similar to the lower-priced bouquets offered by MultiChoice. In a dynamic and competitive market, OpenView also continuously seeks to improve its offering and attractiveness. In the last quarter of 2018, it launched Open News (now rebranded as News & Sports), and a 2-hour block of Afrikaans programming on eExtra.[223] It plans to broadcast recently-acquired live EPL matches and related Premier League magazine programmes as well as more sport in the future on its new News & Sports channel.

241.2.2 OpenView's STB is available for only R499, with a full installation for R1299.[224] As indicated in earlier submissions,

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[221] Seardel Integrated Annual Report for the year ended March 2015, p. 8: http://www.emediaholdings.co.za/wp-content/uploads/2015/11/seardel-iar-2015-web.pdf

[222] Channels currently available on OpenView include Glow TV, eMovies, eMovies Extra, eExtra, the three SABC channels, e.tv, Mindset, eToonz+, Da Vinci Learning, BBC World News, eReality, eForce, e.tv sports and news, Star Life.

[223] https://www.enca.com/south-africa/sa-media-landscape-opening-up-as-emedia-launches-opennews

[224] OpenView: https://www.openview.co.za/help

OpenView is distributed via the same satellite that services DStv. This reduces viewers'/subscribers' switching costs, and allows OpenView to deliberately target current and past DStv subscribers – which they are indeed doing.[225]

241.2.3 This content and STB entry cost package is clearly highly competitive as OpenView has experienced high growth in a very short space of time, with more than 1.5 million activations to date. This represents an increase of 50% since October 2017.[226] It has reported that it expects activations will continue to grow at an average of 35 000 per month.[227]

241.3 Finally, Kwesé Free TV, which was recently awarded a broadcasting licence, is also marketing itself as "*a game changer for the FTA television industry.*"[228] Kwesé Free TV is anticipating the launch of its service well within two years. It has indicated:

> *"Once ICASA issues our broadcasting licence, we will have 24 months to get the channels up and running. With the skills, expertise and technical ability we have brought together, we are confident that we will go live well within the 24-month window"*[229]

242 MultiChoice has provided ICASA with extensive evidence that FTA TV services constrain MultiChoice in SA, ICASA has not, however, considered and weighed up all the evidence provided, reaching its conclusions on a superficial basis. Some of MultiChoice's submissions (which seem to have been overlooked or ignored by ICASA) are summarised and amplified below:

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225 OpenView: Products: http://www.openviewhd.co.za/products

226 https://www.bizcommunity.com/Article/196/66/168476.html

227 TechCentral, 23 May 2019, McLeod, D. OpenView free TV tops 1.5 million activations: https://techcentral.co.za/openview-free-tv-tops-1-5-million-activations/89751/

228 Business Report, 27 March 2019, Rajgopaul, D. Kwesé Free TV set to be a gamechanger in SA broadcasting: https://www.iol.co.za/business-report/companies/kwese-free-tv-set-to-be-a-gamechanger-in-sa-broadcasting-20115869

229 Business Report, 27 March 2019, Rajgopaul, D. Kwesé Free TV set to be a gamechanger in SA broadcasting: https://www.iol.co.za/business-report/companies/kwese-free-tv-set-to-be-a-gamechanger-in-sa-broadcasting-20115869

242.1 Around the time that OpenView was launched in 2013, MultiChoice introduced two new bouquets, EasyView and Access. Both bouquets saw a 50% or so increase in the number of channels between March 2013 and March 2014 while the price remained constant. Since then MultiChoice has continued to add additional channels to these lower-priced bouquets, and has not adjusted the prices save for a 6% increase in the Access price in April 2019.

242.2 The fact that the lower-priced bouquets have seen no price adjustment since launching, despite the large increases in content and improved platform services, reflects the constraint placed by FTA on MultiChoice.

242.3 [redacted]

Figure 14: EasyView monthly product movement (April 2011 to April 2018)

[redacted]

243 The competitive interaction between FTA and Pay TV is also recognised by the FTA broadcasters themselves. The FTA broadcasters stated in their oral representations to ICASA that they see themselves in competition with MultiChoice.

243.1 OpenView clearly sees itself as a competitor to Pay TV, having noted in August 2017 that the tough economic environment in SA is making consumers and TV viewers rethink the costs of entertainment, which makes OpenView *"a viable alternative"*.[230]

243.2 e.tv's response to ICASA's questionnaire was that the price/quality offering of the lower-priced Pay TV packages is likely to be constrained by the FTA offering and vice-versa.[231]

244 In fact, as MultiChoice has previously submitted, the fact that FTA and OTT service providers have participated in the Inquiry inherently indicates that these firms consider themselves to be competitors of MultiChoice, as a Pay TV service provider. ICASA has –

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[230] TV with Thinus, 16 August 2017, eMedia Investment's OpenView HD reaches a tipping point as the free satellite TV service will reach 1 million decoder activations by mid-September 2017: http://teeveetee.blogspot.co.za/2017/08/emedia-investments-openview-hd-reaches.html

[231] e.tv response to question 1.3 of the Questionnaire.

244.1 ignored or dismissed both the content and import of the submissions by FTA broadcasters;

244.2 dismissed MultiChoice's correlating submissions; and

244.3 instead concluded, on limited information, that Pay TV is a constraint on FTA but not vice versa.

245 This is not a rational or balanced assessment of the evidence provided to ICASA.

246 Finally, while it is clear that FTA directly constrains the lower-end bouquets, FTA also constrains the higher-priced bouquets indirectly. MultiChoice's 2017 submissions showed that changes in the lower-priced bouquets during 2013, which were driven by the competitive constraint of FTA offerings, had a ripple effect through all the tiers, as channel numbers were increased considerably – a real increase in value – but prices did not increase in real terms.

Successful entry of Pay TV broadcasters in the rest of Africa

247 The substantial market opportunity for lower-priced bouquets and the popularity of local content has provided a significant opportunity for the entry and growth of a number of Pay TV services on the African continent. These Pay TV broadcasters have entered successfully and have grown on the back of providing, initially, more basic offerings. These examples demonstrate how basic entry can succeed in the South African context:[232]

247.1 StarTimes/StarSat is one of MultiChoice's major competitors in Africa. In Nigeria, StarTimes, was reportedly the biggest Pay TV broadcaster by 2015, experiencing significant growth since entering the market in 2010.[233] Its significant growth in the 14 countries in which it operates is based on DTT and DTH bouquet offerings targeting low to middle income consumers. StarTimes has acquired UEFA National Team Football broadcasting rights (the Euro 2020 as well as qualifiers, the

232 Appendix 3 to MultiChoice's 2017 submissions.

233 Quartz Africa, 4 August 2015, A Chinese media company is taking over East Africa's booming Pay TV market: https://qz.com/470166/a-chinese-media-company-is-taking-over-east-africas-booming-Pay TV-market/

Nations League 2020/21 and European qualifiers to the FIFA World Cup 2022 and all national friendlies) for exploitation on all media platforms in all countries across sub-Saharan Africa, excluding South Africa.[234]

247.2 ZAP TV is now the largest Pay TV broadcaster in Angola (surpassing MultiChoice, despite only being launched in 2010). Its four bouquets via DTH cater for a range of low- to high-end consumers. It has focused on offering a Pay TV service tailored to the needs of the local audience (including through its strategy of providing Portuguese content) without offering FSPTW movies. It also holds sports rights, such as Spanish La Liga football and NBA basketball.

247.3 Zuku TV broadcasts in Kenya, Malawi, Tanzania, Uganda and Zambia via DTH, DTT and cable. In 2016 Zuku TV was reported to be the third largest Pay TV operator in Africa.[235] Zuku's strategy is focused on developing local content channels which resonate with its African audience.[236] It invested significantly in acquiring and commissioning Swahili content which has been successfully broadcast in Kenya, Malawi, Tanzania, Uganda and Zambia.[237]

247.4 Azam TV officially launched in Tanzania in 2013 and has since outstripped MultiChoice's performance in that country. It has also expanded its presence into Kenya, Malawi and Uganda. Azam TV offers its subscribers a choice of four bouquets with access to local, regional and global channels, targeting the low to middle end of the market. Apart from a focus on investing in local entertainment content (such as dramas and movies) it has also emerged as a leading

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234 https://www.sportindustry.co.za/news/startimes-secures-euro-2020-rights and https://www.ghanabusinessnews.com/2019/08/08/startimes-secures-rights-to-broadcast-euro-2020-and-2022-world-cup-matches/

235 TechCentral, 15 August 2016, Pay TV in Africa to double in size: https://techcentral.co.za/Pay TV-in-africa-to-double-in-size/67672

236 Zuku, About Zuku: http://www.zuku.co.ke/about-zuku

237 Balancing Act, 18 November 2016, Zuku TV relaunches Swahili channel as competition heats up: http://www.balancingact-africa.com/news/broadcast-en/39032/zuku-tv-relaunches-swahili-channel-as-competition-heats-up

broadcaster, promoter and sponsor of local football in East Africa. It also broadcasts the Spanish La Liga football league.

COMPETITIVE RESPONSES FROM MULTICHOICE

248 The dynamics outlined above collectively present a huge challenge to MultiChoice's business, and an existential threat going forward. MultiChoice subscribers are not locked into long-term contracts and already churn in large numbers on a monthly basis. Therefore, there has been a need for a competitive response to these dynamics including continual investment in subscriber acquisition and retention efforts.

249 MultiChoice's 2017 submissions and 2018 supplementary submissions demonstrated that this response has occurred across all bouquets and all competitive dimensions, including price, content type and mix, technical platform/services, retention efforts and customer services.[238] This evidence has not been considered by ICASA in the Draft Findings. The section below reiterates, and in some instances updates, the evidence previously provided.

Decoder and platform innovation

250 To enhance its competitive position relative to its rivals and to enhance the consumption experience of customers given evolving consumer preferences and habits, MultiChoice has improved its technical platform and provided a range of additional services. These investments are directed at responding to changing consumer demand patterns and the rise of OTT services (indeed many seek to mirror OTT functionality).

251 The value-added platform services provided by MultiChoice include:[239]

251.1 The DStv Catch Up service is a "push" VOD service currently available to DStv Premium, DStv Compact Plus and DStv Compact subscribers at no extra cost. This is a globally innovative service using satellite

238 MultiChoice's 2017 submissions, para 567-590.

239 Further details can be found in MultiChoice's 2017 submissions, paras 579-580.

technology and a local hard drive. DStv Catch Up Plus is a more extensive "pull" VOD service available to subscribers with internet connectivity at no extra cost.[240]

251.2 MultiChoice continuously invests in STB development. Software upgrades improve performance and the user interface. Many of the improvements to the STBs are related to enhancing their VOD capabilities. This includes enhanced PVR functionality which enables time-delayed viewing and remote recording.

251.3 BoxOffice is a TVOD service, whereby movies that are rented can be downloaded or streamed on a TV set (accessed via a STB) or a device such as a PC, tablet or smartphone. This service is available to anyone in South Africa, whether or not a DStv subscriber and at discounted rental rates for Premium, Compact and Compact Plus subscribers.

251.4 Showmax is an SVOD service that provides unlimited access to more than 25 000 movies and series for R99 per month. Audio-visual content is delivered over the internet and is accessible on a wide range of devices. For DStv Premium subscribers, Showmax is being made available at no extra cost whilst Subscribers to DStv Compact Plus and DStv Compact bouquets get Showmax for a discounted price.[241]

251.5 DStv Now is MultiChoice's internet streaming service available to all DStv subscribers at no extra cost.

251.6 The SuperSport app allows customers to access video highlights, sports news and live scores on demand. DStv premium subscribers can also live video stream sport via the app.

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240 Appendix B to the 2018 supplementary submissions, para 54.2.
241 Appendix B to the 2018 supplementary submissions, para 54.5.

251.7 In October 2018, MultiChoice added the Joox VIP streaming music service as a free value-add to DStv Premium, Compact and Compact Plus subscribers.

252 The need to respond to OTT is also reflected in the fact that MultiChoice plans to launch a streaming-only version of DStv in the near future.[242] This version of DStv will not require a satellite dish but will instead rely on the internet to deliver channels and on-demand content. The investment in this offering is a direct response to OTT competition and reflects the business's view on the importance of the internet as a means of distributing content.

253 An important aspect of competition between electronic audio-visual service providers is the upfront costs to consumers of connecting to the service. For traditional Pay TV broadcasters this involves the cost of the STB and, in the case of DTH, the added costs of the satellite dish and installation. As MultiChoice has explained, OTT and other platforms have low upfront costs, if any. MultiChoice has therefore reduced STB prices, in part through subsidies.[243] MultiChoice would not subsidise these costs (i.e. bear these additional costs at its expense) unless it faced competitive constraints, which is further evidence of constraints which ICASA has ignored.

253.1 MultiChoice's flagship STB, DStv Explora, was launched in 2014 at a price of R2 999. The latest Explora 2 model currently sells at approximately R999 at many national retailers.[244]

253.2 The standard HD STB was launched with a retail price of R700, but currently sells for as little as R369 at some national retailers.

242 https://techcentral.co.za/dstv-to-launch-streaming-only-option/81195/

243 Appendix B to the 2018 supplementary submissions, para 56.

244 Appendix B to the 2018 supplementary submissions, para 65.5.

Content offering

254 M-Net has invested substantial amounts in commissioning local content in response to consumer demand and competitive behaviour of rivals.[245] Dedicated local content channels produced by M-Net include: kykNET, kykNET & Kie, Mzansi Magic, Mzansi Wethu and Mzansi Bioskop and 1 Magic.[246]

255 MultiChoice has also been innovative in its use of pop-up channels and festivals, such as with the M-Net Movies Game On, the M-Net Movies Marvel Studios pop-up channels and the Animania Festival broadcast during 2018/19.

256 MultiChoice works with its third-party channel providers to assist them in repackaging their channels to make them more relevant to domestic audiences. This includes local programming, such as that provided by Comedy Central.

257 MultiChoice is constantly assessing its offering to identify gaps that can be covered. For example, as telenovelas became more popular, MultiChoice launched the dedicated "Telemundo" channel in 2014.[247]

258 It is also always seeking to add value and increase the attractiveness of its bouquet to actual and potential subscribers. As consumer preferences change over time, content/channels also added or removed to reflect those changes. For example, it has recently announced that they will be refreshing their content line-up by removing a few third-party channels in favour of greater investment in local content and two new channels which are expected to have greater resonance with customers – one being an established global brand and the other a new innovative brand.[248]

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245 Appendix B to the 2018 supplementary submissions, para 47.
246 Appendix B to the 2018 supplementary submissions, para 48.
247 Appendix B to the 2018 supplementary submissions, para 49.3.
248 https://www.dstv.co.za/whats-on/news/articles/channel-changes/

Customer service

259 MultiChoice's customer-focused mindset has been sharpened even further in recent years as competition has intensified. Better systems, customer interaction, additional points of payment and self-service on digital platforms and social media platforms are examples.[249]

Retention efforts

260 Since 2014, MultiChoice has invested in activities specifically focused on retention of subscribers.

260.1 MultiChoice recognised the need for active outbound retention, which means actively calling disconnected/dormant subscribers or subscribers who are identified as having a high propensity to churn.

260.2 MultiChoice offers discounted prices in order to win back customers who are disconnecting their subscriptions.

260.3 MultiChoice launched "DStv Moments" in 2017, a rewards programme for long-standing customers with exclusive offers, discounts and access to exclusive DStv events.

Pricing and quality

261 The increasingly-competitive landscape has pressured MultiChoice to contain real price increases across all bouquets, while at the same time increasing consumer value and improving technological elements of its services. This competitive pressure has also meant that Multichoice has also not increased the prices for BoxOffice content since 2016. Evidence demonstrating this has been provided to ICASA in a number of submissions by Multichoice. However, despite this ICASA still appears to place significant weight on its claim in the market

[249] Appendix B to the 2018 supplementary submissions, para 59-62, p. 45-49 for more detail on customer service innovations.

definition section that MultiChoice has increased *nominal* prices by more than a claimed 5% average over all bouquets for the period 2014 to 2017.[250]

262 This misunderstands the information provided by MultiChoice to ICASA which shows that, on average, real prices have continued to decline relative to April 2014. In particular, over the five-year period ending April 2019, real prices–

262.1 decreased by an annual average of 1% for the premium bouquet;

262.2 increased by a modest annual average of 0.3%, 1.1% and 2.3% for the Compact Plus, Compact and Family bouquets respectively; and

262.3 decreased by an annual average of 3.7% and 3% for the Access and EasyView bouquets respectively.

263 Based on these figures, there has been a weighted average annual real price decline of 1% since 2014.[251]

264 This should also be seen against a backdrop of content expense escalations, meaning that, in quality-adjusted terms, all DStv prices have fallen significantly.

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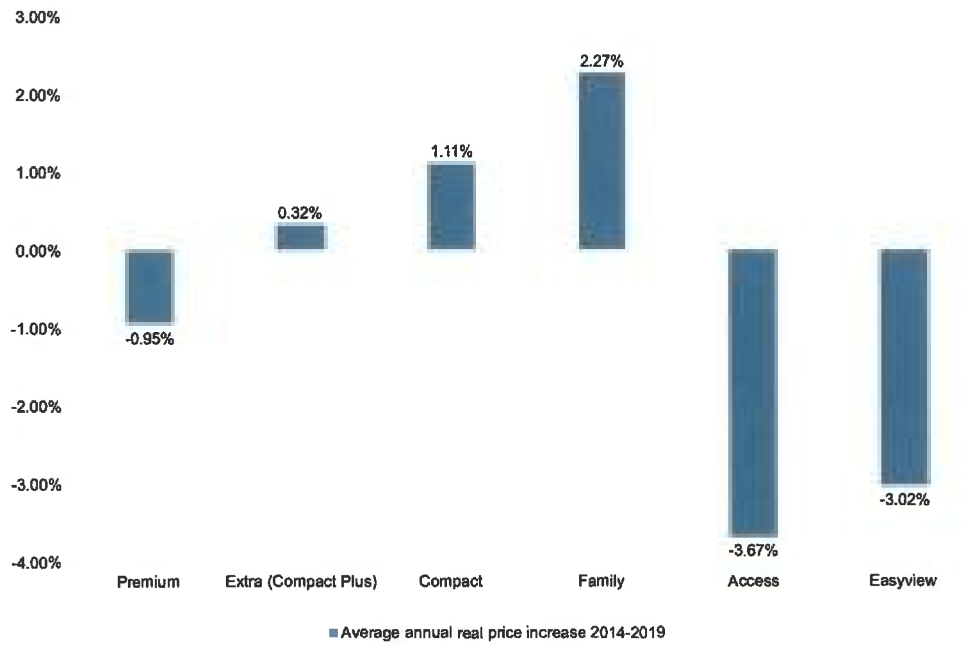
250 Draft Findings, para 5.17.23 and Figure 6.

251 Based on April 2019 subscriber weights.

Figure 15: Average annual real price increase by bouquet (2014 to 2019)



265 Even in a competitive market, prices can be expected to rise at least in line with increases in input costs. In this case, input costs have risen significantly, without commensurate bouquet price increases. This reflects effective competition and constraints on MultiChoice as a Pay TV provider.

Increased efficiency

266 As a result of stronger competition from both traditional players and new online entrants from across the entertainment value chain, MultiChoice has faced pressure to continuously improve customer value but at the same time contain the prices paid by consumers (as demonstrated by the average annual real price decline of 1% discussed above). This has meant that MultiChoice has also had to focus on improving its operational efficiency and contain operational costs over this period.

267 As a result, and as outlined in detail in previous submissions, MultiChoice has launched a number of cost savings drives including a [redacted]

[redacted]

268 Since MultiChoice's previous submissions, the pressure to respond to the significant changes in the electronic audio-visual landscape and increased competition has intensified. At the end of June 2019 MultiChoice commenced a retrenchment consultation process involving over 2000 employees at its call and walk-in centres spurred by changes in customer behaviour towards digital service and self-service platforms.

269 [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted][252]

270 This clearly demonstrates the very real impact that the rise of digital services and competition from OTT platforms is having on MultiChoice's business.

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[252] Consultation Notice in Terms of Section s189A(3)(a) of the Labour Relations Act, dated 21 June 2019.

CONCLUSION

271 This chapter provides an overview of the dramatic, rapid and irreversible changes in the provision and public consumption of electronic audio-visual services. This is important because it places ICASA's analysis squarely in the midst of a period of rapid and irreversible change and disruption.

272 In doing so, it demonstrates that ICASA's analysis is superficial, selective and often erroneous in crucial respects. ICASA ignores –

272.1 important changes in electronic audio-visual consumption patterns and consequently dismisses the competitive constraint exerted on MultiChoice by the entry of a number of formidable OTT service providers with attractive content offerings;

272.2 relevant local dynamics. Instead, ICASA incorrectly adopts the historical (and outdated) Western European view that movies and popular sports are the key drivers of Pay TV subscriptions;

272.3 the strong competitive interactions between FTA and Pay TV, instead incorrectly concluding that analogue based FTA TV does not compete for viewers with Pay TV or satellite FTA TV services; and

272.4 important market dynamics that reflect the significant opportunity for entry and growth with respect to lower-priced Pay TV bouquets.

273 In contrast, MultiChoice's submissions and this Part A have shown the following:

273.1 There has been a rapid and significant disruption in the way in which electronic audio-visual services are consumed. These dynamics are impacting negatively on the viewership and subscriptions for Pay TV services as subscribers engage in significant cord-shaving and cord-cutting behaviour.

273.2 Consequently, traditional broadcasters are facing a significant threat in the form of competition from OTT services offered by global giants and large, well-resourced domestic telcos, as well as regional players that have access to a variety of attractive and often exclusive content.

273.3 The rapid pace at which these developments are occurring means that competition is expected to further intensify, even on a conservative view of the market, within the next 3 years.

273.4 There is a high preference for local content in South Africa and the majority of market demand is for lower-priced bouquets. As a result, movies and popular sport are not important for building a subscriber base as demonstrated by OpenView's growth.

273.5 FTA TV services continue to remain competitive due to well-established positions in the market which are strongly associated with the provision of popular local content, including entertainment, news and sports.

273.6 MultiChoice's experience elsewhere in Africa demonstrates that the substantial market opportunity for lower-priced bouquets coupled with the popularity of local content in South Africa provides a significant opportunity for entry and growth by alternative Pay TV service providers in South Africa.

273.7 The multitude and strength, individually and collectively, of competitive threats described above has meant that MultiChoice has had to engage in a variety of initiatives to improve its offering and retain subscribers, consistent with a broadcaster in an effectively competitive market.

274 In sum, in coming to its conclusions ICASA has not conducted a fair or balanced assessment of the evidence before it. ICASA accepts unsubstantiated claims from third parties without interrogation while overlooking or ignoring evidence provided by MultiChoice or other third parties that is inconsistent with its view. It also cites selectively from a number of sources and misrepresents the data. As a result, and viewed within the current competitive landscape, ICASA's findings are inconsistent with market realities and hence wholly unsuitable within the current market context.

275 This failure on the part of ICASA is particularly serious in circumstances where it is contemplating ex ante regulation. Indeed, any license conditions based on such unsound analysis of market developments would likely result in significant unintended consequences. In particular, licence conditions would serve to disempower a South African broadcaster with a track record of local investment and innovation that brings benefits to South African consumers, from competing with other electronic audio-visual service providers who include global giants that are not constrained by regulation.

PART B: ICASA'S CONSUMER SURVEY

INTRODUCTION

276 As part of its Inquiry, ICASA commissioned an independent consumer survey in order to "*understand consumer behaviour with respect to television broadcasting and video-on demand services*".[253] Pulse, the consultancy engaged by ICASA to conduct the survey, conducted a number of small consumer focus group discussions ("Phase 3" of the market research) as well as a quantitative online survey of 1,002 respondents ("Phase 4" of the market research).[254]

277 ICASA primarily commissioned the Consumer Survey for the purpose of informing its definition of the relevant markets for analysis. ICASA states that the Consumer Survey results form part of ICASA's analysis of market definition as set out in the Draft Findings.[255] However, MultiChoice submits that the survey was not sufficiently well designed to achieve this purpose.

278 First, the research methodology, weighting and sample selection applied in constructing the Consumer Survey is not in line with best practice and the survey evidence is, in particular, not representative of actual and potential subscribers to Pay TV services (the focal product for ICASA's market definition assessment).

279 Second, even putting sampling issues to one side, the Consumer Survey results do not provide any information that would allow for direct assessment of the HMT that is standard in market definition exercises or, more generally, for estimating the price elasticity of demand for Pay TV services.

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253 Draft Findings, para 1.1.6.

254 There were five phases of market research carried out for the purpose of the Inquiry:
- Phase 1 - Project Development Workshop;
- Phase 2 - Desk research and expert interviews;
- Phase 3 - Consumer focus group discussions;
- Phase 4 - Quantitative online consumer survey; and
- Phase 5 - Analysis and reporting of results.

255 Draft Findings, para 2.2.25.

279.1 Survey respondents were not asked the SSNIP test question of how they would react to a hypothetical 5-10% increase in price of Pay TV services.

279.2 Indeed, survey respondents were not asked any question at all in relation to their likely reactions to a price increase in Pay TV services. This is despite one of the stated objectives of the survey being to "*determine the cross-price demand elasticities between alternative television broadcasting products / services, including free-to-air television and OTT services*".[256]

280 Third, the survey questions were in any event drafted too broadly and vaguely to elicit information to inform the market definition assessment. For example:

280.1 Questions concerning viewing and subscription preferences around sport and movie content did not specify those sports and movie contents that ICASA defines as "premium", but rather just "sport" or categories of sport and "movie" content in general.

280.2 Questions concerning preferences among a number of hypothetical subscription offerings presented insufficient detail regarding those hypothetical offerings to elicit any useful information. In particular, while respondents were presented with a number of hypothetical offerings at different price points and with different numbers of channels, no details were given to respondents of the specific channels or types of content included in each of the offerings.

281 ICASA relies extensively on the Consumer Survey results, as they relate to consumer behaviour and viewing preferences, primarily to support its definition of three separate retail markets for basic Pay TV services, premium Pay TV services and video on demand services. Notwithstanding that ICASA's Consumer Survey was not fit for purpose, for each of the reasons stated above, most of the assertions made by ICASA in the Draft Findings in relation to (a) the

[256] Draft Findings, para 2.6.1.

behaviour and viewing preferences of consumers and (b) relevant retail markets are not supported by the Consumer Survey results.

282 Specifically, the Consumer Survey results do not support the Draft Findings' assertions that:

282.1 Viewers' subscription decisions depend on the availability of a specific content genre within a specific service.[257]

282.2 Specific boundaries can be circumscribed around free-to-air, basic tier, middle-tier, premium and OTT viewers based on SEM levels, and the services offered or targeted at each income level belong in distinct relevant markets.[258]

282.3 49% of basic-tier Pay TV subscribers cite affordability as the reason for not moving up into a mid-tier bouquet.[259]

282.4 It is highly unlikely that enough viewers would switch from Pay TV services to free-to-air television services in response to a SSNIP.[260]

282.5 Pay TV subscribers would not be satisfied with a FTA offering.[261]

282.6 FTA viewers are highly unlikely to consider OTT services as an alternative based on affordability.[262]

282.7 The cost of data and access to high speed internet limit the ability of viewers to migrate to OTT offerings.[263]

257 Draft Findings, para 5.17.4.
258 Draft Findings, para 5.10.41.
259 Draft Findings, para 5.10.25.
260 Draft Findings, para 5.10.8 and 5.10.9 and 5.10.22.
261 Draft Findings, para 5.10.25.
262 Draft Findings, para 5.10.40.
263 Draft Findings, para 5.12.17.

282.8 Non-premium subscribers would only change their packages when something more valuable is added to the more expensive packages.[264]

282.9 Cord shaving occurs only when prices change drastically.[265]

282.10 There is a limited extent of cord cutting.[266]

282.11 Insignificant changes in subscription price do not affect premium Pay TV, as the price is in-elastic.[267]

282.12 The significance of live sport content to premium Pay TV service subscribers, and the high preference for linear television as a mode of electronic audio-visual content consumption in the South African context limit the current ability of OTTs to be reasonable or credible substitutes.[268]

282.13 By and large, South African viewers tend to take up OTT services to complement rather than substitute Pay TV services.[269]

283 Many of these assertions in the Draft Findings are expressly attributed to ICASA's Consumer Survey while the remainder purport to be findings regarding consumer behaviour and viewing preference, which are highly fact-based conclusions for ICASA to reach unsupported by the Consumer Survey results.

284 In contrast with these assertions, an objective reading of the Consumer Survey results suggests that, at least with respect to the respondents in the survey sample:

284.1 The survey respondents that subscribe to Pay TV services value a wide range of content, not just movies and sports content, with local content

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264 Draft Findings, para 5.12.37.
265 Draft Findings, para 5.12.38.
266 Draft Findings, para 5.12.38.
267 Draft Findings, para 5.12.38.
268 Draft Findings, para 5.12.39.
269 Draft Findings, para 6.5.57 and also 5.13.1

in particular being important to a large proportion of those survey respondents.

284.2 Bouquet decisions tend to be a compromise, with the desire to entertain or satisfy children being a primary factor in the decision to subscribe to a Pay TV service.

284.3 There is a large uptake of OTT services, particularly among respondents that subscribe to DStv.

284.4 The uptake of OTT services has been enabled by both the penetration of smartphones as well as the rollout of the fibre network: these developments are changing how survey participants consume content both inside and outside their home and resulting in cord cutting and cord shaving.

285 These findings have been largely overlooked by ICASA and are consistent with MultiChoice's contention that it competes in one highly competitive and dynamic electronic audio-visual services market in SA.

286 The first section of this Part B discusses methodology issues with the Consumer Survey results and explains why the survey methodology does not represent best practice. The second section demonstrates the lack of evidential support in the Consumer Survey results for the various premises in the Draft Findings regarding consumer behaviour and viewing preferences and the significance of OTT services, on which ICASA's market definitions are based. The final section of this Part B observes that in various respects, and notwithstanding the sampling issues discussed in the first section, the Consumer Survey results are consistent with MultiChoice's previous submissions concerning consumer preferences and behaviour regarding electronic audio-visual content and services, including in relation to OTT services, and that there is a single market for the retail distribution of electronic audio-visual services in South Africa.

THE METHODOLOGY APPLIED DOES NOT REPRESENT BEST PRACTICE

287 ICASA's Consumer Survey consists of Phase 3, "consumer focus group discussions" and Phase 4, a quantitative online survey undertaken by Pulse.[270] Based on the survey documentation provided to MultiChoice, the research methodology, weighting and sample selection applied in constructing ICASA's Consumer Survey is not in line with best practice. This is elaborated upon further below for each of the phases.

The Phase 3 consumer focus group discussions are not based on best practice

288 The objective of the consumer focus group discussions[271] is to inform the design of the quantitative survey but also to unpack the SA TV viewing market, by identifying factors that influence TV viewing patterns, switching patterns, key content and price sensitivities.

289 The focus group exercise consisted of six focus group discussions held in Sandton, with six to eight respondents in each group. Each group was intended to target a specific consumer segment defined in terms of television viewing behaviour and socio-economic background.

290 Having regard to the documentation relating to the design of the focus groups and sample, as well as the outputs of Phase 3, it is clear that there are a number of methodological flaws in the approach applied:

290.1 First, the total number of focus groups are too few to represent the South African market. For a study of this nature, MultiChoice considers twenty to thirty groups across multiple cities/towns would have been advised. Six groups are inadequate to explore the diverse language, culture and interests of the South African society. Furthermore, best practice would also be to hold groups across multiple cities to consider regional differences and to run separate gender/age/language/interest

[270] These in turn are informed by Phase 1 (Project Development workshop) and Phase 2 (Desk research and expert interviews).

[271] Outlined in the Project Development Workshop, Minutes and Project Plan, 6 September 2018.

and cultural groups to make sure all diverse views are heard and to probe strong interest and language and gender groups separately.

290.2 Second, the profiles of the focus groups are skewed relative to the current structure of the South African viewing television market, which is likely to compromise the results. For example:

290.2.1 In terms of demographics, Afrikaans speaking consumers were either not represented or under-represented in the Pay TV groups (particularly for Premium viewers) and the sample group structures are skewed away from older and lower income consumers.

290.2.2 In terms of viewing options, OVHD viewers are not covered in any of the groups while the "OTT group" was designed around subscribers to Netflix only,[272] thus excluding other subscription and advertising-based OTT services.

290.3 Third, it is unclear whether there were any validation procedures to verify whether respondents were in fact active viewers to their claimed package. This is because representation from a content usage perspective within each of the focus groups is also skewed. For example –

290.3.1 Premium subscribers did not mention watching any of the content that is available exclusively on the Premium bouquet;

290.3.2 the programmes mentioned by DStv subscribers in Group 2 (Compact and Compact Plus) are FTA (and are also not specific to these DStv packages); and

290.3.3 those who form part of Group 6 (the OTT group) are also watching National Geographic and Mzansi Magic, which reveals that these are not Netflix only subscribers.

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272 Pulse, Phase 2 profiles, 18 September 2018.

290.4 Fourth, the report quantifies satisfaction levels which is unsound. This is because results from qualitative focus groups are not normally quantified based on low respondent sizes. These results cannot be taken as being representative since they are based on too few people and there are missing segments of society.

290.5 Last, the "price sensitivity" section was built on channels that respondents valued the most, which will differ from person to person. This effectively means that each respondent based their answers on a different bundle of channels and not a standard set of channels. This was then used as the basis for defining the three broad packages used in Phase 4.

The Phase 4 quantitative online survey is not based on best practice

291 The purpose of the online Consumer Survey is to establish baseline television viewing patterns and factors that influence such viewing patterns as well as product awareness, motivations for switching and cross-price demand elasticities. This was to be done based on an online survey that targets a representative sample of the South African population that are subscribers to pay television but would also include consumers of non-pay television offerings.[273]

292 The methodology employed with respect to sampling does not represent best practice.

292.1 When it comes to sampling, best practice is to put measures in place to control for any methodological approaches that could limit or skew the sample profile. This is done to arrive at a representative sample of the target market. In the instance where an online methodology is used, it is critical to apply correct demographic and usage quotas to represent the target market. It does not appear that this was done and therefore the representation largely relies on the profile of the online panel.

[273] Outlined in the Project Development Workshop, Minutes and Project Plan, 6 September 2018.

292.2 Furthermore, the sample was not appropriately weighted at the overall level and for the individual consumption group categories:

292.2.1 As far as MultiChoice has been able to ascertain, only minimal weighting was applied to the results. Whilst metro/urban/rural weights were applied to the sample of 1,002 respondents, the sample was not grossed up to be representative of population statistics based on demographic weights for age, race, gender, income or province.

292.2.2 Sample weights were also not applied for the individual consumption groupings, despite the fact that the individual sample group profiles are not well aligned to the corresponding population groups on the key demographics of gender, race, age, income, education, work status and position.

293 Accordingly, the findings cannot be considered representative of "*baseline television viewing patterns among television viewers in South Africa*".

294 Furthermore, some of the flaws identified with respect to Phase 3 have been carried through to Phase 4.

294.1 OVHD is not adequately included in the survey nor are all forms of file sharing and pirated viewing. Furthermore, OTT was defined as only a limited set of subscription offerings and exclude the full range of OTT video content services (including free OTT services).

294.2 Based on the information provided, the alternative channel packages used in the survey to inform the so-called "cross-price elasticity of demand" exercise (which are not cross-price elasticities at all) are compromised and unlikely to be representative. This is because these packages are described in insufficient detail, listing only the broad genre of the channel (i.e. series, movie, news, local live sport, children's, reality, movie, comedy, sport) and hence are open to significant interpretation. In particular, respondents are likely to consider these based on their own viewing interests which means that respondents are not basing their answers to these questions on the same alternative offerings. For example –

294.2.1 "series channels" could be local or international, and they could carry old or new shows;

294.2.2 "children's channels" could be local or international, educational, cartoons, aimed at toddlers or older children;

294.2.3 "news channels" could be local or international;

294.2.4 "local live sport" could be anything from Varsity Cup soccer to PSL to netball; and

294.2.5 "sports channels" could be interpreted as relating to any one of a range of sports, and at the local or international level.

THE CONCLUSIONS ICASA DRAWS IN THE DRAFT FINDINGS ARE NOT SUPPORTED BY THE CONSUMER SURVEY RESULTS

295 The Consumer Survey results were primarily used by ICASA to define the relevant markets for analysis.[274] ICASA considers that the Consumer Survey results support its findings that –

295.1 basic-tier Pay TV services belong in a separate market to premium Pay TV services;[275]

295.2 analogue-based FTA TV services belong in a different market to basic-tier Pay TV services;[276] and

295.3 video-on-demand services (OTT services) belong in a separate market to Pay TV services.[277]

274 Draft Findings, para 1.1.6.
275 Draft Findings, para 1.3.5 and 1.3.10.
276 Draft Findings, para 1.3.7.
277 Draft Findings, para 1.3.9.

296 In the sub-sections below MultiChoice demonstrates that the Consumer Survey results do not support ICASA's delineation of the relevant retail markets.

ICASA's finding of different markets for basic-tier and premium Pay TV services

297 In the Draft Findings, ICASA defines separate markets for the retail distribution of "basic" tier Pay TV services and "premium" Pay TV services.[278]

298 It is difficult to discern, in the Draft Findings, a clear basis for this delineation. It appears to be based on ICASA's contentions that –

298.1 viewers attach particular value to particular types of content that ICASA labels as "premium" and that the presence or otherwise of these contents in bouquets drive subscription decisions to such an extent as to justify defining separate markets;[279] and

298.2 services "offered or targeted" at different income levels belong in distinct markets.[280]

299 For the reasons explained below, neither of these contentions are supported by the Consumer Survey results. Moreover, ICASA's Consumer Survey did not ask any question that would elicit information on the extent to which subscribers to a "premium" Pay TV service would switch to a "basic" Pay TV service in response to a SSNIP. As a result, ICASA's Consumer Survey does not provide any support for ICASA's delineation of separate markets for the retail distribution of

278 Draft Findings, para 1.3.5 and 1.3.10.

279 Draft Findings, para 1.3.5 and sections 5.16 - 5.17. ICASA defines "premium" content to include certain sports content and Hollywood FSPTW movies and series. See Draft Findings, para 5.17.4 to 5.17.8. Although MultiChoice's Compact, Compact Plus and Premium bouquets each contain what ICASA defines as "premium" content, it does not include mid-tier and premium bouquets in the same market on this basis. Rather, it considers these bouquets to belong in the same market on the basis of the degree of migration between these bouquets. See Draft Findings, para 5.12.41. There is an inconsistency therefore in ICASA's approach to retail market definition in which ICASA "picks and chooses" the bases on which it delineates market boundaries, sometimes by reference to substitution patterns and other times by reference to product characteristics (i.e. whether certain types of content are included or not the bouquets).

280 Draft Findings, para 5.10.41.

"premium" Pay TV services on the one hand and "basic" Pay TV services on the other.

Drivers of subscription decisions

300 ICASA's apparent contention that whether "premium" content (as defined in the Draft Findings) is included in a bouquet drives subscription decisions is, in part, informed by ICASA's misinterpretation of the Consumer Survey results in relation to the viewing patterns and preferences of consumers.[281] In particular, ICASA claims that –

300.1 "*[t]he results of the Authority's survey clearly indicate that viewers take into account the type of content offered, in their decision making*"; and

300.2 "*movies, sport and drama series are mentioned most frequently when personal preference is at play*".[282]

301 According to ICASA, those preferences "*influence the type of service that viewers ultimately choose, other things being equal*".[283] On this basis, ICASA disagrees with MultiChoice's contention that viewers' subscription decisions depend on the overall programming offered by various electronic audio-visual services, rather than on the availability of a specific content genre within a specific service.[284]

302 MultiChoice submits that ICASA's Consumer Survey does not in fact provide support for ICASA's disagreement with MultiChoice's contention. While consumers will of course take into account the content offered in bouquets when making their subscription decisions, ICASA's Consumer Survey does not support ICASA's suggestion that those decisions are generally driven by whether

281 See Draft Findings, para 5.8.5, which indicates that ICASA's reasons for why it believes that there is a difference between "premium" content and "other" content is set out in sections 5.15 and 5.16 of its decision. ICASA's findings in relation to the delineation of the upstream wholesale markets for the supply and acquisition of content were, in fact, included in sections 5.16 and 5.17 of the Draft Findings.

282 Draft Findings, para 5.17.4.

283 Draft Findings, para 5.17.4.

284 Draft Findings, para 5.17.4.

particular content is in the bouquet, rather than by the overall programming offered in the bouquets.

302.1 First, ICASA's Consumer Survey asked questions concerning viewership patterns.[285] Viewership patterns are not the same thing as subscription decision drivers. For example, a subscriber may watch news content on a daily basis and also regularly watch series or drama shows, but may have ultimately purchased their Pay TV package because that package also included a range of children's channels that were not available on FTA services. It is not safe, therefore, to draw on a finding that certain types of content are viewed a lot, to conclude that those contents alone drive subscription decisions. ICASA's Consumer Survey did not ask consumers whether it is more important that they have access to a range of content (including news, documentaries and children's content) or that they have specific content such as movies or sport. Since the survey did not ask this question, there is no basis in the Consumer Survey results for the conclusion ICASA seeks to draw.

302.2 Second, even if one were to read the Consumer Survey results on viewership patterns as evidence of subscription drivers, the results indicate that sport content is one of the three most viewed content genres for only 35% of all subscribers to DStv Premium and only 27% of subscribers to DStv Compact and Compact Plus.[286] In other words, 65% of Premium subscribers and 73% of subscribers to DStv Compact and Compact Plus reported that they watch at least three other content genres more often than they watch sport. Further, ICASA's so-called "premium" sports content is not watched by all subscribers to these bouquets.[287]

285 Phase 4 Report, p. 47 – 57.

286 Phase 4 Report, p. 53.

287 Phase 4 Report, p. 61. ICASA's so-called "premium" sports content is, however, watched by a significant proportion of surveyed FTA viewers, suggesting that OOH viewing of sport content is an option for a significant number of South Africans.

302.3 Third, ICASA's Consumer Survey asked questions conceming the main reasons why subscribers opted to purchase the DStv Compact, Compact Plus or Premium bouquets, instead of lower or higher priced packages.[288] Responses to these questions indicate that there are a number of reasons why subscribers choose these bouquets, not just access to so-called "premium" content.

302.3.1 A higher proportion of subscribers to DStv Compact and Compact Plus cited the main reason for choosing that package over a DStv basic package was that it "*benefits me and my family*" (30%) and "*It is worth the money for the extra channels I receive*" (25%) than those that cited "*I can get local and international sport live in HD*" (24%) or "*I can get international movies*" (20%).[289] MultiChoice notes that each of these responses were presented to respondents as pre-defined options, with there being no option of "*I value the range of channels provided in the DStv Compact/Compact Plus package*".

302.3.2 A higher proportion of subscribers to DStv Premium cited "*I can get all the sports channels*" or "*I can get the latest movies*" as their main reason for purchasing that package rather than a lower-priced package. However, this first reason (sports channels) was cited by less than half of all respondents and the second (latest movies) by only a quarter of all respondents, with a significant proportion citing other reasons such as "*I can get CatchUp which enables me to watch what I want, when I want*" (37%) and "*My family can watch online on a smartphone or tablet using the DStv Now App*" (25%).[290] MultiChoice notes that, again, survey respondents were not presented with an option such as "*I*

288 Phase 4 Report, p. 99 – 104.

289 Phase 4 Report, p. 99.

290 Phase 4 Report, p. 103.

value the range of channels provided in the DStv Premium package". It is therefore not appropriate to draw a conclusion that subscribers opt to purchase the DStv Premium package on the basis of sports or movie content alone, as opposed to the range of content offered in that package.

302.4 Last, the questions on viewership patterns and main reasons for subscribing were drafted too broadly to enable any distinction to be drawn between different sports content (those that ICASA regards as "premium" and those that it does not) and different movie content (FSPTW movies, which ICASA regards as "premium", and other movies). The viewership pattern questions only ask, generically, about viewing of "sports" or different categories of sports and viewing of "movies".[291] Therefore, while sports and movies, generically, are most viewed, this does not tell us anything about whether there should be separate markets, on the one hand, for bouquets that contain the sports and movies that ICASA has defined as "premium" and, on the other, for bouquets that contain other sports and movie content.

<u>Services and income levels</u>

303 ICASA asserts that it "*is able to circumscribe specific boundaries around free-to-air, basic tier, middle-tier, premium and OTT viewers based on SEM levels, which indicates the services offered or targeted at each income level belong in distinct relevant markets*".[292] ICASA does not explain how it is able to circumscribe such boundaries, other than by asserting them.

291 The survey did consider the viewing patterns of what was identified as a "sports audience". However, only 356 respondents were asked this question, almost half of which did not subscribe to a DStv package.

292 Draft Findings, para 5.10.41

304 There is no support in the Consumer Survey results for such boundaries. The Consumer Survey results indicate that:

304.1 Each DStv bouquet attracts subscribers from nearly the entire range, if not the entire range of income levels. Surveyed subscribers to DStv EasyView, Access and Family had incomes ranging from less than R5,000 per month up to R75,000 per month and surveyed subscribers to DStv Compact, Compact Plus and Premium had incomes ranging from less than R5,000 per month to more than R100,000 per month.[293] Surveyed subscribers to OTT services also ranged in terms of their monthly incomes from less than R5,000 per month to more than R100,000 per month.[294]

304.2 Further, although a larger proportion of surveyed subscribers to DStv Premium had larger incomes than surveyed subscribers to DStv EasyView, Access and Family, there is considerable spread in the surveyed subscriber base for each "tier" of bouquet such that one cannot circumscribe specific boundaries around each based on income levels. This is demonstrated in Figure 16 below, which shows the distribution of monthly incomes for subscribers to each "tier" of MultiChoice bouquet (as defined by ICASA) as well as the distribution of incomes of all subscribers to OTT services.

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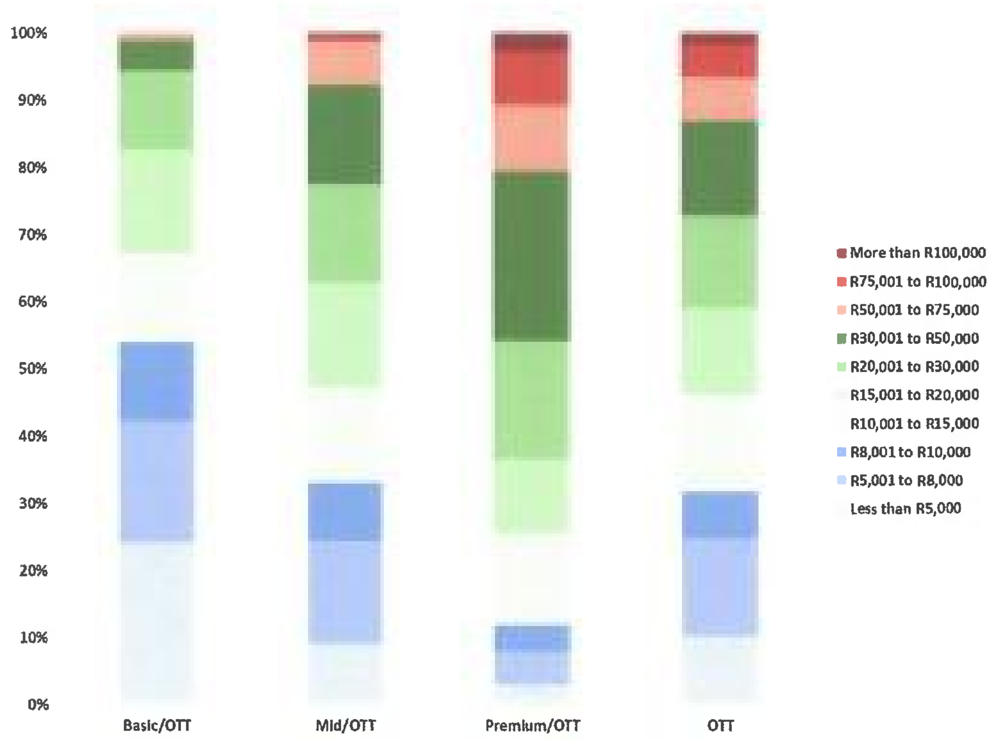
293 Phase 4 Report, p. 12.

294 Based on data in the Phase 4 Report showing the distribution of incomes of subscribers to each tier of bouquet both including and excluding OTT subscribers, p. 12 and 16.

Figure 16 – Distribution of monthly incomes of DStv subscribers and subscribers to OTT services in the quantitative Consumer Survey



305 Related to this, ICASA claims that 49% of basic-tier Pay TV subscribers cite affordability as the reason for not moving up into a mid-tier bouquet.[295] This claim is not well founded.

305.1 First, ICASA provides no reference to the Consumer Survey results for this claim and MultiChoice has been unable to find any result of this kind in the Consumer Survey materials that ICASA has released.

305.2 Second, when surveyed DStv basic-tier subscribers were asked their reasons for not switching to mid-tier or higher bouquets, only 19% identified affordability as an issue, noting that they would have to forgo some other expense in order to meet their budget as the main reason that they did not subscribe to a more expensive Pay TV service.[296] While 66% of the same subscribers responded that they have not

295 Draft Findings, para 5.10.25.
296 Phase 4 Report, p. 97 - 98.

switched because "It is too expensive",[297] this does not imply that they could not afford to. Rather, it only suggests that they did not consider the value of the additional or differentiated content of higher priced bouquets to justify the additional cost.[298]

ICASA's finding of different markets for analogue-based FTA services and basic-tier Pay TV services

306 There is no support in the Consumer Survey results for the following contentions made by ICASA in the Draft Findings:

306.1 There is evidence of asymmetric substitution from analogue-based FTA services to basic-tier Pay TV services but not in the other direction.[299]

306.2 There is a break in the chain of substitution that, if it did exist, would justify the definition of one retail market that includes all television and OTT services,[300] because FTA viewers are highly unlikely to consider OTT services as an alternative based on affordability.[301]

Substitution from basic-tier Pay TV services to analogue-based FTA services

307 ICASA claims that it is highly unlikely that enough viewers would switch from Pay TV services to FTA television services in response to a SSNIP.[302] This appears to be based, in part, on ICASA's assertion in paragraph 5.10.6 that ICASA's Consumer Survey found that a better quality TV signal is the strongest reason to purchase a basic DStv package over the FTA offering. Although a footnote in the Draft Findings refers to page 98 of the Phase 4 Report, all we can find that might be relevant is the results reported on pages 96-97 of the Phase 4 Report, which concern reasons for basic DStv subscribers not to rely on FTA services.

297 Phase 4 Report, p. 97 – 98.

298 A range of other value considerations were also identified by respondents including 'I do not watch enough TV for it to be worth it' (24%) and 'It is a waste of money' (18.4%).

299 Draft Findings, para 1.3.6.

300 Draft Findings, para 5.10.39.

301 Draft Findings, para 5.10.40.

302 Draft Findings, para 5.10. 9.

This is not a basis for finding that it is "highly unlikely" that enough subscribers would switch to FTA in response to a SSNIP. Indeed, none of the questions in ICASA's Consumer Survey elicited information that would assist in understanding the number or proportion of respondents that would switch from Pay TV services to FTA television services in response to a SSNIP. As explained above, no question in ICASA's Consumer Survey asked respondents about their reactions to a price change.

308 In paragraph 5.10.25 of the Draft Findings, ICASA purports to refer to the Consumer Survey results in support of its contention that Pay TV subscribers would not be satisfied with an FTA offering. In particular, ICASA claims that "*DStv subscribers cited a number of reasons why they would not be satisfied with an FTA offering, including signal quality (25%), product affinity (15%) and content offering (movies, sport and children's offering)*".[303]

308.1 MultiChoice has been unable to find these results in the Phase 4 Report. Indeed, MultiChoice has been unable to find a survey question that asked subscribers for reasons why they would not be satisfied with an FTA offering. It is therefore unclear to MultiChoice where these results come from and whether they are correct reflections of ICASA's Consumer Survey.

308.2 ICASA's Consumer Survey did ask surveyed basic-tier DStv subscribers for the main reasons they chose those packages rather than just receive FTA television. The Phase 4 Report records that the main reasons DStv basic-tier subscribers chose those bouquets (rather than just receiving FTA television) were: to get a better signal (45%); because they are "used to" DStv and have no reason to change (26%); and because they would miss the movies (21%) and live sport (20%).[304] However, reasons for choosing basic-tier bouquets over FTA television are not the same thing as whether subscribers would be satisfied with an FTA offering if, for example, the price for their basic-tier offering

303 See para 5.10.25.

304 Phase 4 Report, p. 96.

were to increase or the quality were to decrease. Moreover, even if one were to interpret the responses to this question as signalling that these proportions of basic-tier subscribers would not switch to FTA in response to a SSNIP (or an equivalent decrease in quality of their basic-tier bouquet) (which would not be a valid way of interpreting the results), that evidence does not preclude a finding that there is a sufficient proportion of other basic-tier subscribers that would switch to FTA offerings and defeat the SSNIP (or equivalent quality decrease) (by making the SSNIP unprofitable).

Breaks in the chain of substitution that would justify a single retail market for the distribution of television services

309 In Draft Findings paragraph 5.10.39, ICASA claims that there is a break in the chain of substitution that precludes the definition of a single retail market that includes all television and OTT services.[305] This is based on ICASA's claim that FTA viewers are highly unlikely to consider OTT services as an alternative based on affordability.[306]

309.1 This claim is surprising given that many OTT services are free and, as demonstrated earlier,[307] other OTT services are significantly cheaper than Pay TV services.

309.2 ICASA provides no basis for this claim. MultiChoice notes that ICASA's Consumer Survey could not be the basis because it did not ask those surveyed FTA viewers that did not already subscribe to OTT services why they would not subscribe to OTT.

309.3 ICASA's claim regarding the behaviour of FTA viewers is also inconsistent with the Consumer Survey results, which record that around one-third of FTA viewers watch audio-visual content on a

305 Draft Findings, para 5.10.39.
306 Draft Findings, para 5.10.40.
307 Refer to Part A of these submissions

device other than a TV[308] and almost a quarter subscribe to some form of OTT offering.[309]

310 The Consumer Survey results also suggest that, among the survey respondents, there is a proliferation of smartphones and other devices that are connected to mobile networks which facilitates access to OTT services by respondents who don't otherwise subscribe to a Pay TV service. According to the Phase 4 Report just over 57% of surveyed FTA viewers that watch electronic audio-visual content on devices other than TVs use those devices to watch at home using a mobile data plan.[310] This means that around 21% of the 339 surveyed FTA/OTT viewers stream or download data from mobile networks to watch electronic audio-visual content at home on devices other than TVs.

Different markets for OTT services and Pay TV services

ICASA's claim that the cost of data and access to high speed internet are limiting migration to OTT offerings is not supported by the Consumer Survey results

311 ICASA claims that "*the consumer survey further revealed that the cost of data and access to high speed internet were limiting the ability of viewers to migrate to the OTT offerings*".[311] Presumably this statement is based on responses to the quantitative Consumer Survey question put to DStv subscribers as to why they do not also subscribe to Netflix.[312] These responses need to be interpreted carefully.

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308 Phase 4 Report, p. 37 which identifies 104 of the 339 FTA/OTT respondents as using an alternative device to watch TV. Specifically, of all FTA/OTT respondents, around a quarter watch TV on their desktop or laptop, around a quarter watch TV on their cellphone or smartphone and around 16% watch TV on a tablet or iPad. See Phase 4 Report, p. 36.

309 Phase 4 Report, p. 19 and 24 which shows that 23% of surveyed FTA viewers watch or subscribe to OTT services and a small proportion have previously subscribed (but do not currently subscribe) to one or more OTT services.

310 Phase 4 Report, p. 37.

311 Draft Findings, para 5.12.17.

312 The Draft Findings provides no reference to any particular survey question or to the Phase 4 Report for this statement.

311.1 First, the question is only in relation to Netflix, rather than with regard to OTT offerings generally.

311.2 Second, the question is asked of respondents that do not currently subscribe to Netflix. It therefore disregards the fact that 23% of surveyed subscribers to DStv basic bouquets, 41% of surveyed subscribers to DStv Compact and Compact Plus and 51% of surveyed subscribers to DStv Premium already subscribe to Netflix.[313]

311.3 Third, while some respondents reported not subscribing to Netflix because the cost of data for them is too high or because they do not have a fixed internet connection (ADSL or fibre), there may be duplication across these responses because respondents were allowed to choose multiple responses. Moreover, given that the question was asked only of those surveyed DStv subscribers to Compact, Compact Plus and Premium that do not already subscribe to Netflix, it is possible that no more than 14% of surveyed Premium DStv respondents and no more than 19% of surveyed DStv mid-range package subscribers view the cost of data or access to high speed internet as barriers to subscribing to Netflix.[314]

312 ICASA also asserts that *"very few consumers would have a 10Mbps fibre/ADSL internet package required for good quality, high speed internet connection"*.[315] ICASA does not refer to any evidence on this (or explain why a 3-5Mbps

[313] Phase 4 Report, p. 19.

[314] Of the 208 surveyed subscribers to DStv Premium, 49% (103) did not subscribe to Netflix. Of those that did not subscribe, 28% reported they did not do so because the cost of data was too high, 28% because they do not have an ADSL line to their home and 27% because they do not have an internet fibre connection at home. Therefore, it is possible that only 28% of the 49% that did not subscribe to Netflix did not do so due to the cost of data or lack of access to fixed broadband. This represents just 14% of surveyed subscribers to DStv Premium. Of the 253 surveyed subscribers to a DStv mid-range package, 59% (150) did not subscribe to Netflix, of which 33% reported they did not do so because the cost of data was too high, 23% because they do not have an ADSL line to their home and 21% because they do not have an internet fibre connection at home. Therefore, it is possible that only 33% of the 59% that did not subscribe to Netflix did not do so due to the cost of data or lack of access to fixed broadband. This represents just 19% of surveyed subscribers to a DStv mid-range package.

[315] Draft Findings, para 5.12.28.

connection would not be sufficient for high quality online electronic audio-visual services). It is a shame that respondents to ICASA's Consumer Survey were not asked about the quality of their internet connections and OTT audio-visual content delivered over those connections. However, what we do know from the Consumer Survey results is that of the 568 respondents that watch TV on cellphones/smartphones or desktops/laptops, 54% do so at home over fibre or ADSL connections and 51% do so at home using a mobile broadband connection.[316] This translates into more than 30% of all Consumer Survey respondents watching electronic audio-visual content at home over fibre or ADSL connections and close to 30% using mobile broadband connections. Moreover, again, 45% of all Consumer Survey respondents reported viewing or subscribing to at least one of Showmax, Netflix, black, DEOD and Amazon Prime. These revealed preferences suggest large proportions of all survey respondents find the quality of their fixed and mobile broadband connections sufficient to enjoy electronic audio-visual content over the top.

<u>ICASA's claims about "non-premium subscribers" are not founded in the Consumer Survey results</u>

313 ICASA asserts that "*non-premium subscribers are value driven and would only change their packages when something more valuable is added to the more expensive packages*".[317] The Draft Findings does not refer to any evidential basis for this assertion and the Consumer Survey results do not contain any support for it.

313.1 There is no reason in principle why subscribers to mid-tier and basic subscription services would not change their subscription choices (either moving to a higher tier package or to a lower tier package or to OTT or FTA together with OOH viewing) in response to a price increase of their package or a price decrease of other packages or a reduction in quality of their package or an increase in quality of lower tier packages or OTT or FTA services. All of these, in principle, could

[316] Phase 4 Report, p. 37, which records responses to quantitative survey question 10.
[317] Draft Findings, para 5.12.37,.

cause a subscriber to change from their current package. In the absence of any evidence regarding each of these potential drivers of change there is no basis for ICASA's statement.

313.2 The quantitative online Consumer Survey did ask surveyed subscribers to DStv Compact and Compact Plus why they have not purchased DStv Premium, and one of the reasons put to respondents and selected by some is that more expensive packages do not represent value to them.[318] However, the fact that some respondents chose this option (among others, since respondents were able to choose more than one option) does not justify a conclusion that they would "only" change "*if something more valuable is added to more expensive packages*".

<u>None of the claims in paragraph 5.12.38 of the Draft Findings are supported by the Consumer Survey results</u>

314 ICASA's view is that constraints from OTT services are not strong enough to warrant including OTT services in the same relevant market as Pay TV services.[319] In support of this view, ICASA claims that:[320]

314.1 ICASA's Consumer Survey indicates that cord shaving occurs only when prices change drastically;

314.2 "*there is a limited extent of cord cutting*"; and

314.3 "*insignificant changes in subscription price do not affect premium Pay TV, as the price is in-elastic*".

315 None of these assertions are supported by the Consumer Survey results.

315.1 The quantitative online Consumer Survey does not contain any evidence regarding the extent to which cord-shaving or cord-cutting occurs in reaction to price changes. It did not ask any questions

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318 Phase 4 Report, p. 100 and quantitative survey question 34.
319 Draft Findings, paras 1.3.9 and 5.13.17.
320 Draft Findings, para 5.12.38.

concerning consumer reactions to price changes. There is therefore no basis at all in ICASA's Consumer Survey for any of these claims that the Draft Findings attempts to attribute to it.[321]

315.2 The qualitative consumer focus group evidence also does not support any of these assertions. Indeed, on the contrary, the Phase 3 report includes findings that –

315.2.1 cord-cutting is a consideration for subscribers to DStv Premium;

315.2.2 cord-shaving was an experience of some DStv Compact subscribers (as reported by some in the "Youth with Now" group) and some in the DStv Basic and Starsat group; and

315.2.3 fibre is the "disruptor" and that "*cord cutting and shaving is likely to increase*".

315.3 Specifically in relation to the assertion that "price is in-elastic", which MultiChoice assumes is meant to be a suggestion that demand for Pay TV is inelastic with respect to price, there is no basis for this assertion in the Consumer Survey results for the very simple reason that no question was asked of respondents concerning their likely future, or actual historical, reactions to price changes.

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321 There is also no basis in the Consumer Survey results for the claim in the same paragraph of the Draft Findings that "when the price of premium subscription television increases drastically, consumers generally opt for the mid-range subscription options". Since there haven't been any drastic price increases for the DStv Premium bouquet, there cannot be any evidential basis for this claim. In any event, there cannot be any evidence for the claim in the Consumer Survey results as no question was asked of consumers regarding price changes, let alone "drastic" ones.

There is no support in ICASA's Consumer Survey for ICASA's claims regarding viewer preferences for live sport, linear television, TV sets and the conclusions ICASA seeks to draw from these claims

316 ICASA asserts that the "*high preference for linear television as a mode of audio-visual content consumption in the South African context limits the current ability of OTTs to be reasonable or credible substitutes*".[322] ICASA does not refer to any evidential basis for this claim, and it is not supported by ICASA's Consumer Survey. The Consumer Survey results indicate that 77% of surveyed subscribers to DStv basic-tier bouquets, 81% of surveyed subscribers to DStv mid-tier bouquets and 84% of surveyed subscribers to DStv Premium watch TV on an alternative device.

317 Further, with regard to use of specific alternative devices, the Consumer Survey results indicate that –[323]

317.1 55% of basic subscribers, 58% of mid-tier subscribers and 62% of premium subscribers watch TV on a desktop or laptop;

317.2 54% of basic subscribers, 61% of mid-tier subscribers and 59% of premium subscribers watch TV on a cellphone or smartphone;

317.3 16% of basic subscribers, 44% of mid-tier subscribers and 47% of premium subscribers watch TV on a tablet or iPad; and

317.4 4% of basic subscribers, 11% of mid-tier subscribers and 21% of premium subscribers watch TV on a games console or media player.

318 Further, a large proportion of surveyed subscribers watch TV on these devices at home. In particular:[324]

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322 Draft Findings, para 5.12.39.

323 Phase 4 Report, p. 36 – 37. These percentages have been derived by deducting the percentages of respondents that chose "none of the above" from 100%.

324 Phase 4 Report, p. 36 - 37.

318.1 58% of surveyed DStv basic-tier subscribers watch TV at home using their mobile data plan, 22% use an ADSL connection and 20% use a fibre connection;

318.2 60% of surveyed DStv mid-tier subscribers watch TV at home using their mobile data plan, 23% using an ADSL connection and 27% use a fibre connection; and

318.3 36% of surveyed DStv premium subscribers watch TV at home using their mobile data plan, 37% use an ADSL connection and 36% use a fibre connection.

319 Moreover, again, 45% of all respondents reported viewing or subscribing to at least one of Showmax, Netflix, black, DEOD and Amazon Prime and, of these, 48% responded that they do so on a PC/laptop, 43% indicated that they do so on a PC/laptop connected to a TV and another 8% indicated that they do so on another screen.[325] None of this supports ICASA's claim that subscribers have a high preference for watching linear electronic audio-visual content on TV sets.

320 In the Draft Findings, ICASA finds that there is a "*limit on the current ability of OTTs to be reasonable or credible substitutes*" due to what ICASA asserts is a "*significance of live sport content to premium Pay TV subscribers*" and high preferences for linear television.[326] There is nothing in ICASA's Consumer Survey that supports the asserted causal connection. OTT services can be and are reasonable and credible alternatives. This is supported by the significant proportions of surveyed consumers that do not view live sport as a "must have at all costs" and that are embracing non-linear viewing.

321 ICASA also asserts that "*a TV set is still the preferred mode of audio-visual consumption for South Africans*", referring again to the March 2018 Establishment Survey, which reports that 98% of South Africans prefer the TV set.[327] It is unclear why ICASA does also not refer here to ICASA's Consumer

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325 Phase 4 Report, p. 74.

326 Draft Findings, para 5.12.39.

327 Draft Findings, para 5.12.40.

Survey. As just explained, ICASA's Consumer Survey reports significant use of alternative devices by the survey respondents across all surveyed consumer groups (subscribers and non-subscribers) and across all surveyed income groups.

OTT services as a complement rather than a substitute for Pay TV services

322 ICASA accepts that some high-end consumers subscribe to OTT services only, as they do not see premium subscriptions as value for money and prefer on-demand viewing.[328] Despite this, ICASA also asserts that –

322.1 "*by and large, South African viewers tend to take up OTT services to complement rather than substitute Pay TV services*";[329]

322.2 "*to a large extent OTT services are more of complement than a substitute to traditional television broadcasting services*";[330] and

322.3 "*South African households are no different, also taking up OTT services to complement Pay TV services*".[331]

323 ICASA's basis for these assertions seems to be the claim that Consumer Survey respondents pointed to the lack of sport content on OTT services as a "key reason" that OTT services would not satisfy their needs.[332] However, ICASA's Consumer Survey did not ask respondents for reasons why they do not switch from their current subscription packages to OTT services. It only asked for their main reasons for not subscribing to Netflix in addition to their current subscription packages. It is therefore unclear on what basis the Draft Findings has reached its view that the lack of sport content on OTT services precludes OTT services from being a substitute and "satisfying" the needs of subscribers. In any event,

328 Draft Findings, para 5.12.37.
329 Draft Findings, para 6.5.57.
330 Draft Findings, para 5.13.1.
331 Draft Findings, para 5.13.4.
332 Draft Findings, para 5.13.4. Note that it is not clear whether ICASA considers this to be a key reason for consumers to not take up OTT services at all or to not take them up as a substitute for Pay TV services.

less than 1% of surveyed DStv Compact and Compact Plus subscribers responded that they would not subscribe to Netflix in addition to their current subscription package because of the lack of sport on Netflix.[333]

324 The Consumer Survey results regarding viewership patterns also reveal that sports content is not as widely viewed as other types of content for surveyed DStv Premium, Compact and Compact Plus subscribers.

324.1 Only 58% of surveyed subscribers to the DStv Compact and Compact Plus bouquets and 69% of surveyed subscribers to DStv Premium watch sports content. This compares with 76% and 84% that watch movies and 69% and 77% that watch series/drama/crime shows. Moreover, 65% and 59% watch news, 64% and 47% watch soap operas/Telenovelas, 64% and 62% watch comedy/sitcoms and 62% and 49% watch music programs.[334]

324.2 Surveyed subscribers to these bouquets also identified movies, series/drama and comedy/sitcoms as types of content they would like to get more of, more often than local or international sport content.[335] It is therefore far from clear that the absence of sports content is inhibiting the uptake of OTT services as a substitute for Pay TV services.

325 The Consumer Survey results are also consistent with MultiChoice's contention that OTT services are a substitute for certain forms of content in MultiChoice's higher priced bouquets that has facilitated cord-shaving in favour of MultiChoice's more basic bouquets. In particular, all types of surveyed consumers subscribe to OTT services, not just those that subscribe to the DStv Premium bouquet. Specifically:[336]

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[333] Phase 4 Report, p. 102 – 103. It appears that surveyed DStv Premium subscribers were not given the option of choosing "There is no sport on Netflix" when they were asked the same question (see p. 104).

[334] Phase 4 Report, p. 49. Movies and series/drama/crime shows also ranked higher than sport based on respondents' top 3 categories: see p. 53.

[335] Phase 4 Report, p. 85 – 86.

[336] Phase 4 Report, p. 19.

325.1 23.3% of surveyed consumers that watch FTA, but do not subscribe to a pay TV service, subscribe to an OTT service;

325.2 50.8% of surveyed subscribers to DStv EasyView, Access or Family subscribe to an OTT service;

325.3 59.6% of surveyed subscribers to DStv Compact and Compact Plus subscribe to an OTT service; and

325.4 54% of surveyed subscribers to DStv Premium subscribe to an OTT service.

326 This is consistent with the results of Pulse's observations from its desktop rèsearch and expert interviews. Pulse noted that there was evidence of cord cutting, particularly amongst millennials, driven by data affordability, increasing free WiFi locations, increasing incidence of smartphones and the growth of WhatsApp and Facebook. Pulse also noted that there was evidence of cord-shaving, primarily to replace higher tiers of Pay TV services with OTT services.[337]

<u>ICASA's consideration of "viewing patterns" has ignored the Consumer Survey results</u>

327 ICASA refers to BRC data on internet-enabled TV set penetration and the incidence of viewing of online video content in support of a conclusion that OTT is not a major threat to Pay TV.[338] It is unclear why ICASA did not refer here to the evidence on smart TV penetration and on the incidence of watching TV on online devices from the quantitative online Consumer Survey that ICASA itself commissioned. This survey evidence paints a very different picture, at least with respect to the respondents in the survey sample.

327.1 According to ICASA, BRC data puts internet-enabled TV set penetration in South Africa at 8%.[339] However, according to the Phase

337 Pulse 838 Phase2, Summary of Desk Research and Expert Interviews, p. 4.
338 Draft Findings, para 5.12.3.
339 Draft Findings, para 5.12.3.

4 Report, more than 50% of survey respondents had at least one smart TV, and even when limiting to just surveyed FTA respondents, close to 25% had at least one smart TV.[340] While the survey sample may not be representative of all actual and potential subscribers to Pay TV services, it is no less representative of actual and potential subscribers than the BRC sample, which is representative of the entire South African population (i.e. including many that are not actual or potential subscribers to Pay TV services).

327.2 According to ICASA, BRC data records that only 3% of the population watch online video content on a TV set.[341] However, according to the Phase 4 Report, when asked whether they or their family members ever watch TV on alternative devices (desktop/laptop, cellphone/smartphone, tablet/iPad or games console/media player) more than 66% of respondents indicated online video content consumption on alternative devices.[342] Even looking only at FTA respondents and only at the lowest income group, more than 36% and more than 31%, respectively, reported watching TV on alternative devices.[343] Among the surveyed DStv Premium subscribers, the incidence was almost 85%.[344] Moreover, out of the 1,002 survey respondents in total, 454 (i.e. 45%) reported that they view or subscribe to at least one of Showmax, Netflix, black, DEOD and Amazon Prime.[345] Of these, more than 82% also watch online content for free via YouTube.[346] The incidence of watching online content for free via YouTube is also likely to be high among those that do not view or

340 Phase 4 Report, p. 32 – 33.

341 Draft Findings, para 5.12.3.

342 Phase 4 Report, p. 34.

343 Phase 4 Report, p. 36 – 37 and 39.

344 Phase 4 Report, p. 36 – 37.

345 See quantitative consumer survey question 1b and Phase 4 Report, p. 74, which records the results of quantitative consumer survey question 20 and reveals that 454 respondents must have nominated at least one of these OTT services in response to question 1b (since question 20 was asked only of those that nominated one of these services in question 1b).

346 Phase 4 Report, p. 81

subscribe to at least one of those specific five subscription OTT services.

328 ICASA's conclusion in paragraph 5.12.3 that "*the claim that OTT distributers [sic] is a major threat to subscription TV is overstated*" is therefore not supported by its own Consumer Survey results.

ICASA'S CONSUMER SURVEY RESULTS ARE CONSISTENT WITH MULTICHOICE'S SUBMISSIONS

329 In its submissions to ICASA, MultiChoice has explained that it competes in a highly competitive and dynamic electronic audio-visual services market that includes all electronic audio-visual services without distinction by reference to content genre, price point or distribution technology or whether the service is linear or non-linear.[347] The Consumer Survey results are consistent with MultiChoice's submissions, both in relation to consumer preferences for content and services and in relation to the significance of OTT services as a constraint on traditional Pay TV services.

The Consumer Survey results are consistent with MultiChoice's submissions on consumer preferences for content and services

330 MultiChoice has previously explained to ICASA that the range of content that builds audiences for electronic audio-visual services is broad and there is no relevant distinction between content traditionally considered to be "premium" and other content.[348] In particular, consumers value a range of content, including local content[349] and children's content, and subscription decisions are a compromise among the content desires of family members. This is because the typical subscriber is a household, not an individual. Variety of content across a range of genres is therefore a key element of the attractiveness of a package,

[347] MultiChoice's 2017 submissions, para 270

[348] MultiChoice's 2017 submissions, para 627 - 654

[349] Local content is important for building audiences for electronic audio-visual services in SA, with local dramas and soap operas and local reality television formats being more popular than international content (MultiChoice's 2017 submissions, para 638)

with the choice of electronic audio-visual services subscribed to being driven by their ability to satisfy the various preferences and interests within the household.

331 The Consumer Survey results are consistent with MultiChoice's submissions on consumer preferences regarding content and services and drivers of subscription decisions, and that all electronic audio-visual services supplied in South Africa belong in a single relevant market.

332 First, the Consumer Survey results indicate that the type of content that the surveyed consumers watch and value is wide and is not limited to movies and sport content. In particular, the Consumer Survey results indicate that:

332.1 A substantial proportion of surveyed subscribers to MultiChoice's higher-priced bouquets identify series, drama or crime shows, news, soap operas/Telenovelas and lifestyle shows as among their most watched programs:

332.1.1 Of the surveyed subscribers to DStv Compact, Compact Plus and Premium, the proportion that identified series, drama or crime shows as one of their top three most watched genres (35% for Compact and Compact Plus and 44% for Premium) was substantially higher than the proportion that identified sport as one of their most watched genres (27% for Compact and Compact Plus and 35% for Premium);[350]

332.1.2 Of the surveyed subscribers to DStv Compact and Compact Plus, the proportion that identified soap operas/Telenovelas as one of their top three most watched genres (29%) was higher than the proportion that identified sport as one of their most watched genres (27%);[351] and

[350] Phase 4 Report, p. 53.
[351] Phase 4 Report, p. 53.

332.1.3 More than 20% of surveyed subscribers to DStv Compact and Compact Plus identified comedies/sitcoms or lifestyle shows as one of their three most watched genres.[352]

332.2 A substantial proportion of surveyed subscribers to all but the DStv Premium bouquet, which contains the widest range of sport and other content of all DStv bouquets, identified series or drama, reality shows, children's shows, documentaries, lifestyle programs, 24hr news channels, music channels, soap operas/Telenovelas and even wildlife programs as the type of content they would ideally like to get more of.[353]

332.3 Of the surveyed respondents that do not currently subscribe to a Pay TV service, over 24% would like access to more series and drama shows, 24 hour news channels, comedy/sitcoms, reality shows, children's shows, documentaries, soap operas/ Telenovelas and lifestyle programmes in addition to more movies and sport content.[354] This is consistent with the results of the consumer focus group discussions, which revealed that focus group consumers that only watch SABC or eTV would be interested in accessing a range of contents such as children's programmes, soccer, Mzansi, African documentaries, wildlife and reality shows at a price of R250 per month.[355]

333 The focus group discussions also revealed that, for families, high value is placed by parents on children's content, which satisfies demands of children for

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352 Phase 4 Report, p. 53.

353 See Phase 4 Report, p. 85-86. Of the surveyed subscribers to lower-priced DStv bouquets (EasyView, Access and Family), 43% indicated they would like more series or drama content and over 27% indicated they would like more reality shows, more comedy/sitcoms, more music channels and more children's shows. This compares to only 24% of surveyed subscribers to these bouquets that indicated they wanted access to more international sport content. Of the surveyed subscribers to DStv Compact and Compact Plus, 47% indicated they would like more series or drama content, over 37% indicated they would like more reality shows and children's content and over 30% indicated they would like more documentaries and lifestyle programmes. This compares to the 24% of surveyed subscribers to these bouquets that wanted more international or local sport content.

354 Phase 4 Report, p. 85 – 86.

355 Phase 3 Report, p. 16.

electronic audio-visual entertainment in the home and allows for parenting in absentia.

334 Second, the Consumer Survey results suggest that local content is more popular than international content for surveyed subscribers to lower-priced DStv bouquets and is also some of the most favoured content among surveyed subscribers to the highest priced DStv bouquets.

334.1 Of the surveyed subscribers to lower-priced DStv bouquets (EasyView, Access and Family), 57% indicated that they watched locally-produced programs most often and the proportion of these subscribers that indicated that they wanted access to more local sports content (38%) was higher than the proportion that wanted more international sport content (24%).[356]

334.2 Although a smaller proportion of surveyed subscribers to DStv Compact and Compact Plus (48%) and Premium (24%) indicated that they watched locally-produced programs most often, the results of the consumer focus groups indicated that local sport shows such as Laduma and local soap operas such as Generations are some of the most popular shows watched by surveyed Compact and Compact Plus subscribers and the 24 hour African news channel eNCA and other local content aired on Mzansi is popular among surveyed Premium subscribers.[357]

335 The value that subscribers attach to locally produced content was also recognised by Pulse in its summary of desktop research and interviews with experts. Pulse noted that a movement to local content is prevalent in the strategies of the main Pay TV providers.[358]

336 Third, even if some surveyed respondents have a strong preference for a particular content genre, the Consumer Survey results indicate that for surveyed

356 Phase 4 Report, p. 57 – 58.
357 Phase 3 Report, p. 13 - 14.
358 Pulse 838 Phase2, Summary of Desk Research and Expert Interviews, p. 4.

families, subscription decisions are a compromise, with the various needs of family members determinative of the choice of package.

336.1 Those that participated in the consumer focus group discussions indicated that for a family, package selection is a compromise among family members, that there is a social element to TV viewing in that it provides a focal point for bringing the family together, and that electronic audio-visual content enables parental control in absentia.[359]

336.2 Among the focus group subscribers to the DStv Compact and Compact Plus bouquets, children were considered to be the driver of the subscription decision.[360]

336.3 The quantitative Consumer Survey results are also consistent with MultiChoice's submission that the needs of different family members influence choice of subscription package.

336.3.1 Of all surveyed subscribers to lower-priced DStv bouquets (EasyView, Access and Family), 26% indicated that the main reason that they purchased that DStv package was because "*I can afford DStv and it benefits me and my family*" and 23% indicated that they purchase that package because "*My family insists on getting the DStv channels*".[361]

336.3.2 Of all surveyed subscribers to DStv Compact and Compact Plus, 30% indicated that the main reason that they purchased that DStv package was because "*It is affordable and it benefits me and my family*" and 22% indicated that they purchase that package because "*My family insists on getting the DStv Compact/Compact Plus package*". A further 19% of surveyed DStv Compact and Compact Plus subscribers

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359 Phase 3 Report, p. 13, 14, 22 and 24.
360 Phase 3 Report, p. 14 and 25.
361 Phase 4 Report, p. 96.

indicated that the main reason they purchased that package was so that "*My family members can watch online on a smartphone or tablet using the DStv Now App*" and 18% purchased that package so that "*Through XtraView my family members can watch different things at the same time*".[362]

336.3.3 Of all surveyed subscribers to DStv Premium, 25% indicated that the main reason they purchased that package was so that *"My family members can watch online on a smartphone or tablet using the DStv Now App*" and 20% purchased that package so that "*Through XtraView my family members can watch different things at the same time*".[363]

The Consumer Survey results are consistent with MultiChoice's submissions on the significance of OTT services

337 MultiChoice has previously explained to ICASA that the emergence of OTT services has brought massive change in the electronic audio-visual services sector and substantial disruption to traditional Pay TV broadcasting services. OTT take-up is significant and whereas in the past the vast majority of a household's electronic audio-visual consumption was in the form of linear channels viewed on a TV set, today large amounts of viewing time are devoted to linear and non-linear content viewed OTT on various devices (including smartphones, tablets and PCs) that offer greater convenience and customisation. As a result, the relevant retail market is platform neutral regarding distribution technologies, and includes OTT services together with traditional Pay TV services and FTA services.[364]

338 The Consumer Survey results are consistent with MultiChoice's submissions in relation to OTT services. In particular, it reveals that a large proportion of survey respondents – including large proportions of surveyed DStv subscribers – view or subscribe to OTT services, and that the emergence of these services is

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362 Phase 4 Report, p. 99.
363 Phase 4 Report, p. 103.
364 MultiChoice's 2017 submissions, para 220.2

changing the way that many consumers view electronic audio-visual content. In particular, the Consumer Survey results reveal that:

338.1 Over 77% of all surveyed DStv subscribers watch TV on an alternative device,[365] and of these, a large proportion watch TV on alternative devices *at home*.[366]

338.2 Around 45% of all survey respondents view or subscribe to one of the following OTT services: Showmax (separately to any DStv subscription), Netflix, black, DEOD or Amazon Prime. Of these, Netflix is the most popular paid-for service, with *over 32% of all respondents* viewing or subscribing to this OTT service.[367] While these percentages are large, the prevalence of OTT viewing among the survey respondents is much higher than these figures suggest, since the survey question asked only about viewing or subscriptions to a limited set of all OTT services. Had the question asked about viewing or subscriptions to OTT services in general, the percentages would likely have been much higher. In particular, viewing of free OTT content such as YouTube was not included in the list of OTT services that survey respondents were offered.[368]

338.3 Viewing or subscriptions to OTT services is common for all types of DStv subscribers, with 51% of surveyed DStv Basic subscribers, 60%

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365 Phase 4 Report, p. 36 – 37. 77% of surveyed subscribers to MultiChoice's EasyView, Access or Family bouquets watch TV on an alternative device such as a desktop or laptop, cellphone or smartphone, tablet, iPad, games console or other media player. 81% of surveyed subscribers to MultiChoice's Compact and Compact Plus bouquets and 84% of surveyed subscribers to MultiChoice's Premium bouquet watch TV on one or more of these alternative devices.

366 See Phase 4 Report, p. 37. The bulk of surveyed DStv subscribers that watch TV on an alternative device do so at home using their mobile data plan (58% of 'Basic' subscribers, 60% of 'Mid-tier' subscribers and 36% of 'Premium' subscribers). A significant proportion also watch at home using an ADSL line (22% of 'Basic' subscribers, 23% of 'Mid-tier' subscribers and 37% of 'Premium' subscribers) or fibre connection (20% of 'Basic' subscribers, 26% of 'Mid-tier' subscribers and 36% of 'Premium' subscribers).

367 Phase 4 Report, p. 19.

368 The survey does reveal that more than 82% of survey respondents that view or subscribe to Showmax, Netflix, black, DEOD or Amazon Prime also watch content for free via YouTube: Phase 4 Report, p. 81. It is therefore also likely that a large proportion of survey respondents that do not view of subscribe to those subscription-based OTT services watch content for free via YouTube.

of DStv mid-tier subscribers and 54% of surveyed DStv Premium subscribers viewing or subscribing to one or more of the above-mentioned OTT services.[369] Further, around 25% of surveyed FTA viewers also subscribe to an OTT service.[370] This suggests that OTT services are attractive to and used by all types of consumers and are not services that are alternatives only for consumers with high incomes or only for consumers that subscribe to higher-tier Pay TV services.

338.4 The ability to watch OTT services on alternative devices *at home* is one of the main factors cited by some surveyed DStv subscribers for subscribing to higher-priced bouquets. As noted above, of the surveyed subscribers to DStv Compact and Compact Plus, 19% indicated that the *main reason* they purchased that package was so that "*My family members can watch online on a smartphone or tablet using the DStv Now App*" and 18% purchased that package so that "*Through XtraView my family members can watch different things at the same time*".[371] These percentages were higher for surveyed DStv Premium subscribers, at 25% and 20% respectively.[372] Further, the main reason cited by 40% of surveyed DStv subscribers for subscribing to an online service in addition to their DStv subscription was that "*I can watch anywhere on my smartphone or tablet*".[373]

339 The results of the consumer focus group discussions reveal that the adoption of OTT services and the willingness of consumers in the focus groups to use alternative devices to watch TV has led to cord shaving. Participants in those focus groups report cord shaving from Premium to Compact and from Premium and Compact to DStv basic bouquets and Starsat.[374] Cord cutting is also a

369 Phase 4 Report, p. 19.
370 Phase 4 Report, p. 19.
371 Phase 4 Report, p. 99.
372 Phase 4 Report, p. 103.
373 Phase 4 Report, p. 108.
374 Phase 3 Report, p. 16 and 18.

consideration among focus group subscribers to Dstv Premium.[375] This is consistent with Pulse's observation based on desktop research and expert interviews that there is evidence of cord cutting (driven by data affordability, increasing free WiFi locations, increasing incidence of smartphones and the growth of whatsapp and facebook) as well as cord shaving (primarily as a result of OTT being used to top up the pay TV package).[376] Overall, Pulse considered that cord cutting and cord shaving is likely to increase as a result of the rollout of the fibre network.[377]

375 Phase 3 Report, p. 14.

376 Phase 2 Report, Summary of Desk Research and Expert Interviews, p. 4.

377 Phase 3 Report, p. 23.

PART C: MARKET DEFINITION

INTRODUCTION

340 As MultiChoice has previously submitted to ICASA, it competes in a highly competitive and dynamic electronic audio-visual services market that includes linear and non-linear services across all distribution technologies (including OTT). It also includes all electronic audio-visual services (free as well as paid-for) without distinction by content genre or price point.

341 MultiChoice's 2017 submissions highlighted three fundamental features of the South African electronic audio-visual sector, each with significance for the relevant markets for ICASA's assessment of the effectiveness of competition in the sector.

341.1 First, the rapid roll-out of broadband infrastructure and connected smart devices, together with changing consumption patterns towards non-linear and more varied content has led to the emergence and rapid growth of OTT services that compete with traditional Pay TV and FTA services and are fundamentally challenging and constraining traditional Pay TV broadcasting business models. These OTT services are firmly within the relevant retail market for ICASA's inquiry, not only on the basis of established market definition principles, but also as a forward looking assessment of the effectiveness of competition cannot be conducted without appreciating the significance of the OTT constraint.

341.2 Second, FTA TV in SA broadcasts large amounts of popular sport as well as compelling local dramas and soap operas that are particularly popular in SA due to preferences for content reflecting local languages and cultures. Together with OOH viewing options and free OTT services, FTA TV offers marginal subscribers (i.e. those least wedded to Pay TV services and prone to cancelling subscriptions) a compelling alternative to Pay TV services. Again both established market definition principles and a sound assessment of the effectiveness of competition requires that the relevant retail market include free as well as paid-for electronic audio-visual services.

341.3 Third, seismic shifts have occurred in recent years in relation to electronic audio-visual content. The major Hollywood studios are now less important as other studios and production houses have muscled in, including Netflix, with Oscar-winning movies such as "Roma". At the same time, movies are no longer seen as the so-called "drivers" for subscriptions to electronic audio-visual services that they once were as there has been a proliferation of highly valued series, documentary and reality content developed by and for OTT services (examples being "Stranger Things", "Narcos", "House of Cards", "Orange is the New Black", "Transparent", "Queer Eye" and "Losers"). Moreover, local content (drama and reality series) is recognised as important for building audiences for electronic audio-visual services in SA and is highly sought after by South African broadcasters. SABC and e.tv attract huge audiences through their local content and the Viu OTT service in SA is built largely on local content from SABC and e.tv. Demand for local content is also driving investment in local content by global OTT providers such as Netflix. This is demonstrated by Netflix's investment in local original South African content including "Shadow", "Queen Sono" and "Blood and Water". Similar trends are appearing for sport: new competitions are developing (e.g. Twenty-20 cricket competitions, such as the Mzansi Super League and e-sport events). As a consequence, the range of content that can be used to build audiences for electronic audio-visual services is much broader than it used to be. Relevant content markets are therefore equally broad: for the purposes of defining relevant markets there is no relevant distinction between content traditionally considered to be "premium" and other content, and there is also no relevant distinction by genre.

342 As MultiChoice has previously explained, the overall effect of these constraints on Pay TV services can be seen in the significant falls in quality-adjusted prices for DStv bouquets over recent years. While bouquet prices in real (inflation

adjusted) terms have remained largely unchanged or have fallen, there have been significant increases in the number of channels included within the bouquets and in value-added services, such as the ability to watch content on any platform at any time as well as music streaming. There are costs associated with providing these value-added services to consumers. At the same time, MultiChoice's investment in content has increased significantly. As such, the quality-adjusted value for subscribers of the DStv bouquets has increased substantially. This is the direct effect of the competitive constraints that MultiChoice, as a Pay TV broadcaster, faces from other Pay TV services, OTT services and the FTA developments described in the 2017 submissions.

343 Notwithstanding these factors that call for a single retail market, ICASA's Draft Findings defines four separate retail markets for, respectively: (i) the distribution of analogue FTA TV services; (ii) basic-tier Pay TV and satellite-based FTA TV services; (iii) "premium" Pay TV services; and (iv) VOD services.[378] It also defines separate upstream wholesale markets for the supply and acquisition of "premium" content and "non-premium" content. These narrow market delineations are the result of flawed methodological approaches to market definition and flawed analysis, and are detached from the reality of the present-day dynamics of competition in the provision of electronic audio-visual services in SA. ICASA's analysis of relevant markets also lacks evidential basis and largely ignores the evidence presented by MultiChoice during the course of the inquiry.

344 According to ICASA, market definition has far reaching implications because the rest of ICASA's analysis "*hinges on a properly defined market*".[379] ICASA also expresses a view that "*market definition allows the analysis to be confined to the relevant goods or services that pose a competitive constraint on each other within a defined geographical area*".[380]

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378 Draft Findings, para 5.13.20.
379 Draft Findings, para 5.3.1.
380 Draft Findings, para 5.1.2.

345 Even with the best effort and intentions, narrowly defined markets are prone to not capture all significant competitive constraints and effects of relevance. It is not sound to define a market narrowly and at the same time adopt a position that the competitive effects assessment analysis "hinges on" the defined market or that "*market definition allows the analysis to be confined to the relevant goods or services that pose a competitive constraint on each other within a defined geographical area*". If markets are defined too narrowly, there are likely to be errors in the assessment of the effectiveness of competition. Accordingly, where, markets have been defined narrowly, as ICASA has done, the better approach is to recognise that constraints that fall outside of the defined markets may yet be significant and need to be given careful consideration. Instead, ICASA reflects a narrow assessment of the effectiveness of competition in a manner that largely ignores evidence of constraints that are outside of the arbitrarily narrow markets defined by ICASA.

346 This Part C begins by explaining the methodological and analytical flaws in ICASA's approach to market definition. The same flaws appeared in the Discussion Document and were identified in MultiChoice's 2017 submissions. ICASA appears not to have advanced beyond the Discussion Document in these respects.

347 This Part C then deals in turn with ICASA's analysis in its Draft Findings of "premium" content and services, whether FTA services belong within the same relevant retail market as Pay TV services, whether OTT services including non-linear VOD services belong within the same relevant retail market as Pay TV services, and the relevant wholesale market. MultiChoice explains that ICASA has failed to define "premium" content in any coherent way or identify the characteristics that delineate "premium" content from other content, and with respect to FTA services, OTT services and wholesale alternatives, flawed methodology and analysis leads ICASA to overly narrow and artificial market delineations.

348 The final section of this Part C details the lack of evidential support in the Draft Findings for various premises on which ICASA's market definitions appear to be based.

ICASA'S ANALYSIS OF RELEVANT MARKETS IS METHODOLOGICALLY AND ANALYTICALLY FLAWED

349 Part C of MultiChoice's 2017 submissions set out in some detail the well-established methodological principles of market definition that are founded in the economic literature and applied by competition authorities and regulators around the world.

350 Fundamental to this is that the relevant market definition task is to identify close substitutes and competitive constraints for a focal product and to include these within the relevant market. To identify close substitutes and the boundaries of relevant markets, the application of the HMT, which is often referred to as the "SSNIP" test, has become standard practice.[381] The focus on close constraints and whether a hypothetical monopolist of the focal product would be constrained from profitably imposing a SSNIP has a number of well-understood implications, including that:

350.1 constraints should be considered <u>in aggregate</u>, rather than one-by-one: the basic idea behind this is that the profitability of a SSNIP is determined by the total loss of customers following a price increase regardless of where the customers go;

350.2 the relevant responses are those of <u>marginal</u> consumers, and the relevant question is whether <u>marginal</u> consumers would switch away from the focal product in response to a SSNIP <u>in sufficient numbers</u> as to render the SSNIP unprofitable;

[381] See paras 233 & 234 of MultiChoice's 2017 submissions for a description of the HMT test.

350.3 differences in product characteristics, prices and business models do not necessarily imply that products belong in separate markets. Such differences may be taken into account, but the ultimate question that must be asked and answered is the HMT question: would there be enough substitution away from the focal product, in aggregate, in response to a SSNIP, to render the SSNIP unprofitable for a hypothetical monopolist. Significant substitution may occur to differentiated products notwithstanding the differences;

350.4 products that contribute significantly to aggregate constraints indirectly, through a chain of substitution, should be included within the relevant market;

350.5 markets should not be prejudged by suspicions of market power; and

350.6 markets should be judged on the basis of a rigorous assessment of the factual circumstances of the sector in the country in question and at the time of the inquiry, and not be overly influenced by historic assessments and precedents from authorities in other countries and at other times, because the circumstances in those other countries and at other times may be significantly different.

351 As was the case in the Discussion Document, ICASA has in its Draft Findings largely ignored and failed to apply these principles (despite in some instances appearing to accept them). In particular:

351.1 ICASA erroneously considers alternatives to Pay TV services (terrestrial FTA, satellite FTA and VOD) one-by-one, instead of considering the aggregate loss of customers to the various alternatives;

351.2 ICASA frequently considers responses of consumers that it refers to generically (e.g. "a" consumer) and "typical" consumers, instead of marginal consumers, and ICASA consistently fails to ask the fundamental market definition question of whether a sufficient number of marginal consumers would be likely to switch away from a hypothetical monopolist in response to a SSNIP in relation to the focal product so as to make that SSNIP unprofitable;

351.3 Much of the analysis in the Draft Findings is of arbitrary and selective differences in product characteristics, prices and business models without demonstrating that those differences translate into limited constraints;

351.4 ICASA misunderstands and misapplies the concept of chains of substitution and does not ultimately engage with MultiChoice's 2017 submissions on chains of substitution;

351.5 ICASA appears at times to prejudge relevant markets with references to MultiChoice's "control of the market", behaviour, prices and profits – indeed, ICASA's determination to draw conclusions against MultiChoice as opposed to on the basis of a holistic approach to analysis and evaluation of evidence is apparent; and

351.6 ICASA places some reliance on historical international experience and precedents without objectively demonstrating, with evidence, the applicability of those precedents to the South African context at the current time.

352 The following sub-sections elaborate.

ICASA has failed to assess constraints in aggregate

353 The HMT calls for an expansion of the relevant market beyond the focal product if a hypothetical monopolist would be unable profitably to impose a SSNIP due to substitution to other products. Importantly, the HMT calls for an expansion of the relevant market on the basis of aggregate substitution to other products in response to a SSNIP. As MultiChoice has previously explained,[382] where competition takes place between differentiated products, a "one-by-one" assessment of the constraints – in which each is considered on its own as a

[382] MultiChoice's 2017 submissions, para 236-238.

potential constraint on the focal product – will fail to capture the combined effect of the constraints and risks erroneously defining markets too narrowly. It will also fail to properly contextualise the dynamics of competition in the relevant markets.

354 In its Draft Findings, however, ICASA analyses separately the constraints on Pay TV from terrestrial FTA TV, satellite FTA TV and OTT services, and at no point does ICASA consider the combined effect of those constraints. This is despite MultiChoice raising the importance of considering constraints in aggregate in its 2017 submissions. ICASA does not engage in the Draft Findings with MultiChoice's 2017 submissions in this regard, nor explain why constraints should be considered in the siloed fashion in which they are considered in the Draft Findings.

355 For example, in paragraph 5.10.2 of the Draft Findings, ICASA acknowledges that the alternatives available to subscribers that are faced with a SSNIP in relation to Pay TV include FTA services and VOD services, however in paragraph 5.10.3 of the Draft Findings states that ICASA starts its analysis by considering "*whether enough subscribers faced with a 5-10% price increase in subscription fees would switch <u>to a free-to-air television service</u> to render such an increase unprofitable to the hypothetical monopolist*" (emphasis added). As just explained, the correct approach is to consider whether enough subscribers faced with a SSNIP would switch <u>in aggregate to other products</u> to render the SSNIP unprofitable.

356 Similarly, in paragraph 5.12.2 of the Draft Findings, ICASA acknowledges that OTT services "*impact on viewing patterns and behaviour, and have implications for traditional television broadcasting, including subscription television*", but concludes that "*there are several factors that mitigate against OTTs constituting a strong constraint on subscription television services in South Africa*". The HMT, however, calls for a holistic assessment of all constraints together. MultiChoice does not agree that OTT services do not represent a "strong" constraint. But in any event, a finding that OTT services do not constitute a "strong constraint" in themselves (whether that finding is right or wrong) does not allow for constraints from OTT services to be dismissed as a factor in the HMT, as they are a component of the aggregate constraints on Pay TV.

357 Two other paragraphs in the Draft Findings further illustrate the problems with ICASA's "one by one" assessment of constraints.

357.1 In paragraph 5.10.4, ICASA states that "*[a] subscriber to a basic-tier bouquet faced with a SSNIP can only churn out of the service*". In fact, a subscriber to a basic-tier bouquet faced with a SSNIP in relation to basic-tier bouquets may do one of many things, including switching "out of the service" to FTA TV (terrestrial or satellite), OTT services and/or OOH viewing, or switching to a mid-tier or higher-tier bouquet (i.e. switching to another Pay TV service) that offers a relatively better price/quality value proposition following the SSNIP. Constraints of all kinds need to be considered and factored into the aggregate assessment that is called for by the HMT. This demonstrates the simplicity with which ICASA has approached what are in fact very complex and dynamic considerations.

357.2 In paragraph 5.12.11, ICASA considers the advent of piracy and comes to the conclusion that "*since there are various efforts to stem the tide of piracy*" it "*does not offer a strong competitive constraint on subscription television*". As explained below, ICASA does not support these statements with evidence or analysis.[383] Moreover, the efforts underway to address piracy do not constitute a basis to dismiss piracy as a constraint. In any event, even if piracy on its own does not represent a strong constraint, it remains to be included as a factor in the HMT assessment, which is an assessment of whether the aggregate of constraints on a hypothetical monopolist of Pay TV services would be able profitably to impose a SSNIP without too much substitution to the range of alternatives (including FTA services, OOH viewing of Pay TV services, legal free and paid-for OTT services, and pirated OTT services).

358 It is MultiChoice's experience and submission to ICASA that Pay TV services in SA are constrained by a "pincer" movement of on-demand OTT alternatives and

[383] See para 482 below.

FTA TV. Both OTT and FTA TV are alternatives for all types of subscribers (from subscribers to the highest-tier subscription offers to subscribers to the lowest-tier offers).[384] These operate as aggregate constraints, both directly and indirectly via chains of substitution,[385] on all Pay TV products, from the highest priced to the lowest priced, precluding a hypothetical monopolist of any Pay TV service (high-tier, mid-tier or low-tier) from profitability increasing quality adjusted prices.

The Draft Findings has failed to focus on marginal consumers and the HMT

359 The question of whether a hypothetical monopolist can profitably impose a SSNIP depends on how many sales would be lost to the various constraints. As MultiChoice explained in its 2017 submissions[386] this does not require that the majority of, or all, consumers of the focal product would switch to alternatives, nor that "average" or "typical" consumers would switch. It requires merely that a sufficient number would switch so as to render the SSNIP unprofitable. It follows that what matters are the responses to the price rise of marginal consumers (those who value the service at a small amount more than the current price and hence might consider switching in response to a SSNIP) and the number of marginal consumers that would switch.

360 As MultiChoice has previously submitted,[387] the need to focus on reactions of marginal consumers and to assess their significance to the hypothetical monopolist means that caution is required when interpreting results of consumer surveys that reflect the spectrum of consumers including infra-marginal as well as marginal consumers. As Bishop and Walker have observed: "*[t]he existence of even a large group of consumers who would not switch in response to a*

384 For example, Star Times and Viu both offer OTT services that are attractive and affordable for all types of subscribers. MultiChoice also understands that the SABC is developing its own OTT offering. At the same time, FTA TV (together with OOH viewing) is an alternative for all types of subscribers.

385 For more on this, see paras 379-384.3 below.

386 MultiChoice's 2017 submissions, paras 239-240.

387 MultiChoice's 2017 submissions, para 241.

relative price increase is not by itself sufficient to conclude that the relevant market should be defined narrowly."[388]

361 Consistent with this, ICASA correctly states that "*[t]he test that has to be met in defining a relevant market is whether enough consumers would consider switching*" (emphasis added)[389] when faced with a SSNIP.[390] This requires a focus on marginal consumers, the alternatives available to them, and the number of them that would switch in response to a SSNIP.

362 ICASA should be aware that, in its Draft Findings, it incorrectly characterises MultiChoice as contending that "*the analysis should be limited to marginal consumers without consideration of whether enough of such marginal consumers are likely to switch to render the SSNIP unprofitable*" (emphasis added). ICASA provides no reference to any passage in MultiChoice's 2017 submissions to this effect. The alleged contention is also plainly inconsistent with MultiChoice's 2017 submissions. Paragraph 239 of Part C of the 2017 submissions in response to the DD stated:

> *"The question of whether a hypothetical monopolist can profitably increase prices by a small but significant and non-transitory amount depends on how many sales would then be lost due to the various constraints. This does not require that the majority of consumers of the focal product would switch to alternatives. It requires merely that a sufficient number would switch so as to render the price increase unprofitable overall. Thus what matters are the responses to the price rise of marginal consumers (those who value the service at a small amount more than the current price and hence might consider switching), not the behaviour of infra-marginal consumers who value the focal product highly and would not considering switching, and the significance of marginal consumers for the hypothetical monopolist's profits."*
>
> (emphasis added)

388 Bishop and Walker, p134.

389 Draft Findings, para 5.3.6.

390 The Draft Findings reiterates this point in para 5.3.8.

363 Despite appearing to accept and agree with MultiChoice that the relevant HMT question is whether enough consumers would consider switching in response to a SSNIP, when it comes to assessing relevant market boundaries, ICASA does not ultimately focus on whether enough marginal consumers would consider switching. Instead, ICASA focuses on undefined average or "typical" consumers and the attitudes of consumers that are likely to be "infra-marginal" consumers.

364 For example, when describing its approach to assessing the SSNIP test in relation to FTA services, ICASA states that "*the Authority takes into account the behaviour of a typical subscriber*".[391] ICASA does not explain the characteristics of a "typical" subscriber. Given that subscribers vary significantly along multiple dimensions (including preferences for electronic audio-visual content, family size and incomes), MultiChoice submits that there is no such thing as a "typical" subscriber. In any event, MultiChoice submits that ICASA's focus should be on *marginal* subscribers rather than "typical" subscribers.

365 More generally, throughout the remainder of its market definition analysis, ICASA describes consumer behaviour in a general sense, rather than focusing on the question of how many marginal consumers would be likely to switch away from subscription television services to other products in response to a SSNIP and whether that would be a sufficient number to render the SSNIP unprofitable.

366 ICASA's lack of focus on marginal consumers is particularly apparent in those parts of the Draft Findings that seek to rely on the Consumer Survey results. In particular, when interpreting the Consumer Survey results, ICASA ignores Bishop and Walker's note of caution and emphasises the reported attitudes of consumers in the survey that are likely to be "infra-marginal" consumers, rather than the attitudes of consumers that would be most inclined to switch and the proportion of consumers in that category.

366.1 For example, in paragraph 5.10.6 of the Draft Findings, ICASA asserts that its Consumer Survey found that a better quality TV signal is the strongest reason to purchase the Basic DStv package over the FTA

[391] Draft Findings, para 5.10.3.

offering, and in paragraph 5.10.7, ICASA draws on this to suggest that subscribers to Pay TV services are "*highly unlikely to substitute backwards from subscription services to free-to-air services*". However, just because some (or even many) consumers consider signal quality to be a reason to purchase Pay TV services tells ICASA nothing about the proportion of subscribers that would switch to FTA services in response to a SSNIP of 5-10% in Pay TV services (i.e. the "marginal" consumers).

366.2 Another example is in paragraph 5.12.10 of the Draft Findings, where ICASA claims that its Consumer Survey "*revealed that access to sport and latest movie channels is a key driver for premium subscription television uptake, (20% of the respondents cited sport as a key driver while 12% cited latest movies)*". ICASA's purpose in making this claim appears to be to suggest that a lack of "sport" and "latest movie channels" on OTT services (which is not actually the case) precludes OTT services from acting as a close constraint on "premium" Pay TV services. However, even if OTT services lacked "sport" and "latest movie channels", the relevant question is not whether some subscribers view "sport" and "latest movie channels" as "key drivers" of their subscription decisions, but rather it is the proportion of subscribers that do not and that would consider OTT services as good alternatives if there were to be a SSNIP in relation to Pay TV services.

366.3 A further example is in paragraph 5.12.17, where ICASA asserts that its Consumer Survey "*revealed that the cost of data and access to high speed internet were limiting the ability of viewers to migrate to the OTT offerings*". As explained earlier,[392] in fact only a minority of surveyed DStv subscribers chose these options when asked why they do not subscribe also to Netflix. This leaves the majority of DStv subscribers unrestricted by the cost of data and access to high speed internet. It is

392 Refer to Part B of these submissions.

from this latter group of subscribers that the marginal subscribers will come.

366.4 Unfortunately, ICASA's Consumer Survey did not ask any questions that can help ICASA understand the proportion of subscribers that would switch in response to a 5-10% price increase (i.e. the proportion of subscribers that are "marginal").

366.5 ICASA's Consumer Survey and ICASA's reliance on it is therefore symptomatic ICASA's more general failure to focus on marginal consumers and the SSNIP test question that is at the core of modern market definition analysis.

367 In paragraph 5.3.7 of the Draft Findings, ICASA asserts that it is "*improper to ignore what are called 'core', 'committed' or 'infra-marginal' customers*" and that "*[t]here are instances where such core customers can be regarded as central to market definition*".

367.1 It is unclear what ICASA means by this, why and how "core", "committed" or "infra-marginal" consumers should bear on market definition, and what instances ICASA is referring to in the Draft Findings.[393]

367.2 This assertion is in plain contradiction of ICASA's earlier statement in the Draft Findings that "*[t]he test that has to be met in defining a relevant market is whether <u>enough consumers would consider switching</u>*" (emphasis added)[394] when faced with a SSNIP.

367.3 It is also in contradiction of well-established market definition practice. As MultiChoice explained in its 2017 submissions,[395] to focus on average consumer behaviour rather than marginal consumer behaviour is known as the "toothless fallacy", after the *United Brands*

393 The Draft Findings provides no elaboration, nor any reference to academic or other literature in support.

394 Draft Findings, para 5.3.6 and see also para 5.3.8.

395 MultiChoice's 2017 submissions, paras 239-241.

decision. Bishop and Walker have explained the toothless fallacy in the following terms:

> *"In this decision, the Commission argued that bananas defined a separate relevant market because the very young and the very old (i.e. those without teeth) did not consider other fruit a suitable substitute for bananas. However, the fact that there is a captive group of consumers for whom there are not substitute products available is not enough to define the relevant market. The important question in United Brands was not "will the toothless switch to other fruit in response to a rise in the price of bananas?", but "will enough consumers switch to other fruit in response to a rise in the price of bananas to make that price rise unprofitable?"*[396]

368 MultiChoice maintains that a focus on whether enough consumers would consider switching in response to a SSNIP requires a focus on marginal consumers, not infra-marginal consumers who value the focal product more and for whom a greater price increase would be required before they would be likely to switch. However, in the Draft Findings, ICASA consistently fails to apply a "marginal consumer" focus in its market definition analysis and therefore fails properly to apply the SSNIP test.

ICASA emphasises differences in product characteristics, prices and business models at the expense of the HMT

369 The HMT calls for a focus on the constraints on a hypothetical monopolist of the focal product and whether these are, in aggregate, sufficient to preclude a profitable SSNIP. As MultiChoice has previously submitted, products do not have to be identical or even similar in characteristics, prices or business models to be included in the same market: products that differ in each or every one of

396 Bishop and Walker, p. 134-135.

these respects can still be important constraints on the focal product of a hypothetical monopolist.[397]

370 This is not to say that differences between the focal product and another product (in terms of characteristics, prices, business models or in other respects) are not relevant matters for consideration. Such differences may be factors that imply limited substitutability and constraint. However, they also may not. Therefore, while they may be observed, they should not play a determinative role in market definition. The determinative market definition question is whether a hypothetical monopolist of the focal product could profitably impose a SSNIP without being constrained by other products: this may include products that differ significantly in characteristics (yet are substitutable in function), products that are cheaper or more expensive (where the price differential may reflect a difference in quality levels), and products produced under markedly different business models (e.g. a subscription model versus an advertising model).

371 In its Draft Findings, ICASA at times appears to appreciate that the HMT question of close constraints is the ultimate question that must be assessed, and that the focal product may be closely constrained despite product, price and business model differences. For example, ICASA acknowledges that "*products with very different characteristics may be close substitutes if, from a customer's point of view, they have a very similar use*".[398] However, on other occasions ICASA appears not to appreciate this.

371.1 For example, ICASA appears not to have appreciated the point when it has been made in previous submissions by MultiChoice:

371.1.1 In paragraph 5.3.22 of the Draft Findings, ICASA mischaracterises MultiChoice's contention, which is that a focus on product characteristics and other factors at the

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397 MultiChoice's 2017 submissions, paras 242-251. Indeed, competition through differentiation can be an intense form of competition, potentially more valuable to consumers than competition based on imitation. See also UK Office of Fair Trading, *Market Definition: Understanding Competition Law*, 2004, para 3.5.

398 Draft Findings, para 5.3.17.

expense of an economic application of the SSNIP test relies on value judgment and is impressionistic.

371.1.2 In paragraph 5.3.24 of the Draft Findings, ICASA suggests that MultiChoice has submitted that consideration of product characteristics and other factors must be "excluded" from the analysis. This has never been MultiChoice's contention. In fact, MultiChoice contended:

> *"While differences in product characteristics may affect the strength of constraint a product represents, this should not be assumed based on differences in characteristics alone. Ultimately it is an empirical question whether a product, individually or collectively with other constraints, is sufficient to constrain a hypothetical monopolist of the focal product from profitably implementing a SSNIP, and this does not necessarily correspond closely with product characteristics"*.[399]

371.2 In two separate places in the Draft Findings, ICASA asserts that market definition can be conducted by analysing "*product characteristics, price comparisons, or business models, in addition to the SSNIP test*" (emphasis added).[400] This demonstrates a misunderstanding of the nature of the HMT and its SSNIP test question and the role of analysis of product characteristics, price differences and business model differences in market definition. While product differences, price differences or business model differences may have some bearing on the closeness of substitutability and strength of competitive constraint that one product imposes on the focal product, this falls to be considered as part of the SSNIP test assessment, not in addition to it.

399 MultiChoice's 2017 submissions, para 243.

400 Draft Findings, paras 5.3.4 and 5.3.25.

371.3 Similarly, ICASA asserts that "*it is an established approach in competition economics that following the application of the intuitive SSNIP test the analysis often proceeds to consider evidence of substitution*"[401] (emphasis added). This is simply not correct. The established approach to market definition in economics and competition authority practice around the world is to consider evidence of substitution and closeness of constraints within the framework of the SSNIP test. Rather than sequential stages of analysis, consideration of evidence of substitution and of constraints on a hypothetical monopolist of the focal product should take place as part of the SSNIP test analysis.

372 In support of an approach that focuses on product, price and business model differences, ICASA seeks to rely on the US Supreme Court's *Brown Shoe* decision[402] from 1962 and the "practical indicia" set out in that decision. However, *Brown Shoe* is one of the most criticised decisions in US antitrust jurisprudence, not only for its prohibition of a merger on the basis of a concern that the merged entity would become more efficient than its competitors, and the Supreme Court's indication of a willingness to block a merger even if the merged entity were to have a market share of only 5%, but also and in particular for its market definition "practical indicia".[403] Apart from "*customer sensitivity to price changes*" (which corresponds to price elasticities that are indeed central to the substitutability question at the heart of the market definition exercise and the HMT), each of the other *Brown Shoe* indicia lack economic motivation and connection to the now well-established HMT and its SSNIP test question.

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401 Draft Findings, para 5.3.14.

402 Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

403 See, for example: Bryce L. Jones, (1963), "New Thrust of the Antimerger Act: The Brown Shoe Decision," 38(3) *Notre Dame Law Review*, 229-243; R. Posner (1975), "Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions," 75 *Columbia Law Review* 282 at 301-311; R. Posner (1976), *Antitrust Law*, 100-105 and 129-130; R. Bork (1978), *The Antitrust Paradox*, 200-208 and 210-216; L. Kaplow (1987), "Antitrust, Law and Economics, and the Courts," 50(4) *Law and Contemporary Problems*, 181-216 at 185; and Herbert J. Hovenkamp (2012), Markets in Merger Analysis, Faculty Scholarship at Penn Law, 1895.

373 As MultiChoice has explained, the HMT is concerned primarily with whether products are close substitutes. How the "industry or public" refer to the markets, differences in characteristics of products, the uniqueness or otherwise of production facilities and the existence or otherwise of distinct prices are all only relevant to the extent that they may bear on the substitutability question at the core of the HMT and the market definition exercise. It is possible that products referred to by industry players or in public as in separate "markets", and products that differ in their characteristics, prices, business models or production facilities, may nonetheless be close substitutes for the focal product on either the demand side or the supply side, in the economic sense that is tested by the HMT. ICASA itself recognises this in the Draft Findings,[404] and so it is a puzzle why ICASA at the same time appears to defend reliance on such "indicia".

374 It follows that while the "practical indicia" may have some bearing on the substitutability question and the HMT, it is the HMT that must ultimately be examined. Simple observations regarding how industry players refer to the products and differences between the products are not sufficient, and are prone to result in markets defined on the basis of impressionistic value judgments. The analysis must always be drawn back to the question of substitutability and whether a hypothetical monopolist of the focal product would be able profitably to impose a SSNIP. As MultiChoice explains below, ICASA's analysis of FTA and OTT services places excessive emphasis on differences between those services and Pay TV services, at the expense of a careful consideration of the HMT

375 In further defence of its "differences in product characteristics" approach, ICASA seeks to rely on the Competition Tribunal decision in *Massmart v Moresport*.[405] However, MultiChoice submits that the Competition Tribunal's decision in that case – in particular, the passage from that decision that ICASA quotes in the Draft Findings – confirms MultiChoice's consistent submissions during the

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[404] Draft Findings, para 5.3.17: "products with very different characteristics may be close substitutes if, from a customer's point of view, they have a very similar use".

[405] Draft Findings, para 5.3.19.

course of this Inquiry that the ultimate relevant market definition question is one of competitive constraints. The Competition Tribunal emphasises that practical indicia such as differences in product characteristics should not be "*simply enumerated in an exhaustive manner*".[406] Differences in product characteristics may be relevant, but only to the extent that those differences inform the HMT assessment of whether there would or would not be sufficient substitution away from the focal product to other products to defeat an attempted SSNIP. MultiChoice's earlier criticism of the Discussion Document, and its criticism now of the Draft Findings, is that in these documents ICASA relies too heavily on an enumeration of differences, without assessing, based on objective evidence, whether these differences are such as to preclude sufficient substitution to defeat an attempted SSNIP by a hypothetical monopolist of Pay TV services. In *Massmart v Moresport* the Competition Tribunal ultimately focused on competitive constraints, not just differences in characteristics, and defined a broad market that included differentiated products.

376 ICASA also attempts to rely on passages from the UKCC's Movies on Pay TV Market Investigation as support for the proposition that "*product characteristics, price levels, business models and other factors are critical in the context of analysing competitive constraints*".[407] However, the UKCC's Movies on Pay TV Market Investigation in fact supports MultiChoice's submission that, while differences in product characteristics may be relevant to the extent that they may inform the HMT, ultimately the HMT must be applied, meaning that ultimately there must be careful consideration of the question of whether there would be sufficient substitution, notwithstanding product differences, to defeat a SSNIP. As the UKCC said in that decision:

> "*Again, we considered both evidence on product characteristics and the ways in which rivalry occurred and sought to apply the hypothetical monopolist test, asking the conceptual question of whether a hypothetical monopolist retailer*

[406] Massmart Holdings Limited and Moresport Limited (62/LM/Jul05) [2006] ZACT 40 (12 May 2006), para 48.

[407] Draft Findings, para 5.3.22.

of pay-TV would be able profitably to price above the competitive price by at least a SSNIP."[408] (emphasis added)

377 Again, MultiChoice's criticism of the Discussion Document and of the Draft Findings is that the authors of these documents have not undertaken a careful assessment of the HMT and have instead stopped short by simply enumerating differences in product characteristics, price levels and business models.

378 ICASA's reliance on product differences is also arbitrary and selective, rather than balanced and holistic. For example, ICASA's finding in the Draft Findings that Pay TV services and FTA services are in separate markets is in part based on differences in content, yet content labelled by ICASA as "premium" content (live football and cricket) is broadcast on FTA TV on SABC channels. Near-live rugby is also broadcast by the SABC and commands strong viewership numbers for a lower cost. A similar observation can be made in relation to OTT services, where ICASA seeks to draw a distinction in relation to sport and local content (a distinction that in fact does not exist, since sport and local content is broadcast on OTT services) , yet ICASA does not engage with the competitive interaction between FSPTW movies on Pay TV services and first-run (and even second-run) original content on OTT services.

ICASA has failed to appreciate the role and significance of chains of substitution

379 MultiChoice welcomes ICASA's agreement that chains of substitution should form part of the market definition exercise.[409] MultiChoice also agrees with ICASA that analysis of chains of substitution is not a substitute for the SSNIP test.[410] Analysis of chains of substitution is a part of the SSNIP test. The SSNIP test asks whether constraints in aggregate are sufficient to preclude the profitability of a SSNIP by a hypothetical monopolist of the focal product. Among those aggregate constraints are products that act to constrain the focal product indirectly, via the constraint they impose on products that are direct alternatives

408 UKCC, Movies on Pay TV Market Investigation, para 4.75.
409 Draft Findings, para 5.3.10.
410 Draft Findings, para 5.3.27.

for the focal product. If the indirect constraints are significant, they fall to be included within the same relevant market as the focal product and its most immediate direct constraints.[411]

380 As MultiChoice explained in its 2017 submissions, relatively inexpensive cars may not be viewed as direct substitutes for luxury cars, but may nonetheless exert an indirect constraint on luxury cars through a chain of substitution in which relatively inexpensive cars directly constrain intermediate-priced cars, which in turn directly constrain luxury cars. Through a chain of substitution, by contributing to the constraints on a hypothetical monopolist of luxury cars, relatively inexpensive cars may fall within the same relevant market as luxury cars.

381 This is an important consideration given the need to consider all constraints in aggregate. While a product rather distant in the chain may not have a strong effect in itself, it may contribute importantly to the aggregate constraint on the focal product. Moreover, when separate constraints operate at either end of a chain of products – e.g. the most expensive products are directly constrained by one alternative while the cheapest are directly constrained by another – the combined effect of the two constraints acting along the chain may be such as to bring all products into the same relevant market.

382 However, while ICASA acknowledges chains of substitution as a relevant consideration, it has misunderstood and misrepresented the concept, and has ultimately failed to properly assess chains of substitution.

383 First, ICASA fails to fully appreciate the role of indirect constraints in chains of substitution. To simplify the example of how A could constrain C, consider a situation where the price of B is lower because of the price of A and the risk of customers switching to A. If a hypothetical monopolist supplier of C attempts to raise the price of C, customers are more likely to switch to B because it has a lower price because it is itself constrained by product A. This may make the price

[411] More generally, see MultiChoice's 2017 submissions, paras 252-255.

increase on C unprofitable, meaning that A indirectly constrains C. This is how chains of substitution work. The significance of products A and E in the example in the Draft Findings[412] is therefore not merely that they are close substitutes for and directly constrain products B and D. The significance of A and E is that they will indirectly constrain the focal product (C), via the direct constraint that they impose on B and D. In other words, A and E are additional constraints on C that need to be assessed as part of the aggregate of constraints on C.

384 Second, a number of inadequacies appear in ICASA's treatment of the chains of substitution concept in paragraphs 5.10.38-5.10.40 of the Draft Findings, in the context of its consideration of satellite-based FTA services.

384.1 First, it is unclear why ICASA only considers chains of substitution in the context of satellite-based FTA services. The potential constraints on basic, middle and high-tier Pay TV services, via chains of substitution, include terrestrial FTA services and OTT services. Taking any tier of Pay TV services as the focal product, the aggregate assessment of the constraints that is called for by the HMT (to determine if that tier lies within a market of its own or within a broader market) requires an holistic assessment of the combined strength of all constraints together. This includes constraints from all types of FTA services and OTT services whether directly or indirectly via chains of substitution. For example, if the focal product is high-tier Pay TV services, the HMT requires assessment of the combined strength of constraints from other Pay TV services including middle-tier and basic-tier services (which may constrain high-tier services both directly as an alternative and indirectly via a chain of substitution through middle-tier services) and from all OTT and FTA services (which may also act both directly and indirectly via a chain of substitution by directly constraining middle and low-tier services). This is even more important given the interrelated supply-side considerations faced by providers of electronic audio-visual content which mean that the loss of subscribers at one end

412 Draft Findings, para 5.3.28.

has consequences for other bouquets. ICASA ignores these dynamics. ICASA's analysis of chains of substitution, in the Draft Findings, is not part of an holistic assessment.

384.2 Second, ICASA's reasons to conclude that there is a break in the chain are not sound. One reason that ICASA gives is that FTA viewers "*are highly unlikely to consider OTT services as an alternative based on affordability*".[413] Putting to one side the lack of any evidential basis for this premise and the existence of evidence to the contrary that has been provided to ICASA by MultiChoice (see Part A) and that emerges from ICASA's Consumer Survey,[414] ICASA appears to consider that there need to be direct constraints between FTA and OTT services for these to participate as constraints on Pay TV services via chains of substitution. This is not correct. It is not necessary for FTA viewers to consider OTT services to be a direct alternative for there to be both:

384.2.1 a chain of substitution that has the effect of FTA services constraining high-tier Pay TV services indirectly via direct constraints on basic and middle-tier services; and

384.2.2 another chain of substitution that has the effect of OTT services constraining basic-tier Pay TV services indirectly via direct constraints on high and middle-tier services.

384.3 A second reason given by ICASA for a "break in the chain" is that price levels at the extremes of the chain are not of the same magnitude.[415] The view that prices levels at the extremes of the chain need to be of the same magnitude appears to derive from a statement in the EC's 1997 market definition guidelines that has been taken out of context. The context for that statement was geographic chains of substitution where the products being sold are otherwise identical. In that situation one would expect that if chains of substitution between different

413 Draft Findings, para 5.10.40.

414 Refer to Part B of these submissions.

415 Draft Findings, para 5.10.40.

geographic regions are effective constraints, price levels should be similar across the regions. However, where one is considering chains of substitution between differentiated products within a single geographic region – as ICASA is doing when it considers OTT and FTA services as constraints on Pay TV services, all in South Africa – there is every reason to expect differences in prices at the extremes of the chain, yet this does not negate the potential for effective constraints indirectly through chains of substitution across differentiated products.

ICASA appears to have prejudged the markets by reference to views on MultiChoice's position and behaviour

385 In paragraph 5.12.45 of the Draft Findings, ICASA asserts that:

> *"data shows that MultiChoice is firmly in control of the market and will continue to do so in the foreseeable future, despite the entry of OTTs in South Africa. MultiChoice has pre-empted the impact of OTT entry by adopting new business strategies [redacted] and has launched new services that compete directly with OTT services."*

386 Quite apart from the lack of any details regarding what "data" shows firm "control", now and "in the foreseeable future", and the unwarranted pejorative interpretation of MultiChoice's entry into OTT services, it is not apparent what any of this has to do with market definition. The reader gets a strong sense from this paragraph that ICASA seeks to define the retail market in a way that will allow it to characterise MultiChoice as dominant rather than by following an objective process of assessment.

387 Similarly, prejudgment is evident in paragraph 5.17.23 of the Draft Findings, where ICASA states:

> *"MultiChoice has been able to increase prices by more than [redacted] on average for most of its bouquets and still remained profitable. Figure 6 below shows annual price increases between 2014 and 2017. Figure 7 below indicates the profitability trend during the same period but up to 2018."*

388 First, the HMT is concerned with price increases linked to the exercise of market power. ICASA should therefore be assessing whether a hypothetical monopolist, if one were to suddenly emerge from a competitive milieu, would be able profitably to impose a SSNIP above the pre-existing competitive levels holding all else constant (including costs). It follows that actual historical price increases cannot be interpreted as evidence that a hypothetical monopolist would be able profitably to increase prices above competitive levels unless it can be shown that those price increases have followed from (and been caused by) a change in market structure from a competitive market to a market in which there is an unconstrained monopolist. Since there has not been a change in market structure of that kind, historic increases in the prices of MultiChoice's bouquets cannot be interpreted as evidence that a hypothetical monopolist would be able profitably to impose a SSNIP.

389 Second, the historic increases in MultiChoice's bouquet prices are merely in line with inflation[416] and reflect a (partial) pass-through of higher costs, rather than unconstrained pricing discretion. As MultiChoice has previously indicated to ICASA, the increases in MultiChoice's bouquet prices have occurred in the context of considerably greater cost increases.[417] Even in perfectly competitive markets, cost increases will translate into price increases. The observed increases in prices therefore do not represent pricing discretion that reflects the absence of competitive constraints, which is what the SSNIP test seeks to establish. Indeed, as MultiChoice has previously established for ICASA, its bouquet prices have been decreasing in quality adjusted terms, reflecting the broad market in which MultiChoice competes.[418]

390 Third, whereas ICASA seeks to ascribe negative connotations to the profitability information in Figure 7 of the Draft Findings, that figure presents profits in

416 Inflation averaged 5.08% between 2014 and 2019. For Premium, Access and EasyView, real (i.e. inflation adjusted) prices have declined between 2014 and 2019, and prices for Compact, Compact Plus and Family have increased in real terms only very modestly over the same period (by 1.1%, 0.3% and 2.3%, respectively).

417 MultiChoice's 2017 submissions, para 572 and MultiChoice's 2018 supplementary submissions, para 68.

418 MultiChoice's 2017 submissions, para 572 and MultiChoice's 2018 supplementary submissions, para 68.

absolute terms, and as can be seen in the figure, [redacted] Rising costs over that period mean that [redacted] Firms facing competition from various sources will also generate profits.

ICASA has relied unduly on international experience and precedents

391 Economic principles are immutable. To the extent that legal precedents state economic principles correctly, those precedents will be universally applicable (across countries and over time) regarding those principles. However, as ICASA should be well aware, legal precedents – such as findings of relevant markets – are much more than simply statements of economic principles. To the extent that they are findings of fact based on factual circumstances that are unique to the time and country in question, they will not be automatically applicable to cases concerning other times and other jurisdictions where the facts may be very different.

392 ICASA should therefore take no comfort in MultiChoice's acknowledgment that economic principles are immutable.[419] This acknowledgment does not give ICASA carte blanche to rely on international precedents that have found – in different country circumstances and at different points in time – Pay TV services to be in separate markets from FTA services or from OTT services, rather than engage in its own careful consideration of the particular factual circumstances of the South African electronic audio-visual landscape at the current point in time and into the future. To be very clear – and as ICASA should itself be very aware – the Discussion Document and the Draft Findings do not rely on international precedents for their statements of economic principles, but rather for their findings of fact regarding relevant markets.

[419] MultiChoice refers here to para 5.3.31 of the Draft Findings, which refers to MultiChoice's agreement that "*there is no time limit to referencing an economic principle*".

393 Indeed, as a matter of legal principle there is a need for any inquiry to be grounded in the factual circumstances of the sector in question at the time of the inquiry, and not overly influenced by historic assessments by authorities in other jurisdictions, because the circumstances in those other countries and at other times may be significantly different to the circumstances in SA at the current time.

394 As explained in MultiChoice's 2017 submissions, this is of particular importance in the context of an inquiry into the electronic audio-visual services sector that is experiencing tremendous disruption, where new technologies and enhancements represent significant constraints on services provided using traditional technologies, and where particular local characteristics (e.g. lower average incomes, a generally youthful population, strong preferences for local content, as well as high quality FTA offerings) suggest different conclusions in terms of relevant markets than in other countries.

395 In stark contrast to ICASA's appreciation of the dramatic upheaval in the electronic audio-visual services sector in its decision on the e.tv news application (the upheaval has developed further since), ICASA's approach to market definition in the Draft Findings suffers from a reliance on historic characterisations of the sector and far-removed international precedents that cannot serve as a basis for a finding of relevant markets in SA in the context of this Inquiry.

396 For example:

396.1 Paragraphs 5.10.13-5.10.14 of the Draft Findings refer to a number of European merger decisions between 2003 and 2010, the last being almost ten years ago, and all concerning different electronic audio-visual sectors from SA. The only more recent decision referred to in these paragraphs is the UKCC's Movies on Pay TV Market Investigation, which found that in the UK in 2012 FTA offerings imposed some constraint on Pay TV services and accounted for FTA as an out of market constraint. Despite this decision being from 2012, it recognises and accepts emerging trends that have since become even more relevant compared to the earlier decisions which have increasingly become irrelevant.

396.2 Paragraphs 5.10.15-5.10.16 of the Draft Findings refer to the two EC decisions in *Liberty Global / Ziggo* (in 2014 and 2018 respectively). These decisions both concern the Netherlands, where cable services are near ubiquitous and there is essentially no FTA service. This illustrates the danger and unreasonableness of ICASA's reliance on international precedents to form its view on relevant markets in SA. In both of these decisions the EC left open whether FTA services were in the same market as pay TV services in consideration of "*the limited offer of FTA channels in the Netherlands*" and because it would make no difference to its assessment of the transaction. In the second decision, the EC stated that "*[t]he market investigation has confirmed that the Dutch market has a very limited offer of FTA TV services, which makes the distinction between Basic Pay TV and Premium Pay TV more appropriate*".[420] These decisions therefore do not support ICASA's finding that terrestrial FTA services are in a separate market from Pay TV services.[421] Moreover, in SA there is significant presence of FTA offerings with widely appealing content. This is quite contrary to the Dutch situation, making the precedent of little relevance.

396.3 Paragraphs 5.13.9-5.13.10 of the Draft Findings refer again to the 2018 *Liberty Global / Ziggo* decision, this time in the context of ICASA's retail market consideration of whether Pay TV services and OTT services are substitutes or complements for consumers. In that decision, the EC left open whether linear services and non-linear OTT services were in the same relevant retail market.[422] ICASA incorrectly suggests that

[420] EC, Case M.7000 *Liberty Global / Ziggo*, 30 May 2018, para 135.

[421] MultiChoice also notes that whereas the Draft Findings in these paras is concerned with the question of the relevant retail markets, ICASA's reference in para 5.10.15 to the 2014 *Liberty Global / Ziggo* decision is to a part of that decision that concerns the upstream market for the licensing and acquisition of content. It is unclear what relevance ICASA sees in statements about upstream markets for its delineation of relevant retail markets.

[422] *Liberty Global / Ziggo*, 30 May 2018, para 137.

the EC defined the relevant retail markets by reference to broadcasting windows. The discussion of the windowing of rights that ICASA is referring to is located within the EC's consideration of relevant upstream markets for the licensing and acquisition of content, not its consideration of relevant retail markets.[423] In any event, even in relation to the upstream market, the EC ultimately left open "*whether the broadcasting rights for each exhibition window, including for SVOD and for TVOD, belonged to the same or to separate markets*".[424] It did not adopt the closed net approach that ICASA adopts in the Draft Findings.

396.4 Paragraph 5.13.16 of the Draft Findings refers yet again to the *Liberty Global / Ziggo case*, but ICASA is not specific whether it is referring to the EC's 2014 decision or its 2018 decision or the 2017 decision of the General Court, which annulled the EC's 2014 decision. Although ICASA refers to "the court", MultiChoice has only been able to identify the statement in paragraph 5.13.16 in a EC "Competition Merger Brief" from 2015.[425] ICASA claims that "*the court found that the OTT platform was not yet sufficiently developed in the Netherlands at that time to allow TV broadcasters to switch their distribution instantly and entirely from the classic fixed networks in favour of the internet*". This statement was in the context of the EC's consideration of the effect of the merger on buyer power, where the term "TV broadcasters" refers to channel and content suppliers rather than distributors/retailers. It is unclear how ICASA sees this as bearing on its delineation of relevant retail markets, as it is clear that retail market definition was not the context in which the statement was made by the EC. That channel and content suppliers would not switch instantly and entirely from cable and fibre networks to OTT is not a consideration that has any bearing on

423 *Liberty Global / Ziggo*, 30 May 2018, paras 49-50.
424 *Liberty Global / Ziggo*, 30 May 2018, para 51.
425 EC (2015), "The Commission's Review of Liberty / Ziggo," *Competition Merger Brief, No 1/2015*, p11, available at http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf.

whether OTT services represent a significant constraint on a hypothetical monopolist of Pay TV services.

397 International precedents (particularly historic ones) are irrelevant if they do not reflect the massive changes that have taken place in technology and in consumption patterns, and the particular characteristics of this sector in SA at this point in time, as outlined in Part B of MultiChoice's 2017 submissions and in Part A of this submission. The present realities in SA at this point in time are significant competitive constraints on traditional Pay TV services from OTT and FTA services.

FLAWED ANALYSIS OF "PREMIUM" CONTENT AND SERVICES

"Premium" content

398 As MultiChoice has previously submitted, the term "premium" does not provide a robust basis for market definition.[426] In the Draft Findings, ICASA agrees that the term "premium" is subjective and "fluid".[427] Despite this, ICASA continues to rely on the term with the result that ICASA's market definitions continue to be subjective and vague (given the inherent subjectivity of the term "premium") and detached from the principles of market definition.

399 Market definition is concerned with identifying the effective constraints on a focal product. The HMT therefore asks about the extent of substitution away from the focal product to other products in response to a SSNIP. Historically the term "premium" has been used to refer to certain types of content, however there is no analytical rigour in defining markets simply by reference to content that is subjectively labelled as "premium" content. To do so does not ask the HMT question and does not seek to understand the strength of constraints on a focal product.

426 MultiChoice's 2017 submissions, paras 287-297.
427 Draft Findings, para 1.3.11.

400 In the Draft Findings, ICASA observes that, in the Discussion Document, it proposed a definition of premium content as "*valuable content that is acquired on an exclusive basis and made available on high end premium bouquets*".[428] It is not clear whether ICASA proposes to maintain the definition contained in the Discussion Document or is merely observing it, but it does not propose any other objective definition of "premium" content in the Draft Findings. ICASA also does not engage with any of the criticisms of that definition made in MultiChoice's 2017 submissions.[429] Since ICASA has not countered any of the challenges that have been made to the only objective definition of "premium" content that it has proposed, it is unreasonable for that definition to stand.

401 Nonetheless, ICASA somehow seeks to maintain that "*there is a distinction between premium and non-premium content*".[430] ICASA emphasises that, amongst other reasons, it reaches this position "*in light of the contradiction between what MultiChoice states in its public pronouncements on the issue of 'premium content' and what is contained in its business plans*".[431] MultiChoice submits that this is not a sound basis for ICASA's position in the Draft Findings.

401.1 First, business plans and other internal documents are drafted by business people and not regulatory or competition law experts. [redacted] subjective and inherently vague term that defies any clear and objective definition, or even a definition that is widely agreed upon (as is clear from the submissions that ICASA received in response to its Discussion Document). The fact that Viu refers to its content as "Premium"[432] is an illustration of both the subjectivity and vagueness of the term and its

[428] Draft Findings, para 5.6.3.

[429] MultiChoice does not repeat those criticisms here, but refers ICASA to MultiChoice's 2017 submissions. See paras 287-297 and 350-363 and in particular paras 354-360.

[430] Draft Findings, para 5.8.3, and see also para 5.17.8: "the Authority maintains its position that there is premium and non-premium content".

[431] Draft Findings, para 5.8.5.

[432] See, for example the quotes attributed to Viu country manager Ryan Solovei in https://mybroadband.co.za/news/broadcasting/297846-how-viu-plans-to-take-on-netflix-with-sabc-and-etv-shows.html.

use by business people in relation to all sorts of content. This demonstrates that if ICASA were to rely on how the term "premium" is used by business people, then it would need to include the Viu content.

401.2 [redacted]

401.3 [redacted]

401.3.1 [redacted]

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433 Draft Findings, para 5.17.2.5.

[redacted]

401.4 [redacted]

401.5 [redacted] does not deny the reality that the importance of content that has traditionally been referred to as "premium" has declined due to the proliferation of high quality and varied international and local drama and reality series and new popular sporting events

434 The quote reads as follows: [redacted]

such as IPL.[435] Also note that in its Draft Findings, ICASA mischaracterises MultiChoice when it suggests that MultiChoice contends that "*premium content ceased to exist in the past*"[436]. MultiChoice contends not that premium content ceased to exist, but that: (a) there is no merit in a market definition exercise in labelling content as "premium" or otherwise, since the term is vague and subjective and it does not help to answer the HMT question; and (b) over time there has been a proliferation of high quality content that is attractive to viewers, meaning that whereas in the past specific content may have been of particular importance to broadcasters, this importance has been significantly reduced.

402 ICASA then defines "premium" content not by reference to objective criteria, but by listing a number of specific content rights.[437] ICASA does not provide any list of characteristics that these content rights have in common that qualify them for the label of "premium". These rights appear to be "premium" only by virtue of ICASA labelling them as such. The subjectivity of ICASA's approach to the "premium" label is apparent. For example, it is not clear why extremely popular Netflix original series content is not considered to be "premium" when FSPTW Hollywood movies and series are.

403 What is more, as discussed further below, some of the content that ICASA labels as "premium" – a "fluid" term that ICASA ultimately attempts to use to differentiate between Pay TV services on the one hand, and FTA and OTT services on the other – is available on FTA offerings (e.g. live football, live cricket and near-live rugby). ICASA's approach to identifying Pay TV services as a separate market appears to be in large part that these have content that is not available on FTA or OTT. Yet, there is no basis to believe that FTA services that

435 MultiChoice's 2017 submissions, paras 287-297.

436 Draft Findings, para 5.17.2.5.

437 Draft Findings, para 5.17.8.

carry the same content are unable to constrain Pay TV services. As such, the term is a tenuous basis to use to define relevant markets.

404 Shortly afterwards, ICASA applauds itself in the Draft Findings for "*[h]aving established that premium content consists of FSPTW movies, series and live sports*" (emphasis added).[438] The better description would be that ICASA has decreed it.

405 The approach to the "premium" concept adopted by ICASA exposes it to the risk of engaging in confirmation bias. This arises when one searches for, interprets, favours and recalls information in a way that confirms one's pre-existing beliefs or hypotheses. In so doing, one ignores or understates the weight of information that is contrary to or refutes their belief. This leads to errors, as it influences the way one gathers and interprets evidence. In a number of respects, conclusions reached in the Draft Findings reflect a lack of genuine attempts to critically engage with economic analysis, commercial reality and MultiChoice's submissions, and fails to critique submissions made by third parties, especially where they support ICASA's preferred conclusion.

"Premium" retail services

406 At the end of its consideration of retail markets, ICASA concludes that there are four separate retail markets, two of which are: (i) "basic-tier" Pay TV services and satellite-based FTA services; and (ii) "premium" and "midrange" Pay TV services.[439] The use of the term "premium" here, in the retail context, is distinct from the use of the term in the context of the wholesale market for content. ICASA's subjective definition of "premium" content does not map one-to-one to retail services, which are supplied as bundles of channels and contain a wide variety of content. Some of the content that ICASA labels as "premium", in the Draft Findings, is available in basic as well as midrange and premium Pay TV

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438 Draft Findings, para 5.17.9.

439 Draft Findings, para 5.13.20, when read together with para 5.12.41, which states that ICASA considers "midrange" Pay TV services to fall within the same market as "premium" Pay TV services given the extent of migration witnessed between these.

services, as well as in FTA services. And much of the content that is only included in MultiChoice's most expensive bouquet is not content that ICASA has labelled as "premium".[440]

407 ICASA's finding that "premium" and "midrange" services lie in a separate retail market from "basic" Pay TV services is also striking for the fact that it is not supported by any HMT analysis. Indeed, it appears in the Draft Findings without any preceding analysis of the substitution that a hypothetical monopolist of "premium" and "midrange" services could expect, either in aggregate or specifically to "basic" services, if it were to attempt to impose a SSNIP. This suggests that markets are being defined arbitrarily and are not substantiated by coherent, objective economic analysis. MultiChoice submits that it is entirely irregular and unreasonable for ICASA to reach a conclusion on relevant market boundaries without any analysis whatsoever, especially where boundaries are defined narrowly.

408 MultiChoice also notes that ICASA's basis for including midrange services in the same retail market as "premium" services is the extent of migration between these services.[441] There seems then to be an inconsistency and arbitrariness (reflecting ICASA's subjective approach to market definition) in the exclusion of basic services from the market, given that there is a similar extent of migration between midrange services (e.g. DStv Compact) and basic services (e.g. DStv Access). This can be seen in Figure 17 below. A consistent approach to evidence by ICASA would demonstrate that on the basis of migrations between packages, basic-tier, mid-range and high-end bouquets are all part of the same relevant market.

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[440] For further details, see MultiChoice's 2017 submissions, para 357.

[441] Draft Findings, para 5.12.41

Figure 17: Migrations out of DStv Premium to DStv Compact and Migrations out of DStv Compact to DStv Access (FY2017 – FY2019)

[redacted]

FLAWED ANALYSIS OF FTA SERVICES

409 ICASA's findings regarding FTA services suffer from a number of methodological and analytical flaws. In particular, in the Draft Findings, ICASA:

409.1 assesses <u>sequentially</u> the strength of constraints imposed on Pay TV services by terrestrial and satellite-based FTA services, rather than the strength of <u>aggregate</u> constraints on Pay TV services, including both terrestrial and satellite-based FTA services and also other alternatives for viewers (including OOH viewing, legal free and paid-for OTT services, and pirated electronic audio-visual content);

409.2 places considerable emphasis on the propensity for FTA viewers to switch to Pay TV services and the rate at which they are doing so, when it should instead be seeking to understand a distinct and converse matter: the propensity for subscribers to Pay TV services to switch to FTA services in response to a SSNIP; and

409.3 focuses overly on differences in product characteristics, prices and business models and ultimately fails to operationalise the HMT test.

410 Regarding the first matter, Figure 18 below presents, for each of the DStv bouquets, the proportions of net disconnects out of the opening base of subscribers in recent financial years. As can be seen in this figure, [redacted]

Figure 18: Net Disconnects as % of Opening Subscriber Base, by DStv Bouquet, FY2016 to FY2019

[redacted]

411 To elaborate on the second matter, in a number of places in the Draft Findings, ICASA explores barriers to switching and the extent of switching from FTA services to subscription television services.

411.1 In paragraph 5.10.4 ICASA asserts that FTA viewers who want to purchase Pay TV television services "*have to invest in a satellite dish and decoder in addition to paying an installation fee as well as committing to a monthly subscription. The investment made by the* *consumer becomes a sunk cost, since some of the equipment purchased cannot be used elsewhere*".

411.2 In paragraph 5.10.22 ICASA asserts that there is evidence "*suggesting that FTA viewers have been migrating to subscription television*", and in paragraph 5.10.24, refers to evidence given by e.tv that it regards SABC as its main competitor "*although lately there has been some switching away by viewers from analogue terrestrial broadcasting towards the lower-cost subscription television broadcasting digital satellite bouquets such as DStv's Easyview*".

412 None of this, however, is relevant for the HMT question of whether the relevant market is limited to Pay TV services (ICASA's focal product in this Inquiry) or is broader including FTA services. That question calls for consideration of the likelihood of and extent of switching in precisely the opposite direction, <u>from Pay TV services to FTA services</u>, in response to a SSNIP in relation to Pay TV services. In this regard MultiChoice adds the following observations.

412.1 The costs of switching from FTA services to Pay TV services might bear on whether FTA services are in a market on their own or are sufficiently constrained by Pay TV services, but not the converse. Regarding the converse, MultiChoice agrees with ICASA's conclusion in the Draft Findings[442] that there are no costs of switching from Pay TV services to FTA services.

412.2 There is no basis for ICASA's suggestion that because FTA viewers have been migrating to Pay TV "*it is highly unlikely that enough subscribers would switch back to analogue FTA services in the event of a SSNIP*".[443] Demonstrating its selective approach to the evidence, ICASA ignores all of the evidence that MultiChoice has previously submitted on the constraint on Pay TV services from FTA services and the likelihood of subscribers switching to FTA if a SSNIP in relation to Pay TV services were attempted. MultiChoice refers ICASA, in

[442] Draft Findings, para 5.10.29.

[443] Draft Findings, para 5.10.22.

particular, to paragraphs 32-36 of Appendix B of the 2018 supplementary submissions. [redacted].[444] The rate of net disconnects from DStv bouquets is also relevant here (see Figure 18 above). It is therefore highly likely that in response to a SSNIP by a hypothetical monopolist there would be significant substitution from Pay TV services to FTA services and other FTA options (including OOH viewing of Pay TV services, free OTT services and pirated content).

413 Turning to the third matter, the excessive reliance in the Draft Findings on differences in product characteristics, prices and business models and ICASA's failure to operationalise the HMT is illustrated in the concluding statement in the Draft Findings in relation to FTA services:[445]

> *"it is unlikely that viewers of free-to-air channels distributed terrestrially would consider the more expensive subscription television packages as close substitutes, due to significant differences in their price points, unique content proposition and quality. However, the Authority is inclined to consider free-to-air services distributed digitally to be close substitutes to basic-tier subscription services based on slight differences in price, quality and quantity of channels provided."* (emphasis added)

414 As can be seen in this statement, ICASA expresses its conclusions with respect to both terrestrial FTA services and satellite-based FTA services as based on price and product differences, rather than a consideration of the volume of marginal sales that would likely be lost by a hypothetical monopolist of Pay TV services to FTA services (and other alternatives) if it were to attempt a SSNIP,

[444] Appendix B to the 2018 supplementary submission, para 34.3.

[445] Draft Findings, para 5.10.42.

and whether that volume would be likely to render such a price increase unprofitable.

415 The same focus on product, price, and business model differences and the same failure to operationalise the HMT question pervade ICASA's consideration of FTA services. For example, in paragraph 5.10.9 of the Draft Findings, ICASA purports to reach a conclusion on the basis of a HMT assessment of the likelihood of whether enough viewers would switch from Pay TV services to FTA services in response to a SSNIP, however that conclusion is based on preceding paragraphs that do not operationalise the HMT.

415.1 Paragraphs 5.10.5 and 5.10.6 assert a "progression" from FTA services to Pay TV services to access particular content and better quality transmission, and refer to evidence from ICASA's Consumer Survey that "*a better quality TV signal is the strongest reason*" for consumers to purchase Pay TV services instead of relying on FTA services and that "*[o]ther reasons relate to the type of programming offered*". ICASA then concludes, in paragraph 5.10.7, that "*[i]f viewers perceive subscription television services as of better quality than free-to-air services it means that once they upgrade from free-to-air to subscription they are highly unlikely to substitute backwards from subscription services to free-to-air services*". There is no logical justification for this conclusion. Consumers may perceive a focal product to be higher quality than an alternative product, and there may have been a "progression" over time from the alternative product to the focal product, yet there may still be significant substitution in the opposite direction from the focal product to the alternative product <u>in response to a SSNIP in the focal product</u>. The HMT question is concerned with reactions to a SSNIP in relation to the focal product, and evidence of a "progression" from FTA services to Pay TV services and of quality perceptions do not directly address this question.

415.2 ICASA argues in paragraph 5.10.8 that "*given the growth in the viewership of subscription television services over the years, there is no evidence suggesting reverse substitution from subscription to free-*

to-air services". First, growth in viewership of Pay TV services does not imply the absence or lack of constraints – it is entirely consistent for consumption of a product or services to be growing, while that product or service is constrained by other products or services. Second, growth in viewership of Pay TV services does not imply the absence of reverse substitution: gross additions to subscriber numbers typically exceed net additions with the difference being disconnections. Third, even if no disconnections have occurred, this does not address the HMT question, which is concerned with the number of disconnections that would occur in response to a SSNIP in quality adjusted terms. In short, the growth in viewership of Pay TV services cannot be used to infer a narrow market because it does not inform us of the extent of "reverse" substitution that would occur in response to a SSNIP, and therefore does not address the HMT.

416 ICASA's discussion of the Consumer Survey results[446] also does not inform the HMT question and does not advance understanding of the relevant market.

416.1 For example, ICASA asserts that its Consumer Survey "*found that a better quality TV signal is the strongest reason to purchase the Basic DStv package over the FTA offering*" with other reasons relating to "*the type of programming content enjoyed*".[447] ICASA appears to draw on this assertion when claiming that "*it is highly unlikely that enough viewers would switch from subscription television services to free-to-air television services in the face of a SSNIP*".[448] However, the survey question that was asked did not test the reactions of these subscribers to a price (or quality) change. While 45% of the surveyed DStv EasyView / Access / Family subscribers responded that they have chosen that package rather than just receiving FTA "*in order to get a good TV signal*", and at least 23% responded that their main reasons

446 Draft Findings, para 5.10.25.
447 Draft Findings, para 5.10.6.
448 Draft Findings, para 5.10.9.

include the type of programming (e.g. "*My family insists on getting the DStv channels*"),[449] this tells ICASA nothing about the proportion of basic-tier subscribers that would be likely to switch to FTA in response to a SSNIP in relation to basic-tier Pay TV services. There is therefore no basis in the Consumer Survey results for ICASA's"highly unlikely" claim in the Draft Findings.

416.2 ICASA subsequently reports that surveyed DStv subscribers cited "*a number of reasons why they would not be satisfied with a FTA offering, including signal quality (25%), product affinity (15%), and content offering (movies, sport and children's programs)*".[450] As observed earlier, MultiChoice has been unable to find, in the Consumer Survey documentation that ICASA published on its website[451], a question concerning why subscribers would not be satisfied with FTA, let alone these particular results.[452] In any event, even if the question was asked and these were the results, the fact that some DStv subscribers have reasons not to be satisfied with an FTA offering does not inform the HMT question. Even if these particular consumers would not switch in response to a SSNIP, they would be infra-marginal consumers. As explained above and in previous submissions, to understand the boundary of the relevant market using the HMT one needs to understand the number of marginal subscribers that would be likely to switch in response to a SSNIP. The preferences of all (or even most) subscribers do not bear on this: many subscribers may be unlikely to switch and may have reasons for that, but this doesn't establish a narrow relevant market, as that depends on how many would be likely to switch.[453] As far as MultiChoice has been able to ascertain from the

449 "Phase 4 Report", p. 96-97.

450 Draft Findings, para 5.10.25.

451 Including the research methodology, weighting and sample selection, questionnaires, and results reports available at https://www.icasa.org.za/legislation-and-regulations/inquiries/subscription-broadcasting-services-market-inquiry.

452 Refer to Part B of these submissions.

453 According to ICASA, the Consumer Survey results indicated that "a better quality TV signal is the strongest reason to purchase the Basic DStv package over the FTA offering" and that "[o]ther reasons relate to programming content enjoyed". The same comments apply to these findings. They are not probative of the HMT question.

Consumer Survey documentation the SSNIP question was not asked in the Consumer Survey in any form. MultiChoice considers it to be likely that if the SSNIP question had been asked, a large proportion of subscribers would have indicated a likelihood of switching to FTA services, notwithstanding that some subscribers may have reasons for not switching. The rate of net disconnects from DStv presented earlier (see Figure 18 above), even in the absence of any SSNIP in quality adjusted terms, is suggestive that if a SSNIP were attempted there would likely be a significant volume reaction. [redacted]

416.3 Similar comments apply to ICASA's assertion of reasons given by basic-tier Pay TV bouquet subscribers for not moving into mid-tier bouquets ("affordability (49%), and "cost of service not reflective of value offered").[454] As observed earlier, MultiChoice has been unable to find results of this kind in the Consumer Survey documentation.[455] Instead, the Consumer Survey results suggest that only 19% of DStv Easy View / Access / Family subscribers identified affordability as a reason for not subscribing to mid-tier bouquets.[456] In any event, proportions of subscribers with reasons not to subscribe to higher priced bouquets at current prices do not inform the SSNIP question in relation to basic-tier bouquets as a focal product. That question concerns the proportion of basic-tier subscribers that would switch in aggregate (to mid-tier services, higher-tier services, FTA services or other services) in response to a SSNIP. A SSNIP in relation to basic-tier bouquets would make basic-tier bouquets less affordable, and would be likely to result in substitution to FTA services (together with OOH viewing, Free OTT services and pirated services). It would also make mid-tier bouquets more attractive relative to basic-tier bouquets

454 Draft Findings, para 5.10.25.

455 Refer to Part B of these submissions.

456 Refer to Part B of these submissions.

in terms of value for money and would be likely to result in substitution to mid-tier bouquets.

417 A number of other examples of ICASA's failure to operationalise the HMT can be observed. For example:

417.1 In paragraph 5.10.36 of the Draft Findings, ICASA discusses the advertising side of the market. The analysis of advertising in this part of the Draft Findings misunderstands the significance of the evidence from e.tv and SABC that competition for advertising has increased between MultiChoice and FTA services. ICASA asserts that the increased competition for advertising "*reveals that there has been one-way substitution by advertisers, from FTA to subscription channels*". Assuming that this assertion of the flow of advertising is correct, this focuses (incorrectly) on the direction of the trend of advertising Rands away from FTA services. The correct focus should be on whether a hypothetical monopolist of Pay TV services could profitably implement a SSNIP. If it were to do so, an additional constraint it would face is that, as subscribers depart in response to the higher price, it would also lose advertising revenue as it would have fewer "eyeballs" to offer advertisers. The greater the share of the hypothetical monopolist's revenue that is contributed by advertising, the more significant the loss of advertising revenue will be in determining whether the SSNIP would be profitable. Therefore, if anything, increasing competition for advertising Rands implies that FTA services are closer substitutes for and constraints on Pay TV services. As ICASA itself states: "*advertisers may easily substitute between basic-tier bouquet channels and free-to-air channels*".[457] MultiChoice also notes that it appears that ICASA refers to the competitive impact on FTA advertising revenue of Pay TV using all of MultiChoice's Pay TV advertising revenue, without distinction by DStv bouquet. Given that migration between packages is prevalent and that there is an overlap in the channels between

457 Draft Findings, para 5.10.34.

packages there is more likely to be competition for advertising Rands in which FTA is in competition with all Pay TV services (not only with basic-tier Pay TV services).

417.2 In paragraph 5.10.41 ICASA observes that the "*quality and amount of content shown on free to air and basic-tier bouquets and premium bouquets differ vastly*". This ignores the fact that significant amounts of the content (e.g. football, cricket, rugby) that it identifies as a differentiator is also available on FTA. Moreover, all that ICASA is observing is differences in product characteristics of the different bouquets. Reflective of these differences are differences in prices. As explained above and previously, differences in product characteristics and prices are not in themselves evidence of a lack of substitution and a narrow market: a low quality, low price product may be a substitute for a high quality, high price product. While mid-tier bouquets may be closer substitutes for higher priced bouquets than basic-tier bouquets, basic-tier bouquets may still act as important constraints, both directly and indirectly via chains of substitution.

418 In summary, ICASA's findings regarding FTA services represent impressionistic value judgments premised on differences in prices, product characteristics and business models, and flawed analysis of international precedents (see paragraph 395 above) that are in any event far removed in time and place from the current situation of the electronic audio-visual sector in SA in 2019. In short, ICASA's findings regarding FTA services do not represent a considered, coherent assessment of the HMT, despite ICASA undertaking to conduct such an assessment. A proper and consistent application of the HMT together with proper economic analysis of the facts – including the rate of net disconnects even in the absence of a SSNIP and previous failed attempts to increase prices for Pay TV services – would have led ICASA to conclude that FTA services impose significant competitive constraints on Pay TV services and that an attempted SSNIP would not be possible given the alternatives that include FTA services among other things.

FLAWED ANALYSIS OF OTT SERVICES

419 ICASA's findings regarding OTT services also suffer from a number of methodological and analytical flaws. In particular:

419.1 ICASA has failed to operationalise the well-established and accepted HMT approach to market definition. In particular, in the Draft Findings, ICASA:

419.1.1 assesses the strength of constraints from OTT services separately from constraints from other alternatives for Pay TV subscribers (including FTA services and OOH viewing), rather than assessing constraints <u>in aggregate</u> as called for by the HMT;

419.1.2 focuses on the likely behaviour of generic subscribers, rather than on whether there would be sufficient switching by <u>marginal</u> subscribers to render an attempted SSNIP unprofitable;

419.1.3 focuses overly on usage data and on assertions of <u>product and price differences</u> between OTT services and Pay TV services that do not directly address the HMT question; and

419.1.4 assessment of constraints from OTT services is not forward looking.

419.2 ICASA has failed properly to understand the current nature, quality and usage of OTT offerings in SA and has overstated differences between Pay TV services and OTT services. The result is that ICASA paints a misleading picture of the current significance of OTT offerings as substitutes for and constraints on Pay TV services.

419.3 The data in the Draft Findings, as well as the Consumer Survey results that is relied upon elsewhere in the Draft Findings, suggests a likelihood that significant substitution would occur from Pay TV services to OTT services in response to a SSNIP in relation to the former, which would be sufficient either on its own or together with other constraints to preclude a hypothetical monopolist of subscription services from profitably imposing a SSNIP;

419.4 ICASA misunderstands the significance and implications of OTT services as a complement to Pay TV services and the relationship between cord-stacking and cord-shaving; and

419.5 ICASA adopts a flawed approach to its consideration of the relative costs to consumers of OTT services and Pay TV services and significantly overstates the costs to consumers of OTT services.

420 The following sub-sections elaborate.

ICASA has failed to operationalise the HMT

421 As with ICASA's discussion of FTA services in the Draft Findings, ICASA's discussion of OTT services fails to consider constraints on a hypothetical monopolist of Pay TV services in aggregate, fails to focus on marginal subscribers and focuses overly on price and product differences.

422 The HMT calls for an aggregate assessment of whether there would be sufficient switching of marginal subscribers to preclude a profitable SSNIP, including not only cord-cutting and cord-shaving, but also cord-nevers.

423 The focus of this assessment should be on the number of marginal subscribers that would likely be lost altogether by the hypothetical monopolist (cord-cutters and cord-nevers) as well as those that would reduce their spend on the hypothetical monopolist's services (cord-shavers), as this will determine whether the SSNIP would likely be profitable or not. ICASA, however, focuses on the behaviour of subscribers in a generic or general sense. For example, according to ICASA "*the question that arises is whether in the event of a SSNIP, a subscription television service consumer would switch to OTT services*" (emphasis added).[458] The question that ICASA should be asking is whether in

[458] Draft Findings, para 5.12.8.

the event of a SSNIP a sufficient number of marginal subscribers would switch to other services in aggregate (including FTA services and OOH viewing as well as OTT services), whether cutting or shaving their Pay TV "cord", to render the SSNIP unprofitable. In the context of assessing switching to OTT services, the focus should be on those subscribers that are most likely to switch to OTT services (i.e. those with access to, or the means readily to acquire access to, sufficiently fast broadband services).

424 Throughout the discussion of OTT services, in the Draft Findings, references are made to usage statistics and to price and product differences, as if these determine the answer to the HMT question, without properly operationalising the HMT question. The following paragraphs elaborate.

425 ICASA's consideration of OTT services begins with a discussion of "viewing patterns" and a range of data on South African and international usage of OTT and Pay TV services is presented in the Draft Findings.[459]

426 In the following sub-section this data is critiqued and MultiChoice observes that ICASA has failed to understand the nature, quality and usage of OTT offerings in SA and has overstated differences between Pay TV services and OTT services. For now, MultiChoice observes that none of that data ultimately goes to the question of whether there would be sufficient substitution that would occur away from Pay TV services to other services (including OTT services) to render a SSNIP unprofitable. As explained further below, when that question is asked, the available data suggests the scope for significant substitution to OTT services in response to a SSNIP, particularly among subscribers to higher-tier and mid-tier Pay TV services.

427 ICASA then turns to consider differences in content.[460] Here, ICASA is mistaken regarding the facts. For example, ICASA is incorrect to suggest a lack of sport on OTT services in SA. Vodacom acquired the rights to live stream the 2018/19 FA Cup in SA, the Star Times app offers live sports and Telkom LIT includes a linear sports channel as did Cell C black's initial OTT offering. The new NBCU

[459] Draft Findings, paras 5.12.3 - 5.12.6.
[460] Draft Findings, paras 5.12.9 - 5.12.16.

streaming service, "Peacock," will show the 2020 Olympics. And DAZN is an international sports-only OTT operator that is gaining traction.

428 Moreover, and in any event, as previously explained, differences in product characteristics do not determine the HMT question.

428.1 Even if there were a lack of sport and FSPTW movies on OTT services, and even if some subscribers have strong preferences for this content, this does not preclude significant substitution to OTT services in response to a SSNIP. The many subscribers that do not have strong preferences for that content would be the marginal subscribers that should be the focus of ICASA's assessment of the relevant market.

428.2 Regarding news content, ICASA appears to view the fact that most OTTs do not offer news (notwithstanding that StarTimes On, DEOD, Telkom LIT and the SABC news app all offer news channels as did Cell C black's initial offering) as a reason to define OTT services in a separate market from Pay TV services.[461] This ignores that: (i) some OTT audio-visual services in SA do offer news channels (e.g. StarTimes ON and Telkom LIT, as just mentioned) and on-demand news programmes; (ii) subscribers that substitute to OTT services by shaving their Pay TV cords will retain news channels in their mid-tier or basic-tier Pay TV packages; (iii) subscribers that substitute to OTT services by cutting their cords will be able to continue to access the high quality news content on FTA TV services as well as online news content (including free OTT news programs); and (iv) many subscribers do not care much for electronic audio-visual news content as they get the news they need in other forms (e.g. online news sites, newspapers, radio and social media).[462] The fact that most OTT services do not

[461] Draft Findings, para 5.12.14.

[462] PWC's Consumer Insights Survey finds that "*33% of South African consumers go to social media first to hear about current events*": see https://www.pwc.co.za/en/press-room/consumer-spend-online.html.

offer news therefore does not preclude significant switching from Pay TV services to OTT services.

428.3 It follows that the quote from the Netflix CEO to the effect that Netflix has no intention of competing in live sports and news broadcasting is also not probative of the HMT question: there is no need for competition in live sports and news broadcasting from a single OTT player for there to be significant substitution to OTT services in response to a SSNIP and an inability of a hypothetical monopolist of Pay TV services to profitably impose a SSNIP. Other OTT services do offer live sports and news (as detailed above), and in any event, even if they did not, this would not preclude significant substitution in response to a SSNIP. ICASA is therefore entirely unjustified in its suggestion that this quote "*puts paid the argument whether OTTs pose a competitive constraint on subscription broadcasting*".[463] Despite what the CEO of Netflix may have said, the fact is that there are consumers of Pay TV services in SA that are cord-cutting, cord-shaving or never subscribing, due to OTT alternatives, and this behaviour has implications for the profitability of a SSNIP in relation to Pay TV services.[464]

429 Similarly, ICASA's discussion of broadband access and cost, in the Draft Findings, does not address the HMT question.

429.1 While access to fixed broadband may be limited to some parts of the country, according to ICASA's own data there were 4.7 million fixed broadband subscriptions in SA in 2018 and fixed broadband take-up is increasing rapidly.[465] It is unclear why ICASA does not report this data, which it collects directly from telecommunications providers, and instead refers to a (much smaller) MultiChoice estimate of fixed line broadband homes. This raises serious questions about whether

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463 Even if this were not the case, ICASA would be unjustified in reaching such a conclusion on the basis of a single quote from a single business executive.

464 Netflix, Inc. Annual Report for the fiscal year ended 31 December 2018 accessible at https://s22.q4cdn.com/959853165/files/doc_financials/annual_reports/2018/Form-10K_Q418_Filed.pdf, p. 1 and 3.

465 2019 ICT Sector Report, p. 33.

ICASA has done so selectively to understate the number of fixed broadband connections in order to support a pre-determined conclusion of a narrow retail market.

429.2 In any event, the relevant question is the extent to which <u>subscribers to Pay TV services</u> have fixed broadband access and their ability to switch (in part or entirely) to OTT services. [redacted][466] This means that a large proportion of subscribers to those services are potentially marginal subscribers that may switch to OTT services in response to a SSNIP in relation to high-tier Pay TV services. They will therefore act as an important constraint on the pricing of high-tier Pay TV services, which will act as a constraint on other Pay TV services via a chain of substitution.

429.3 Turning to mobile broadband, ICASA reports that, even as of 2017, mobile broadband penetration was close to 60% of the population.[467] It is unclear why, in the Draft Findings, ICASA characterises the reported increase in one year from 50.5% to 57.8% as only a "marginal" increase. In any event, 57.8% represents a significant percentage of the population that has the capability of receiving OTT services over their mobile devices. Many of the remaining 42.2% would be too young or too old to be making decisions regarding Pay TV services. ICASA's own data reports that as of September 2018 there were close to 66 million mobile phone data subscriptions.[468] And according to We Are Social, there were 29 million active mobile internet users in SA in 2019 with average internet connection speeds of 25Mbps, and 48% of 31

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466 These figures are from MultiChoice's 2019 Video Entertainment Research Report: [redacted]

467 Draft Findings, para 5.12.17, referring to ICASA, *Report on the State of ICT in South Africa*, 31 March 2018.

468 2019 ICT Sector Report, p. 31.

million internet users in SA stream TV content each month.[469] Consistent with this, Vodacom has reported that as at the end of FY2019 it had 19.9m active smart devices on its network and 10m 4G customers (an increase of 35% compared to the end of FY2018).[470] Vodacom and other telcos have partnerships with streaming services that facilitates the uptake of the services.

429.4 Moreover, mobile data prices in SA, are decreasing rapidly. Vodacom has reported that in FY2019 alone mobile data prices per MB fell by 37% and prices for out of bundle data fell by 50%.[471] Vodacom also reports that it has reduced its tariffs on big data bundles (likely used largely for streaming) by 40%, with massive promotions amounting to 80% of data bundle sales.[472] These figures are consistent with findings from ICASA's own bi-annual tariff analysis reports.[473] These show that telcos are extending discounts through promotions, and that prices for streaming bundles and large bundles are much lower than acknowledged by ICASA in the Draft Findings. For example, according to ICASA:

> *"there is a positive initiative by operators to embrace OTTs, by offering OTT related price bundles, with lower effective rate per MB; for example, Cell C black, Telkom FreeMe, Vodacom Ticket and MTN Social bundles."*[474]

ICASA also states, when commenting on Rain's discounted data offerings that *"[w]ith the steadily evolving market, the Authority is*

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[469] We Are Social, *Digital 2019 South Africa*, slides 15, 21, 24 and 28.

[470] Vodacom, *Annual Results for the Year Ended 31 March 2019*, accessible at https://www.vodacom.com/pdf/annual-results/2019/annual-results-presentation-fy18.pdf, p. 15.

[471] Vodacom, Annual Results for the Year Ended 31 March 2019, p. 15.

[472] Vodacom, Annual Results for the Year Ended 31 March 2019, p. 15.

[473] Bi-Annual Report on the Analysis of Tariff Notifications Submitted to ICASA for the period 01 January 2018 to 30 June 2018 and Bi-Annual Report on the Analysis of Tariff Notifications Submitted to ICASA for the period 01 July 2018 to 31 December 2018.

[474] Bi-Annual Report on the Analysis of Tariff Notifications Submitted to ICASA for the period 01 January 2018 to 30 June 2018, p. 61

expecting to see similar affordable offerings being launched in the market in the short to medium term."[475]

These findings, in ICASA's own bi-annual tariff analysis reports, and the trends from Vodacom's financial results, are consistent with MultiChoice's submissions regarding the competitive constraints posed by OTT providers. MultiChoice submits that ICASA's failure to reflect the findings of its own bi-annual tariff analysis in the Draft Findings' consideration of mobile data pricing is another indicator of selectivity and confirmation bias in the Draft Findings.

429.5 In any event, the data just reported on mobile broadband and streaming usage demonstrates that mobile data prices are not prohibiting users accessing OTT audio-visual content on mobile devices. It follows that a large proportion of mobile subscribers have high speed internet access over their mobile devices and stream electronic audio-visual content. While some (particularly the poorest in the community) might consider the cost prohibitive, the HMT question concerns subscribers to Pay TV services, and in particular those that are potentially marginal and would consider OTT services over mobile devices as an alternative (either entirely or in part, and either alone or together with other alternatives including OTT services over fixed connections or using WiFi in public spaces or at work).

429.6 The cost of OTT for consumers is also significantly overstated by ICASA in the Draft Findings, as explained further below.

430 ICASA's consideration of "viewer experience" also focuses on differences in product characteristics and does not engage with the HMT question. In particular, the discussion of differences between Pay TV services and OTT services in paragraphs 5.12.27 to 5.12.33 of the Draft Findings (including potential differences in quality, equipment required, whether linear or on-demand, payment plans and advertising) does not answer whether there would

475 Bi-Annual Report on the Analysis of Tariff Notifications Submitted to ICASA for the period 01 July 2018 to 31 December 2018, p. 62.

be significant substitution from Pay TV services to OTT services in response to a SSNIP in relation to the former. A number of other comments apply here.

430.1 ICASA argues that "*very few consumers would have a 10Mbps fibre/ADSL internet package required for good quality*".[476] It is not clear why ICASA considers that a 10Mbps connection is required for streaming electronic audio-visual content. Netflix recommends internet download speeds for its streaming service of 3Mbps for SD quality and 5Mbps for HD quality.[477] As compression technologies improve speed requirements will be lower in the future. In any event, a large proportion of subscribers to high-tier and mid-tier Pay TV services would enjoy broadband connection speeds above 10 Mbps. That is the relevant matter for the HMT question. According to mybroadband.co.za, in Q1 2018 average broadband speeds ranged from 6Mbps for MWEB (the lowest average among all ISPs) to 34Mbps for Cell C.[478] According to the latest We Are Social report, average mobile broadband speeds are 25 Mbps and average fixed broadband speeds are 18 Mbps.

430.2 Since Pay TV services can be purchased on a month to month basis, and most subscription OTT services are similar, the distinction suggested by ICASA regarding payment plans[479] is not material.

430.3 ICASA includes a lengthy summary of the market definition consideration in the *Facebook/Whatsapp* case, presumably in order to demonstrate that differences in "user experience" were taken into account by the EC in its consideration of the relevant market in that case.[480] However, the fact that much of the EC's consideration of the relevant market in that case was a discussion of differences in product characteristics does not justify ICASA relying on differences in product characteristics to reach a view on the relevant market in this case, in

476 Draft Findings, para 5.12.28.

477 See https://help.netflix.com/en/node/306

478 See https://mybroadband.co.za/news/broadband/254601-average-speed-of-south-africas-top-isps.html

479 Draft Findings, para 5.12.32.

480 Draft Findings, paras 5.12.34 - 5.12.36.

lieu of a careful consideration of the HMT and the extent of substitution that would be likely to occur in response to a SSNIP. It should also be emphasised that the EC ultimately chose to leave open the question of whether consumer communication apps and social networks belong within the same market, due to the evolving nature of the services. Despite purporting to be acting consistently with the EC, ICASA does not do so. Instead, ICASA draws strict boundaries around narrow markets. MultiChoice submits that ICASA should instead follow the EC approach in relation to Pay TV services and OTT services and leave the market open in view of the evolving nature of the services, if it wishes to claim that its positions are informed by recent enforcement practice in the European Union.

ICASA has failed to understand the nature, quality and usage of OTT offerings in SA and has overstated differences between Pay TV services and OTT services

431 ICASA has misrepresented the nature and quality of the offerings of OTT players in SA.

431.1 At times ICASA appears to view Netflix as the only form of OTT offering and ignores other significant OTT offerings including Amazon Prime, Star Times ON, Vodacom Video Play, Viu, Telkom LIT and Cell C black. There is also significant viewership of online video content on YouTube.

431.2 Moreover, although Netflix is far from the only significant OTT offering, ICASA also understates the significance of the constraint on Pay TV service providers from Netflix. In particular, ICASA quotes selectively and misleadingly from a 2016 MultiChoice business plan, [redacted] ICASA attempts to use this observation to suggest that MultiChoice's own business plans "contradict" MultiChoice's submissions that Netflix represent a significant competitive constraint. ICASA goes so far as to suggest that this demonstrates that MultiChoice is engaging in a "threat inflation" tactic. These suggestions are entirely unwarranted.

431.2.1 [redacted]

431.2.2 [redacted]

431.3 Again demonstrating selectivity and confirmation bias, ICASA overlooks to mention that 2016 business plan also states that [redacted].[481]

431.4 ICASA's suggestion that OTT offerings are not affordable for basic-tier subscribers and FTA viewers[482] does not make any sense given that Viu has stated that it targets customers in LSM 6 and below,[483] many significant OTT offerings are free (including YouTube and Viu's free service, the latter in partnership with the SABC and e.tv), and others are available at monthly subscription prices that are no greater than basic-tier Pay TV prices. For example: whilst DStv Access is R105 per month and Easy View is R29 per month, Vodacom Video Play monthly subscription is between R25 and R99 per month, Cell C black's monthly

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481 The Draft Findings itself includes this quote in para 5.17.2.11.

482 Draft Findings, paras 5.12.8 and 5.10.40.

483 https://mybroadband.co.za/news/broadcasting/297846-how-viu-plans-to-take-on-netflix-with-sabc-and-etv-shows.html

subscription offerings range between R25 to R99, the DEOD monthly subscription ranges between R40 and R129, whilst Viu's "Premium" monthly subscription price is R60. All these players also offer fractional billing, which means that customers that cannot afford to, or prefer not to, pay the monthly fees for electronic audio-visual services upfront can also subscribe to packages on a weekly or daily basis or just for a weekend.

431.5 In the Draft Findings, ICASA incorrectly asserts that currently there is no live sport on OTT services in SA (paragraph 5.12.10). However:

431.5.1 Vodacom Video Play has streamed live football content since before the publication of the Draft Findings having acquired the rights to live stream the 2018/19 FA Cup in SA;

431.5.2 the Star Times app offers live sports;

431.5.3 YouTube offers a dedicated channel for live NBA Africa games across SSA; and

431.5.4 global OTT players are investing heavily in live sport and this trend is already impacting SA. For example, Twitter has acquired global rights to distribute 140 hours across 28 tournaments of the PGA Tour. Twitter has also acquired rights to live stream the NBA finals in India. Other notable OTT live sport acquisitions include Facebook's acquisition of rights to the English Premier League, UEFA Champions League, La Liga, MLB and the PGA Tour, among others, and Amazon's acquisition of rights to live stream US Open tennis, ATP tennis and 20 English Premier League matches.

431.5.5 sports bodies are also offering their content direct to consumers in SA and elsewhere. For example, UEFA recently launched a free OTT streaming service (called UEFA.tv) to show live and on-demand video content which will cover various content including national leagues and the

WWE Network, recently made available in SA, provides access to every live WWE pay-per-view event and hours of on-demand programming including from the WWE archive.

431.6 ICASA also incorrectly asserts that OTT services do not offer linear channels.[484] There is nothing in principle precluding OTT services from offering linear channels that appear for all purposes the same as linear services provided over fibre, satellite and terrestrial networks. Indeed, StarTimes ON, DEOD, and Telkom Lit all offer linear channels, as does DStv Now.

432 ICASA also takes an outdated approach to traditional Pay TV services when comparing the viewer experience of these services to the viewer experience of OTT services in the Draft Findings. In particular, ICASA fails to recognise the VOD functionality that features like DStv's "Catch Up" allows for. It also overstates differences in payment plans,[485] with DStv subscribers able to subscribe on a month by month basis in the same way as subscribers to OTT services.

433 ICASA also significantly understates usage of OTT services, particularly among consumers that are most likely to be marginal with respect to Pay TV services. For example, in paragraph 5.12.3 of the Draft Findings, ICASA relies on certain data from the BRC to claim that "*out of 14.4 million households with a television set, 8% have an internet enabled TV set with only 3% of them claiming to have used the internet functionality on their TV sets*" and "*about 96% of households still watch live television content and only 3% of the population watch online video content*".

433.1 First, ICASA misinterprets the BRC data. ICASA's claim that "*only 3% of the population watch online video content*" is implausible. The BRC question (T6) asked "*when last, if at all, did you watch a TV programme*

484 Draft Findings, para 5.12.39.
485 Draft Findings, para 5.12.32.

online".[486] In response to such a question, survey respondents may have not reported viewing YouTube, Netflix or other online content that they do not associate with "TV" content. MultiChoice is in no doubt that a much larger proportion of the population watches online audio-visual content. In this regard, see Part A of these submissions.

433.2 Second, even if 96% of TV households may watch live TV content via their TV sets, this does not preclude significant substitution of Pay TV services (either cord-cutting or cord-shaving) for OTT services.

433.3 Third, since the BRC data reflect the total population of SA, they misrepresent the propensity for substitution from Pay TV services to OTT services in response to a SSNIP: more relevant would be the proportions of subscribers to Pay TV services that have and use internet enabled TV functionality and that view online audio-visual content.

433.4 Fourth, again since the BRC data reflect the total population, the percentage of actual and potential subscribers to Pay TV services that own smart TVs is likely to be much greater than 8% and the percentage that makes use of smart TV functionality is likely to be much greater than 3%. As mentioned earlier,[487] according to MultiChoice's 2019 Video Entertainment Survey, [redacted] and according to the 2017 Deloitte Global Mobile Consumer Survey[488] 23% of surveyed South African consumers reported owning a smart TV whilst 17% reported owning a video streaming device.

433.5 Fifth, the "stock" of TV sets that are internet-enabled significantly understates the "flow" share of TV sets sold that are internet-enabled.

486 BRC, Establishment Survey Questionnaire, Jul – Dec 2017, available at https://brcsa.org.za/establishment-survey-questionnaire-jul-dec-2017/

487 In Figure 8 of Part A of these submissions.

488 The survey comprised 1,000 respondents across age groups, genders and socio-economic clusters.

Moreover, there is growing use of internet-connected video streaming devices that effectively convert any TV set into a smart TV.

433.6 Sixth, ICASA's reliance on the BRC data is highly selective given the full set of evidence available to ICASA in relation to OTT subscriptions and viewing. As a result, the conclusion that ICASA attempts to draw in paragraph 5.12.3, of the Draft Findings that "*the claim that OTT distributors [sic] is a major threat to subscription TV is overstated*" is unsupported and unreasonable.

433.6.1 In particular, ICASA has selectively ignored its own Consumer Survey that reported that more than 50% of all 1,002 survey respondents had a least one smart TV. Even when limiting just to FTA respondents, ICASA's Consumer Survey suggests close to 25% had at least one smart TV, and even when limiting just to the lowest income respondents surveyed (those earning less than R5000 per month), more than 15% had smart TVs. The same survey found that <u>more than 66%</u> of all respondents to the Consumer Survey consumed online video content on devices other than TV sets, with the incidence of viewing of online video content rising to 85% among DStv Premium subscribers. Moreover, out of the full survey sample of 1,002 respondents, <u>45% reported that they view or subscribe to at least one of Showmax, Netflix, black TV, DEOD and Amazon Prime</u>. ICASA's reliance on the BRC data and its failure to make any mention of ICASA's own Consumer Survey results, which is relied upon elsewhere in the Draft Findings, demonstrates unreasonable selectivity of the evidence base that was available to ICASA when it prepared the Draft Findings. As explained above, this is consistent with confirmation bias.

433.6.2 Similarly, MultiChoice's 2019 Video Entertainment survey reports that [redacted] of surveyed DStv Premium subscribers and [redacted] of surveyed DStv Compact subscribers subscribed to paid VOD.[489]

433.6.3 Moreover, the failure to assess the penetration of OTT services has further contributed to ICASA's understatement, in the Draft Findings, of both the size and impact of OTT services. Apart from ShowMax, ICASA has not attempted to obtain and consider subscription figures from OTT service providers. To give one example, Vodacom's recent financial results show that it has 869,000 active users on its Video Play platform,[490] yet this OTT service is not given any serious consideration at all in the Draft Findings.

434 Another example is in paragraph 5.12.39 of the Draft Findings, where ICASA asserts that a "*high preference for linear television as a mode of audio-visual content consumption in the South African context limits the current ability of OTTs to be reasonable or credible substitutes*". The basis for the claim of "high preference" is not stated in this paragraph. It is unclear why ICASA does not reflect here on the evidence provided by MultiChoice as well as the evidence provided by ICASA's Consumer Survey, which suggests: that more than 66% of online survey respondents consumed online video content on devices other than TV sets and 45% report viewing or subscribing to subscription-based OTT services. More generally, refer to Part B above.

435 A further example is in paragraph 5.12.40, where ICASA relies on findings from the March 2018 Establishment Survey to assert that "*a TV set is still the preferred mode of audio-visual consumption for South Africans (98%) with smart phones (5%), laptop/PC (1%), Tablet (1%) and games console (1%).*"

489 2019 Video Entertainment survey.

490 See Vodacom Annual Results Presentation for the Year ended 31 March 2019, accessible at https://www.vodacom.com/pdf/annual-results/2019/annual-results-presentation-fy19-latest.pdf, p. 16.

435.1 First, the relevant Establishment Survey question (question T3)[491] asks about watching "TV" rather than about watching "audio-visual content" or "television content". It is therefore likely that responses were biased towards TV sets for this reason.

435.2 Second, the relevant Establishment Survey question asks whether each device was used to watch TV "yesterday", "in the last week", "in the last month" or "longer ago/never". It is unclear whether the BRC draws from the responses in relation to "yesterday" or all of the options when reporting that 98% use TV sets, 5% smartphones and 1% for other devices. The percentages would likely be higher for the other devices if not limited to "yesterday".

435.3 Third, in any event, since the BRC reports the propensity of viewing by device among all South Africans, this fails to inform the propensity for substitution from Pay TV services to OTT services in response to a SSNIP, since all South Africans are not representative of subscribers to Pay TV services. MultiChoice has previously provided ICASA with such evidence for its own subscribers, but this has been ignored.

435.4 Fourth, reliance on the data in the March 2018 Establishment Survey is an unreasonably incomplete and selective account of the evidence available to ICASA when preparing the Draft Findings. Again, ICASA's Consumer Survey reports significant consumption of online video content on alternative devices across all survey respondents and even higher percentages (above 77%) among DStv subscribers. ICASA's failure to report ICASA's Consumer Survey results in relation to viewing of electronic audio-visual content on alternative devices is inexplicable and suggests a "blind eye" has been turned to evidence that does not support ICASA's proposed narrow market definition.

491 See Establishment Survey Questionnaire July – December 2017, p5, accessible at: https://secureservercdn.net/160.153.136.1/695.618.myftpupload.com/wp-content/uploads/2018/04/ES-Questionnaire-Jul-Dec-2017-Release-version.pdf

436 The overall result of ICASA's selectivity and misrepresentation of the evidence in relation to the nature, quality and usage of OTT services is that, in the Draft Findings, ICASA paints a misleading picture of the significance of OTT offerings as substitutes for and constraints on Pay TV services. ICASA's conclusion that the competitive constraint from OTT services "*is not strong enough to warrant including those services in the same relevant market as Pay TV services*"[492] is therefore unfounded and unreasonable.

437 More should not be needed, but MultiChoice considers it important here to observe that ICASA entirely ignores the evidence that MultiChoice has provided to ICASA on the impact of OTT services on the DStv Premium bouquet. MultiChoice's 2018 supplementary submissions included a figure showing the trend in DStv Premium subscriptions up to April 2018.[493] This showed a marked drop off in DStv Premium subscribers immediately following the launch of Netflix in early 2016. An updated version of this figure is produced below. This shows that DStv Premium has now lost [redacted] of its subscriber base since January 2016. This is not a trivial impact. Moreover, this is in the face of MultiChoice continually investing in its content and the quality of its Premium bouquet, in response to the competitive environment that it faces.

[492] Draft Findings, para 5.13.17.
[493] 2018 supplementary submissions, Part B, p. 23.

Figure 19: DStv Premium Subscriber Numbers (April 2011 – March 2019)

[redacted]

The data in the Draft Findings and in ICASA's Consumer Survey suggests a likelihood of significant substitution to OTT services in response to a SSNIP

438 Again, the relevant HMT market definition question concerns the quantum of marginal subscribers that would switch in response to a SSNIP. An objective and non-selective assessment of the data in the Draft Findings and in ICASA's Consumer Survey presents a strong case that switching by marginal subscribers from high-tier Pay TVservices to OTT services would be significant in response to a SSNIP in relation to the former.

438.1 Based on the BRC's TAMS (Television Audience Measurement Systems) data, ICASA reports that 8% of 14.4 million South African households with a television set have internet enabled TVs.[494] This implies around 1.15 million internet enabled TV households. Given that, as of late 2018 there were around [redacted] DStv Premium and DStv Compact subscribers, and assuming that the vast majority of

[494] Draft Findings, para 5.12.3.

internet enabled TVs are owned by these subscribers, this suggests that [redacted] of subscribers to DStv Premium and Compact bouquets would be readily able to switch to OTT delivered services without changing TV sets. Moreover, according to ICASA's Consumer Survey results, which ICASA selectively omitted to mention in the Draft Findings, more than <u>73%</u> of Premium DStv subscribers and more than <u>65%</u> of mid-tier DStv subscribers had at least one smart TV.[495] This suggests that smart TV ownership is more widespread among online survey respondents that are DStv Premium, Compact, and Compact Plus subscribers than for the population as a whole.[496] It is also relevant here to account for the growing use of internet-connected boxes that effectively convert any TV set into a smart TV.

438.2 The Ofcom survey data reported in paragraph 5.12.4 of the Draft Findings suggests that 12% of UK consumers are already OTT devotees and that 29% of all electronic audio-visual viewing in the UK is of OTT content.

438.3 The Ofcom data reported in paragraph 5.13.1 of the Draft Findings suggests that 26% of subscribers to on-demand and streaming services have no Pay TV service (i.e. they are cord-cutters or cord-nevers). The other 74% do not all necessarily view OTT services as a complement to Pay TV services. A proportion of that 74% would be cord-shavers that have retained Pay TV services, but have substituted OTT for access to channels in higher-tier bouquets.

438.4 The US data reported in paragraph 5.12.5 of the Draft Findings suggests that, already, at current prices, around 10% or more of US households have "cut" their cords (Pay TV penetration is down from 88% in 2010 to 78% in 2018), and that around 70% of households have subscription VOD services. Similarly, the Mexican data reported in paragraph 5.13.3 of the Draft Findings suggests that even at current

495 Phase 4 Report, p. 32–33.
496 Phase 4 Report, p. 32–33.

prices 11% of households with Pay TV services are intending either to cancel their subscription (cord-cutting) or to migrate to a lower cost packages (cord-shaving). Given this, the incremental proportion that would intend to cut or shave their cord in response to a SSNIP in relation to Pay TV services may be large.

439 In the Draft Findings, ICASA also presents a figure that is extracted from a We Are Social report from January 2018.[497] This figure suggests that, according to a Google survey, only 6% of internet users stream online content via a TV set and only 8% of internet users stream online content via another device.[498] However, ICASA has been highly selective in its use of this evidence.

439.1 It is not clear what the base of internet users is. It is likely, however, that the 6% of internet users that already streamed online content via a TV set in January 2018, represented a large proportion (perhaps [redacted]) of DStv Premium and DStv Compact subscribers.

439.2 In any event, MultiChoice submits that the January 2018 We Are Social data should be regarded as a significant understatement of current conditions. The subsequent We Are Social report from January 2019 includes a figure that suggests that 48% of South African internet users stream TV content.[499] This is a significantly larger percentage than We Are Social reported for January 2018. We Are Social also reports that 97% of internet users watch videos online. This reflects the speed with which South African consumers are adopting streaming, which is an important dynamic that is in opposition to ICASA's attempts, in the Draft Findings, to understate the importance and significance of OTT services in SA. Consistent with this, as mentioned earlier, Vodacom's annual results for FY2019 demonstrate the prevalence of OTT audio-

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497 Draft Findings, para 5.12.6.

498 The figure comes from slide 84 of We Are Social, *Digital in 2018 in South Africa*, January 2018, slide 84, which can be accessed at: https://www.slideshare.net/wearesocial/digital-in-2018-in-southern-africa-86865907

499 See slide 28 of We Are Social, *Digital 2019; South Africa*, January 2019, which can be accessed at: https://datareportal.com/reports/digital-2019-south-africa

visual consumption already today, with 10 million 4G customers, and 869,000 Vodacom Video Play users.[500]

439.3 Moreover, consistent with both the latest We Are Social report and the Vodacom annual results, ICASA's Consumer Survey results suggest high rates of streaming of OTT services by DStv subscribers in general and by DStv Premium, Compact, and Compact Plus subscribers specifically, among the survey respondents. In particular, as previously observed, according to the Consumer Survey results over 77% of all surveyed DStv subscribers watch TV on an alternative device[501] and around 45% of all consumers surveyed view or subscribe to Showmax (separately to any DStv subscription), Netflix, black, DEOD or Amazon Prime. The prevalence of OTT viewing among ICASA's Consumer Survey respondents is much higher than this 45% figure suggests, since the survey question asked only about viewing or subscriptions to a limited set of subscription OTT services (the survey did not ask all respondents about other subscription OTT services or about free OTT services such as YouTube that include significant South African content including from SABC and e.tv). Moreover, the Consumer Survey results indicate that viewing and subscriptions to OTT services is common for all types of DStv subscribers that were surveyed, with 51% of DStv basic-tier subscribers, 60% of DStv mid-tier subscribers and 54% of DStv Premium subscribers that were surveyed viewing or subscribing to one or more of the above-mentioned OTT services.[502]

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500 See Vodacom Annual Results Presentation for the Year ended 31 March 2019, accessible at https://www.vodacom.com/pdf/annual-results/2019/annual-results-presentation-fy19-latest.pdf, p. 16.

501 Phase 4 Report, p 36 – 37. 77% of subscribers to MultiChoice's EasyView, Access or Family bouquets watch TV on an alternative device such as a desktop or laptop, cellphone or smartphone, tablet, iPad, games console or other media player. 81% of subscribers to MultiChoice's Compact and Compact Plus bouquets and 84% of subscribers to MultiChoice's Premium bouquet watch TV on one or more of these alternative devices.

502 Phase 4 Report, p. 19.

Misunderstanding of OTT services as a complement and the relationship between cord-stacking and cord-shaving

440 In the Draft Findings, ICASA suggests that OTT is more a complement to Pay TV than a substitute[503] and refers to a "prevalence of 'cord-stacking'" in the US and to a conclusion of research carried out in Mexico that OTT is not an "absolute substitute" for Pay TV services.[504]

441 ICASA again loses sight here of the HMT question. The HMT is interested in whether there would be sufficient switching away from the focal product to render a SSNIP unprofitable (not whether for some, or even most subscribers, alternative products might be considered complements). MultiChoice does not disagree that OTT is sometimes a complement to Pay TV, nor that OTT is not always an "absolute substitute" for Pay TV. However, this does not preclude significant "cord-cutting" (by marginal subscribers that view OTT as a substitute) and significant "cord-shaving" (by marginal subscribers to more expensive Pay TV products that view OTT as a complement to a less expensive Pay TV product). As the data that MultiChoice has provided to ICASA in relation to its ShowMax OTT service reveals, [redacted] of ShowMax subscribers do not subscribe to DStv Premium. This [redacted] is a mixture of cord cutters, cord-shavers and cord-nevers. Moreover, Figure 19 above is all the evidence that ICASA should need of significant cord-cutting and cord-shaving and significant constraint on Pay TV services from OTT services.

442 MultiChoice also does not dispute that some consumers will "cord-stack", meaning that they will make use of OTT services in addition to Pay TV services. Some "cord-stackers" will be stacking OTT on top of their pre-existing Pay TV service and will not be substituting (except to the extent that their eyeballs may spend more time directed at the OTT service and less time directed at the Pay TV service). However, the data on "cord-stacking" referred to in paragraphs 5.13.1-5.13.3 will also include many subscribers that have downgraded to less expensive Pay TV services: these are "cord-shavers" that are substituting OTT

503 Draft Findings, paras 5.12.5 and 5.13.1-5.13.8.
504 Draft Findings, paras 5.12.5 and 5.13.2-5.13.3.

services for higher-tier Pay TV services for and contributing to the constraints on Pay TV services. In other words, "cord-shavers" are a subset of "cord-stackers". This appears to have been overlooked by ICASA in the Draft Findings in its rush to report on evidence of cord-stacking.

443 MultiChoice further submits that, for consistency, ICASA's basis for including "midrange" services in the same market as "premium" services[505] justifies the inclusion also of OTT services in the market, since much of the migration from "premium" to midrange services will be in conjunction with OTT services (not only ShowMax, but also other OTT services such as, Vodacom Video Play, Netflix and Amazon Prime) that are purchased as a complement to the midrange services.

Misunderstanding of the relative costs to consumers of OTT services and FTA and Pay TV services

444 In paragraph 5.12.24 of the Draft Findings, ICASA incorrectly subscribes to a flawed comparison presented by Econet of the stand-alone cost of OTT (including broadband costs) and the cost of Pay TV services to conclude that the cost of OTT is "higher than most subscription-TV packages". This is an absurd and entirely unreasonable analysis. OTT services make use of the existing ecosystem of broadband connections and devices. The vast majority of actual and potential subscribers to Pay TV services will already be incurring the costs of broadband needed to view OTT services (whether in the form of a fixed broadband connection or mobile subscriptions). The incremental costs of OTT services are therefore in fact significantly smaller than the incremental costs of Pay TV services. For example, whereas DStv Premium, DStv Compact and DStv Access retail for R809, R385 and R249 per month, respectively, and require a satellite dish and STB, OTT subscriptions do not require any upfront costs, and a subscription to Cell C black is just R69 per month and subscriptions to Netflix range from R99 to R169 per month. While some broadband connections (fixed and mobile) have data caps, these are increasing and out of bundle data charges

505 Draft Findings, para 5.12.41.

are commonly zero-rated for electronic audio-visual content, as ICASA has itself observed in its tariff analysis reports.

445 MultiChoice also submits that since many OTT services are free or have low monthly subscription fees, ICASA's reasons in the Draft Findings for discarding switching from basic-tier bouquets to OTT services "*on account of substantially different price points*"[506] and for asserting that FTA viewers are "*highly unlikely to consider OTT services as an alternative based on affordability*"[507] are not valid. The proliferation of OTT services, aided by telcos who are rapidly lowering the costs for such services, taken together with the evidence of the impact on Pay TV shows that OTT is in the same relevant market as Pay TV services and FTA services. From a MultiChoice perspective, the presence of these constraints is evident, [redacted]

ICASA's assessment of constraints from OTT services is not forward-looking

446 ICASA has conducted a static assessment of the state of the market based on historical perceptions (i.e. as explained below, not even reflecting the current nature and quality of OTT offerings), rather than a forward-looking assessment that takes into account not only the current nature, quality and usage of OTT services and allocations of content rights, but also how OTT services and content rights allocations are likely to develop over the coming few years.

447 MultiChoice submits that a market definition that is not forward looking will not provide a good frame of reference for an effectiveness of competition assessment that needs to be forward-looking. In particular, it will tend to exclude products and services that are significant current and future constraints and that need to be given careful consideration in a forward-looking assessment of effectiveness of competition.

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[506] Draft Findings, para 5.12.8.
[507] Draft Findings, para 5.10.40.

448 While MultiChoice recognises that ICASA has taken OTT services into account as an "out of market competitor" in its effectiveness of competition assessment in the Draft Findings, MultiChoice submits that a better analytical approach would be to define the relevant market more broadly to start with, in recognition that if, as ICASA believes, OTT services are not already significant constraints (which MultiChoice contends they in fact are), they soon will be.

FLAWED ANALYSIS OF WHOLESALE MARKETS

Flawed analysis of the supply and acquisition of channels

There is no relevant market for the wholesale supply of channels

449 ICASA does not agree with MultiChoice's submission that there is no separate relevant market for the wholesale supply of channels.[508] The basis for ICASA's disagreement appears to be the observation that wholesale channel supply agreements exist between channel producers and retailers.[509]

450 What ICASA has failed to grasp here is that the existence of supply of a product does not imply a market boundary limited to that product. As MultiChoice explained in its 2017 submissions, the definition of relevant markets along a supply chain should reflect constraints, not activities.[510] The fallacy that ICASA has perpetuated in the Draft Findings, is the definition of a market boundary around an activity in a supply chain rather than by reference to the relevant market definition question of whether a hypothetical monopolist of that activity would be able profitably to impose a SSNIP. Although channel packaging may be identified as a distinct activity, and although channels are, without question, supplied on a wholesale basis between channel producers and retailers, this does not necessarily imply that the wholesale supply of channels forms a relevant market.

[508] Draft Findings, para 5.15.5.

[509] For this observation, ICASA appears to rely on testimony of the CEO of MultiChoice Group that over the years MultiChoice has concluded channel licensing agreements with a number of channel providers.

[510] MultiChoice's 2017 submissions, paras 256-257, 420 and 431.

451 As always, one needs to examine the constraints on a hypothetical monopolist of the focal product (here, this is the wholesale supply of channels), and specifically, whether a wholesale monopolist supplying linear channels to electronic audio-visual retailers would be able profitably to impose a SSNIP over the competitive price level. MultiChoice has previously explained to ICASA that there are three reasons why that hypothetical monopolist would be unable profitably to impose a SSNIP, and, consequently, why there is no relevant market limited to the wholesale supply of channels.[511]

451.1 First, a hypothetical monopolist supplier of linear TV channels that attempted to implement a SSNIP would find that retailers would switch directly to non-linear forms of similar or equivalent content. For example, instead of acquiring the rights to a movie channel, a retailer may contract for a library of SVOD movie rights. This is essentially what Netflix and Amazon have done as an alternative to retailing pre-packaged channels. It is notable here that traditional linear TV providers are increasingly providing non-linear alternatives (e.g. DStv CatchUp and the strategic partnerships between the SABC and e.tv and Viu[512]), reflecting the changes in viewer preferences towards non-linear audio-visual consumption.

451.2 Second, a hypothetical monopolist supplier of wholesale linear TV channels would also be constrained, indirectly, by non-linear content offerings that are made directly to consumers at the retail level, using OTT, from content owners such as HBO, Disney and sports federations, as well as from content aggregators who also produce their own content such as Netflix and Amazon. Indeed, since an attempted SSNIP by a hypothetical monopolist wholesaler of channels would harm content owners (as well as consumers), content owners would have strong incentives in response to any attempted SSNIP to bypass the channel wholesaler and distribute the content direct to consumers. Content owners are increasingly supplying consumers directly, both

511 MultiChoice's 2017 submissions, paras 422-424.

512 http://www.sabc.co.za/sabc/sabc-and-viu-sa-announce-strategic-partnership/

with respect to sports content and other content. Thus, the relevant market includes non-linear content as well as linear TV channels, due to both direct and indirect constraints.

451.3 Third, a retailer of linear TV channel packages does not need to acquire content in aggregated form (i.e. in the form of a channel), since it can readily undertake the aggregation activity itself and create its own channels. Indeed, such aggregation is already undertaken by most players in the market including FTA providers like e.tv and the SABC. There are very low barriers to entering into content aggregation, as Netflix and Amazon, as well as many other OTT content aggregators and retailers have demonstrated. Thus, if a hypothetical monopolist wholesaler of channels attempted to implement a SSNIP, retailers could acquire content rights directly from rights owners and aggregate those into its own channels. This disintermediation threat was the basis for the UKCC to find no separate wholesale channel supply market in its Movies on Pay TV investigation.[513]

452 In summary, the traditional linear TV channel environment is being supplanted by non-linear alternatives (in particular, non-linear OTT alternatives) and retailers today can acquire, commission or themselves generate content directly (self-supplying any necessary content aggregation or channel packaging activity), and therefore do not need to acquire pre-packaged channels. It is also important to note that the market has changed significantly and there are no longer any pure linear TV providers. Traditional broadcasters, FTA and Pay TV, now have non-linear as well as linear offerings. The non-linear offerings are provided in the form of value-added services (e.g. Catch Up services on DStv) or using OTT apps (e.g. SABC and e.tv use YouTube and Viu as platforms for this). This shift is in response to shifting consumption patterns as well as the emergence of the threat from non-linear offerings. ICASA's attempts in the Draft Findings to pigeonhole linear and non-linear content into separate markets is clearly out of touch with market reality and confirms its rooting in historical views. After all, linear TV

513 MultiChoice's 2017 submissions, paras 426-427.

channels are simply bundles of programmes, and it is the programmes that audiences want to watch. Today, those programmes are available in both linear and non-linear environments. For instance, the popular SABC 1 drama Muvhango is broadcast linear on analogue terrestrial, DTT, OVHD, StarSat and all DStv bouquets and is also available on-demand from a number of OTT services (Viu, YouTube and DStv Now).

453 ICASA does not engage with the last of the above three arguments. Regarding the first two, ICASA does not agree with MultiChoice that linear channels are readily substitutable for non-linear content. However, ICASA's reasoning in support of this disagreement is not robust.

453.1 While movie release windowing delays the availability of non-linear viewing of a particular movie relative to its availability on linear TV services, this does not preclude delayed non-linear movie distribution from acting as a significant constraint on linear TV movie channels. In the Draft Findings, ICASA has not asked, specifically, whether in response to a SSNIP in relation to linear TV channels, there would be significant substitution by people who subscribe for Pay TV services which offer FSPTW movies to non-linear services that offer the same movies with a delay together with a wide range of movie and series content on-demand. Also overlooked by ICASA is the strength of constraint imposed by non-linear first-run series content such as Netflix originals.

453.2 In relation to sport, while non-linear streaming of live sport is not yet as prevalent as live sport on linear TV channels, there are clear trends towards disruption of traditional linear TV viewing of sport by non-linear services provided by Vodacom Video Play, Facebook, Amazon, and Google, among others. There are also linear OTT sport channel streams available in SA (e.g. those on StarTimes ON and Telkom LIT). MultiChoice has previously provided ICASA with a wealth of information on this development, which is being felt around the world and will be felt equally in SA.[514] ICASA does not engage with this evidence or present any contradictory evidence. It merely asserts that "*it is a fallacy that linear and non-linear content is currently readily substitutable in South Africa*" and concludes that "perhaps" it will be the case "*sometime in the future, but the Authority is not persuaded that this would be the case in the short or medium term*". This assertion and conclusion are not reasonably made given the lack of any evidential basis and their contradiction with the evidence that MultiChoice has provided to ICASA.

<u>There is no basis for limiting wholesale channel supply markets by genre</u>

454 In the Draft Findings, ICASA suggests that channels in different genres fall within distinct wholesale channel supply markets. Specifically, ICASA considered whether "*from a demand side substitution perspective, a television broadcaster would, on behalf of its viewers, consider two or more channels as substitutes*"[515] and concluded that "*it is highly unlikely that a SSNIP on a documentary channel, would lead to switching by broadcasters to a movie channel, for instance*".[516] The same statements appeared in the Discussion Document.[517] MultiChoice's 2017 submissions in relation to these statements appear not to have been addressed: ICASA's analysis of a SSNIP on a documentary channel remains mere speculation without any evidential basis and without careful analysis.[518] In particular, like in the Discussion Document, ICASA has not properly asked the HMT question in the Draft Findings.

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514 MultiChoice's 2017 submissions paras 116, 144, 145, 147, 150, 170, 505 – 513, 696, 923, 925, 967, 987 – 991, 1005 – 1009, 1022 – 1028, 1036, 1041, 1042, 1057, 1064, 1065 and 1086; MultiChoice's 2018 supplementary submissions, paras 101, 110 and 117 – 119; See also Part A of these submissions.

515 The premise that a broadcaster makes decisions regarding which channels to acquire "on behalf of its viewers" is flawed. Broadcasters make these decisions on their own behalf, taking into account the viewers they think they can attract with the channels and the incremental profitability to the broadcaster of the channels. Indeed, if a particular genre of channels were to be subject to a SSNIP, broadcasters may not acquire those channels, and may instead acquire other channels, potentially to the dissatisfaction of some viewers, but satisfying others.

516 Draft Findings, para 5.15.1.

517 Discussion Document, para 5.8.3

518 MultiChoice's 2017 submissions, para 436.

454.1 In this context the HMT question would be a question about a hypothetical monopolist of all documentary channels (not "a" documentary channel).

454.2 And if the price of all documentary channels were to increase by a SSNIP, broadcasters would need to consider whether to substitute one or more channels from documentary channels to one or more channels in other genres (where the alternatives include not just movie channels, but channels in all other genres, including news, entertainment, children's and sport, among others) as well as whether instead to acquire, commission or produce content directly (an alternative to acquiring channels on a wholesale basis). These considerations are relevant especially given the trade-offs involved in content acquisition decisions.

454.3 MultiChoice again submits that, given this range of constraints, a hypothetical monopolist of documentary channels would not be able profitably to impose a SSNIP. Retailers would be likely to switch a significant amount of their demand for documentary channels to other channels. This might mean, for example, acquiring only three or four documentary channels instead of six, and acquiring instead more children's channels, more comedy channels, more general entertainment channels or more movie channels, or commissioning or producing more channels directly. Both the SABC and e.tv have submitted to ICASA during the public hearings in relation to the Draft Sports Broadcasting Services Amendment Regulations, 2018 that decisions on content acquisition and broadcast are commercial in nature and whether they would acquire sports content and broadcast it depends on the ability to generate revenue relative to the cost of acquiring the content. In making these choices, the SABC and e.tv would be trading off between broadcasting sports content as opposed to other content. When broadcasting non-sports content generates greater revenue than broadcasting sports content, the trade-off to non-sports content is likely to occur. While this might leave some customers unhappy, commercially it is the best and likely strategy for any broadcaster.

455 ICASA then turns to discuss advertising and asserts that "*advertisers chase after audiences that are attracted to a particular channel*" and on that basis ICASA "*does not believe that channels of different genres would be substitutable from an advertiser's perspective*".[519] This assertion and belief are not grounded in any evidence on the relationships between advertisers and channel producers or how advertisers choose where to advertise.

455.1 Fundamentally, advertisers seek eyeballs. Often they seek specific types of eyeballs, such as men or women aged 25-54 or children. While sometimes placing ads within particular programmes or within particular channels may appeal, advertisers do not typically need their advertisements to be broadcast on a particular programme or channel for their target number and type of "eyeballs" to be reached.

455.2 For example, a stereotypical man aged 25-54 may like to watch sport, but may also like to watch Game of Thrones, as well as action movies, reality TV, re-runs of US sitcoms and gardening shows. These constitute different content in different genres that are likely to be on different channels. In other words, even if advertisers "*chase after audiences that are attracted to a particular channel*", the same audiences will be accessible via other channels.

455.3 Therefore, if the price of advertising on channels within a particular genre were to increase by 5-10% (holding prices for advertising on other channels constant) it is likely that there would be significant substitution by advertisers to other channels, including FTA channels (which offer the greatest audience "reach" – i.e. the most unique pairs of viewing eyeballs and are therefore particularly attractive alternatives to genre-specific channels only available on Pay TV services and consequently limited in their "reach").

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519 Draft Findings, para 5.15.2.

There is no basis for defining separate wholesale channel supply markets for premium content and non-premium content

456 ICASA also states that it "*maintains its position and finds that there are separate markets for premium and non-premium content, and therefore separate channels*" (emphasis added).[520] MultiChoice finds it difficult to respond to this, given that it is not supported by any analysis at all in the Draft Findings. If this finding is based on the analysis on this matter contained in the Discussion Document, then MultiChoice's 2017 submissions in response to that analysis continue to apply and have not been addressed by ICASA.[521]

Flawed analysis of the market for content

457 MultiChoice has previously submitted that, reflecting the broad retail market and the dramatic changes in electronic audio-visual consumption patterns in recent years, there is today a single relevant upstream market for the acquisition of content (including channels), without distinction in terms of the price, quality or genre of the content.[522] In particular, MultiChoice has previously submitted that there is no relevant distinction, for market definition purposes, between "premium" and "non-premium" content, for the following reasons.[523]

457.1 First, the term "premium" is subjective and vague and does not provide a reliable basis for definition of the relevant market. What one operator may view as "premium" or "key" may differ from what another operator may view as "premium" or "key" and in any event such delineations are no basis for market delineations where substitutability and the HMT should be the key considerations.

457.2 Second, electronic audio-visual retailers and channel packagers do not require access to any particular content in order to compete because

520 Draft Findings, para 5.15.9.

521 MultiChoice's 2017 submissions, para 423-435

522 MultiChoice's 2017 submissions, paras 228.3.1 and 388-419.

523 MultiChoice's 2017 submissions, paras 390-394. To be clear, MultiChoice is not suggesting here that all content is the same. Instead, MultiChoice is submitting that, from the perspective of identifying relevant markets, a proper application of the HMT would conclude that there is no relevant narrow market for the supply of certain content that is labelled "premium".

they can build offerings from a variety of content, including local content, to attract subscribers.

457.3 Third, in building those offerings trade-offs need to be made in terms of what content rights or channels to acquire. Specifically, retailers need to trade off the incremental benefit that they will get from acquiring any particular content (in terms of additional subscription and advertising revenues) against the cost of that content. As the price of the particular content increases, it will become more attractive to acquire other content. This applies equally to higher priced content (that may traditionally have been labelled "premium") as to other content. A retailer that is bidding for certain sports rights, for example, will have an upper limit on what it is prepared to bid that reflects the value to the retailer of alternative content (including alternative sports rights) that may be cheaper to acquire.

457.4 Fourth, content that may traditionally have been labelled "premium" (e.g. FSPTW rights to Hollywood movies and certain sports) has been declining in importance, as the range and volume of content that is attractive for viewers, including local content, has proliferated in recent years.

458 It follows that, from an electronic audio-visual retailer's perspective, there is plenty of content that is substitutable for content traditionally labelled as "premium". And it follows that a hypothetical monopolist of content or channels traditionally labelled as "premium" would be precluded from profitably implementing a SSNIP due to substitution by retailers to these alternatives. MultiChoice has previously provided ICASA with details of the following significant examples of this fluidity of content.[524]

458.1 When MultiChoice Africa Ltd (MAL) lost the EPL, the UEFA soccer rights (Champions League and Europa League), the FA Cup and the English Football League for the rest of SSA, it invested in local soccer

[524] MultiChoice's 2017 submissions, 391 and 397-398.

leagues that were not at the time particularly attractive rights, and were much cheaper to acquire, yet offered considerable value in terms of attracting and retaining subscribers.

458.2 When BSkyB lost the European Champions League soccer rights to British Telecom, it redeployed its content budget across its offering, including dramas and original production.

458.3 When TalkTalk entered Pay TV in the UK, it claimed that sports content is not necessary for success in Pay TV and that other types of content (specifically local general entertainment content) are good alternatives.

458.4 As discussed in paragraph 454.3 above, the SABC and e.tv have explained that they, too, substitute non-sports content for sports content.

459 In addition to these examples, StarTimes has been acquiring football content rights for various countries in Africa including Ghana and Uganda, following a similar approach to MultiChoice Africa Ltd as described above, where not having access to some content leads a broadcaster to invest in other content.

460 In paragraphs 5.17.2.2 and 5.17.2.3 of the Draft Findings, ICASA suggests that a distinction can be drawn between OTT content and content on Pay TV services. [redacted] This is far from a statement that would support a finding that OTT providers and Pay TV service providers do not compete for the same content. In general, the movies and series available on OTT are the same or similar to the movies and series on Pay TV services, and as MultiChoice has demonstrated to ICASA, both OTT services and Pay TV services offer local content, news and live sports content.

461 In paragraph 5.17.2.6 of the Draft Findings, ICASA argues that with respect to Hollywood movies, there is "*price discrimination inherent in the windowing model*" that "*means that content providers are able to segment customers*" and that "*price discrimination can point to markets that are separate*". This is flawed in a number of respects.

461.1 First, price discrimination involves selling the same product to different customers at different prices. Movies in different release windows are different products: a movie in the FSPTW is closer to its theatrical release time and consequently a more valued product than the same movie in a later window. The timing of the release window changes the nature of the product. Therefore, the segmentation of licenses to movie rights between different windows is not price discrimination. It is simply product differentiation. ICASA therefore cannot point to price discrimination as a basis for defining separate markets for FSPTW movies and movies in later release windows.

461.2 Second, the windowing model does not mean that content providers are able to segment customers. The same electronic audio-visual service provider (whether a Pay TV distributor, an OTT service provider, or an entirely independent third party) could acquire the rights to all windows, online rights, including VOD and linear Pay TV channel distribution.

462 It follows that there is nothing in paragraph 5.17.2.6 of the Draft Findings that supports the delineation of separate markets for FSPTW movies on the one hand and movies in other release windows on the other. The relevant question that ICASA has not asked here is whether a hypothetical monopolist of FSPTW movies would be able profitably to impose a SSNIP without there being so much substitution to movies in other release windows or other content altogether (e.g. series content, reality TV content, sports content) as to make such a price increase unprofitable.

463 With regard to sports programming, in paragraph 5.17.2.8 of the Draft Findings, ICASA asserts that sports programming is a driver of growth, however it does so

without any sound evidential foundation (based only on a global BCG report, a quote from a newspaper article in January 2016, more than three years ago, and a quote from MultiChoice that does not say that sport is a driver)[525] and disregarding the evidence that MultiChoice has provided on the drivers of subscriptions.[526] The January 2016 quote attributed to Arthur Goldstuck to the effect that OTT services cannot compete in live sports should be disregarded in light of the live sport content that has been made available on StarTimes ON, Cell C black and Vodacom Video Play, as well as the many live sports rights acquired by global OTT players such as Facebook, Twitter, Amazon and YouTube and OTT services such as Hotstar in India and DAZN in, among others, the United States, Germany, Spain and Italy that are built on sports rights.

464 In paragraph 5.17.4 of the Draft Findings, ICASA states that it "*does not agree with MultiChoice that viewers' subscription decisions depend on the overall programming offered by various electronic audio-visual services, rather than on the availability of a specific content genre within a specific service*". This disagreement seems to be based on results of ICASA's Consumer Survey. According to ICASA, the Consumer Survey results "*clearly indicate that viewers take into account the type of content offered, in their decision making*". ICASA then characterises the Consumer Survey results as finding that "*movies, sport and drama series are mentioned most frequently when personal preference is at play*" and concludes that "*[s]uch preferences influence the type of service that viewers would ultimately choose, other things being equal*". ICASA's reasoning here is flawed for a number of reasons.

464.1 First, while of course consumers will take into account the content offered in bouquets when making their subscription decisions, this fact does not contradict MultiChoice's submission that those decisions are generally driven by the overall programming offered in the bouquets rather than by whether specific content is in the bouquet.

525 Draft Findings, paras 5.17.2.8-5.17.2.10.

526 MultiChoice's 2017 submissions, Part D para 669 and Figure 82.

464.2 Second, ICASA has mischaracterised the Consumer Survey results. Those results do not in fact support ICASA's disagreement with MultiChoice's contention. As explained earlier,[527] ICASA's Consumer Survey asked questions about viewership patterns, not about the types of content or range of content that drive their subscription decisions. In particular, ICASA's Consumer Survey did not ask respondents whether it is more important that they have access to a range of content (including news, documentaries and childrens' content) or that they have access to specific content such as movies or sport.

464.3 Third, even if one were to consider evidence on viewership patterns to be evidence on subscription drivers (notwithstanding the objection just mentioned to such tenuous interpretation), ICASA's Consumer Survey did not ask about the sports that ICASA considers to be "premium" and FSPTW movies, which ICASA also considered to be premium, but rather about sport and movies generically. Therefore, at best (i.e. if one is content to draw a tenuous link) the viewership patterns might be used to conclude that movies, sport and drama series generically are drivers of subscription decisions, not specifically "premium" sports as ICASA defines them, nor FSPTW movies.

464.4 Fourth, even if a survey were conducted that found a proportion of respondents reporting that the sports ICASA refers to as "premium" and FSPTW movies are important drivers of their subscription decisions, this would not answer the HMT question. The HMT question is whether, in response to a SSNIP in relation to those contents, a sufficient number of broadcasters would substitute to other content to defeat the profitability of the SSNIP. To answer that question one needs to understand the proportion of actual and potential subscribers that do not view those contents as "must have" and would therefore be attracted to offerings from broadcasters that do not include those contents.

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527 Refer to Part B of these submissions.

465 After identifying "premium" content by way of listing a number of rights ("FSPTW movies, series and live sports") ICASA asks "*what would a television broadcaster or video-on-demand service provider do when faced with a SSNIP on say premium movies*" (emphasis added)?[528] ICASA's answer is that broadcasters and VOD service providers would not turn to other types of content because, for instance, "live sports are not substitutable for movies" and "[n]either are series or local content".[529] Similarly, ICASA argues that:[530]

> *"it would be a fallacy to assume that lovers of live soccer would all of a sudden be satisfied with watching a movie, drama series, a reality show or news, in the event that a broadcaster that airs such live matches is faced with a SSNIP and decides to purchase other content. A broadcaster who does that would lose viewers. This explains the high demand for rights to live soccer matches despite the high cost of such rights."*

466 A number of comments apply to these parts of the Draft Findings.

466.1 Once again, ICASA has asked itself a question concerning the response of a generic customer (in this case, "a" broadcaster or VOD provider) rather than seeking to understand the responses of marginal customers and their significance for the HMT question.

466.2 In any event, MultiChoice considers that any broadcaster or VOD provider faced with a SSNIP in relation to premium movies or live soccer matches would give consideration to whether some or all of its content budget currently devoted to that content could be spent more effectively on other content. While this may result in a loss of some subscribers, that loss would not preclude substitution to other content, since the other content would attract other subscribers. To put it simply, a broadcaster or a VOD provider does not have to have all content and can trade off the value to it of certain content against the

[528] Draft Findings, para 5.17.9. Similarly, in para 5.17.1 ICASA states that it "starts its analysis by asking what a television or video-on-demand services provider, would do if the price of a particular set of content increased by a margin of 5-10%" (emphasis added).

[529] Draft Findings, para 5.17.9.

[530] Draft Findings, para 5.17.2.1.

value of other content. The example of Sky described above is an illustration of this.

466.3 In support of its answer, ICASA refers to its arguments on this matter in the Discussion Document. MultiChoice therefore refers ICASA (again) to its 2017 submissions[531] and in particular to the following challenges to the Discussion Document's arguments that ICASA has not addressed in the Draft Findings.

466.3.1 The Discussion Document failed to apply the well-established and widely applied principles of market definition – the HMT approach – to the question of whether there are distinct markets for the supply and acquisition of "premium" content.

466.3.2 The Discussion Document relied on differences in product characteristics, however, as explained above, products do not have to be identical to be close substitutes and effective constraints, particularly when aggregate constraints on a hypothetical monopolist are considered.

466.3.3 The Discussion Document asked whether content is able to "*generate demand or attract lucrative advertising*" and suggested that if so, a relevant market can be defined around that content. However, again, this is not addressing the HMT question, which is whether there would be sufficient constraints on a hypothetical monopolist of that content to render a SSNIP unprofitable. Moreover, this approach to market definition would result in distinct markets defined around each and every piece of content, given that each generates viewer demand and advertising. This is an absurdly narrow and unprincipled approach.

531 MultiChoice's 2017 submissions, para 387-419.

466.3.4 The Discussion Document relied on certain decisions in European jurisdictions that have distinguished markets for premium and non-premium content, but these reflect different factual circumstances at different points in time. As MultiChoice has previously submitted, it is not reasonable for ICASA to rely on factual conclusions in foreign countries from different time periods instead of a careful factual assessment of the conditions in SA at this point in time.

467 ICASA also "*proposes a further distinction, between types of premium content, distinguishing between feature films and movies; series and live sport, including rugby, cricket and premium soccer matches*".[532] This distinction, however, appears to be based solely on observed differences in characteristics of these different types of content. As explained above and previously, identifying differences in characteristics of products is not a sufficient basis for relevant market delineations. ICASA has not given consideration to the HMT applied to any of these types of content as the focal product.[533]

468 The fallacy of the view that a broadcaster requires every type of content is exposed when ICASA observes, in the Draft Findings, differences in the characteristics of different sports (rugby, cricket and soccer). ICASA asserts (without any evidence in support) that a broadcaster is unlikely to substitute soccer for rugby or cricket because of these differences.[534] The reality, however, is that a retailer does not need to offer subscribers any particular sport. If the rights to soccer were lost, there would be funds available to bid for one or both of the other sports, or for other content altogether. This may result in some subscriber churn, but does not deny that the different sport contents are substitutes and constraints.[535] Presumably in recognition of this, and the absurdity of defining markets around every type of differentiated content, ICASA

532 Draft Findings, para 5.17.12.

533 MultiChoice also refers ICASA to MultiChoice's 2017 submissions paras 409-413.

534 Draft Findings, para 5.17.13.

535 MultiChoice also refers ICASA to MultiChoice's 2017 submissions, paras 414-415.

does not ultimately propose to identify separate content markets by sporting code.[536] However, the analytical flaw in ICASA's "characteristics" basis for identifying separate markets is revealed at this point – not every type of content is required and different content with different characteristics can be substitutes.

469 A final observation regarding ICASA's consideration, in the Draft Findings, of the content market is that it misunderstands entirely the nature of exclusivity in content rights deals and its implications for the relative bargaining powers of broadcasters and content producers. ICASA suggests that the sale of sports rights on an exclusive basis is "*illustrative of the limitations faced by content rights owners and indicative of the constraints on their bargaining power given the limited buyer alternatives available.*"[537] The reality is very different.

469.1 When sports rights are sold on an exclusive basis it is because the sports rights owners stand to earn more from selling those rights exclusively, in the context of competition between broadcasters for those rights, than by selling the rights non-exclusively (which will dilute the value of the rights to each broadcaster). MultiChoice has previously explained this dynamic to ICASA.[538] In fact, submissions by rights owners such as the PSL state this plainly.

469.2 The exclusive sale and acquisition of sports rights and rights to other electronic audio-visual content is a common feature of the electronic audio-visual services market internationally, in relation to content that is broadcast FTA as well as on a Pay TV basis, and regardless of how many broadcasters there are. The importance of exclusivity for content providers has been recognised by various competition authorities and regulators internationally and by ICASA itself.[539] It should not be viewed as a systematic outcome of a bargaining power imbalance in favour of broadcasters. ICASA's attempt to characterise sports bodies as at the

536 Draft Findings, para 5.17.13.
537 Draft Findings, para 5.16.5.
538 MultiChoice's 2017 submissions, para 785.
539 MultiChoice's 2017 submissions, para 699-699.

mercy of broadcasters has extraordinarily weak theoretical and empirical foundations.

469.3 Indeed, ICASA observes "*a lot of evidence from around the world pointing to the rising cost of acquiring sports rights in general over the years*".[540] There is a clear inconsistency in ICASA's acknowledgment of this fact and its suggestion that there is a bargaining power imbalance in favour of broadcasters working to the detriment of content owners. If there was such a bargaining imbalance, one would not expect to see escalations in rights costs that far outstrip inflation and are not matched by equivalent escalations in retail prices. On the contrary, one would expect to see sports bodies being paid meagre amounts for their rights.

LACK OF EVIDENTIAL BASIS FOR ICASA'S MARKET DEFINITION PREMISES

470 In this section MultiChoice details the absence of evidential support in the Draft Findings for various premises on which ICASA's market definitions appear to be based. MultiChoice submits that, as a consequence of ICASA's failure to define relevant markets based on a rigorous assessment of the objective facts and evidence provided to ICASA, its attempt to define relevant markets does not stand scrutiny. On that basis, (a) ICASA may not proceed to the next stage of the Inquiry, namely considering whether there is ineffective competition in the relevant markets and (b) ICASA's assessment of competition is fundamentally flawed. ICASA's conclusions fail to meet the legality standards of lawfulness and rationality.

471 In paragraph 1.2.3 of the Draft Findings, when summarising the exclusion of OTT services from ICASA's retail markets for Pay TV services, ICASA asserts a "relatively limited level of internet access", "high cost of data", and "low average internet speeds". ICASA also asserts a "lack of access to local content and sports content" for OTTs in SA. Nowhere in the Draft Findings is any evidence

[540] Draft Findings, para 5.17.2.1.

presented for these assertions. Moreover, MultiChoice has provided ICASA with a wealth of evidence to the contrary in each respect.

471.1 On internet access, see paragraphs 87 – 89.1, 90 – 90.2, 492 – 493 of the 2017 submissions and paragraphs 5, 6, 15 and 16 of the 2018 supplementary submissions. See also paragraph 410 above.

471.2 On data costs, see paragraphs 89.7 – 89.8 and 491 of the 2017 submissions and paragraphs 7 – 14 of the 2018 supplementary submissions. ICASA's Consumer Survey results also suggest that the cost of data is not prohibitive for most respondents to that survey (refer to Part B above).

471.3 On average internet speeds, see paragraphs 89.2 – 89.6 and 490 of the 2017 submissions. See also paragraph 430.1 above.

471.4 On access to local content and sport content for OTT service providers see paragraphs 116, 144, 145, 147, 150, 170, 505 – 513, 696, 923, 925, 967, 987 – 991, 1005 – 1009, 1022 – 1028, 1036, 1041, 1042, 1057, 1064, 1065 and 1086 of the 2017 submissions and paragraphs 101, 110 and 117 – 119 of the 2018 supplementary submissions. See also paragraph 431.5 above.

472 In paragraph 1.3.13 of the Draft Findings, ICASA lists a number of content that it considers to be "premium" content. However, nowhere in the Draft Findings is there an evidential basis for the classification of such content as "premium" based on objective characteristics.

473 In paragraph 5.8.2, ICASA asserts that "*[s]port has the strongest reputation for delivering large audiences and/or numbers of subscribers*". This assertion is vague: ICASA does not clarify which sports in particular have this reputation and presumably it cannot be that all sports have this reputation. ICASA also provides no evidential basis for this assertion, which is disputed by MultiChoice.

474 In paragraph 5.10.4 of the Draft Findings, ICASA asserts that "*free to air viewers who want to purchase subscription television services have to invest in a satellite*

dish and decoder in addition to paying an installation fee". First, this proposition is irrelevant for the market definition exercise that ICASA conducts in the Draft Findings, as it supposes a candidate market of FTA, rather than a candidate market of Pay TV services. Second, current FTA viewers may be previous subscribers to satellite services and already have dishes and decoders and be able to reactivate their subscription without investments in these.

475 In paragraph 5.10.8, ICASA asserts that "*there is no evidence suggesting reverse substitution from subscription to free to air services*". It does so without referring to any evidence of an absence of "reverse substitution" and without regard to the evidence that MultiChoice has provided of "reverse substitution", including in paragraphs 34.3 and 34.4 of Appendix B of MultiChoice's 2018 supplementary submissions. In particular, MultiChoice has provided ICASA with evidence that [redacted] MultiChoice has also provided ICASA with evidence [redacted] MultiChoice has also provided ICASA with evidence that net disconnects from EasyView were [redacted] of the EasyView opening subscriber base in FY16 (see also Figure 17 above).

476 In paragraph 5.10.12 of the Draft Findings, ICASA observes that in its pre-listing statement MultiChoice refers to MultiChoice competing with several electronic audio-visual service providers in Africa and that its primary pay-TV competitor is StarTimes. ICASA then asserts that "*[t]his indicates that MultiChoice regards StarTimes as a direct competitor and other services as indirect competitors*". In fact it indicates no such thing. In any event, these statements have no bearing on the relevant market definition question of whether a hypothetical monopolist of Pay TV services would profitably be able to impose a SSNIP. It is therefore unclear what evidential weight ICASA purports to give these statements.

477 In paragraph 5.10.23, ICASA asserts that increases in basic-tier and mid-tier subscriber numbers of [redacted] should be regarded as "phenomenal growth". MultiChoice submits that the evidence in fact is of

extremely modest growth, and that ICASA's characterisation of that growth as "phenomenal" is evidence of ICASA's confirmation bias against MultiChoice.

478 In paragraph 5.10.32, ICASA refers to information that "underscores" ICASA's finding that "*there is competition between satellite FTA and basic-tier bouquets, although [...] substitution from basic-tier subscription services to satellite FTA is weak*". The MultiChoice research referred to earlier in that paragraph is not a basis for this finding. It is therefore unclear what information "underscores" the finding, in particular the finding that "*substitution from basic-tier subscription services to satellite FTA is weak*". MultiChoice refers ICASA again to the evidence that MultiChoice has provided on [redacted]

479 In paragraph 5.10.40 of the Draft Findings, ICASA asserts that "*free-to-air viewers are highly unlikely to consider OTT services as an alternative based on affordability*". ICASA provides no evidential basis for this assertion, such as details of the incremental costs of OTT services and consideration of the variety of OTT services including free OTT services and OTT services with small monthly subscription fees and fractional billing options. It is also a surprising and implausible assertion that is contradicted by the Consumer Survey results: for further details see Part B of these submissions.

480 In paragraph 5.10.41 ICASA states that it is "*able to circumscribe specific boundaries around free-to-air, basic-tier, middle-tier, premium and OTT viewer based on SEM levels*" and argues that this "*indicates the services offered or targeted at each income level belong in distinct relevant markets*". It is not clear what evidence ICASA has used to "circumscribe" boundaries around products based on SEM levels. In any event, only if ICASA has evidence that viewers in particular SEM levels only ever subscribe to one type of product might this be evidence that would support the delineation of distinct markets around each product. This is a highly unlikely finding and ICASA has not provided any evidence in the Draft Findings to support it. On the contrary, ICASA has evidence from its Consumer Survey, which it appears to have selectively ignored, that demonstrates that viewers of each Pay TV tier come from a wide range of SEM

levels and that viewers in each SEM subscribe to a wide range of DStv bouquets.[541]

481 In paragraph 5.11.3, ICASA lists a number of factual contentions of Econet Media regarding consumer behaviour and access to OTT services.[542] MultiChoice notes that ICASA does not even-handedly list the factual contentions of MultiChoice regarding the same matters. MultiChoice is therefore concerned that the listing of Econet's factual contentions reflects an uncritical adoption of those contentions by ICASA. MultiChoice notes that it would be inappropriate and unreasonable for ICASA to adopt factual contentions of one stakeholder without critical appraisal. Regarding each of the Econet contentions, they either lack evidential basis or should have no bearing on ICASA's market definition deliberations.

481.1 The assertion that more households have television sets than the proportion that have internet access necessary to be able to switch to OTT, is of no bearing on the HMT question, which concerns the extent of substitution away from Pay TV services to OTT and other services in response to a SSNIP in relation to the former. What is relevant for this question is the proportion of Pay TV subscribers that have the necessary internet access. The Consumer Survey results suggest that proportion is significant.

481.2 The assertions that "*South Africa has low internet penetration*" and that "*not many households have the internet access necessary to switch to OTT*" suffer from the same failings. This is also not supported by the 2019 ICT Sector Report. Not all, and not even most households need to have internet access for significant constraints to exist.

481.3 The assertion that "*[f]or households that do have internet access, the internet speed is generally too slow to watch OTT content with a high video quality*" is not consistent with the evidence that MultiChoice has

541 Phase 4 Report, p. 16.

542 These factual contentions appear to have been drawn from the Kwesé presentation to ICASA of 10 May 2018, slide 46.

previously provided to ICASA on fixed and mobile broadband speeds or the evidence in paragraph 487 below.

481.4 The assertion that "*South Africa's internet data costs are expensive relative to other countries*" is not only irrelevant (what matters is how expensive those costs are in absolute terms relative to disposable incomes), but also not reflective of the significant falls in data costs and significant increases in data consumption in recent years that MultiChoice has previously documented for ICASA. Again, see paragraphs 89.7 – 89.8 and 491 of the 2017 submissions and paragraphs 7 – 14 of the 2018 supplementary submissions as well as paragraphs 91- 104 of the 2017 submissions and paragraphs 17 – 19 of the 2018 supplementary submissions. Furthermore, ICASA has selectively ignored the Consumer Survey results on this point, which suggests that the cost of data is not prohibitive for most respondents to that survey (as discussed in Part B of these submissions).

481.5 The assertion that "*[s]ome consumers cannot afford to switch to OTT due to the high internet costs*" is uninformative for ICASA's market definition deliberations. The fact that some may not be able to switch to OTT does not preclude that enough would switch (alone or in aggregate with switching to other alternatives such as FTA and out of home viewing) to render an attempted SSNIP in relation to Pay TV services unprofitable.

481.6 The assertions concerning the "total cost of OTT (subscription fee + internet)" have been dealt with in paragraphs 444 - 445 above.

481.7 The assertion that "OTTs are seen as a complementary service to subscription-TV" has been dealt with in paragraphs 440 - 443 above.

481.8 The assertions that "a large proportion of poor households watch television", and that "some of these are subscription-TV subscribers" and "for some of these the total cost of OTT will be too high to switch", while not in dispute (since "some" is indisputable), again does not take the analysis of market definition anywhere as the market definition analysis requires a focus on the number of marginal subscribers that would switch in response to a SSNIP.

481.9 The same comment applies to the assertions that "*not all rich households have the devices necessary to switch to OTT*" and "*some of these households will not want to spend the additional money*".

482 In paragraph 5.12.8, ICASA asserts "substantially different price points" between basic-tier bouquets and OTT services. This appears to be the basis for ICASA discarding switching from basic-tier bouquets to OTT services. Yet there is no evidential basis provided in the Draft Findings for the assertion, such as details of the incremental costs of OTT services and consideration of the variety of OTT services including free OTT services and OTT services with small monthly subscription fees, compared to the costs of basic-tier bouquets. As MultiChoice has demonstrated, in Part A of these submissions, the price points are in fact not substantially different.

483 In paragraph 5.12.11, ICASA considers the advent of piracy and asserts that "since there are various efforts to stem the tide of piracy", piracy "does not offer a strong competitive constraint on subscription television". ICASA provides no evidential basis or further description of the premise of "various efforts to stem the tide of piracy", let alone any analysis of whether efforts that may be underway are likely to be effective and are likely to preclude piracy from offering a strong constraint on Pay TV. According to [redacted][543]

484 In paragraph 5.12.16of the Draft Findings, ICASA appears to reach a conclusion that OTT services do not pose a competitive constraint on Pay TV based entirely on a single quote attributed to the CEO of Netflix. MultiChoice submits that this is not an adequate evidential basis for such a conclusion, let alone for a

543 Irdeto, Cyber Piracy Report, August 2019.

conclusion regarding whether OTT services belong in the same relevant market as Pay TV services.

485 In paragraph 5.12.19, ICASA makes a number of assertions that are not supported by any evidence: specifically, that (a) the cost of data in SA is "still high"; (b) that cost is decreasing at a slower rate than elsewhere in the world, and (c) data allowances are likely to be exhausted quickly if watching video content on HDTV. MultiChoice disputes each of these unsubstantiated assertions.

486 In paragraph 5.12.28, ICASA assumes that a 10Mbps connection is the minimum speed required for viewers to have a good quality OTT streaming experience. This is assumed without any evidence in support and without regard to recommended speeds of OTT service providers. For example, Netflix recommends internet download speeds for its streaming service of 3Mbps for SD quality and 5Mbps for HD quality.[544]

487 Also in paragraph 5.12.28, ICASA asserts that "*very few consumers would have a 10Mbps fibre/ADSL internet package*". Again, this assertion is made without any evidential support and in contradiction of the evidence available to ICASA.

487.1 This claim could not have been based on the Consumer Survey results, since this shows that of the 568 respondents that watch TV on cellphones/smartphones or desktops/laptops, 54% do so at home over fibre or ADSL connections.[545] This translates into more than 30% of all Consumer Survey respondents watching electronic audio-visual content at home over fibre or ADSL connections. According to the latest We Are Social report (a source also selectively used by ICASA), average fixed broadband speeds are 18Mbps.[546]

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544 See https://help.netflix.com/en/node/306

545 Phase 4 Report, p37, which records responses to quantitative survey question 10.

546 According to mybroadband.co.za, in Q1 2018 average fixed broadband speeds ranged from 6Mbps for MWEB (the lowest average among all ISPs) to 34Mbps for Cell C: see https://mybroadband.co.za/news/broadband/254601-average-speed-of-south-africas-top-isps.html

487.2 Moreover, mobile broadband is an alternative for consumers that do not have fibre or ADSL connections. As detailed earlier, according to We Are Social, there were 29 million active mobile internet users in SA in 2019 with average internet connection speeds of 25Mbps, and 48% of 31 million internet users in SA stream TV content each month.[547]

488 In paragraph 5.12.37 of the Draft Findings, ICASA makes a number of assertions that are not supported by any evidence. For example:

488.1 "urban dwellers [...] largely subscribe to OTT services in addition to other television broadcasting services";

488.2 "the premium market is saturated, and introduction of new providers will not increase the pool of subscribers but will merely change the market share"; and

488.3 "non-premium subscribers are value driven and would only change their packages when something valuable is added to the more expensive packages".

The last two of these assertions appear to have been cut and pasted verbatim from page 122 of the Phase 4 Consumer Survey report prepared by Pulse. These assertions, however, are not clearly tied by Pulse to any particular survey findings, it seems to MultiChoice to be beyond Pulse's role to be asserting the existence of a "premium market", the statement that "the introduction of new providers will not increase the pool of subscribers" seems to go beyond the normal reporting role of a survey firm and the statement that "non-premium subscribers are value driven and would only change their packages when something valuable is added to the more expensive packages" is not well founded in any of the Consumer Survey results or logic (other reasons to change package would surely include if their current package were to become less valuable to them or more expensive or if other packages were to become less expensive). Unless there is clear evidential support for these statements, it

[547] We Are Social, *Digital 2019 South Africa*, slides 15, 21, 24 and 28.

would be unreasonable for ICASA to place any reliance on them in its final findings.

489 There is also no evidential support for the assertion in paragraph 5.12.38 of the Draft Findings that ICASA's Consumer Survey "*indicates that cord-shaving occurs when prices change drastically and there is a limited extent of cord-cutting*". None of the documents that ICASA has released concerning ICASA's consumer survey contains evidential support for this assertion. For further details, see Part B of these submissions.

490 There is also no evidential basis for the assertions in paragraph 5.12.38 of the Draft Findings that "*insignificant changes in subscription price do not affect premium subscription television*" and "*the price is in-elastic*". MultiChoice is not aware of any evidence at all before ICASA that would support the suggestion that there is limited demand elasticity to price changes. As explained earlier (in Part B of these submissions), there is no basis for these assertions in the Consumer Survey results for the very simple reason that no question was asked of respondents concerning their likely future or actual historical reactions to price changes.

491 In paragraph 5.12.39, ICASA asserts that "*[t]he significance of live sport content to premium subscription television services subscribers, and the high preference for linear television as a mode of audio-visual content consumption in the South African context limits the current ability of OTTs to be reasonable or credible substitutes*". ICASA has not established any of the premises in this statement with evidence, and indeed the evidence relied upon elsewhere by ICASA in this section appears contrary to each statement.

491.1 According to the Consumer Survey results, only 42% of DStv Premium respondents view access to sport channels as one of their main drivers for subscribing to DStv Premium rather than a lower priced package.[548] In fact, a significant proportion of sport on the DStv Premium bouquet

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548 Phase 4 Report, p103-104

is also available on lower-tier bouquets (and FTA), meaning that switching is readily possible.

491.2 The same Consumer Survey results suggests significant rates of OTT audio-visual consumption and viewing on alternative devices (other than TV sets), both throughout the survey sample and in particular with respect to DStv subscribers.

491.3 It is also not clear why sport content and linear content delivery are barriers to OTT service provides providing "reasonable or credible substitutes", given that many OTT services can and do offer live sports and some do so by offering linear channels (e.g. StarTimes ON).

492 In paragraph 5.12.45, ICASA asserts that data "shows" that "*MultiChoice is firmly in control of the market and will continue to do so for the foreseeable future*", but the data on which this assertion is based is not provided. The evidence presented in Part A suggests, to the contrary, that MultiChoice is experiencing significant challenges from the growth of OVHD and local and international OTT services such as Vodacom Video Play and Netflix.

493 In paragraph 5.13.3of the Draft Findings, ICASA refers to "research carried out in Mexico" without identifying the research or its author. It appears that ICASA relies here on an online article from 2017 that ICASA appears to have cut and pasted from.[549] Not only is the research not verifiable, but ICASA appears to have selectively quoted from the online article to suggest limited substitution between OTT services and Pay TV services. The article, however, in fact suggests significant substitution of OTT services for Pay TV services. For example it reports that in Mexico more than 11% of subscribers report cord-shaving or cord-cutting, in favour of OTT alternatives. This is a significant proportion, given that there is no suggestion of a SSNIP in relation to Pay TV services. The same article states:

[549] See https://en.tvyvideo.com/201703287475/noticias/empresas/sustitucion-o-complemento-entre-tv-de-paga-y-ott.html

"the growing preference and popularity of content through OTT platforms entails that, at present, they represent an option that competes and even replaced directly to the television networks for a specific segment consumers. This fact has already been identified in different countries, as in the case of the US, where there are already signs of the decline in pay TV subscriptions for growth in the number of users OTT platforms."

494 It also reports that while 67% of households subscribe to both OTT and Pay TV services, 33% use OTT services without subscriptions to Pay TV services and according to the author OTT services are a substitute for the Pay TV services for this proportion of households. Again, this is a significant proportion. The article proceeds to report that 12% of subscriptions (over two million) to Pay TV services were displaced because of the OTT platforms. The article concludes:

"From the foregoing, it can be said that the OTT platforms and represent a competitive and in some segments of the population with connectivity as substitutes in the consumption of audiovisual content option. The growing preference and eventual widespread adoption of these services will result in pay television as OTT services can be considered as parallel markets, ie, they can become perfect substitutes for the general population."

495 In paragraph 5.15.1, ICASA asserts, without any evidential or other basis, that a broadcaster would make decisions regarding channels to acquire "on behalf of its viewers" rather than on its own behalf. ICASA does not explain or provide any evidence why a broadcaster that could use available funds to acquire a different channel that would bring it more viewers would be beholden to stick with its existing channels "on behalf of its viewers". It is transparent that the Draft Findings simply does not contain any evidential basis for this view of how broadcasters make channel acquisition decisions.

496 In paragraph 5.15.1, ICASA asserts, without any evidential or other basis, that it is "highly unlikely that a SSNIP on a documentary channel would lead to switching by broadcasters to a movie channel". As explained in paragraph 454 above, a similar statement appeared in the Discussion Document, also without evidence to support it, and it does not withstand analysis.

497 In paragraph 5.15.2, ICASA asserts, without any evidential or other basis, that advertisers "chase after audiences that are attracted to a particular channel" and would not consider channels of different genres to be substitutes to attract the eyeballs they require. Paragraph 455 above explains the fallacy of these assertions.

498 In paragraphs 5.15.5 – 5.15.6 of the Draft Findings, it appears that ICASA's only evidential basis for not agreeing with MultiChoice's submission that there is no separate upstream market for the wholesale supply of channels is a single statement by the Group CEO for MultiChoice in the Caxton v MultiChoice matter. That statement merely recognises that channel distribution agreements exist. The existence of channel distribution agreements does not imply a market for the wholesale supply of channels, since there may be (and MultiChoice submits that there are) constraints that would preclude a hypothetical monopolist of wholesale channels from profitably implementing a SSNIP.

499 In paragraphs 5.17.2.8 – 5.17.2.10, ICASA asserts that sports programming is a driver of growth, without any sound evidential foundation. This assertion is based only on a global BCG report, a quote from a newspaper article and a quote from MultiChoice that does <u>not</u> say that sport is a driver. It also disregards the evidence that MultiChoice has provided to ICASA on the drivers of subscriptions[550] and the Consumer Survey results, which reports that sport is not a particularly significant driver for low-tier and mid-tier subscribers, and even among DStv Premium subscribers, sport is only a "main" driver for 42% of subscribers.

500 In paragraph 5.17.8, ICASA lists a number of contents as "premium", without any evidence based assessment of characteristics of those contents that distinguish them from other content.

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[550] MultiChoice's 2017 submission, paras 397–399.

PART D: EFFECTIVENESS OF COMPETITION

INTRODUCTION

501 ICASA has determined that there is ineffective competition in the markets for –

501.1 the retail distribution of basic-tier Pay TV services and satellite-based free-to-air televisions services in South Africa;

501.2 the retail distribution of premium Pay TV services in South Africa; and

501.3 the wholesale acquisition of premium content for distribution in South Africa.[551]

502 As established in Part C above, ICASA's approach to market definition is flawed and, as a result, ICASA applies the competitive assessment to narrowly defined markets that do not properly reflect competitive constraints. Nevertheless, this section considers the effectiveness within the markets as have been defined by ICASA. To the extent that MultiChoice, in this Part D or in any other Part of these submissions, refers to a "market" defined by ICASA in the Draft Findings, this is not an admission or concession that the identified market properly constitutes a relevant market for the purpose of this Inquiry.

503 As MultiChoice demonstrates below, ICASA's analysis of the effectiveness of competition in each of these markets is materially deficient. ICASA's analysis does not represent an holistic assessment of the effectiveness of competition and relies on flawed assumptions. In particular, ICASA has –

503.1 adopted a largely static and structural approach to the assessment of barriers to entry and, consequently, has not assessed the strength of entry and dynamic changes in the market that have significantly reduced barriers;

503.2 also adopted a structural approach to assessing market dynamics which assumes that only significant changes in market shares would

551 Draft Findings, para 1.4.2.

result in effective competition and has not assessed competitive constraints on MultiChoice on a dynamic basis;

503.3 given no consideration to whether competition in the relevant markets has delivered positive outcomes for consumers, including competitive prices, better product and service quality, increased variety, and innovation;

503.4 not assessed the reasons for the failure of some Pay TV providers and whether high barriers to entry or strategic behaviour by MultiChoice was the primary cause of these failures; and

503.5 presumed that the content it has labelled as "premium" content is an essential input required by providers of electronic audio-visual service, when the evidence before it clearly shows that it is not.

504 In addition, even under its own overly narrow markets and deficient framework for analysis, ICASA fails to establish that barriers to entry in any of the above markets are sufficiently high to deter efficient new entry or that the dynamic character and functioning of the market does not result in effective competition, currently or prospectively.

505 First, in its assessment of the effectiveness of competition in the purported market for the retail distribution of basic-tier Pay TV services and satellite-based free-to-air televisions services in South Africa, ICASA –

505.1 fails to establish that barriers to entry are sufficiently high to deter entry or expansion in the relevant market;[552]

505.2 provides no evidence in support of its contention that MultiChoice has engaged in limit pricing or expanded its product offering to crowd out (or with the effect of crowding out) potential entrants;[553]

552 Draft Findings, paras 6.5.9 – 6.5.19.

553 Draft Findings, paras 6.5.20 – 6.5.24.

505.3 provides no evidence to support its contention that MultiChoice has adopted a strategy of "locking-in" customers or that its behaviour leads to significant lock-in effects;[554]

505.4 provides no relevant evidence in support of its conclusion that DTT is unlikely to have a marked competitive impact on Pay TV broadcasting in South Africa over the next three years or more;[555] and

505.5 provides no evidence in support of its contention that market shares are likely to remain constant over the next three years and beyond.[556]

506 Second, in its assessment of the effectiveness of competition in the purported market for the retail distribution of premium Pay TV services in South Africa, ICASA –

506.1 fails to establish that barriers to entry are sufficiently high to deter entry or expansion in the relevant market;[557]

506.2 provides no evidence that the introduction of new products or services by MultiChoice such as Showmax and DStv Now is "strategic behaviour" by MultiChoice that it has engaged in with the purpose or effect of deterring new entry or the expansion of existing rivals;[558]

506.3 fails to support its suggestion that the decline in the number of subscribers to MultiChoice's premium bouquet is solely due to the fact that the premium segment of the market has reached saturation or maturity;[559]

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554 Draft Findings, paras 6.5.25 – 6.5.26.

555 Draft Findings, para 6.5.27 - 6.5.44.

556 Draft Findings, para 6.5.44, p. 145. In the Draft Findings, ICASA refers to a market review period of three years.

557 Draft Findings, para 6.5.45 – 6.5.51.

558 Draft Findings, para 6.5.44.

559 Draft Findings, para 6.5.53.

506.4 does not assess potential competition from providers of OTT services on a forward-looking basis; [560] and

506.5 provides no evidence in support of its contention that MultiChoice's share of the market is unlikely to change in the short to medium term.[561]

507 Last, in its assessment of the effectiveness of competition in the purported market for the wholesale acquisition of premium content for distribution in South Africa, ICASA –

507.1 fails to establish that barriers to entry are sufficiently high to deter competition among providers for the acquisition of premium content;[562]

507.2 fails to assess the dynamic character of this market. Instead, ICASA assesses the constraint imposed by providers of OTT services on Pay TV services at the retail level, which is irrelevant to an assessment of competition for the acquisition of content at the wholesale level of the supply chain; and

507.3 provides no evidence in support of its conclusion that MultiChoice is likely to maintain its current position into the foreseeable future.

508 ICASA has failed to establish ineffective competition. On this basis, there are no grounds for ICASA to propose ex-ante regulations. Only if ICASA establishes (on a sound basis) that competition in the electronic audio-visual services market is ineffective, may ICASA proceed to contemplate ex-ante regulation.

509 The remaining sections of this Part D elaborate on the points raised here. After re-iterating the approach required to assessing competition, the deficiencies identified in ICASA's approach will be canvassed, followed by a detailed discussion of ICASA's assessment of competition for each of the markets where it has found competition to be ineffective.

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560 Draft Findings, para 6.5.53.

561 Draft Findings, para 6.5.52.

562 Draft Findings, para 6.5.59 – 6.5.76.

ICASA'S APPROACH TO ASSESSING THE EFFECTIVENESS OF COMPETITION IS FUNDAMENTALLY FLAWED

510 As MultiChoice submitted in its original submissions, section 67(4A) of the ECA indicates what ICASA must consider when determining whether there is ineffective competition, but it does not limit the consideration to those factors only, since they are to be considered "*amongst other things*":

> *"(4A) When determining whether there is effective competition in markets and market segments, the Authority <u>must consider, amongst other things</u> –*
>
> *(a) the non-transitory (structural, legal and regulatory) entry barriers to the applicable markets or market segments; and*
>
> *(b) the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments."*

511 The exercise is primarily forward-looking. Additionally, a holistic rather than purely structural approach should be adopted. Section 67(4A)(b) requires ICASA to consider "the dynamic character and functioning of the market" and to conduct "a forward-looking assessment". Accordingly, the exercise should not simply be a structural analysis of static market shares, but rather a more holistic approach which seeks to identify all the competitive constraints faced by current operators in the market.

512 While ICASA is required to follow the ECA provisions which underpin a section 67 inquiry, the application of the ECA does not limit ICASA to consider only the factors specifically listed under section 67(4A). The Act states that the factors cited are to be considered "*amongst other things*". It is clear from the wording of the ECA that the legislature did not intend to limit ICASA from considering all the factors that are relevant to a coherent and holistic consideration of competition, including on a forward-looking basis.

513 A holistic approach to the assessment of competition requires an assessment of the dynamic character and functioning of the market, which would include market characteristics, the nature of actual entrants and their scope for expansion, the threat of potential competitors, and growth, innovation and differentiation including technological developments and convergence in the provision of electronic audio-visual services. This range of factors is recognized in ICASA's Guideline for Conducting Market Reviews (2010) (Guideline).[563]

514 The Guideline also recognises the importance of following a dynamic and forward-looking approach:

> *"[A] forward-looking assessment of the effectiveness of competition within a market is required to take into account existing as well as potential competitors and the impact of an increasing number of players providing services in the same market on whether it is possible for a licensee to have significant market power. In terms of actual and potential existence of competitors, the assessment will take due regard of all possible barriers to entry as well as the likelihood that entry will have an impact on the market powers of existing licensees. To this extent, new entrants to a market represent a form of supply-side substitution."*[564]

515 ICASA has failed to conduct a holistic and dynamic analysis of the effectiveness of competition. While ICASA claims that it will consider both structural[565] and dynamic features of the market, ultimately it adopts a static and structural approach to the assessment that largely focuses on barriers to entry and market shares. This approach is deficient and ICASA has not assessed competitive constraints on MultiChoice on a dynamic basis. Furthermore, ICASA's assessment is superficial and lacks evidentiary support, as discussed further

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563 "Dynamic characteristics of the market: high levels of growth, innovation and product/service differentiation cumulatively indicate a market that is dynamically competitive as different licensees enter/exit offering different services at different prices within the same market".

564 Guidelines, p. 11

565 Under structural features, ICASA assesses barriers to entry. While the assessment of barriers to entry is a relevant consideration, this does not imply that a structural approach to assessing effectiveness of competition more broadly is appropriate, as MultiChoice has submitted in its original submission. ICASA refers to the use in section 67(4A) of the word "structural". However, this is used only in section 67(4A)(a), which is limited to the assessment of barriers to entry.

below in this Part D. Ultimately, this leads to flawed conclusions that are incompatible with the observed market realities described in Part A above.

ICASA's analysis of barriers to entry fails to consider dynamic changes in the market and the ability of entrants to overcome barriers

516 ICASA's approach to assessing barriers to entry continues to repeat the same flaws that appear in the Discussion Document and were identified by MultiChoice in its response to ICASA. In particular –

516.1 ICASA has adopted a largely static and structural approach to assessing barriers to entry. As indicated above, this appears to be informed by ICASA's interpretation of section 67(4A), which considers structural features separately from the "dynamic" assessment.

516.2 ICASA's approach to assessing barriers amounts to compiling a list of potential difficulties which an inappropriately resourced and inefficient entrant may face. It fails to consider evidence of actual entry and the range of potential entrants for whom entry is feasible and likely.

517 ICASA's approach fails to recognise that factors that may be structural in nature would still need to be considered on a dynamic and forward-looking basis. This is because market dynamics may themselves alter structural elements.

517.1 The EC Explanatory note to the relevant EC recommendation in respect of markets susceptible to ex-ante regulation observes the implications that market dynamics has for barriers:

> *"Market dynamics in the absence of sector-specific ex ante regulation may make barriers to entry disappear over time, for example as a result of technological developments or previously imposed wholesale regulation. The deployment of alternative infrastructures allowing to offer substitutable services at the retail level can result in changes of competitive dynamics throughout the supply chain. Convergence of previously distinct markets may increase competition. Or simply, there may be sufficient players*

active in the market for effective competition to emerge behind the barriers to entry, e.g. on the relevant retail market, even without ex ante regulation."[566] (emphasis added)

517.2 This observation – that barriers may disappear as a result of technological developments – has emerged as a defining feature in the provision of electronic audio-visual services. Technological changes and convergence of business models have reduced, if not eliminated, entry barriers for well-resourced and efficient entrants. In particular, the emergence of the broadband ecosystem has effectively eliminated the need for a prospective electronic audio-visual service to invest in and develop a technical distribution platform for its content. The delivery platform is now the public internet and there is no need to develop, supply and subsidise STBs, since the existing range of smart devices are capable of receiving that content. This represents a fundamental shift in the delivery technology and has substantially reduced the cost of delivery. It is this shift that has disrupted the electronic audio-visual services market as explained in Part A.

518 ICASA continues to engage in an abstract assessment of barriers and fails to practically assess the likelihood of entry. Such an assessment should ultimately take into account whether there exist a range of potential entrants for whom entry is feasible and likely, even if others may be excluded from entry.

518.1 This practical and evidentiary approach is precisely what the OECD advocates.

"In recent years, several competition scholars have concluded that the debate about entry barriers should be considered irrelevant to competition policy. They argue that abstract, theoretical pondering

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[566] Commission Staff Working Document Explanatory Note accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, SWD (2014) 298, p. 9: https://www.pts.se/upload/Regler/Explanatorynote-20141009.pdf

on the definition of barriers to entry is unlikely to be very helpful in investigations and policy decisions. What matters in actual cases is not whether an impediment satisfies this or that definition of an entry barrier, but rather the more practical questions of whether, when, and to what extent entry is likely to occur given the facts in each case. Most competition agencies in OECD countries agree with that pragmatic view."[567] (emphasis added)

518.2 ICASA has failed to consider whether there has been actual entry by competitors or the potential for entry going forward. In the light of the market dynamics described in Part A above, it is evident that there are many large well-resourced actual and potential competitors who are capable of overcoming the challenges identified by ICASA, and have already done so.

Continued reliance on a substantial loss of customers or shifts in market shares as the relevant measure of constraints is flawed

519 ICASA's assessment of market dynamics is based on the flawed belief that, in order for an incumbent to be constrained, there needs to be evidence of a significant loss in subscribers and a resulting decline in market shares. Its primary finding is that the market shares of players are unlikely to change in each of the markets where it has determined there to be ineffective competition.[568] This approach essentially amounts to a structural assessment of the market that has no regard to the effectiveness of competition.

520 It is misguided to assume that the only proof of effective competition is evidence of a material loss of customers to OTT providers (or FTA providers). As has been presented to ICASA, MultiChoice actively seeks to mitigate and prevent customer losses by making attractive, competitive offers to subscribers to entice them to stay and not switch to alternatives. These efforts have ramped up in

[567] OECD Policy Brief, January 2007, Competition and Barriers to Entry: http://www.oecd.org/competition/mergers/37921908.pdf

[568] Draft Findings, paras. 6.5.44, 6.5.52, 6.5.82.

recent years given the intensity of competition faced. The fact that a firm can be successful in competing does not imply that they are not facing constraints from actual or potential competitors.[569]

521 There is a clear recognition by leading scholars and competition authorities that market shares and concentration measures have no useful predictive power as to the effectiveness of competition. Even concentrated markets may be highly contested.

521.1 Low market shares of entrants reflect only the recent nature of the entry rather than the competitive significance of the entrants. As recognised by Ofcom, even small players can provide *"a strong competitive force with a contribution to competition larger than might be inferred from its overall market share."*[570]

521.2 It is also widely recognised that the threat of entry is likely to constrain current pricing, product quality and customer service of firms in a market. This is because exploiting their current market position will only invite entry by those potential entrants and tougher competition in the future. Such outcomes are beneficial to consumers and pro-competitive.

522 As discussed in Part A above, the electronic audio-visual services market in SA has seen prolific entry by significant players, including global OTT operators, large local telcos and regional Pay TV broadcasters, in addition to the well-established and expanding FTA TV broadcasters. ICASA's assessment has had no regard to the seismic shifts taking place in the market, the strength and nature of competitors and what this means for competition, currently and going forward.

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569 Appendix A to MultiChoice's 2018 supplementary submissions, para 26-28.

570 Ofcom, January 2012, Second consultation on assessment of future mobile competition and proposals for the award of 80MHz and 2.6GHz spectrum and related issues, Annex 6: Revised Competition Assessment, at para 2.59.

ICASA fails to consider the extent to which competition has delivered benefits to consumers

523 ICASA contends that it is not required to demonstrate harm to consumers. While MultiChoice also addresses (below) the issue of whether ICASA has demonstrated that the functioning of the market (by reference to competitive interaction and competitive constraints) is ineffective, there is no basis for ICASA's contention that there is no need to consider harm to consumers. A holistic assessment of the effectiveness of competition must necessarily consider the nature of competition and the outcomes that it produces in the market. Competition is ultimately promoted because it is associated with positive outcomes for consumers, including competitive prices, better product or service quality, increased variety for consumers, and innovation.

524 Competition in this dynamic market has been effective in delivering benefits for consumers.

524.1 MultiChoice has shown previously (as summarised in Part A above) that it has responded to competitive constraints and continually increases product value and innovates in order to retain and grow its subscriber base. This has resulted in rapidly escalating costs for both content and platform development that are not reflected in subscription fees, which have generally remained flat or declined in real terms. DStv subscribers have benefited from competitive pricing; enhanced, innovative offerings; and better service.

524.2 At the same time, competitors, including Netflix, OpenView and StarSat are also all enhancing their offerings – all in an attempt to draw viewership onto their respective platforms. As entry is happening at a rapid pace, this will only intensify going forward.

525 ICASA has not demonstrated that, nor considered whether, consumers have been harmed. The evidence before ICASA shows that competition has delivered positive outcomes to consumers. In light of this, there is no basis for ICASA to intervene, particularly as interventions may lead to unintended consequences and worse outcomes for consumers.

526 The suggestion that an assessment of consumer harm (or welfare) has no place in the Inquiry is not only inconsistent with a holistic assessment but is also inconsistent with ICASA's prior statements as to the purpose of the introduction into the ECA of section 67A. The Guideline states that:

> *"The legislative mandate to evaluate and address market failures where they occur stems from the South African government's policy of enhancing competition both within the electronic communications sector (via the ECA) as well as the broader economy (via the Competition Act, no 89 of 1998). The motive behind enhancing competition is to stimulate both allocative and dynamic efficiency up and down as well as across value chains <u>in the supply of goods and services to the South African consumer. The objective is to ensure that the supply of goods and services to the South African consumer</u> is achieved at a fair quality as well as a fair price. Achieving this objective requires a balance to be made between <u>returns on investment in the production and supply of goods and services to the South African consumer and the price</u> (including quality and consumer protection measures) <u>ultimately paid by the South African consumer</u> for such goods and services".*[571] *(emphasis added)*

527 The Guideline goes further to state that:

> "*Effective competition exists when:*
>
> - consumers *have sufficient choice regarding who provides the services they seek, at reasonable prices…*
> - *the price charged for a product or service is a result of the interplay between* consumers *and licensees, i.e. no one firm has price-setting power."*

528 Accordingly, the nature of competition <u>and</u> the outcomes that it produces for consumers are relevant.

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[571] Guidelines, p. 3 (emphasis added).

ICASA fails to establish the cause of the failure of some pay TV providers in South Africa

529 ICASA's assessment does not diagnose the source of any perceived competition problems or market failure. This is despite the fact that the basis for the Inquiry (as stated in the initial Gazette and Draft Findings) is the observation that a number of licenced Pay TV providers have either failed to launch and/or attract a fair number of new subscribers. A stated purpose of the Inquiry is to establish and understand the challenges that have contributed to this outcome.[572]

530 However, the Draft Findings does not assess the reasons for their failure at all. There is no basis to assume that those licensees' failure to launch, or lack of sustainability is due to barriers to entry, market failure, or strategic behaviour by MultiChoice. Contrary to this, the available evidence points to other factors, including a combination of poor strategic business choices and inadequate resources.[573]

531 This is a fundamental omission. Such an assessment is critical to diagnose the problem and to determine if any intervention is required. This is a pre-requisite for any market intervention and to ensure that such interventions adequately address the concern identified. In terms of section 67(4A)(b), intervention in the form of licence conditions must be specifically addressed to remedying the market failure. Without establishing the cause of harm, there is no rational basis for ICASA to propose ex-ante regulation.

There is no basis to assume that premium content identified by ICASA is a requirement for successful entry and expansion

532 ICASA's approach to assessing competition proceeds from the mistaken assumption that its concept of "premium" content is an essential input required by providers of electronic audio-visual services, i.e. that this content is a "must have" input for the entry and expansion of rivals. In particular, ICASA's approach

572 Draft Findings, para. 3.2.5.

573 Appendix 5, MultiChoice's 2017 submissions regarding a detailed account of the Pay TV licensees in SA and the reasons for their failure.

to assessing barriers to the acquisition of premium content assumes this to be the case: However, if premium content is not essential, then whether or not there are barriers to its acquisition would not matter as competitors could compete without acquiring such content.

533 ICASA recognises the difficulty with defining premium content and therefore does not provide a definition of premium, but rather provides a list of rights that it regards as premium, an approach that is itself problematic, as explained in MultiChoice's response to the market definition section of the Draft Findings.

534 Moreover, ICASA has not addressed the question of whether or not "premium content" is essential at all. This requires an entirely different assessment from whether or not content is premium. The observation that particular types of content can attract a larger audience or are of greater quality or more expensive does not necessarily imply that it may be unique, scarce or essential to the success of an entrant into the electronic audio-visual services market and therefore possibly subject to regulation.

535 This failure on the part of ICASA to consider whether or not "premium content" is essential is particularly serious in circumstances where it is contemplating ex ante regulation that involves access to this content. This would likely result in significant unintended consequences and is based on no analysis or evidence to support the requirement for such an intervention.

536 MultiChoice has previously addressed the question as to whether there is any 'must have' content.[574] MultiChoice provided substantial evidence to demonstrate that consumers and households are not homogenous and have diverse preferences as to the content that they would like to watch, and what they are willing to pay for such content. MultiChoice provided a full account of why it is that no single piece of content is essential to entry and expansion in the electronic audio-visual services market. The ultimate success of any particular service will be based on a combination of factors including content, price, the technological platform, customer service and the competing entertainment

[574] MultiChoice's 2017 submissions, para 627-672.

alternatives for a household. The evidence that has been presented (as summarised below) has not been considered by ICASA.

Bulk of demand is for lower-priced bouquets

537 Given the budget constraints facing many individuals, the bulk of demand for electronic audio-visual services in South Africa and the rest of Africa is for lower-priced bouquets. These bouquets (offered by MultiChoice and its competitors) provide variety of content across a variety of genres at an affordable price. To keep these bouquets at lower price points, they do not contain expensive content like live sports or first-run movies and series. This has not impeded the ability of providers of these bouquets to obtain significant subscriber growth.

537.1 MultiChoice's own DStv Access and DStv Compact bouquets have experienced rapid growth and constitute a sizeable share of MultiChoice's South African subscriber base. This is despite the fact that the bouquets do not offer the full sports and first-run Hollywood movies and series included in the DStv Premium bouquet, and Access has no live sport. The experience for OpenView's FTA DTH market is similar. Its strong growth has not come on the back of expensive content, but rather from providing a basic multi-channel offering across genres.

537.2 Similarly, in the rest of Africa, MultiChoice has been successful with lower-priced bouquets and competitors have also entered with bouquets built on inexpensive content. For MultiChoice, GOtv has experienced far more significant growth in other African countries than DStv overall. DStv's growth has also come from bouquets targeted at the lower-end of the market. In addition to bouquets built on inexpensive content, MultiChoice's competitors have also invested in local content which is popular with local audiences.

537.3 This position is consistent with the fact that most of the Pay TV licence applications before ICASA focused precisely on this lower and middle market, and in so doing did not identify access to any particularly expensive content as being necessary for their successful entry.

Furthermore, whilst some applicants may have sought to ultimately compete at the higher end of the market, this was premised on launching and gaining critical mass in the middle-income market, which would provide a viable business platform for launching a high-end offer.

A diversified customer base means that no single content is essential for competition

538 Customer diversification arises due to content preferences and income differences across individuals and households. This leads to different target segments, each with their own content preferences and price points, that are available to traditional broadcasters and OTT services. This diversity means that no single content category is essential for competition.

539 Only a small portion of MultiChoice subscribers in SA – the proportion represented by DStv Premium subscribers – actually subscribe to a bouquet which includes the content listed by ICASA as premium. The vast majority of MultiChoice's subscribers do not have access to any of this content. And households may subscribe to this bouquet for different reasons. The observation that a household subscribes to the Premium bouquet does not imply that it does so for the purpose of watching sport, or movies. Bouquets offer a broad range of content and households may subscribe to a bouquet for reasons other than having access to this particular content.

540 [redacted]

Figure 20: Segmentation of total DStv subscribers and of Access subscribers

[redacted]

Experiences resulting from the loss of rights

541 International experience where an incumbent has lost rights shows that high-priced sports properties are not essential for the success of electronic audio-visual services. For example:

541.1 MultiChoice lost the package A rights to the EPL, UEFA Champions and Europa Leagues, the FA Cup and the English Football League for the 2007/8 to 2009/10 seasons to HiTV in Nigeria and GTV in sub-Saharan Africa (excluding South Africa). Despite this, the DStv subscriber base in sub-Saharan Africa almost doubled whilst that in Nigeria more than doubled over the period 2007 to 2010. This was achieved by a response from MultiChoice that moved from heavy marketing of sports content to actively marketing entertainment content; innovating through enhancing entertainment genres; and investment in local content.

542 In a similar experience in the UK, BSkyB lost some of the EPL and the entire UEFA Champions League rights to BT. BSkyB similarly responded by choosing to invest in more local content. According to one media commentator:

> *"The rights are worth more to BT than to BSkyB, because of its perception that being able to offer sport broadcasts can differentiate its broadband service from those of the big challengers [...]. Meanwhile, the thrust of all recent investment at BSkyB under Jeremy Darroch is to make its television service about much more than sport. Or to put it another way, Darroch believes there are more rewarding ways for his company to deploy £300m a year of cash. So for example BSkyB is already spending more than £500m a year on creating what it calls 'original British programmes' - series such as the Tunnel, Dracula and Strike Back - with the published aim of increasing that to £600m by 2015. [...] Having lost European football, BSkyB is likely to spend even more on drama - which, to state the obvious, will increase BSkyB's competitive threat to ITV and to my employer."*[575]

ICASA HAS NOT ESTABLISHED THAT COMPETITION IN THE MARKET FOR THE RETAIL DISTRIBUTION OF BASIC-TIER PAY TV SERVICES AND SATELLITE-BASED FREE-TO-AIR TELEVISION SERVICES IN SOUTH AFRICA IS INEFFECTIVE

543 ICASA has determined that there is ineffective competition in the purported market for the "*retail distribution of basic-tier subscription services and satellite-based free-to-air televisions services in South Africa*".[576] The factors it considers to come to this finding cover: the listing of various types of barriers to entry which it considers to be applicable to this market; and for the dynamic assessment, citing "strategic behaviour by incumbent" and considering "potential competition" for DTT only.

[575] BBC, 9 November 2013, Can Sky Bounce Back from BT Defeat: http://www.bbc.co.uk/news/24882293

[576] Draft Findings, para 1.4.2.1

544 The assessment in the Draft Findings of these factors does not support ICASA's finding of ineffective competition in this market for reasons elaborated on in this section.

ICASA has not established that barriers to entry are high and insurmountable

545 ICASA's approach to the assessment of barriers involves citing apparent barriers to entry in the market it has defined as the retail distribution of basic-tier Pay TV services and satellite-based free-to-air televisions services. These barriers are switching costs, brand loyalty, vertical integration.[577]

546 The assessment of barriers is superficial and is covered in two pages. In these few pages, ICASA does not practically assess (with evidence) whether these are barriers and whether or not they are surmountable. Instead, ICASA provides a list of potential barriers and then claims that these are barriers to entry, largely through mere assertion without evidential support. In many instances, the findings are also based on inaccurate facts and are inconsistent with the evidence before ICASA.

547 This section deals with each of the factors cited by ICASA in turn. It is clear that a holistic consideration of barriers to entry would demonstrate that they are not significant and are capable of being surmounted by well-resourced and efficient entrants.

Switching costs are not high

548 ICASA's assessment of switching costs is based on the following claims: lack of interoperability leads to high switching costs; STBs and satellite dishes are sunk costs that cannot be recovered when switching to alternatives; the "hassle factor exacerbates the high switching costs" and OpenView viewers can utilise MultiChoice dishes, but this is not the case for StarSat subscribers. [578]

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[577] Draft Findings, paras. 6.5.12 – 6.5.19.
[578] Draft Findings, paras 6.5.12 – 6.5.13.

549 ICASA has not done any analysis to support its claim that switching costs are high. Its "assessment" amounts to making assertions that are unsubstantiated, and includes claims that are factually false.

549.1 ICASA has not assessed the costs of STBs or dishes, or how these costs can be overcome by new entrants. ICASA is therefore not in a position to claim that switching costs are high. Nor can ICASA claim that the "hassle factor" exacerbates switching costs without any facts, information, evidence or analysis of these claimed hassle factors. ICASA has also not provided any evidential basis or analysis to show that these switching costs are material to a consumer's decision to switch and have deterred consumers from switching.

549.2 ICASA is also incorrect in its factual claim that StarSat subscribers cannot use MultiChoice's dishes. StarSat subscribers simply need to be redirected to receive broadcasts from a different satellite. This was addressed in MultiChoice's 2017 submissions and it is unclear why ICASA reaches a fundamentally different – and factually incorrect – view.

549.3 ICASA has repeated the misguided claim made in the Discussion Document that these are sunk costs, with the implication that this, on its own, would deter a consumer from switching. MultiChoice explained why this is an irrelevant consideration for switching costs.[579] When a consumer is faced with a decision to switch to an alternative provider of electronic audio-visual services, they weigh the cost of the STB against affordability, the future savings and added value from switching. The decision-making is forward-looking and not historical. In this respect, the cost of the decoder is small relative to the annual subscription fees that consumers pay. Further, when a consumer decides to either terminate their subscription or switch to a rival, the STB of the provider they are leaving does not become useless to them. Should they decide to switch back in future, all they need to do is simply

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[579] MultiChoice's 2017 submissions, para 547.

reactivate their account and continue to use the same STB. This occurs frequently.

550 MultiChoice has presented substantial evidence that shows that switching costs are not barriers to entry.[580] This is in respect of both switching to another DTH platform (e.g. StarSat or OpenView) as well as to alternative platforms (DTT and OTT). ICASA has not engaged with this evidence at all.

551 With respect to switching to another DTH platform:

551.1 Switching typically requires only the purchase of a new STB, since the satellite dish can be redirected to receive broadcasts from a different satellite. In the case of OpenView and any Sentech FTA service that uses the same orbital slot, the satellite does not even have to be redirected. Reductions in the cost of STBs over time mean that STBs are available at a low price. Providers also frequently run special deals to make the acquisition cost attractive.

551.1.1 OpenView is currently retailing its decoder for R499. The growth of OpenView in a short space of time and the growth in subscribers to the lower-priced DStv bouquets demonstrates that the cost of STBs has not been a barrier to the uptake of new multi-channel services. ICASA also recognises OpenView's growth to over a million viewers.[581] The latest available figures for OpenView show that 1 574 395 boxes were activated as at March 2019[582] compared to 1 008 114 boxes for September 2017.[583] This represents growth of over 55% in 18 months, and clearly demonstrates that the acquisition of a STB is not a high switching cost that is prohibitive to consumers. This growth happened even

580 Refer to MultiChoice's 2017 submissions,, para 541-564.
581 Draft Findings, para. 6.5.5.
582 emedia Holdings Consolidated annual results March 2019, p. 2.
583 emedia Holdings Unaudited Consolidated Interim results 30 September 2018, p. 2.

though a decision was made by OpenView to reduce the subsidy on STBs, with the business noting that "*(d)espite the reduction in subsidy, OpenView set-top box activations continue to grow at an average of 35 000 per month*".[584]

551.1.2 StarSat has an HD PVR STB retailing for only R499, and covers the full cost of installation.[585] This is just over the cost of one and a half month's subscription to its "Max Package".

551.2 Even if the imposition of an up-front payment for a STB is found to inhibit switching by customers (which is denied), new entrants could adopt other strategies to overcome switching costs, for example no or a low fee, with the cost of the STB recovered over time through subscription fees. This means that entrants are able to overcome any switching costs and these cannot be regarded as a barrier to entry.

551.3 The uptake of newer, more innovative decoders by millions of DStv subscribers annually further suggests that the cost of a STB is not prohibitively high for consumers. This uptake of new decoders is similar to what happens with cellphones, many of which are significantly more expensive than decoders. Consumers routinely upgrade their cellphones every few years for better models with new capabilities and features.

551.4 Since DStv subscription contracts are monthly, subscribers wishing to terminate their DStv subscription are able to do so immediately. They are not locked into a long-term contract and incur no termination fees. Only 2% of MultiChoice subscribers are on 24-month price lock deals. This constitutes a negligible share of total subscribers. This is done at their own election to take advantage of discounted subscriptions and offers on hardware purchase plans. Given the low base, even if there is an increase in the number of 24-month contracts, this is unlikely to rise to a material proportion of subscribers. Therefore, for almost all

[584] emedia Holdings Consolidated annual results March 2019, p. 45.
[585] http://starsat.co.za/get-starsat/

customers no costs are incurred when terminating a DStv subscription. This is in contrast to many Pay TV broadcasters internationally, which insist on a minimum term contract for subscribers.

552 Furthermore, switching costs should consider the alternative platforms that are relevant to the assessment of competition:

552.1 Switching to DTT would require only a STB at most, since a satellite dish is not required (although in some cases an external aerial may be required). Modern television sets typically contain a DTT tuner and, in that case, not even a STB is required.

552.2 Switching to an OTT platform would generally also involve limited costs. Households would need an existing broadband connection and Wi-Fi router. However, since this is in any event required for normal internet access, this investment is not typically considered specific to OTT audio-visual services. ICASA has acknowledged that there are low barriers to entry for OTT services.[586]

Brand loyalty does not act as a barrier to entry

553 ICASA considers brand loyalty to be a relevant barrier to entry, stating that given that there was only a single Pay TV broadcaster in SA for a long time, new entrants "may find it difficult to break the brand loyalty barrier". ICASA then quotes MultiChoice referencing the DStv brand and the high awareness and customer support there is for the brand. ICASA claims that it is a process for a new entrant to establish a brand, which weakens their competitive constraint. Finally, ICASA states that the consumer survey shows that a lack of awareness for StarSat is the main reason for subscribers not subscribing to it.

554 Once more, ICASA's discussion of brand loyalty is largely comprised of assertions that have not been substantiated

586 Draft Findings, para. 6.5.58.

555 A proper consideration of the evidence would show that, contrary to ICASA's claim, brand loyalty is not an inhibiting factor for efficient entrants.

555.1 The observation that DStv has high awareness and consumer support does not mean that customers will not switch from the DStv service to that of entrants. MultiChoice has demonstrated that churn is high for MultiChoice, and that consumers are price-sensitive and will move for even small differences in price. To retain customers, MultiChoice has had to spend vast resources in various retention activities, particularly as DStv subscribers are not locked into long-term contracts. It is clear that any brand loyalty that may exist does not prevent subscribers from switching.

555.2 The claim that the lack of brand awareness is the main reason why DStv subscribers have not switched to StarSat is irrelevant as to a finding on brand loyalty as a barrier to entry. While StarSat may not have invested adequately in developing its own brand awareness in SA, this does not mean that StarSat or other well-resourced and efficient firms are unable to do so. Nor does it imply that brand loyalty to DStv acts as a barrier. In other countries in sub-Saharan Africa where MultiChoice competes, StarSat has a significant marketing presence and has demonstrated that where it has invested in developing and marketing its offering, it has grown significantly, despite the brand presence of DStv. The fact that OpenView can acquire 1.5 million subscribers in a short space of time shows that brands can be developed by entrants and that DStv's own brand awareness has not been an impediment to their ability to acquire viewers.

555.3 Global players like Netflix and Amazon have sizeable marketing budgets and already have significant brand awareness among South African consumers. Accordingly, investments in developing brand awareness to attract subscribers in SA would not represent a barrier to entry or expansion for these players.

Vertical integration is not a concern in this market

556 ICASA's assessment of vertical integration as a barrier to entry mostly repeats observations which it had already noted in the Discussion Document[587] and continues to provide no support for its contention that vertical integration is a barrier to entry in the South African electronic audio-visual services market.

557 ICASA recognises that vertical integration is a legitimate practice and can result in economic benefits, but also has the potential to result in market foreclosure. ICASA then suggests that in the television broadcasting and video-on-demand sector, a vertically integrated dominant firm has the incentive to leverage its market position downstream to gain market power upstream in the market for content, which would then reinforce market power downstream.

558 ICASA provides no support for these contentions and has not concluded that MultiChoice has foreclosed rivals. Rather, it suggests that there is the potential for foreclosure, as a vertically integrated player has an incentive to do so. Economic theory clearly shows that it cannot be assumed that vertically integrated firms have an incentive to foreclose. This needs to be properly assessed, particularly given that vertical integration is a a legitimate business model which results in internal efficiencies and economies of scope (which ICASA accepts)[588]. Any theory of harm arising from vertical integration needs to be properly investigated and supported with evidence. ICASA has done none of this and instead merely puts forward an unsubstantiated theoretical possibility.

559 ICASA then goes on to observe that MultiChoice is vertically integrated (it has its own in-house content production and channel packaging capabilities), and incorrectly asserts that the same cannot be said of StarSat and e.tv. While acknowledging that MultiChoice's vertical integration is legitimate, the claim is that this vertical integration can weaken the competitive constraint from subscription and FTA services.

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587 Draft Findings, paras 6.5.17-6.5.19.

588 Draft Findings, para 6.5.17

560 While ICASA mentions that MultiChoice's vertical integration <u>can</u> weaken competitive constrains, it has not sought to show this. Therefore this statement simply refers to an unsubstantiated possibility. However, competitors are readily able to, and in fact do, commission original content and package their own channels. Accordingly, MultiChoice's in-house capabilities cannot result in weakened competitive constraints.

561 In response to the Discussion Document, MultiChoice[589] explained that the core functions of any electronic audio-visual services retailer are to acquire content from rights holders, package the content into an electronic audio-visual service, and retail that service through a distribution platform to consumers. Electronic audio-visual services retailers all do this. Therefore vertical integration along these stages is not specific to MultiChoice.

562 The point that ICASA seems to focus on is that MultiChoice is able to perform these functions in-house (i.e. own content production and own channel packaging capabilities). ICASA, however, fails to recognise that others have these capabilities in-house too. For instance, e.tv commissions its own content and packages channels for OpenView.

563 Furthermore, having these capabilities in-house does not provide a competitive advantage and does not represent a barrier for those who do not.

563.1 In terms of content production, it is not necessary to have in-house capabilities, and having these capabilities does not confer any competitive advantage. A large percentage of content is acquired from third parties and therefore requires no in-house production capability. The proliferation of content means that there is effectively no shortage of content for a prospective entrant with which to launch and build a service. Illustratively, this is precisely where Netflix began, by buying and packaging older library content.

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589 Refer to MultiChoice's 2017 submissions, para 614-617

563.2 Where a broadcaster wishes to produce original content, the most common practice is for that broadcaster to commission content from independent producers. Indeed, most of the original content that MultiChoice broadcasts is commissioned from independent producers. There are a multitude of independent production companies operating in SA and there is no barrier to commissioning those producers. The fact that domestic rivals (including the SABC and e.tv/OpenView) and global rivals all have their own original content demonstrates this point. There is no impediment to other domestic rivals, such as StarSat, also commissioning such content.

563.3 In terms of channel packaging, this function is not always required, since OTT services do not need to provide content in a channel format. Factually, it is also the case that both of SA's domestic FTA broadcasters package content into channels. This would be considered a core skill of a traditional linear FTA TV broadcaster. StarSat is also capable of doing this, and in fact does package content into channels (e.g. sports content into sports channels) in addition to acquiring third party channels. Therefore, ICASA's suggestion that StarSat and e.tv do not have their own channel packaging capabilities is simply untrue.

563.4 Even if firms do not have in-house packaging capabilities, this is not an impediment to entry. There is an active market of intermediaries that package channels and VOD offering for telcos and Pay TV operators globally. This is evidenced by Cell C's approach to launching the black entertainment service. Cell C partnered with Vubiquity, a global provider of electronic audio-visual content and marketing services. Vubiquity provides a mix of linear and VOD content, sourcing content from nearly 650 creators.[590] By outsourcing this function, Cell C's black product was launched without necessarily having any of the in-house capabilities ICASA references.

[590] Screen Africa, 6 November 2017, VUBIQUITY to partner with Cell C in new VOD and linear entertainment service: http://www.screenafrica.com/page/news/new_med/1664275-VUBIQUITY-to-partner-with-Cell-C-in-major-VOD-and-linear-entertainment-service#.WgZIHcaWZPY

564 Finally, ICASA's claim that an entrant would have to enter more than one stage of the value chain in order to be effective, and that this requires a lot of capital, is not sound. This does not represent a barrier to entry.

564.1 First, entry is not necessarily required at more than one level of the supply chain. ICASA appears to be primarily concerned with in-house content production capabilities and channel packaging. As discussed above, entrants are not required to have these capabilities in-house and having these capabilities in-house do not provide a competitive advantage.

564.2 Second, even if entry is required at more than one stage of the supply chain, capital costs would not deter entry from large, well-resourced firms.

564.2.1 Capital costs are not regarded as a barrier to entry. This view is supported by leading antitrust scholars and institutions.[591] The need for capital investment will not prevent a rival from entering a market if attractive profits can be earned. If entry and/or expansion is likely to be profitable, then rivals will be willing to put up the capital required or will be able to raise the capital in financial markets. While the need for a large capital investment amount may reduce the number of potential entrants, it would not eliminate all potential entrants. Siyaya[592] submitted to ICASA that capital raising is a question of presenting a realistic, viable and sustainable business plan and financial model.[593]

564.2.2 The nature of the electronic audio-visual services market is such that access to significant amounts of capital is required. For this reason, entrants tend to be large, well-resourced

591 Refer to MultiChoice's 2017 submissions, para 544-545.

592 Siyaya Free To Air TV (Pty) Ltd, a company which was issued a Pay TV licence by ICASA during 2014

593 Siyaya response to question 1.7 of the Questionnaire.

companies, including companies already in broadcasting or adjacent activities, such as digital platforms and telcos. For these efficient entrants, capital requirements that may potentially appear to be significant do not constitute a barrier to entry and the ability to deliver electronic audio-visual services via the open internet has significantly reduced the capital requirements for entry. The fact that such entry is already occurring, by the likes of Vodacom, Telkom and Cell C, demonstrates the fact.

ICASA's assessment of market dynamics is flawed as it does not establish that competition is ineffective, whether currently or on a forward-looking basis

565 ICASA's assessment of market dynamics includes a discussion of "strategic behaviour by incumbent" and potential competition from DTT. The assessment of these factors in the Draft Findings does not support a finding of ineffective competition for this market.

566 Moreover, by arbitrarily focusing on these limited set of factors, ICASA has not engaged in a holistic assessment of the effectiveness of competition – both currently and on a forward-looking basis. Critically, ICASA has failed to consider the strength of competition currently; outcomes in the market; and competition from OTT as a constraint when it is clearly relevant for this market segment.

ICASA provides no evidence that MultiChoice has engaged in limit pricing or has crowded out potential entrants

567 ICASA claims that MultiChoice's introduction of numerous bouquets at every possible price point leads to product proliferation that crowds out prospective entrants.[594] ICASA also suggests that MultiChoice may have engaged in limit pricing, by setting a price for each of its bouquets at a level below the profit

[594] Draft Findings, para 6.5.24.

maximising level in order to make entry unprofitable.[595] ICASA provides no analysis or evidence for either of these contentions.

568 Concerning the possibility of crowding out, ICASA merely observes that MultiChoice offers bouquets at various price points and states that this behaviour crowds out prospective entrants. This assertion is without any assessment. This approach is especially flawed given that the behaviour observed is ubiquitous among all operators – not just MultiChoice – and is generally good for consumers.

568.1 ICASA disregards the fact that MultiChoice's decision to expand its product offering is entirely consistent with competitive behaviour that is both legitimate and beneficial for consumers. Efficient, competitive firms will engage in initiatives to ensure that their products remain competitive and attractive to consumers. Ultimately, consumers benefit from expanded offerings and investments along all segments of the market.

568.2 The offering of various packages at different price points is a common feature observed in the provision of electronic audio-visual services globally. Providers of electronic audio-visual services typically offer a variety of packages or bouquets to cater to the various needs and budgets of consumers. As an example, StarSat offers seven different packages[596] and Cell C's black offers BTV Access and BTV Unlimited at different price points.

568.3 Offering packages at different price points does not crowd out entrants. The suggestion that it does is based on a misconception of the market that assumes that targeting different income segments is the only way an entrant can compete. This is not the case. Differentiation through content (and other factors) is the very basis for competition in the electronic audio-visual services market and there are many ways for

595 Draft Findings, para. 6.5.22.

596 http://starsat.co.za/packages/

competitors to differentiate themselves that is not limited to servicing different income levels only.

569 With respect to limit pricing, ICASA also has no basis on which to conclude that MultiChoice is engaging in limit pricing. ICASA merely identifies the possibility that MultiChoice's pricing of each bouquet may not be profit maximising. This is inappropriate and unsubstantiated. MultiChoice does not engage in limit pricing and ICASA has no basis to suggest that this may be occurring.

569.1 Low prices would reflect the competitive nature of the market. MultiChoice ensures that its pricing remains competitive and has taken proactive steps to improve customer value over time. This includes increasing product value and introducing major technology improvements which have not been reflected in higher prices. This is consistent with competitive conduct on the merits and reflects a legitimate attempt by MultiChoice to retain and grow its business.

570 Furthermore, leading scholars have warned of the difficulties of distinguishing competitive conduct from exclusionary limit pricing and that such a theory of harm has not generally been pursued by competition regulators. According to Areeda and Hovenkamp:

> *"...prices nearer to the competitive level are generally welcomed by society in the same way as are innovation and higher quality, which also make entry less likely. (...) [T]he more or less permanently maintained limit price should not be considered exclusionary for Sherman Act purposes. In any event, a court cannot rule otherwise without identifying the price that fails to maximize short-run profits—an inquiry that will rarely produce satisfactory results."*[597]

571 Even if limit pricing did occur and can be identified, the economics literature shows that the implications for welfare are ambiguous and not necessarily harmful for consumers. For instance, Milgrom and Roberts[598] consider limit

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[597] Phillip E. Areeda and Herbert Hovenkamp (2019), Antitrust Law- An Analysis of Antitrust Principle and Their Application, 736c2. Condemning prices below short-run profit maximization.

[598] Paul Milgrom and John Roberts, 1982, 'Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis', *Econometrica*, vol.50, no.2, p. 443-460.

pricing under the assumption of incomplete information, where prospective entrants make assumptions on the costs and quantities offered by other firms in the market to determine whether entry is profitable. Under such a scenario, the entrant firm can hold a range of different assumptions, resulting in multiple possible market equilibria. For instance, limit pricing may not deter entry if entrants recognise the incentives for limit pricing and expect that the incumbent is engaging in limit pricing. Entrants may regard current prices as a false signal of post-entry profitability and enter anyway. On this basis, Milgrom and Roberts find that under certain assumptions and market equilibria, "*limit pricing should not be discouraged, since it means lower prices and cannot, overall, limit entry*"[599]. This implies that there may not be a trade-off between lower prices and limited entry.

ICASA provides no evidence that MultiChoice has 'locked-in' customers

572 ICASA claims that MultiChoice's decision to introduce a large range of bouquets at different price points leads to lock-in effects and that its offer of two-year debit order agreements is a strategy to lock-in customers, particularly 'low end' customers.[600]

573 ICASA does not establish that the offer of a large range of bouquets at different price points leads to lock-in effects. Rather, ICASA simply asserts that a consumer's sunk investment in a MultiChoice decoder and satellite dish that is not interoperable with those of competitors, coupled with brand loyalty, makes switching difficult and costly for customers.[601] As set out above, ICASA has not established that switching is costly for customers or that MultiChoice subscribers are so loyal that this would overcome and prevent switching to another provider for a better quality service at a lower price. Indeed, the growth experienced by OpenView over a short space of time is evidence that subscribers are not locked-in and that entrants are able to grow and sustain themselves in the market.

599 Paul Milgrom and John Roberts, 1982, 'Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis', *Econometrica*, vol.50, no.2, p. 458.

600 Draft Findings, para. 6.5.25.

601 Draft Findings, para. 6.5.25.

574 ICASA also does not establish that customers on two-year debit order agreements are 'locked-in' or that a substantial number of subscribers have taken up these contracts. Only 2% of MultiChoice subscribers are on 24-month price lock deals and have done so at their own election. The relatively low take-up of these 24- month contracts indicates that, even if it could be shown that these customers are locked-in to MultiChoice for this period, most subscribers are not and are free to switch to more competitive offers of other providers.

ICASA's analysis does not support a view that DTT is unlikely to have a marked competitive impact on Pay TV broadcasting in South Africa

575 ICASA states that it has determined that OTT is not a form of potential competition, but that perhaps DTT represents potential competition.[602] ICASA then finds that DTT is not expected to have a marked competition impact on Pay TV broadcasting over the next three years.[603]

576 The assessment focuses only on whether DTT is likely to emerge as a subscription-based platform, whereas its own definition of the market includes satellite-based FTA offerings. On this basis, the assessment should include the emergence of both FTA and Pay TV offerings on the DTT platform. As a consequence, ICASA's assessment is deficient and has no regard to potential competition from future FTA licensees. Kwesé has already been awarded a FTA broadcasting licence and a frequency spectrum licence for capacity on DTT Multiplex 3.

577 Moreover, for reasons explained below, the considerations taken into account by ICASA do not support its conclusion to dismiss DTT as a source of potential competition on a forward-looking basis.

578 First, ICASA provides a historical account of the legal challenges with respect to the implementation of digital migration relating to the question of set-top box encryption and also the recent Constitutional Court matter that considered

602 Draft Findings, para. 6.5.27.
603 Draft Findings, para. 6.5.44.

whether or not the channel licensing agreement entered into between the SABC and MultiChoice constituted a notifiable merger.[604] ICASA then concludes that the policy of non-encryption of set-top boxes means that it seriously doubts the strength of potential competition from DTT Pay TV services.[605] This is not a sound basis to come to this finding.

579 The historical account that speaks only to the past delays in digital migration forms the bulk of ICASA's assessment. This says nothing about the potential for future competition as a result of digital migration and is not relevant to a forward-looking assessment. Moreover, the account provided by ICASA is factually incorrect. Since that factual account is irrelevant to a finding about future competition, it is not necessary for MultiChoice to address these factual inaccuracies in this submission. However, MultiChoice reserves the right to address these issues in more detail should this become necessary.

580 It should be noted that the Broadcasting Digital Migration Policy 2008 policy stance on encryption in FTA STBs is not applicable to all DTT set top boxes, nor does it prohibit FTA broadcasters funding encryption in the FTA STB if they choose to do so. It only applies to those FTA STBs that are subsidised by government. It also does not include DTT Pay TV STBs offered by licensed subscription broadcasters on the DTT platform in South Africa. Thus, ICASA's main contention appears to be that the non-encryption of publicly-funded STBs means that DTT will not develop into a strong platform for the provision of Pay TV. The relevant question is therefore whether the encryption of publicly-funded STBs is a requirement for the growth and expansion of DTT Pay TV services. This is evidently not the case for a number of reasons:

580.1 The acquisition of STBs by consumers does not represent an impediment to the entry and expansion of operators. As explained in paragraphs 550 to 552 above, the retail cost of STBs has reduced dramatically over time and therefore acquisition of a STB is not a high switching cost for consumers. Entrants on the DTT platform could also

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[604] Draft Findings, paras. 6.5.28 - 6.5.35.
[605] Draft Findings, para. 6.5.36.

overcome any switching costs by providing a STB at a subsidised price, which is common practice.

580.2 This is confirmed by experience in SA and the rest of Africa. Indeed, the fact that OpenView has entered the market and grown substantially in a short space of time, with 1.5 million activated boxes, indicates that the need to purchase a STB alone is unlikely to significantly inhibit entry and potential future competition from pay TV operators. The experience in the rest of Africa has also shown that publicly funded encrypted STBs have not been needed for DTT Pay TV broadcasters to develop and thrive. In fact, DTT networks were typically first rolled out by Pay TV broadcasters (with their requisite STBs) in the rest of Africa. The FTA channels were then carried by the Pay TV networks.

580.3 The fact that ICASA is issuing an invitation to apply for subscription broadcasting licences for capacity on DTT strongly implies that ICASA must believe that DTT Pay TV entrants will be capable of competing. This must be the case because a prerequisite for awarding a license, or licenses, is a sound business plan that ICASA views as capable of success. In other words, the potential licensee must be competitive. If ICASA truly doubts the strength of potential competition from Pay TV from new DTT entrants, then surely it would not have embarked on such a process and allocated capacity on DTT Mux 3 specifically for subscription broadcasting use in the first place.

581 Second, ICASA suggests that the impact of DTT on Pay TV broadcasting has been "varied" in countries that have undergone full digital migration, referencing the USA, Europe, Italy and Kenya to support this point.[606] The point that ICASA appears to draw from this is that the migration to DTT does not necessarily mean that DTT will emerge as a competing Pay TV platform.[607]

582 However, it is clear that ICASA has not actually investigated this "varied" experience that it references in order to understand the reasons for the variance.

606 Draft Findings, paras. 6.5.38 - 6.5.43.

607 Draft Findings, paras. 6.5.39.

Hence to identify the circumstances under which DTT is or is not likely to encourage entry by Pay TV broadcasters is not factual or supported by analysis. Such an analysis is crucial if ICASA wishes to rely on international experience to draw conclusions about the potential impact of DTT in South Africa.

583 Moreover, ICASA acknowledges that there are a number of factors that can influence the use of DTT platforms by pay TV providers, including whether or not policy makers choose to use DTT to promote entry. However, ICASA fails to consider these factors and their nuances in any detail. Indeed, in many instances there are reasons as to why digital migration has not resulted in entry by DTT subscription providers. However, these reasons are often not relevant for the South African context.

583.1 ICASA has referred to digital migration in the USA as an example of where digital migration did not successfully result in entry. However, it fails to recognise that terrestrial digital migration in the USA was based on a different technology standard, which limited multichannel offerings. As a result, in the USA digital migration was simply a technical migration of the existing terrestrial TV channels of FTA incumbents from analogue to digital and was never designed or intended to provide multichannel Pay TV services. In fact, cable Pay TV services were engaged in their own digital migration to Digital Cable standards at the time. Despite this, however, it is clear that FTA DTT, in combination with VOD offerings are emerging as alternatives to traditional Pay TV services in the USA. Explaining the rise in DTT (referred to in the USA as digital antennas) and OTT and corresponding decline in pay TV subscriptions, the following is observed:

> "*Increasingly, consumers are cobbling together their own bundles of content sources. Digital antennas are experiencing a resurgence as consumers consider over-the-air TV and OTT video services as alternatives to pay TV.*"[608]

608 https://www.broadbandtvnews.com/2018/03/16/20-of-us-broadband-homes-use-dtt/

583.2 Similarly, the experience in Europe would be shaped by its own competitive landscape, where many European markets were already characterised by competition via cable, and so it is not surprising that DTT remained a platform largely reserved for FTA. In some cases, this was a direct result of regulators not being open to introducing or expanding Pay TV offerings on the platform while the FTA broadcasters were engaged in a migration from analogue to digital broadcasting. A notable example is BSkyB's plans to convert its three Freeview channels on the DTT platform in the UK to four subscription channels. At the time, Ofcom flagged a concern that these plans may "unacceptably diminish the appeal" of Freeview.[609] However, this is also changing as BSkyB announced in March 2019 that it would make its offering available to Italian viewers via a new DTT service (including HD channels).[610] Similar to the USA, there has also been a growth of Pay TV platforms built around hybrid DTT and IP infrastructure in Europe. In the UK notable examples are BT TV and Talk Talk TV. Rather than being offered as a completely separate service, like Netflix or Amazon, which are offered through apps on connected TV sets or OTT boxes, these services are laid on top of the existing Freeview DTT service to create an integrated hybrid package. BSkyS has followed these two services to now also offer a Now TV box, which includes a DTT tuner so the FTA channels sit alongside its OTT offering.[611]

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609 https://www.theguardian.com/media/2007/feb/16/citynews.digitaltvradio; https://www.theguardian.com/media/2007/feb/08/bskyb.broadcasting

610 https://www.digitaltvnews.net/?p=30747

611 https://www.arqiva.com/views/blog/picknmix-tv-how-pay-lite-could-become-the-norm-in-the-uk-because-of-dtt/

584 ICASA has only mentioned one African country, namely Kenya, in its review of international experiences. It acknowledges that DTT has contributed to the development of Pay TV and has a market share of 56% of total Pay TV users. [612] This is consistent with MultiChoice's submissions which show that DTT has been a catalyst for rapid Pay TV expansion in a number of countries in the rest of Africa, not only Kenya. In particular, StarTimes has successfully leveraged off the digital migration process to enter, and grow, in a number of African countries. As a result, it is now broadcasting in 14 countries, and is reported to be the largest Pay TV service provider in East Africa and in Nigeria.[613]

585 The dynamics experienced in other African countries (including the demand for low cost offerings which is facilitated by the DTT platform and the absence of cable TV) are similar to those in South Africa. This makes the experience from other African countries, like Kenya, far more relevant than comparators from USA or Europe. A proper application of relevant international experiences and an appreciation of the factors driving the varied experience, would not support ICASA's findings that DTT is unlikely to have a marked competition impact on Pay TV services in SA.

586 Last, ICASA refers to predictions by PWC and findings from an EC merger to contend that Pay TV is likely to be a complement to DTT, rather than compete with it[614] and that satellite and DTT TV are "*slightly less valid alternatives*".[615] However, in both instances, it appears that ICASA has mischaracterised the conclusions that have been drawn.

587 A clear reading of the PWC findings, as reproduced below for ease of reference, reveals that it is not commenting on the complementarity of DTT and traditional Pay TV. Instead, it finds that, as a result of changes in viewing preferences, households are likely to move away from traditional Pay TV packages in favour of a combination of DTT and SVOD services instead. If anything, this suggests

612 Draft Findings, paras. 6.5.42.
613 MultiChoice's 2017 submissions, para 1101.1-1101.2.
614 Draft Findings, para 6.5.37.
615 Draft Findings, para 6.5.43.

that, on a forward-looking basis, such services will be a serious competitive threat to traditional Pay TV broadcasters.

> *"Indeed, with a cultural shift towards viewing content when and where audiences desire, aided by ubiquitous fast Internet services, in the longer term some households might look to supplement their digital terrestrial channels with SVOD platforms rather than traditional pay-TV packages."*[616]
>
> (emphasis added)

and later

> *"In the longer term, after the analogue switch-off, some households might look to supplement their digital terrestrial channels with subscription video on demand (SVOD) platforms rather than traditional pay-TV packages."*[617]
>
> (emphasis added)

588 With respect to the Liberty GlobalZiggo merger, it cannot be relied on to suggest that satellite and DTT platforms are not substitutes. This is because, as is demonstrated by the relevant extract from the decision below, the question of substitutability between satellite and DTT was not actually considered – the European Commission only considered whether satellite and DTT were valid alternatives for cable and IPTV:

> *"As to a possible market segmentation based on distribution infrastructure, the market investigation revealed that cable and IPTV through DSL or fibre appear as interchangeable technical solutions, as they both allow TV distribution and interactivity. On the other hand, satellite (DTH) and digital terrestrial television (DTT) appear to be slightly less valid alternatives."* [618]

589 It is clear that based on what ICASA has relied upon, there is no sound basis for ICASA to conclude that DTT is unlikely to have a marked competitive impact on Pay TV broadcasting in South Africa. The experience elsewhere, particularly in the rest of Africa, suggests that the platform is likely to emerge as a competitive

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616 PWC Entertainment and Media Outlook: 2018 -2022: An African perspective, p. 18.
617 PWC Entertainment and Media Outlook: 2018 -2022: An African perspective, p. 77.
618 European Commission, 2018, Liberty Global/Ziggo, Case No. M 7000, para 114.

constraint to traditional Pay TV in SA, either on its own or in combination with OTT offerings.

ICASA has no basis to conclude that MultiChoice's share of the market is likely to remain constant within the review period and beyond

590 ICASA contends that the relative market shares of licensees are likely to remain constant within the review period and beyond,[619] and that it is unlikely that MultiChoice will lose its leading market position.[620] This finding is on the basis of the alleged strategic behaviour by MultiChoice and ICASA's finding that DTT will not have a marked competition impact on Pay TV services.

591 ICASA has no basis to support such a conclusion. As already shown above, none of the considerations that underpin ICASA's findings hold: there is no basis to contend that MultiChoice has engaged in any strategic behaviour that would exclude competitors and the finding that competition from DTT is unlikely to emerge is not supported by ICASA's analysis.

592 In any case, as explained in paragraphs 519 to 521 of this submission, MultiChoice's market share bears little relevance for assessing competition. Low market shares of entrants reflect only the recent nature of the entry rather than the competitive significance of the entrants. The threat of entry and/or expansion of existing entrants is also likely to constrain the conduct of an incumbent in the market.

593 The trend in the number and strength of competitors is far more informative in the context of a dynamic market. ICASA has not considered the strength of the competitive constraints and the rapid pace at which the market is changing, which has seen significant entry and is likely to experience further entry within the review period. In particular –

619 Draft Findings, para 6.5.44.
620 Draft Findings, para 6.5.26.

593.1 OpenView, which launched in 2013, has already emerged as a formidable competitor, at an estimated 1.5 million[621] active subscribers (and far higher than ICASA's 1.2 million an optimistic estimate).

593.2 It is clear that OTT offerings (both paid-for and free) are also being targeted at this lower-end segment in an attempt to draw viewership away from traditional TV. ICASA has not considered OTT offerings for this market segment at all, even though it is clearly relevant for a consideration of market dynamics.

593.3 Kwesé's FTA offering on DTT will also have an impact on competitive dynamics going forward.

594 These market dynamics have meant that MultiChoice has had to respond competitively to retain subscribers, who are easily able to switch to the alternative competitive offerings, As explained in Part A, MultiChoice has contained prices across the board, where subscription prices have not kept up with the large increases in input costs. Between 2014 and 2019, the real price of the Access and EasyView bouquets decreased by an annual average of 3.7% and 3% respectively. At the same time, MultiChoice has improved its content offering, resulting in increased consumer value over time.

ICASA HAS NOT ESTABLISHED THAT COMPETITION IN THE MARKET FOR THE RETAIL DISTRIBUTION OF PREMIUM PAY TV SERVICES IN SOUTH AFRICA IS INEFFECTIVE

595 ICASA has determined that there is ineffective competition in the purported market for the "*retail distribution of premium subscription television services in South Africa*."[622] The factors its analysis covers is much the same as that for the "retail distribution of basic Pay TV services" in that ICASA: relies on the same list of barriers to entry, but includes another barrier that is specific to this market; and

621 emedia Holdings Consolidated annual results March 2019, p. 2.
622 Draft Findings, para 1.4.2.2.

for the dynamic assessment, ICASA cites "strategic behaviour by incumbent" and considers "potential competition".

596 The assessment in the Draft Findings of these factors does not support ICASA's finding of ineffective competition in this purported retail market for reasons elaborated on in this section.

ICASA has not established that barriers to entry are high and insurmountable

597 ICASA's assessment of barriers to entry in the purported market for the retail distribution of premium Pay TV services cross-refers to the same three factors and analysis it has cited with respect to the market for basic-tier Pay TV services and satellite-based free-to-air televisions services.[623] The deficient nature of ICASA's assessment of switching costs, brand loyalty and vertical integration has already been dealt with above and is not repeated here.

598 In addition to those factors already cited, ICASA cites a further barrier to entry that is specific to this purported market for the retail distribution of premium Pay TV services – that of bundling. The assessment is covered in a mere two paragraphs where the following observations are made:[624]

598.1 ICASA notes that consumers benefit from bundling as a result of the cost savings and convenience, but that this conduct may foreclose the market as consumers purchase the bundled offer instead of dealing with other suppliers.

598.2 ICASA then notes two incidences of bundling: access to discounted data in addition to subscribing to a television or video-on-demand service and that MultiChoice can develop and market bundled products.

599 ICASA's approach to labelling bundling as a barrier to entry is to merely observe the practice's existence in the sector and that there <u>may</u> be instances where bundling forecloses competitors. ICASA does not conclude on bundling or offer

623 Draft Findings, paras. 6.5.46 – 6.5.49.
624 Draft Findings, paras. 6.5.47 – 6.5.48.

any facts, information or evidence to demonstrate that bundling has presented itself as a barrier to entry or has resulted in competitive harm.

600 Observing that bundling occurs is entirely insufficient to find that it impedes entry or results in any harm in the market. Bundling is a ubiquitous practice and is often beneficial to consumers, as is recognised by ICASA. Bundling is likely to be a concern only in very specific circumstances. Summarising the outcomes of bundling and tying, O'Donoghue and Padilla state the following:

> *"Most economists now would agree on three fundamentals in regard to tying and bundling. First, tying is a pervasive practice that, in many instances, gives rise to substantial efficiencies. (...) Second, the circumstances in which tying would lead to anticompetitive effects are restricted and hard to verify. The models that have been put forward for the purpose of identifying such effects rely on highly specific market structures, and the results are very sensitive to changes in the underlying assumptions, Finally, any attempt to balance efficiency gains against possible anticompetitive effects is complex."*[625]

601 Although ICASA labels bundling as a barrier to entry, it has not provided any evidence or analysis to show that bundling results in competitive harm or impedes entry. An investigation of the facts would show that bundling is not a concern in the electronic audio-visual services market in SA, and if anything, bundling facilitates entry by providing a competitive advantage to telcos (as discussed in more detail below).

602 With respect to bundling by MultiChoice, its subscribers benefit from the inclusion of value-add services and MultiChoice is not uniquely positioned to offer a bundle relative to its competitors which provides a significant competitive advantage.

602.1 The inclusion of value-add services to the DStv bouquets (and not only to the Premium bouquet) is an important feature of MultiChoice's competitive response to improve consumer value. Subscribers have benefited from the constant innovations and add-ons introduced by

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625 O'Donoghue and Padilla (2013), The Law and Economics of Article 102 TFEU (2nd Edition), p. 609.

MultiChoice over the years e.g. DStv Now, Catch Up, BoxOffice and Showmax. This includes the introduction of DStv WiFi Connectors that provide an easy and cost-effective way of connecting the Explora to the internet to get access to connected services, like Catch Up Plus.[626]

602.2 There is nothing stopping other DTH operators, like StarSat, from doing the same and investing in innovation to the benefit of consumers. In fact, StarTimes has launched its own OTT offering, StarTimes ON, which is available in South Africa and therefore it too can bundle this with their DTH offerings. SABC has also entered into a partnership with Viu to stream some of its content.

603 Importantly, other firms are in a position to offer bundles that MultiChoice cannot replicate. It is only the telco networks for whom the bundling of Pay TV with broadband and mobile telephony will be feasible. This will be to the advantage of telcos as entrants, thereby placing them in a better position to compete more effectively with any traditional Pay TV incumbent. The telcos already engage in such bundling, as has also been observed by ICASA.

603.1 Vodacom advertises on its website that Video Play subscribers can purchase data bundles that can be used to download and stream videos, at a discounted rate.[627]

603.2 When launching black, Cell C also introduced a range of low-cost prepaid data bundles to allow users to stream content from its black video-on-demand platform, reportedly at an in-bundle rate of 1c/MB.[628]

ICASA's assessment of market dynamics is flawed as it does not establish that competition is ineffective, whether currently or on a forward-looking basis

604 ICASA's assessment of market dynamics for the market that ICASA has defined as the retail distribution of premium Pay TV services also focuses only on "strategic behaviour by incumbent" and potential competition. The assessment

626 These are offered on a standalone basis and are also offered as part of the Price Lock deal.

627 https://www.vodacom.co.za/vodacom/services/vodacom-video-play

628 https://techcentral.co.za/cell-c-launches-low-cost-black-streaming-plans/78172/

of these factors in the Draft Findings does not support a finding of ineffective competition for this market. In fact, ICASA does not even consider whether OTT is a constraint on a forward-looking basis. It again does not consider all factors that are relevant for coming to a finding on the effectiveness of competition, including the actual strength of competition and market outcomes.

ICASA provides no evidence that MultiChoice has engaged in strategic behaviour that has deterred new entry or excluded existing rivals

605 ICASA observes that MultiChoice is taking advantage of the technological changes happening in the television and VOD sector to try and protect its market position. This includes launching Showmax before the entry of Netflix and introducing DStv Now to Premium, CompactPlus and Compact subscribers. ICASA further notes that MultiChoice intends on launching a streaming-only version of DStv.[629]

606 ICASA does not conclude that the introduction of these services has prevented rivals from entering or is anti-competitive in any way. It merely observes that MultiChoice has launched these value-added services and intends to launch additional streaming services in the future.

607 [redacted]

608 The introduction of the products cited by ICASA is consistent with legitimate competitive conduct and consumers ultimately benefit from the enhanced service

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[629] Draft Findings, paras 6.5.54-6.5.55.

[630] ICASA appears to not have requested these figures from Netflix itself and so is relying on MultiChoice's own estimates.

[631] This excludes the DStv Premium subscribers for whom Showmax is added on at no charge, but includes all the subscribers who incur a charge for the service, at the full or discounted rate.

offerings and greater choice. Part A shows that to increase the attractiveness and competitiveness of its offering and to enhance the consumption experience of customers given evolving consumer preferences and habits, MultiChoice has improved its technical platform and provided a range of services. Investments in Showmax, DStv Now and Catch up are all directed at responding to OTT services, which offer similar features.

609 Any suggestion that this represents illegitimate, exclusionary conduct would be misdirected and would represent a fundamental misunderstanding of how competition in markets work. Ultimately, ICASA does not demonstrate – or even attempt to demonstrate – that rivals have been excluded or that entry has been deterred.

ICASA has no basis for its contentions regarding market saturation

610 [redacted][632] Therefore, MultiChoice's claim that its premium base is being eroded by OTTs is not borne out by evidence.

611 ICASA's assertion that the decline in subscribers is because of saturation and not as a result of competition from OTT is not supported by any analysis and is incorrect. While market saturation is a factor that affects subscriber growth, in this case there is a marked decline in the number of subscribers that cannot be attributed to saturation, as ICASA is implying.

612 [redacted]

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632 Draft Findings, para 6.5.53.

[redacted]

Figure 21: Closing base of Premium subscribers (April 2011 to August 2019)

[redacted]

613 MultiChoice has shown in Part A that the trend of "cord-nevers", "cord-cutting" and "cord-shaving" is evident in SA and that the propensity for DStv subscribers to cord-cut or cord-shave is high.

ICASA has not assessed OTT as a source of potential competition on a forward-looking basis

614 ICASA's consideration of OTT as a source of potential competition is contained in a paragraph under a heading called "Potential competition".[633] This is where ICASA contends that the decline in the DStv Premium subscriber base is the result of market saturation and not because of OTTs.

633 Draft Findings, para 6.5.53.

615 This assessment is grossly superficial and says nothing about competitive constraints from OTT currently and on a forward-looking basis.

615.1 As discussed above, ICASA has not established that the decline in MultiChoice's Premium subscriber base is due to market saturation rather than intense competition from OTT providers. Furthermore, the observation that the market is saturated says nothing about the state of current competition between MultiChoice and OTT providers. As this is the only factor that ICASA considers, there is no basis to dismiss OTT as a relevant competitive constraint.

615.2 ICASA has not engaged in a forward-looking assessment to determine potential competition. It has simply taken past experience without considering at all how this will be affected by shifts in the market on a forward-looking basis. Even if ICASA is correct in its claim that the past decline is attributable to saturation (which it is not), ICASA would still be required to consider how the market is likely to change on a forward-looking basis.

616 Moreover, the assessment is premised on the mistaken belief that only a significant decline in subscribers constitutes evidence of effective competition. This is not the case. As has been discussed above in Part A, MultiChoice actively seeks to mitigate and prevent customer losses by making competitive offers to subscribers to entice them to stay and not switch to alternatives. These competitive efforts have ramped up in recent years given the intensity of competition faced. Despite all of this, the DStv Premium subscriber base has contracted by [redacted]

617 Including a section labelled "Potential competition" and having one cursory paragraph to dismiss OTT does not amount to an assessment of potential competition. It is apparent that ICASA has failed to assess OTT as a competitive constraint on a forward-looking basis and having regard to all of the critical factors and evidence before it.

ICASA has no basis to conclude that MultiChoice's share of the market is unlikely to change in the short to medium term

618 ICASA claims that it does not foresee changes to the relative market shares of players in the market, where MultiChoice occupies a leading position. [634] This conclusion is not supported by ICASA's analysis.

619 With regards to the factors that ICASA has considered, there is no basis to dismiss potential competition from OTT on a forward-looking assessment; and merely observing that MultiChoice bundles value-added services with its DStv offering does not support a finding that market shares are unlikely to change.

620 Furthermore, and as has already been explained, MultiChoice's market share is of little relevance for assessing competition. By focusing on market shares alone, ICASA has failed to consider factors that are relevant to an assessment of both current and future competitive constraints. There has been no consideration of:

620.1 the proliferation of electronic audio-visual services, which are constantly being launched to draw viewers and spend away from the MultiChoice service;

620.2 the strength of actual and potential competitors and their ability to expand rapidly; and

620.3 MultiChoice's response to the competitive threat posed, which has resulted in increasing consumer value and real price decreases for the Premium Bouquet and only marginal increases for the Compact Plus and Compact Bouquets.

[634] Draft Findings, paras 6.5.51 – 6.5.52.

ICASA HAS NOT ESTABLISHED THAT COMPETITION IN THE MARKET FOR THE WHOLESALE ACQUISITION OF PREMIUM CONTENT FOR DISTRIBUTION IN SOUTH AFRICA IS INEFFECTIVE

621 ICASA's focus at the wholesale level is on the "wholesale market for the supply and acquisition of premium content" where ICASA finds that competition is ineffective.

622 ICASA agrees with MultiChoice that it is only necessary to assess the effectiveness of competition for the purposes of ex-ante regulation at the wholesale level if it is found that competition in the retail market downstream is itself ineffective. For the reasons explained in the preceding section, competition at the retail level is far from ineffective. On this basis, wholesale markets cannot be a concern and a proper consideration of market dynamics in the upstream market would reveal this.

623 ICASA's assessment of the effectiveness of competition within the upstream market follows the same format as the retail approach – ICASA identifies barriers to entry and then moves on to what it considers to be a dynamic assessment of the market. ICASA's assessment of the wholesale market is as superficial as that for the retail market. It lacks any evidentiary basis and is rather a collection of assertions and speculation which are not informed by the current dynamics in SA or evidence that has been put before ICASA.

624 ICASA also fails to consider market dynamics in this wholesale market. ICASA inexplicably only considers customer behaviour at the retail level, which is completely irrelevant to an assessment of competitive dynamics in the wholesale market for the supply and acquisition of premium content.

ICASA has not established that barriers to entry are high and insurmountable

625 ICASA cites a number of factors with respect to barriers to entry in the supply and acquisition of premium content. These include: scarcity and the cost of premium content; long-term exclusive contracts; and incumbency of special relationships. ICASA has failed to practically assess these barriers and has not

demonstrated, with evidence or at all, that efficient entrants are unable to contest these rights.

626 This section deals with each of the factors cited by ICASA in turn.

<u>There is no scarcity of content that is capable of building an audience</u>

627 ICASA identifies the scarcity of premium content to be the major barrier to entry in the upstream market, disagreeing with MultiChoice's contention that this is not the case given the wide availability of rights.

628 ICASA does not provide evidentiary support for this assertion. ICASA merely observes that certain rights are held exclusively by MultiChoice under multi-year contracts.[635] While this may imply that these rights are unavailable to others over the duration of the agreement, this does not mean that rights are scarce.

629 The claim that premium rights are scarce presumes that these rights are essential for providers of electronic audio-visual services to compete effectively and build an audience. This assumption is incorrect as discussed in paragraphs 532 to 542 above. ICASA has not assessed whether any one of the rights it has labelled as premium is essential; nor has it made the claim that they are essential.

630 ICASA merely states that the SABC and e.tv have lost viewers <u>as a result</u> of losing rights to the PSL and UEFA Champions League respectively (which have since been acquired by MultiChoice).[636]

630.1 No evidence has been provided to support this claim and ICASA has failed to acknowledge that the SABC has had access to a substantial portion of PSL rights and in the past has not even broadcast all of the matches for which it has acquired rights. Nor has ICASA demonstrated that e.tv has lost viewers as a result of losing the UEFA Champions League.

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635 Draft Findings, paras 6.5.62 - 6.5.63.

636 Draft Findings, paras 6.5.60.

630.2 Even if ICASA is correct, the observation that a broadcaster has lost some viewers as a result of losing content would not imply that these rights are essential for the broadcasters to compete. When broadcasters lose rights to content, they are able to invest in other content that is able to attract an audience, as BSkyB did when it lost the rights to the entire UEFA Champions League and responded by investing in more local content. Similarly, MultiChoice did the same when it lost the EPL Package A rights and other rights for the seasons 2007/08 – 2009/10 to HiTV.

631 With respect to movies and series, ICASA states that because of windowing of Hollywood movies, FTA and OTT providers cannot compete with subscription broadcasters for such movies [637] and that according to e.tv, the potential to earn income in the second and third window has been curtailed. [638]

631.1 The observation that the potential to earn income from the second and third windows has been reduced does not imply that first run content is essential.

631.2 This claim by e.tv has also not been investigated by ICASA to determine the veracity of the statement. Moreover, evidence before ICASA shows that second run content can be very popular (outperforming first run content) and the shrinking of windowing has diminished the distinction between first run and second run content. In particular –

631.2.1 Second run series can outperform first run series. The Universal channel primarily screens second run series (90% of content) with only three to four new first run series per year. [redacted] This is despite the fact that DStv Premium bouquet subscribers have access to a large number of first run movies and series across different channels. In contrast, the Fox

[637] Draft Findings, para 6.5.63.
[638] Draft Findings, para 6.5.64.

channel primarily screens first run series from the USA with a number of highly successful series like "Empire", "Grey's Anatomy" and "The Walking Dead". [redacted]

631.2.2 The traditional windows for international movies and series are shrinking. This has substantially reduced the additional value of first-run movie or latest series window. A much larger proportion of consumers are willing to trade-off waiting for a movie against paying for an earlier viewing when the time period is shorter from the USA release. The loss of value from first-run movies and series increases the relative value of the second-run, making it an increasingly attractive strategy for many electronic audio-visual services, especially as they can free-ride on the investments made by the VOD and Pay TV services in promoting that content first. [639]

631.2.3 Furthermore, SVOD and TVOD rights now overlap with traditional movie and Pay TV rights windows, allowing new content to be acquired, particularly by OTT operators, during window periods which previously would have been reserved for cinema and Pay TV broadcast.[640]

632 Furthermore, ICASA has focused only on the rights that are held by MultiChoice, but has failed to consider the full availability of rights beyond those acquired by MultiChoice. It is misplaced and arbitrary for ICASA to limit the list of rights to that which MultiChoice has acquired and to then assume that this content is scarce and required by other Pay TV broadcasters.

633 MultiChoice has demonstrated that there is a wide range of content that is available and capable of attracting audiences. This is particularly the case in

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[639] MultiChoice's 2017 submissions, para 643-646.

[640] MultiChoice presentation to ICASA (11 May 2018), slide 71.

recent years, which has seen an explosion of popular, quality content. An efficient electronic audio-visual service provider is capable of selecting content to appeal to its target market and investing in marketing and promoting that content to consumers. Whilst this may require investment and promotional effort, neither can be considered barriers to efficient entry.

634 With respect to movies, ICASA has focused on big Hollywood studio movies only, but has failed to recognise the growing source of quality content outside of the confines of the big Hollywood studio deals.

634.1 MultiChoice has demonstrated that independent films (i.e. films produced outside of the major Hollywood studios) have proliferated in number. Collectively they produce around four times as many movies compared to the big Hollywood studios per annum.[641]

634.2 In addition to volume, the independent studios are producing high quality and popular productions, typically outperforming blockbuster Hollywood studio movies at awards ceremonies such as the Oscars.[642] Outside of the major Hollywood studios, M-Net acquires a range of movies from independent production studios, including Vision Films, GEM Entertainment, Freemantle, Africa in Motion and Miramax. OTT providers also produce a significant number of original movies. For example, Netflix produced 69 original movies in 2018 and received 15 Oscar nominations.

634.3 There is also a huge volume of popular inexpensive movie content available on the African continent, which comes from a wide range of small independent producers. As such, contracting is relatively easy and inexpensive, but does require connecting with the many producers in this space. This includes literally thousands of producers in Nollywood, but also a sizeable industry in Kenya and domestically (known as "bubblegum" movies). The channels showing these movies

641 MultiChoice's 2017 submissions, para 640.3.

642 Financial Times, 20 February 2015, The unstoppable rise of independent films: https://www.ft.com/content/bc58eede-b770-11e4-8807-00144feab7de?mhq5j=e5

on DStv tend to perform extremely well. [redacted]

635 For international series, there is similarly no scarcity. There are hundreds of international series available from different production companies in the market with a multitude of new titles being launched annually. Indeed, the growing popularity of series has seen a switch by producers to this content genre, fuelling the rapid increase in quality series. MultiChoice's 2017 submissions showed that in the USA alone, the number of new original series produced annually has increased from 182 in 2002 to 455 in 2016, with series for OTT services showing the highest growth over the period.[643]

636 Netflix and other OTT services are making considerable investments into original, often award-winning series and documentaries, which have proven to be very popular and have driven their growth.[644]

637 As regards sports, there are also a multitude of different leagues and competitions within any sports code:

637.1 For example, within soccer, there are a number of different European football leagues which are also followed in SA (e.g. UEFA Champions and Europa Leagues, EPL, Bundesliga, Serie A, La Liga, Ligue 1); international tournaments involving national teams (e.g. FIFA World Cup, UEFA EURO, and UEFA Nations League, Africa Cup of Nations, Confederation of Southern African Football Associations (COSAFA)); regional tournaments involving club football leagues (e.g. CAF Champions League and CAF Confederation Cup); domestic club football (the PSL, as well as PSL-related cup competitions, such as the MTN8 Cup, the Telkom Knockout Cup and the Nedbank Cup); and

643 MultiChoice's 2017 submissions, para 639.

644 https://www.cnbc.com/2019/01/07/netflix-wins-big-at-the-golden-globes.html

matches involving the South African national team (including "friendlies").

637.2 Within cricket, each host nation owns the rights to all international tests, ODIs and T20s taking place in their country and these are therefore each sold independently of international events played under the auspices of the International Cricket Council (ICC). International tournaments are sold by the ICC, and these consist of a range of properties such as the T20 World Championship and ODI World Cups, as well as the Champions Trophy.

638 In addition, the growing range of other sports rights properties, such as for example, E sports, enables an entrant or rival to build a portfolio of rights which collectively is capable of providing appeal and value. In addition, an electronic audio-visual service provider is able to further build the value of those rights through investment in the sport and its promotion, much like SuperSport has done with the PSL.

639 Beyond Hollywood movies, series and sports, ICASA has further failed to recognise other genres of popular, quality content that are not necessarily costly to acquire/produce and are not scarce.

639.1 MultiChoice's 2017 submissions show that local content has become one of the important means of building an audience and subscriptions. There is no scarce supply of local content rights and there are no barriers for electronic audio-visual service entrants and competitors building in-house capabilities or commissioning their own local content from independent producers. Whilst this may require investment and promotional effort, neither can be considered barriers to efficient entry. MultiChoice and many of its rivals in SA and the rest of Africa have invested in local general entertainment content which has proven to be very popular and capable of building audiences/subscriptions.

639.2 Short-form content is increasingly growing in appeal, especially among the younger generation. This is reflected in the massive daily viewing of sites such as YouTube (referenced earlier on), and has spurred the commissioning by Facebook and Snap TV of new short-form original content.

640 Given the proliferation of popular, high quality content that is available to providers of electronic audio-visual services, either by acquisition or own production, there is simply no basis for ICASA to allege that scarcity of "premium" content is a major barrier to entry in the upstream market. Furthermore, the sheer volume of popular, high quality content means that no single electronic audio-visual service provider is capable of acquiring the majority of such content.

The cost of content is not a barrier to entry by efficient and well-resourced firms

641 ICASA contends that the increasing cost of "premium" content is beyond the reach of many broadcasters and new smaller local OTT service providers.[645] However, ICASA has not established that the cost of content is prohibitive and is a barrier to entry for well-resourced firms.

642 ICASA only cites two instances where the SABC and e.tv have failed to acquire rights, but has had no regard for the evidence presented by MultiChoice which shows that sports rights have been successfully contested by entrants. This includes rights to sports in SA which were previously held by MultiChoice, including quality football content secured by StarTimes on an exclusive basis for the whole of sub-Saharan Africa. This includes top flight European leagues, the German Bundesliga and the French Ligue 1 which are cited by ICASA as premium content. The Italian Serie A was previously held by StarTimes, but has since been acquired by SuperSport, demonstrating the contestability of these rights and the dynamic nature of this market.

643 While the focus for ICASA is on 'premium' content, ICASA has not demonstrated that rivals need access to expensive content to compete. MultiChoice has shown that expensive content is not a requirement for successful entry and expansion, particularly in the South African context where there is high demand for low-priced bouquets.

[645] Draft Findings, paras 6.5.59.

644 Moreover, it is clear that even the expensive rights are contestable by well-resourced entrants.

644.1 Whilst some rights are more expensive than others, this reflects the value that can be derived by an electronic audio-visual services provider for those rights. Being expensive does not make rights incontestable, since well-resourced and efficient entrants are capable of monetising that value. Whilst this may require investment, as outlined earlier when dealing with barriers to entry in the retail market, capital costs are not considered a barrier to entry.

644.2 The comment in the MultiChoice Integrated Annual Report that sports rights have become "*hotly contested*"[646] is evidence that other operators are capable of contesting these rights at high prices, and their willingness to do so has driven up the price of these rights.

645 There is also no basis to suggest that production requirements with respect to quality and investment specifications are barriers to entry[647] that cannot be overcome by efficient firms. In terms of the specific example cited by ICASA, both Vodacom and Telkom have bid to acquire the PSL's electronic audio-visual rights (as have e.tv and SABC), demonstrating that they would have been capable of meeting the minimum production requirements.

<u>Duration of rights agreements does not present a barrier to entry and ICASA's continued reliance on the vicious cycle theory is flawed</u>

646 ICASA cites the multi-year duration of the PSL and EPL rights and states that no entrant would have access to these and other rights currently held by MultiChoice. Such content would not be available to entrants until the end of the contract.[648]

647 However, ICASA has failed to recognise that, given the large volume of content that is available and is capable of attracting an audience, rights to a vast range

646 Draft Findings, para 6.5.59.
647 Draft Findings, paras 6.5.61.
648 Draft Findings, paras 6.5.62 and 6.5.68.

of popular content frequently become available for acquisition in a short period of time. Of importance, is also the fact that these rights are "staggered" and come up for renewal at different times, thereby enabling operators to acquire rights at all times. Because no individual content right (or small selection of content rights) is important in attracting subscribers and a wide range of alternatives is available, a competitor does not need to wait for particular rights to become available and can readily build an attractive portfolio of content.

648 ICASA then repeats the vicious cycle argument which it had previously put forward in the Discussion Document.[649] In response to these arguments, MultiChoice had previously outlined in its 2017 submissions that the vicious cycle theory relies on two necessary conditions which have not been met in this case:[650]

648.1 first, that exclusive distribution of certain content can substantially increase the size of the distributor's subscriber base and this cannot be achieved through other content; and

648.2 second, that the size of a distributor's subscriber base prior to a content rights tender significantly increases its chances of success in that tender relative to smaller rivals due to the fact that it can more readily monetize the rights over an existing subscriber base.

649 Whilst ICASA refrains from indicating whether or not it agrees with these conditions, it does state that it considers that both conditions are met in the South African market.[651] However, ICASA does not demonstrate that the conditions are met, which is contradicted by the evidence before it.

650 With respect to the first condition, ICASA considers that MultiChoice has *"bid and won premium sports rights, which are globally accepted crowd pullers"*[652] and

649 Draft Findings, para 6.5.68.
650 MultiChoice's 2017 submission, para 675.
651 Draft Findings, para 6.5.70.
652 Draft Findings, para 6.5.70.

that "*MultiChoice subscriber numbers have grown exponentially over the years since its launch…even in the face of OTTs.*"[653]

650.1 ICASA has provided no evidence to support its opinion that "premium" sports rights are "globally accepted crowd pullers". To the contrary, whilst MultiChoice has increased its overall subscriber base in recent years, it has done so largely on the back of increases in Access bouquet subscribers, with Premium subscriber numbers actually declining since FY2015. The Access bouquet does not include live sports channels or the latest Hollywood blockbusters (via M-NET Movies Premiere). This demonstrates that access to such content is not required to achieve significant subscriber base growth, as has been suggested by ICASA.

650.2 Furthermore, as already outlined previously, there is no content which is particularly important for building audiences and subscriber bases – a range of content can fulfil this purpose, including local content. This means that no single content category represents a unique means of building a subscriber base (and even within categories there is an abundance of quality content and rights),[654] but also that there are many ways a competitor can build up a subscriber base. This has been evidenced by the successful entry of competitors in Africa.

651 With respect to the second condition, the Draft Findings does not deal with why this condition holds. In contrast, MultiChoice's 2017 submissions demonstrated why this condition is unlikely to hold. In particular:

651.1 If certain content does indeed play a strong role in building retail market share, it is also likely to have a very high value to an entrant. This is because the entrant's valuation will not be based solely on the

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653 Draft Findings, para 6.5.70.

654 The threshold for this condition is typically set high: in the UKCC's Movies on Pay TV Market Investigation, the CC held that first-run Hollywood movies, which were reported as important to their subscription decisions by around 10% of survey respondents, were not a sufficiently strong driver of subscriptions to generate an adverse effect on competition. UKCC, *Movies on Pay TV Market Investigation*, 2 August 2012, para 53.

immediate monetisation of the rights, but will also take into account the longer-term benefits of getting into the market. In other words, even if certain content is important for building a subscriber base (which MultiChoice denies for the reasons discussed above), this would work in favour of entrants who would have strong incentives to acquire the rights and turn this to their own advantage.

651.2 Even without an existing large subscriber base, the entrant is still able to monetise the rights in a number of ways. This includes: (i) enticing customer switching on the back of much lower switching costs than has historically been the case, (ii) targeting the substantial untapped demand for Pay TV services (especially at the lower-end of the market) or (iii) monetising the content by sub-licensing the rights or a selected portion of the rights to other players.

651.3 There is significant evidence that new entrants and smaller rivals have been able to successfully contest for content rights globally and local entrants are increasingly looking to and successfully acquiring sporting content rights. This is discussed in more detail in paragraphs 662 to 666. The evidence of entrants successfully contesting such rights both globally and on the continent is in direct contradiction to the claim of some vicious cycle or incumbency advantages.

652 In addition to the above, ICASA has also failed to acknowledge that even if one were to consider that the conditions for a vicious cycle are in place (which MultiChoice does not accept), those conditions would advantage telcos and global OTT services when it comes to bidding for rights. This is because these players have access to significant financial resources, large existing installed bases of customers and the opportunity for complementary revenue streams and content monetisation. These factors collectively serve to undermine any alleged advantage a Pay TV broadcaster has in contesting for rights.

653 There has been actual entry by telcos in SA and the successful acquisition of rights is consistent with these advantages. The fact that Vodacom Video Play already claims to have 869 000 active users on its platform in one year and successfully acquired the streaming rights for the iconic English football property, the FA Cup, is evidence of this.[655]

654 Finally, ICASA refers to the impact of exclusive rights that were granted to Cable companies to service apartment buildings and multi-family dwellings in the USA.[656] This point is irrelevant as it has nothing to do with the consideration of the acquisition of exclusive contents rights. As outlined in MultiChoice's 2017 submissions, the requirement of exclusivity for content rights is a common feature of electronic audio-visual services markets throughout the world and is recognised by competition authorities and regulators as central to competition.[657]

ICASA has not demonstrated that the incumbency of special relationships results in barriers to entry

655 ICASA claims that content suppliers and advertisers want to do business with an established operator instead of a new entrant. ICASA provides no evidence or analysis to support this claim, which is also inconsistent with available evidence of entrants acquiring rights on a regular basis.

655.1 None of the sports bodies who responded to ICASA's Discussion Document have stated that they are loath to do business with service providers that have no track record in the market (as asserted by ICASA in paragraph 6.5.76 of the Draft Findings). In fact, both the PSL and SARU have stated that the sale of their rights are subject to an open and competitive process which is available to any interested buyer.[658] In addition, it is MultiChoice's experience that, as long as an

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[655] https://techfinancials.co.za/2019/05/13/vodacom-video-play-is-gaining-traction-with-close-to-a-million-users/

[656] Draft Findings, para 6.5.73.

[657] MultiChoice's 2017 submissions, para 697-710.

[658] Para 9.2.3.2, SARU submission, December 2017; p. 5, lines 5-7 and p. 14, lines 9-13, transcript of SARU's presentation on 11 May 2018; para 47, PSL submission, December 2017

operator is in a position to make payment and is able to guarantee such payment, entrants are able to acquire the rights from the rights holders.

655.2 ICASA claims that Telkom rightly points out that MultiChoice's position in the market has ensured that it has forged relationships with content suppliers which has made it difficult for entrants to make inroads in the market.[659] ICASA has not interrogated whether this is the case or not. The very purpose of an inquiry of this nature is to properly test the veracity of assertions made by parties, rather than simply accepting them as evidence and fact. Assertions made by MultiChoice's competitors hold no probative value whatsoever. There is therefore no basis for ICASA's acceptance of Telkom's unsubstantiated assertions.

655.3 The reference to a merger case from 1998 in the EU (where it was stated that rights holders want to see their product distributed widely and new comers run considerable risk when acquiring rights compared to established players) does not constitute evidence that special relationships held by incumbents has resulted in barriers to entry.

656 Finally, such a claim of incumbency advantages is inconsistent with the evidence of entrants acquiring rights, implying that the current holder of those rights does not necessarily have an insurmountable advantage in the next rights sale. This evidence has been provided to ICASA and is dealt with further below.

ICASA's analysis of the constraint imposed by OTT services at the retail level is irrelevant to an assessment of the dynamic character of this wholesale market

657 ICASA's assessment of the dynamic character and functioning of the market at the wholesale level focuses exclusively on factors related to the strength of competition from OTT at the retail level.[660] This is entirely irrelevant to an assessment of market dynamics in the wholesale market for the supply and acquisition of premium content. ICASA has therefore omitted to consider market

659 Draft Findings, paras 6.5.75-6.5.76.

660 Draft Findings, paras 6.5.78-6.5.80.

dynamics, including a forward-looking assessment, for the wholesale market for the supply and acquisition of premium content.

658 In terms of what ICASA does consider in this section, it looks at churn of subscribers and the implications this has for cord-shaving and cord-cutting as a result of OTT. ICASA states that, if anything, churn rates out have decreased, there is no direct link between OTTs and cord-shaving in SA and that those who churn down substitute to other middle-tier bouquets.[661] However, there is no basis for dismissing competition from OTT from the churn data provided to and considered by ICASA.

658.1 [redacted]

658.2 [redacted]

[661] Draft Findings, paras 6.5.78.

Figure 22: DStv Premium Net Disconnects (Financial Years ending 2013 to 2019)

[redacted]

658.3 [redacted] This reflects that strong competitive constraints faced by MultiChoice, which has caused it to take measures to <u>attract</u> and <u>retain</u> subscribers, contain price increases and improve quality.

658.4 [redacted]

Cord-shaving imposes a strong competitive constraint, as is evident by MultiChoice's competitive response, including limiting price increases and improving quality. It also engages in various retention strategies which seek to prevent subscribers from disconnecting altogether and churning down to cheaper bouquet offerings.

658.5 The observed fall in the Premium subscriber base is consistent with [redacted]

659 In the Draft Findings, ICASA repeats the claim of saturation for the Premium segment, which has been addressed above. Market saturation does not explain the substantial losses experienced by DStv, with subscribers clearly leaving the platform and accessing electronic audio-visual content from providers other than MultiChoice. The further observation that consumers do not upgrade to the Premium bouquet because of budget constraints and "*value perspectives*" [662] is vacuous (it could be said of every product for which there is a higher price and higher quality alternative) and does not bear on an assessment of OTT constraints on MultiChoice.

660 ICASA's analysis of OTT in this section therefore suffers from the same problems identified with respect to the assessment in the retail segment of the analysis. ICASA fails to assess OTT as a competitive constraint on a forward-looking basis. Furthermore, ICASA has not considered factors that are critical to an assessment of competitive dynamics, including entry, the nature of competitors and MultiChoice's response to competition, including how it actively seeks to mitigate and prevent customer losses.

ICASA has no basis to conclude that MultiChoice is likely to maintain its current market position into the future

661 ICASA contends that MultiChoice is likely to maintain its current market position into the foreseeable future.[663] However, ICASA has not engaged in an assessment of market dynamics on a forward-looking basis in the wholesale market for the supply and acquisition of premium content. There is therefore no

662 Draft Findings, paras 6.5.80.

663 Draft Findings, paras 6.5.82.

basis for ICASA to come to this conclusion for this wholesale market as ICASA has not assessed this at all.

662 The evidence that has already been put forward to ICASA demonstrates that new entrants and smaller rivals have successfully contested for content rights globally and in sub-Saharan Africa. [664] This market is dynamic and competition for rights will be more intense in the future. This includes competition from OTT providers as well as traditional broadcasters who have decided to aggressively pursue rights, particularly sports content for sub-Saharan Africa, including SA. ICASA has not taken into account any of this evidence in its consideration of barriers to entry and market dynamics.

663 The rise of OTT services has provided new opportunities for content rights owners to distribute their content to consumers and reduce their reliance on traditional broadcasters as a route to market. This spans all content genres, including movies, series, news and sports. OTT service providers have bid for and won the electronic audio-visual rights to an increasing range of content genres, including live streaming content such as sport. The table below has examples of sports rights contested or acquired by international OTT providers.

Figure 23: Sports Rights contested by OTT service providers

Facebook	
IPL	Failed bid for global TV rights for IPL cricket matches for estimated $600 million
Premier League	The deal with the social media company will run for three seasons, from 2019-20 to 2021-22, and will be worth about $25m (€21.2m) per season Facebook and the Premier League are yet to sign a long-form contract
UEFA Champions League	Deal for 2018-2021 and covers 32 games per season
La Liga	Three-season deal, from 2018-19 to 2020-21, worth about €5m ($5.8m) per season. Facebook will show all 380 La Liga matches per season for free. Facebook will show every match on the La Liga Facebook page as well as individual clubs
ESL	Coverage of all global ESL esports competitions non-exclusively to Facebook

664 Refer to MultiChoice's 2017 submissions (para 692.1-692.7 and 693.1 – 693.4) for the further list of illustrative international examples, as well as Appendix 3 of that submission.

MLB	MLB and Twitter partnership, which includes streaming of live games on Twitter, cross platform digital storytelling and using social media to create more viewer interaction
PGA Tour	The PGA Tour aired live coverage of the 8 tournaments in 2018-2019 on Facebook exclusively
Twitter	
PGA Tour	The PGA Tour announced a renewed and expanded agreement with Twitter to distribute, on a free basis, nearly 140 hours of live competition from PGA Tour Live across 28 tournaments during the 2018-19 PGA Tour Season
NBA Finals	The NBA has confirmed that the basketball league's season-ending Finals will be live-streamed in India on Facebook, Twitter and YouTube
NBA	Twitter will allow live streaming of a single player in the second half of the match. This will be based on online votes in the first half, of which player viewers would like to see
NFL	This deal is complete and now replaced by Amazon
Wimbledon	Twitter has partnered with the All England Lawn Tennis Club (AELTC) to live stream its Wimbledon Channel
Amazon	
WTA	Amazon acquired the exclusive UK rights to broadcast the WTA Tennis Tournament from 2020.
ATP	US Open rights across Europe to be worth about $33.5m per year from 2018 – 2022 Eurosport to maintain fee of $26.5m per year, but will lose UK and Ireland rights Amazon will acquire UK and Ireland rights in a deal worth about $7m per year
English Premier League	Exclusively livestream 20 matches per season from 2019, including the right to stream a full round of live English Premier League matches
NFL	Amazon to live stream 10 NFL games, replacing Twitter
YouTube	
NBA Africa	A YouTube channel dedicated to fans in Sub-Saharan Africa. This Africa YouTube channel will stream two live games per week during prime time. As well as original content from documentaries about African-born players
BT Sport	Free YouTube streaming of the live UEFA Champions League and UEFA Europa League, including a virtual reality viewing experience
YouTube TV	YouTube TV offers a line-up of sports networks, with four ESPN channels, The Big Ten Network, CBS Sports, NBC Sports, The Tennis Channel, the SEC Network, NESN and the Olympic channel. NBA fans can sign up for NBA League Pass as an add-on
DAZN	
DAZN is an international sports-only OTT operator that carries live and on-demand streaming of events across a broad portfolio of sports properties (including soccer, rugby, American football, baseball, basketball, motor sports and tennis, among others). It is reported that it plans on spending US$2.5bn on global media rights in 2019	

664 MultiChoice's rivals in the rest of Africa and SA have already been successful in contesting for a number of sports rights across the continent in competition with MultiChoice. Some have built up a credible portfolio of rights with which to attract significant subscriber numbers. This has included the largest sports rights on the continent (EPL and UEFA). Exclusive rights for sub-Saharan Africa (including SA) to European football leagues (Bundesliga, Serie A and French Ligue 1) and other popular sporting events (such as the NBA and IAAF properties) have also successfully been contested for by competitors.

664.1 European football league rights. StarTimes currently holds exclusive rights to a number of European football leagues, including Bundesliga, and French Ligue 1 for sub-Saharan Africa (including SA) and the UEFA Europa League in the rest of Africa. It also previously acquired rights to Series A, which has only recently been acquired by MultiChoice. These are all rights that ICASA has labelled as "premium", which demonstrates that competitors have already been able to successfully contest these rights for SA. StarTimes has supplemented these rights with a host of other rights. For example, StarTimes acquired the Fox Sports channels,[665] which it has non-exclusively, as well as some other exclusive African football rights, such as the Kenya FA Cup and the Ghana Premier League. It has also acquired exclusive rights to the Chinese football league, to the ICC football Championships, the FIFA Club World Cup and the FIBA Basketball World Cup. It has also acquired non-exclusive rights to major football tournaments such as the FIFA World Cup (2018) and UEFA Euro 2020

665 Content carried on the Fox Sports channels includes live coverage of the Dutch Eredivisie Football League, live coverage of the Scottish Premier Football league, live coverage of the Juliper Belgian Professional Football league, live coverage of the French Ligue 1 Football League and Coupe De La Ligue (Cup competition), live coverage of the West African Football Union (WAFU) events, delayed coverage of the EPL via the Arsenal TV channel, live coverage of USA's and Canada's Major League Soccer competition, live coverage of Australia's NRL (National Rugby League), live motor racing with DTM touring cars, Superleague Formula and Mobil The Grid Formula One programme, live kickboxing from the "It's Showtime & Fight Code" series, live coverage of British Association of MMA, live coverage of the Ultimate Fighting Championship (UFC), live coverage of Fox African Boxing, live coverage of Euroleague Basketball, live coverage of Glory World Series Kick Boxing, live coverage of ACB Basketball league and F8, live coverage of top marathons throughout the world, live coverage of British Superbikes motor sport, watersports.

Football Championships. This wide variety has provided a base to build a significant sports offering.

664.2 Local football rights in East Africa. Azam has emerged as a leading promoter and sponsor of local football rights in East Africa, having secured the exclusive Pay TV rights to a portfolio of domestic leagues, including the Azam Rwanda Premier League, the Uganda Premier League, the Vodacom Premier League (Tanzania), the Primus League (Burundi) and the Football Kenya Federation League. It also has non-exclusive rights to the Spanish La Liga.

664.3 EPL and UEFA rights in other African countries: GTV was launched in 2007 in Kenya on a DTH platform and sought to broadcast to the rest of the region on the back of its satellite footprint.[666] It succeeded in acquiring the Package A broadcasting rights to the EPL for the 2007/08 – 2009/10 seasons, outbidding MultiChoice. A similar story to GTV is that of HiTV, which launched in Nigeria in 2007 on the DTH platform.[667] It also acquired the EPL Package A rights for the seasons 2007/08 – 2009/10 outbidding MultiChoice, which retained only the Package B rights. Both HiTV and GTV also acquired rights to the FA Cup, and the English Football League, outbidding MultiChoice at various stages during this period.

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666 The Guardian, 23 May 2007, English football to spread satellite TV across Africa: https://www.theguardian.com/media/2007/may/23/broadcasting.internationalnews

667 Vanguard, 4 October 2017, Remembering HiTV as TSTV comes to town: https://www.vanguardngr.com/2017/10/remembering-hitv-tstv-comes-town/

665 The mere fact that MultiChoice currently holds a number of sports rights for SA is not indicative that the rights are not contestable, or that there is ineffective competition for such rights. All rights which SuperSport has acquired have been available to all broadcasters. All competition economics texts emphasise that market shares in the context of bidding markets provide no meaningful information as to the true extent of competition in such markets. This is because such measures reflect only who succeeded in winning previous bidding opportunities. This reveals nothing as to the contestability of the contract (the true measure of effectiveness of competition). In the event that another operator wins certain rights, market shares are capable of changing significantly.

666 The dynamic nature of the electronic audio-visual services sector indicates that competition for rights in SA will be more intense in the future. For example:

666.1 StarTimes already holds rights labelled by ICASA as "premium". Its success in the rest of Africa indicates that when a licensee consciously decides to contest for rights, then it is capable of winning them.

666.2 Vodacom sought to bid for PSL's mobile broadcast rights in the previous tender, and Telkom Media[668] has also previously bid for those rights. The SABC has regularly bid for the PSL rights, including on the pay platform (e.tv also previously did so). In November 2017, Vodacom bid to acquire the PSL's electronic audio-visual rights for the next five seasons. Vodacom has already successfully secured the rights to live-stream the FA Cup football tournament. The games were made available on a pay-per-view basis in SA over Vodacom's Video Play platform.

666.3 Kwesé has previously acquired rights for SA and is likely to focus more on acquiring FTA rights for SA now that it has been awarded a FTA broadcasting licence in SA.

[668] Telkom Media (Pty) Ltd, a company which was issued a Pay TV licence by ICASA in August 2008

666.4 There is significant potential for global OTT services to acquire sports rights, including international rights for streaming on their services as shown in Figure 23 above.

CONSIDERATION OF LICENSEES WITH SIGNIFICANT MARKET POWER

667 ICASA has determined that MultiChoice has SMP in the three markets: (i) the retail distribution of basic-tier Pay TV services and satellite-based free-to-air televisions services;[669] (ii) the market for the retail distribution of premium Pay TV services;[670] and (iii) the market for the wholesale acquisition of premium content for distribution in South Africa.[671]

668 An important prerequisite to determining SMP is that competition within the relevant market/s has been found to be ineffective. This is clear from the wording of the ECA, where section 67(4) states that the consideration of licensees with SMP only occurs in circumstances where competition has already been found to be ineffective.

> *"(4) The Authority must, following an inquiry, prescribe regulations defining the relevant markets and market segments and 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 regulations must, among other things –*
>
> *...*
>
> *determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition"*
>
> (emphasis added)

669 Draft Findings, para 7.3.8.
670 Draft Findings, para 7.3.9.
671 Draft Findings, para 7.3.16.

669 In other words, if ICASA is unable to find, on a forward-looking basis, that competition in the relevant market is ineffective, then the inquiry ends there and there can be no further consideration of SMP or the imposition of any licence conditions. The determination of SMP cannot be used to displace the inquiry into effectiveness of competition – the purpose of determining SMP is purely to identify licensees which may be subject to licence conditions.

670 ICASA appears to ignore this requirement of the ECA, as the Draft Findings states that:

> *"[a]s indicated in the Discussion Document, once a market has been defined, the next step is to identify players in that market, calculate their market shares and identify those players who have significant market power."*[672]

671 An approach that moves from the identification of relevant markets straight to the determination of market shares and SMP is inconsistent with the ECA and ignores the fact that the effectiveness of competition assessment is a prerequisite for any SMP analysis. As discussed in the preceding section, ICASA has failed to demonstrate, currently and on a forward-looking basis, that there is ineffective competition in any of the markets (retail or wholesale) that it has defined, and there is therefore no basis for ICASA to determine SMP in any of the markets it has defined.

672 Moreover, even if we are to consider SMP, for reasons explained further below, ICASA's approach to determining SMP in all three markets is highly superficial and is incapable of accurately determining actual market power in any of these markets.

ICASA has not established that vertical integration harms competition

673 ICASA states that it "*...has determined that Multichoice is vertically integrated in a manner that allows it to leverage its market power at one end of the value chain to benefit the other end*"[673] and that "*it is vertical integration that has given rise*

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[672] Draft Findings, para 7.1.2.
[673] Draft Findings, para 7.3.4.

to the current market structure that exhibits outcomes that prevent entry and expansion in the market. There are inherent economies of scale and scope associated with vertical integration. Unfortunately these have given rise to a market structure that results in ineffective competition."[674]

674 These statements are highly misleading as nowhere in the Draft Findings has ICASA made such a determination. ICASA has also not provided any evidence to suggest that vertical integration has given rise to a market structure that results in ineffective competition, allows market power to be leveraged, or that MultiChoice has leveraged such alleged market power.

675 The Draft Findings' only reference to vertical integration in the assessment of the effectiveness of competition is with regard to barriers to entry for the retail market. As discussed above, ICASA merely observes that MultiChoice is vertically integrated, acknowledges that vertical integration produces economic benefits and that MultiChoice's vertical integration is legitimate.

676 ICASA also suggests that vertical integration can weaken competitive constraints.[675] However, ICASA presents no analysis and no evidence to suggest that this is the case, and does not conclude that vertical integration harms competition. Given that vertical integration is a common feature in many industries and generally results in efficiencies and pro-competitive benefits, any theory of harm, such as leveraging of market power, as is alluded to by ICASA,[676] would need to be properly supported with evidence to demonstrate that this is occurring. It is noted that in ICASA's discussion of the market for the wholesale acquisition of non-premium content, ICASA finds that "*(v)ertical integration here does not appear to cause any harm to competition*"[677]. Therefore, ICASA itself does not assume that vertical integration necessarily results in ineffective competition. Yet ICASA provides no guidance or analysis as to when vertical integration is, or is not, a problem for competition.

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674 Draft Findings, para 7.3.5.
675 Draft Findings, para 6.5.18.
676 Draft Findings, para 7.3.4.
677 Draft Findings, para 7.3.15.

677 As explained in paragraphs 556 to 564, the vertical integration cited by ICASA (i.e. own content production and own channel packaging capabilities) does not provide a competitive advantage and does not represent a barrier for those who do not have these capabilities in-house.

678 There is simply no basis for ICASA to state that it has determined that MultiChoice is vertically integrated in a manner that allows it to leverage alleged market power or that this has given rise to a market structure that results in ineffective competition. ICASA has clearly demonstrated nothing of the sort.

ICASA has failed to consider factors that reduce the extent of market power

679 ICASA has stated that significant market power can be deduced from market shares alone and that: "To the extent that other factors are at play, they only magnify the extent of the market power that already exists due to the size of a firm in the market."[678] (emphasis added)

680 Such an approach is economically unsound and fails to acknowledge that 'other factors at play' can reduce or refute the inference of market power from market shares.[679] From an economic perspective, particular attention needs to be paid to entry barriers when interpreting market shares and making inferences as to the existence of SMP.

680.1 As noted by O'Donoghue and Padilla (2013):

"[T]he most important point is not the existence of high market shares, but whether such shares are likely to confer lasting market power. This involves a proper assessment of entry barriers. If barriers to entry are

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[678] Draft Findings, para 7.3.3.

[679] Posner, R.A., Landes, W.M., Market Power in Antitrust Cases, HeinOnline - 94 Harv. L. Rev. 937 1980-1981, p. 938.

low, firms with very high market shares may have no market power."[680] (emphasis added)

680.2 According to Bishop and Walker (2013):

"[I]f entry and exit were costless and very easy, then even a monopolist might not be able to raise prices above the competitive level because the mere threat of entry would keep prices low". [681]

681 This means that the mere threat of entry can constrain pricing, enhance product quality and customer service of firms and hence the degree of market power held by a firm. This is because exploitation by a firm of its current market position (implied by its market share) will only invite entry by potential entrants, and therefore invite tougher competition in the future. It also means that low market shares of new entrants (and high market shares of the incumbent) may merely reflect the recent nature of entry rather than the competitive potential of the entrants and the constraint they place on MultiChoice.

682 This is a fundamental consideration in the context of the current market inquiry that has been ignored by ICASA. The major disruption to traditional Pay TV broadcasters by the emergence of the broadband ecosystem has effectively eliminated the need for entrants to invest in and develop an elaborate and capital intensive technical distribution platform. This has significantly reduced barriers to entry and has facilitated widespread entry. This includes entry from firms in adjacent markets, like the telcos, and from global entrants that all have considerable scale and financial resources. Their immediate market position does not reflect the strength of those capabilities and their ability to scale up quickly.

683 It is inappropriate for ICASA to conduct its assessment in a manner that fixates on static market shares and assumes that other factors will only "enhance" any market power deduced from market shares. Instead, a holistic approach which

680 O'Donoghue, R., Padilla, J., 2013, The Law and Economics of Article 102 TFEU, Hart publishing, p. 146.

681 Bishop and Walker (2013) The Economics of EC Competition Law: Concepts, Application and Measurement, p.65

seeks to understand the relevant current and future dynamics is essential to making a determination on market power.

ICASA's estimation of market shares are not indicative of market power at the retail level

684 ICASA's determination of SMP for the purported retail markets for the "*distribution of basic-tier subscription services and satellite-based free-to-air televisions services*" and the "*distribution of premium subscription television services*"[682] is based solely on the estimation of market shares for these markets.

685 However, market shares are not informative of market power at the retail level:

685.1 First, it is common cause that any SMP assessment must take place within the context of an appropriately defined market. However, as already established in Part C, ICASA has defined markets that are overly narrow and fail to capture all significant competitive constraints and effects of relevance. It is within each of these narrow and artificial market delineations that ICASA has calculated market shares. Given this overly narrow view of the relevant retail markets, it is unsurprising that the market shares calculated with respect to the retail markets indicate a high market share for MultiChoice. However, these shares do not reflect the broader competitive constraints faced by MultiChoice and, for this reason, say very little about market power.

685.2 Second, these retail market shares calculated are not reflective of market power since they fail to take into account the dynamic nature of the markets in question. In particular, these markets have recently been subject to significant disruption and entry and expansion by a variety of players. For example:

[682] Draft Findings, para 7.3.8 and 7.3.9.

685.2.1 OpenView has been expanding rapidly in recent years reporting over 1.5 million box activations in total and 35 000 new activations per month as of March 2019;

685.2.2 Vodacom reported that its Video Play service had 890 000 active users in March 2019.[683] This represents remarkable growth since its launch just 7 months earlier, in August 2018.

685.2.3 Following its launch in January 2016, Netflix has also experienced significant growth. MultiChoice estimates that it has around 800 000 subscribers, almost doubling its subscriber base in the past 12 months.

686 It is clear from the above that any barriers to entry in the electronic audio-visual services industry that may have existed are being eroded and that new entrants are experiencing rapid growth in their subscriber bases. As discussed above, a currently high market share for MultiChoice (and low market shares of entrants) is far from reflective of a lack of competitive constraints on MultiChoice (and hence the existence SMP).

ICASA has not established SMP in the market for the supply and acquisition of "premium" content

687 ICASA has failed to show that MultiChoice has SMP in the market defined as the supply and acquisition of "premium" content. ICASA's approach to determining SMP simply involves listing rights to "premium" content that are held by MultiChoice.[684] This approach does not amount to an analysis or demonstration of SMP, which cannot be determined on the basis of a list of rights held by one firm (or any other subjectively-chosen list). This approach has a number of serious deficiencies.

687.1 First, as discussed in Part C, there is no distinct market for "premium" content. Therefore this cannot be the basis for determining market

683 Vodacom Group Integrated Report, 31 March 2019.
684 Draft Findings, para 7.3.16.

power. Even if there were a market for "premium" content, that market is incapable of being delineated in a clear, objective and unitary manner – any list of "premium" content tending to be subjective and lacking a coherent basis. As a result, any analysis of rights held are also incapable of being accurate or informative.

687.2 Second, ICASA has failed to recognise that, even for the rights it has labelled as premium,[685] competitors have already been successful in contesting these rights or have been able to access these rights through sub-licensing.

687.2.1 For example, StarTimes successfully bid for exclusive rights to Bundesliga and Ligue 1 for sub-Saharan Africa, including SA. These rights were previously held by MultiChoice. StarTimes also previously held the rights to Serie A, and MultiChoice has only recently re-acquired these rights as of the 2018-19 season.

687.2.2 The SABC has also acquired a significant amount of sports content ICASA has cited as premium, either through the direct sports rights acquisition or the sub-licensing of sports rights. This includes rights to a significant share of PSL matches, rights to all Bafana Bafana home and away tournament matches, rights to the 2018 FIFA World Cup and all other FIFA events for the two years prior to this, rights to all test, ODI and T20 cricket matches played in SA by the Proteas and rights for all international rugby test matches played by the Springboks in SA.

687.3 Third, the mere fact that MultiChoice currently holds a number of sports and movie rights for SA is not informative of whether or not those rights are contestable. ICASA has not considered the contestability of such rights at all, which is central to a consideration of market power.

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685 Draft Findings, para 1.3.13.

687.3.1 It is well accepted by economists and competition authorities that market shares hold little meaning within the context of bidding markets such as those for content rights. This is because this only reflects who succeeded in winning the contract and reveals nothing as to the contestability for the contract and whether any acquirer has market power. According to Bishop and Walker (2013):

> *"The number of firms can be a particularly poor indicator of market power in markets that are properly characterised as bidding markets. Where firms bid for contracts that are large relative to the size of the market and that are only offered infrequently, competition is likely to be fierce even if there are only a very few firms competing. Furthermore, market shares in such markets can be poor indicators of market power as the competitive constraint provided by an individual firm depends not in its current market share but in its ability to submit a credible bid. Even a firm with a very lower market share may still have a major effect on the bidding behavior of other firms in the market as long as they bid credibly and aggressively. Accordingly, current market shares can provide a very misleading picture as to the level of competition."*[686]

687.3.2 The dynamic nature of the sector indicates that competition for rights in SA is intense and that the set of rights held by MultiChoice is capable of changing significantly as other operators contest such rights. Operators, like StarTimes, have already shown that they are capable of successfully contesting rights. There is also significant potential for OTT

[686] Bishop and Walker (2013) The Economics of EC Competition Law: Concepts, Application and Measurement, p. 65.

providers to acquire sports rights, as discussed above at paragraph 663. The comment in MultiChoice's annual report that sports rights have become "hotly contested"[687] is evidence that operators are contesting these rights and their willingness to do so have driven up the price of these rights.

687.4 Last, ICASA has also not considered the full set of rights available and capable of being used by providers to build an audience base. "Premium" content as defined by ICASA is not essential for the successful entry and expansion in the market, nor is it scarce since there is an enormous supply of content that operators may use to build an audience. As such, having access to "premium" content does not provide any degree of market power as it cannot be derived from this content. When considered within the context of all the available supply of content capable of building an audience, MultiChoice holds the rights to only a small proportion of this content.

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687 Draft Findings, para 6.5.59.

PART E: REMEDIES

INTRODUCTION

688 In Section 8 of its Draft Findings, ICASA sets out third-party responses and its own findings on the questions raised in its Discussion Document regarding possible "pro-competitive licence conditions" that may be imposed on a licensee with SMP.

689 Before proposing, and consulting on, "*appropriate and sufficient pro-competitive licence conditions*" that may be imposed on licensees, ICASA is required to determine finally –

689.1 the relevant markets;

689.2 that there is ineffective competition in the relevant markets; and

689.3 that a licensee has significant market power in such markets.

690 ICASA's preliminary findings on appropriate licence conditions are premature. The constitutional implications in this regard are set out in further detail in Part F of these submissions.

691 In prior submissions, MultiChoice has also pointed out that ex ante regulation would be inappropriate, and risk significant unintended consequences, given the extraordinarily dynamic nature of the electronic audio-visual services market.

692 ICASA has failed to meet the requirements set out in section 67 of the ECA and it is therefore impermissible to contemplate the imposition of any conditions.

693 Nevertheless, since ICASA has included proposed remedies in the Draft Findings, and has further particularised these – albeit with insufficient detail on the nature and substance of the envisaged remedies – MultiChoice has taken the precaution of providing high-level comments on the proposed remedies. The first section of this Part E starts with some general comments on ICASA's approach to remedies and the type of analysis that is required before such measures can be imposed if the regulator is to avoid the risk of unintended,

harmful consequences. The second section of Part E then examines the proposed licence conditions in turn, demonstrating why these are inappropriate and, if adopted, would be harmful to the development of the South African electronic audio-visual services market and detrimental to consumers.

REGULATORY IMPACT ASSESSMENT IS NEEDED BEFORE REGULATION IS IMPOSED

694 Before any licence condition can safely be adopted, there would need to be a rigorous and detailed regulatory impact assessment (RIA) comparing the costs and benefits of the condition against the likely counterfactual. ICASA has conducted RIAs in other processes, most recently in its review of the must-carry regulations. RIAs are also standard practice among communications regulators in other jurisdictions (e.g. Ofcom): a RIA must be carried out prior to the imposition of any form of regulation, with the regulation being adopted only if the net impact is strictly positive.

695 As well as being a matter of good practice, a RIA confers a number of benefits for industry stakeholders. These include: better and more informed policy-making; better diagnosis of the problem, if any; an objective assessment of whether the proposed measures in fact remedy the identified problem; ensuring that the remedy is proportionate; and gaining a better understanding of the costs imposed by regulations to society and businesses, including sports bodies and broadcasters.

696 The RIA would assess how competition is likely to develop with and without the remedy, the resulting benefits to consumers and the costs of the remedy to operators and consumers, including potential risks to innovation and investment. We note in this regard that ICASA does not even meaningfully acknowledge the benefits derived from the agreements it wants to intervene in, let alone attempt to weigh these benefits against their alleged harms. The RIA should also consider the need for remedies to be proportionate to the competition detriment that has been identified. Guidelines for market investigations produced by the

UK Competition Commission (UKCC) defines a proportionate remedy as one that:[688]

696.1 is effective in achieving its legitimate aim;

696.2 is no more onerous than needed to achieve its aim;

696.3 is the least onerous if there is a choice between several effective measures; and

696.4 does not produce disadvantages which are disproportionate to the aim.

697 It is not sufficient for ICASA simply to claim that the net impact of its proposed remedy package, taken as a whole, is positive. Rather, the impact of each proposed remedy needs to be considered in turn and compared with alternative approaches, including measures that are less restrictive or omitting that condition entirely.

698 While ICASA notes in paragraph 8.3.2 of the Draft Findings that it "*will have to embark on a separate regulation process in order to consult upon any possible licence conditions*", it nonetheless appears already to have concluded that a number of measures are required. For example, in paragraph 8.3.12 ICASA states that it "*will limit the number of Hollywood studios that a player may enter into exclusive agreements with*", despite having conducted no analysis of the costs and benefits of this proposal, let alone a full-blown RIA. Given the inadequate level – or complete absence – of cost-benefit analysis in the Draft Findings, this is highly premature.

THE PROPOSED LICENCE CONDITIONS

699 This section discusses the licence conditions under consideration by ICASA in the Draft Findings. We note that ICASA appears to be adopting a 'laundry list' approach, suggesting nearly all of the potential remedies that might be

688 UK Competition Commission, Guidelines for market investigations: Their role, procedures, assessment and remedies, CC3 (revised), April 2013.

considered.[689] Specifically, in paragraph 1.6.1 of the Draft Findings ICASA states that it considers the following licence terms and conditions as appropriate to deal with the ineffective competition in the relevant markets:

699.1 Reducing contract duration and prohibiting automatic renewal of contracts;

699.2 Unbundling of rights by mode of distribution;

699.3 Rights splitting into multiple packages and selling these to more than one distributor;

699.4 Limiting the number of Hollywood movie studios contracts that may be taken out;

699.5 Wholesale must-offer obligation; and

699.6 Set-top box interoperability.

700 These proposed remedies are discussed in turn in the sub-sections below.

Reducing the duration of exclusive contracts

701 The Draft Findings concludes that long-term exclusive contracts are a barrier to entry into the wholesale market for the supply and acquisition of premium content for distribution in South Africa (paragraphs 6.5.68 – 6.5.73) and considers them to result in input foreclosure (paragraph 8.3.5). While, in the narrow sense, any exclusive contract prevents others from accessing the relevant content for the duration of the content, this is not usually regarded as input foreclosure. Other potential buyers can compete for the contract, and the longer the contract, the keener this competition will be.

702 To qualify as input foreclosure, rival operators would need to be excluded from the TV market as a result of the exclusive contract, not merely prevented from using the particular content for a period of time. As discussed in Part D of this

[689] Two other remedies – access to ICASA's platform and à la carte retailing – have previously been mentioned by respondents and/or ICASA but are not being pursued.

submission, ICASA has failed to take into account the large volume of content that is available and is capable of attracting an audience. Given this, a competitor does not need to wait for particular rights to become available and can readily build an attractive portfolio of content with which to compete for consumers. Hence ICASA has not demonstrated the relevance of the proposed remedy to any consumer harm.

703 In the absence of clear evidence of a link between the duration of exclusive contracts and competition in the TV market, benefits from the proposed remedy will be limited. Meanwhile, as discussed below, extensive detriments are likely to arise. Accordingly, a cost-benefit analysis of the proposed remedy will not support its imposition.

704 Turning to the specifics of its proposal, ICASA finds that competition becomes ineffective when a licensee with SMP enters into exclusive contracts with a duration of five years or more (Draft Findings paragraph 1.6.1.1). In the same paragraph ICASA proposes to limit the duration of contracts entered into by such a licensee to three years. In support of its approach, ICASA cites (Draft Findings paragraph 8.3.5) the European Commission (EC) Guidelines on Vertical Restraints[690] to suggest that contracts of more than five years duration generally raise competition concerns as any resulting efficiencies usually do not offset foreclosure effects. In the same paragraph ICASA raises, but does not address, the question of whether the South African market may be different from the European one. In the absence of such an analysis the EC approach cannot simply be accepted as relevant to the South African situation. Moreover, even if, following detailed consideration, the EC approach were deemed to be applicable to South Africa, this would not justify imposing a duration limit that is significantly shorter, at just three years. ICASA does not explain or demonstrate how it arrives at the conclusion that five-year contracts are problematic, suggesting that this is arbitrary. The references to the EC are concerned with contracts that are longer than five years not necessarily those that are five years.

690 Available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

705 In the absence of compelling evidence for applying the EC approach to South Africa, ICASA must also look to the experience of rights contracts in other countries. Lengthy contract periods are common around the world, reflecting the benefits derived by both the rights owners (often sports federations) and broadcasters from the stability of long-term exclusive arrangements. For example:

705.1 In Canada, in 2013 the National Hockey League (NHL) signed an agreement for the sale of exclusive rights to Sportsnet for a period of twelve years and Canadian Interuniversity Sport (CIS), the governing body of university sport in Canada, has a six-year agreement with Sportsnet for seasons 2013-2014 to 2018-2019.

705.2 In the US, NBC has the American rights to the NHL for ten years up to 2021 and ESPN has an eight-year deal for Major League Baseball matches and a 12 year deal for college (American) football playoffs.

705.3 In Africa, StarTimes acquired exclusive Pay TV and FTA TV rights to the Ghana Premier League for ten years from 2017 and ten years for the Uganda league, and Fox Sports Africa has recently concluded a ten-year deal for West African Football Union (WAFU) Football.

706 For the following reasons, multi-year exclusive contracts between rights owners and broadcasters have long been accepted by competition and regulatory authorities as desirable and compliant with competition law. Such contracts are efficient and beneficial to consumers as well as the rights owners (allowing them to budget for all-important projects, such as development programmes making them sustainable for reasonable periods of time) and broadcasters. Accordingly, regulation to restrict the duration of exclusive contracts – especially (but not merely) to a period of just three years – would incur costs for content owners, broadcasters and consumers. The following points apply to all content types, though the discussion will focus mainly on sports and movie rights.

Time taken to develop and commercialise content

707 TV content takes time to develop and commercialise, in particular for the content's branding to become known and to build up its popularity among viewers. This is especially relevant to high quality content, which may require development and continuous investment over a number of years for its full quality and value to become recognised, and to be maintained. MultiChoice works over multiple years with some content owners and channel producers to build their profile and attract viewers. For example, as discussed in MultiChoice's December 2017 submission, the PSL (like most domestic leagues across the continent) was not previously considered a valuable rights property, but over time has been successfully developed by SuperSport into a more valuable property. A broadcaster is unlikely to invest considerable amounts in respect of production, rights fees marketing and other aspects in the knowledge that it may shortly after commencement of a rights-cycle lose those rights to a competitor.

708 Development times are lengthy for new content (e.g. a sport that has not previously been promoted or a new TV series), for which there is no viewer familiarity. Similarly, there is need to continue investing in content to ensure that its appeal is not diminished and the high quality is maintained. For this reason, the restriction to a short contract duration is likely to be particularly harmful for content rights and may even prevent the marketing of such rights. This would result in harm to consumers, who miss the opportunity to view such content, compared with the counterfactual in which the restriction is not imposed.

709 A decline in the marketing of new rights would also harm competition in the TV rights market: fewer rights would be marketed, with the result that competition would be less vibrant. Moreover, lower entry into the supply of content rights may also reduce the entry of new broadcasters who would, in the counterfactual, be attracted by the new content rights and stronger competition between rights owners.

Localisation of content

710 South Africa is a small territory by global standards. A bespoke feed tailored content to the region delivers greater value for consumers through schedules

that are tailored for local time zones, content catering for local audience preferences and creating opportunity for local content to be developed and added to the feed.[691] However, a bespoke feed is more costly to make; to justify this investment, content suppliers typically prefer a minimum contract term of three to five years.

711 MultiChoice regularly reviews the performance of content and channels, and provides local insights to owners to ensure that the content resonates with and is scheduled according to local audience preferences. These investments and efforts require time and commitment to ensure long-term viability and attractiveness of content to viewers.

712 Channels that MultiChoice has invested in and assisted to better cater for local audiences and improve performance include the following:

712.1 [redacted]

712.2 [redacted]

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691 Rather than tailoring the channel content to South Africa, the feed may be shared with other countries, typically Eastern Europe and the Middle East. These territories have larger subscriber numbers than MultiChoice. Since the preferences and requirements of the biggest territory typically dictate the schedule and the type of content aired on the channel, this is often not ideal for MultiChoice, as a large part of the content shown will not be suitable for its subscribers.

712.3 [redacted]

712.4 [redacted]

713 [redacted]

Broadcaster investment in marketing and promotion of content

714 Lengthier contracts tend to provide greater incentives to buyers (usually broadcasters) to invest significantly in the marketing and promotion of the content. The costs of such investment are typically incurred up-front and then recouped over the duration of the contract. A lengthier contract gives the broadcaster a longer period over which to recover such costs and, therefore, incentivises greater investment in the rights.

715 Moreover, since the marketing and promotion of the content may have long-lasting effects in raising viewer awareness and building the brand, the possibility that the rights may after a short period of time be awarded to another buyer – who is also likely to be a competitor in the retail market – would weaken the buyer's incentive to invest in marketing and promotion. A short contract duration will inevitably attract less investment in new content rights and induce broadcasters to focus on existing, well-known and well-understood brands that audiences already know and watch.

716 For some content – sports rights in particular – the buyer is also involved in the production of the electronic audio-visual content. For example, the broadcaster invests in filming and other production equipment, the creation of electronic audio-visual feed, employment and training of staff (e.g. camera crew and commentators), much of which may be specific to the rights in question. These investments are, in the main, not recoverable, i.e. they are "sunk" once made. Accordingly, the broadcaster needs a sufficient period of time to amortise this upfront investment and will have a greater incentive to invest in enhancing production quality if it has a longer period over which to recoup its investment. A three-year period would often be insufficient to recoup investments, with the result that the investment may not take place at all.

717 While the restriction on contract duration might formally be imposed on MultiChoice alone and not on other potential buyers, it may well affect the latter too. If rights are to be sold via an auction or open tender process, the terms of the contract – including its duration – will need to be standardised and made available to all bidders. The restriction may therefore result in a three-year

contract being offered to any buyer, not just MultiChoice. Given the investment required by new TV entrants, the impact of a short contract duration on their investment and willingness to bid is significant. This would inhibit the entry of new entrants into bidding for rights and developing content themselves. Alternatively, the rights owner could offer a longer contract, but then MultiChoice would be unable to compete for the content, resulting in less competition and lower prices for the rights.

718 A reduction in broadcaster investment in producing, marketing and developing content rights would harm those consumers who would be interested in viewing the content. With less investment in production the quality of the content they view will be lower, while a reduction in marketing and promotion will mean that some consumers remain unaware of the content and do not watch it at all. If reduced incentives to invest in content result in it not being acquired and marketed at all, consumers will lose the benefit of seeing it altogether. Accordingly, a restriction on the duration of exclusive contracts to three years would reduce both the range and quality of the content available to consumers.

Investment by the rights owner

719 Rights owners also undertake investments which affect the attractiveness of the content to consumers. Sports federations invest in grass-roots development as well as marketing their sport, while clubs invest in players and venues. Movie studios invest considerable amounts in paying script-writers, producers and actors, as well as filming and editing their movies, investments which generate highly variable returns. A longer contract duration gives rights owners greater certainty over their future revenues, improving their ability to acquire financing, plan and budget for their activities.

720 Accordingly, a shorter contract duration would inhibit such investments, reducing the quality of the content on offer to consumers. Moreover, as above, the provision of certainty is of particular importance in the early years of the development of the content, when large and riskier investments need to be taken by the rights owner. It is well accepted in South Africa that the development of grassroots sports is paramount and is just taking off, with the Diski Challenge

and the Rugby Challenge having been launched in recent years. Given that the funding for these programmes comes primarily from the sale of broadcasting rights, the proposed remedies place these investments at significant risk.

Transaction costs

721 Rights contracts are relatively complex transactions and negotiations are often protracted, resulting in high transaction costs. It is therefore costly and undesirable to renegotiate rights very frequently, as would be the case if duration were limited to just three years.

Impact on rights values

722 A longer contract duration may raise rights values on an annual basis (i.e. over and above the mechanical effect that a contract covering a greater number of years naturally sells for a higher price). Investments by both buyers and sellers typically increase the value of rights: buyers will be willing to pay more for the rights when the seller has strong incentives to make complementary investments (e.g. in the quality of their sport) and when their own investments are protected by a longer contract. Thus, as well as incentivising investments by both parties, greater contract length may result in higher (annual) payments for the content, providing additional funds to rights owners for development of their content (sport, movies, etc.).

723 The effect may also extend to the values of other, related rights. Greater investment in movie production increases the (expected) value of that movie in all windows, not just the first subscription pay TV window. In addition, marketing expenditure by the pay TV broadcaster increases the value of the movie in subsequent windows (second runs, FTA, movie rental and electronic downloads). Higher payments for related rights will add to the beneficial effects noted above.

Rights owners are best-placed to determine contract duration

724 In the current and future dynamics of the electronic audio-visual services market, rights owners are best placed to assess the relative benefits of different contract lengths to optimise investments in, and the values of, their rights. For example, a rights owner may be reluctant to commit to a longer contract given the state of flux in the market: the future emergence of alternative distributors who will compete for content rights and the rights owner's option to sell directly to consumers via OTT distribution.

725 It is notable that most of the rights sellers whose comments are reported in the Draft Findings are opposed to ICASA's proposed licence conditions. SA Rugby supports exclusivity and argues that shortening contract durations would jeopardise rights values and threaten the SANZAAR and Celtic Rugby joint ventures (paragraph 8.2.31), for the reasons explained above, with a negative impact on the viewer experience. The PSL also opposes the proposed remedies, which it regards as disproportionate and damaging to sport (paragraph 8.2.34).

Prohibiting automatic renewal

726 ICASA argues (Draft Findings paragraph 8.3.6) that auto-renewal is a disguised extension of the term of exclusivity. However, out of all the contracts it has reviewed, it appears that ICASA has identified only two instances in which (it claims) there was automatic renewal of the contracts. This, in itself, suggests that automatic renewal is not a widespread problem warranting intervention.

727 Moreover, ICASA appears to not have gone to the effort to ask the parties involved to clarify the circumstances surrounding these contract renewals. Instead, ICASA appears simply to have jumped to the conclusion that the extension of the PSL contract by a period of two years was "disguised" automatic renewal. This is not the case, and any suggestions of underhand behaviour are misplaced. Since the PSL was under no legal or regulatory obligations preventing it from automatically renewing its agreements, and hence was not circumventing any such obligations, it was unnecessary for it to disguise the contract extension. If the PSL had wanted to renew the agreement automatically, it could simply have done so for a five-year period (the standard length of its contract).

728 The circumstances of the PSL contract extension were quite specific and are not representative of the PSL's usual contracting approach. As is well-known, the PSL usually sells its rights by means of a tender. The extension of the contract was necessitated by the dire financial situation various of the PSL's clubs found themselves in at the time, which threatened the existence of the league. This crisis compelled the PSL to raise money quickly and to achieve this it decided to monetise its key asset, its broadcasting rights, for a further two years. This relatively short contract extension ensured that the PSL did not lose the benefits of going to the market for its normal rights-selling cycle. The urgency of raising funds did not allow the time required to arrange and hold a tender. It may also have been difficult for the PSL to do this while its content was still under contract, as it is likely that other operators would have been unwilling to bid for it at this time and provide funding to the PSL at its time of need. Moreover, the PSL would have done the same thing with whoever it was under contract with at the time, not just SuperSport. Given this background, there is no basis for ICASA to suggest that either the PSL or MultiChoice were attempting to disguise an automatic renewal. It is significant to note that after the expiry of the extension with the normalising of finances at the PSL, it conducted a full and open public tender for its next rights-selling cycle.

Unbundling rights by platform

729 Rights unbundling involves offering to different buyer the rights to distribute the same content using alternative business models (e.g. subscription or free-to-air TV), distribution modes (linear or on-demand) and/or transmission technologies (e.g. DTH satellite, DTT, OTT or mobile). The unbundling of rights between platforms would allow different buyers to acquire rights to the same match (or movie or other content).

730 In paragraph 8.3.6 of the Draft Findings ICASA sets out conditions adopted by the EC for the sale of sports rights – which presumably it intends to adopt as a model for its own regulation – according to which rights must be sold in an open tender and "unbundled" to allow more than one buyer. ICASA highlights in particular the unbundling of mobile and internet (i.e. OTT) rights, expressing its view that there is no reason why these should be bundled with other distribution

rights to PSL matches. This superficial conclusion is erroneous, as we elaborate next.

731 ICASA's presumption that PSL's rights are sold as a bundle is factually incorrect. Interested parties can bid for any of the various packages which are made available under the PSL's tender process in its Invitation to Tender document. After which the PSL at its own discretion, evaluates the various bids and decides how and whom to award their rights. For example, one can choose to bid for the PSL's Mobile rights, as Vodacom did in the last rights cycle. ICASA appears to have simply looked at a contract and from this it has drawn erroneous conclusions about the rights-sales process. It is important to note that contracts generally only formalise the outcome of the rights-sales process between the seller and the successful acquirer and seldom deal with the prior process itself. For example, if rights are sold in various packages and the acquirer of two or more of the packages in the tender is the same party, it is natural that the buyer and seller will conclude a single agreement covering all rights that the acquirer has successfully bid for rather than concluding multiple contracts. The contract will also per se not refer to rights to other packages which the acquirer has not acquired and which will form the subject of a further contract between the rights holder and another bidder. Thus, the mere observation that a contract covers multiple rights provides very little meaningful insight into how the rights-sales process itself operated.

732 ICASA has not detailed the competition detriment(s) such a remedy is intended to address. As discussed above, ICASA has not taken into account the large volume of content that is available and is capable of attracting an audience: given this it is unclear what, if any, benefits would arise from granting multiple operators access to particular content. Moreover, ICASA does not appear to consider the role of differentiation between content offerings in competition between operators: offering the same content as a competitor does not generate strong competition between the two. Meanwhile, the removal of "match exclusivity", which would result in the same match being simulcast on various distribution technologies, has a number of potential adverse consequences, discussed below.

Restricted range of services available from one broadcaster

733 Technology has evolved such that consumers are watching video entertainment content on multiple screens and through various modes of distribution. For example, a consumer may watch linear TV in the evenings, then use a catch-up service for content they have missed and view video via mobile when on the move. In today's world, ICASA's implicit assumption that different distribution modes will be served by different operators is invalid: it is entirely natural that a DTH broadcaster (say) will provide OTT and mobile services alongside its linear TV offering, as Sky has done in the UK and as MultiChoice, StarTimes, SABC and e.tv are now doing in South Africa. Operators are now competing on multiple distribution platforms, not on a single platform. The market has long since moved on from the world that ICASA appears to be considering.

734 A licence condition that limits a buyer's ability to acquire rights for multiple distribution modes will restrict the range of services that may be offered by a single operator. This would harm the broadcasters, who would be severely limited in the range of services they are able to offer, and limit competition between linear and other broadcasters, to the detriment of consumers. As an analogy, ICASA's proposal would be like restricting newspapers to print distribution, which would limit their ability to meet consumer demand for a mixture of media types as well as inhibiting the ability of newspaper operators to compete with internet-based news companies.

735 Unbundling of rights would harm consumers, who would enjoy only a restricted range of services from their subscription. A customer might find that they require one subscription for linear TV and then find that they need to take out a second one, with a different operator, to access an on-demand or mobile service for the same content. It is likely that the overall cost to the consumer, let alone the inconvenience, of taking out multiple subscriptions with different operators to obtain the desired combination of services would exceed that of taking out a subscription for all services from a single operator.

Higher costs and lower quality

736 Rights unbundling may increase broadcaster costs overall due the loss of synergies between distribution modes. For example, a match need only be filmed once to be distributed via linear, non-linear and mobile platforms, and this synergy is automatically realised when the rights to all distribution modes are held by the same broadcaster. It is far from guaranteed that the buyers of the unbundled rights would find a way to split these costs and, in any case, elements of duplication would remain likely (e.g. each broadcaster may employ their own commentary staff). While this may seem an issue for broadcasters, higher costs will ultimately be passed on to consumers in the form of higher retail prices.

737 It is also possible that, in the absence of the cost synergies noted above and the greater experience of the linear broadcaster, the OTT and/or mobile service would be of lower quality. Investment incentives are also likely to be lower. These outcomes would harm consumers, who would be denied the high-quality services across all distribution modes that would be offered in the counterfactual.

Impact on rights values and investment by rights owners

738 By restricting the buyer from providing greater value to its customers, rights unbundling is likely to diminish the value of the rights to the buyer and hence the price paid to the rights owner. As discussed above, a reduction in the revenues from content rights is likely to reduce investment by the owner, lowering the quality of the content provided to consumers.

739 For this reason, the decision of whether and how to unbundle is best left to rights owners. The dynamic changes within the market, with traditional broadcasters having to compete with OTT providers for the acquisition of content, means that rights owners have additional options for selling their rights compared with a few years ago, which they are well able to exploit. Moreover, giving rights owners the choice of how to sell the rights to the various distribution modes does not imply that these will necessarily be sold as a bundle: rights owners are already experimenting with various packaging combinations, such as allowing separate sale of certain OTT streaming rights. For instance, some US sports federations have sold streaming rights for certain matches to OTT players, separately from

traditional FTA and pay TV rights. Given this, there may be little need to impose unbundling, while its precise timing and nature is better determined by the rights owner.

Rights splitting with sale to more than one buyer

740 This proposal involves splitting content rights into packages (e.g. each containing different matches within a league competition) and selling these subject to a rule that no buyer can acquire all (or more than a given number) of packages. Such an approach has been imposed on the sale of live rights to the top national soccer leagues in England and Germany. ICASA finds that the current practice in South Africa of allowing a "winner-takes-all" outcome limits entry into the market (paragraph 1.6.1.3 of the Draft Findings), and concludes (in paragraph 8.3.8) that "*[i]n the long run, ... the splitting of rights should enhance overall competition in the market.*" ICASA has provided no objective evidence to substantiate these claims, which must therefore be regarded as mere speculation. In particular, ICASA has not demonstrated that its perceived lack of entry results from matches being sold as a bundle.

741 As discussed above in relation to the proposal to unbundle rights by platform, there is no basis for regulation to compel right splitting with sale to more than one buyer. There has been an explosion of varied, high-quality content, both internationally and within South Africa. There is therefore no content that is so essential that the rights need to be shared between two or more broadcasters. Furthermore, rights owners have strong incentives to draw in more bidders and increase competition between potential buyers to maximise the value of their rights. Accordingly, the existence of any benefits from rights splitting is unproven.

742 As ICASA itself acknowledges in paragraph 8.3.8, there are arguments for and against the splitting of rights. However, ICASA has not provided an analysis of the costs and benefits, let alone demonstrated that the latter exceed the former; there is no *a priori* basis for thinking this is the case. Moreover, ICASA appears to believe that the split can be designed to ensure both wider access and benefit to the rights owner, but provides no guidance as to how this is to be achieved.

743 Rights splitting is likely to have a number of adverse effects, similar to those described above for rights unbundling and discussed further below. The norm in the sports broadcasting industry is that broadcasters are required to acquire rights and broadcast any and all events within a specific competition. This prevents an operator from "cherry-picking" the best and most valuable content and neglecting the broadcasting of lesser-matches and teams, which would lead to severe prejudice for those other teams.

Restricted range of content available from one broadcaster

744 Matches in the same series are, to a degree, complementary products: consumers' interest in and demand for the matches is likely to be greater when all televised matches can be watched. If rights are split and cannot be acquired by a single buyer, consumers who want access to the full complement of the league's (or their team's) matches will find that these cannot be obtained from a single provider. As ICASA acknowledges in paragraph 8.3.8, consumers may find it difficult to subscribe to multiple providers to obtain access to all the matches they want: this is likely to incur higher fees (in total) than a single subscription covering all the matches, and may involve purchasing additional equipment as well as greater inconvenience and cost for consumers. Consumers with a high demand for multiple matches will incur these costs, paying more overall to see the same number of matches than they would in the absence of rights splitting, while those with limited willingness or ability to pay will subscribe to just one of the services, losing the enjoyment of watching the forgone matches.

745 As an example of these issues, when the live EPL rights in the UK were first split into separate packages with a "no single buyer rule" Setanta secured two of the packages while Sky obtained the rest. Many fans then complained that they had to subscribe to both retailers to obtain the matches they wanted (since Setanta retailed its channel directly to consumers and did not wholesale it to Sky). Moreover, Sky's prices for its channels containing EPL matches increased and Setanta charged around £10 per month for its sports package. Although it is difficult to determine the counterfactual – i.e. what would have happened to Sky's prices had it retained all of the rights – it seems unlikely that consumers would have paid as much as the combined prices of Sky and Setanta. This experience

strongly suggests that the intervention resulted in higher payments by those consumers who wanted to watch all or most televised matches, while others settled for watching fewer matches.

Lower broadcaster investment and quality

746 By reducing the demand facing each buyer, rights splitting is likely to reduce the returns to each one. If broadcasters cannot earn commercially viable and attractive returns, they are likely to reduce their investment in the production and marketing of the matches. Investments that have spillover benefits to the other retailer, such as marketing, will be particularly affected: each retailer's incentive to invest is reduced as this partly benefits the other retailer, and it can also free-ride on the marketing of the other.

747 MultiChoice invests heavily in grassroot sports, through for example the MultiChoice Diski Challenge and Shield (football) and the SuperSport Rugby Challenge.[692] These investments are viable because MultiChoice has acquired the primary rights to the PSL and rugby content; they could not be developed commercially on their own. If those rights were split into smaller packages, the commercial viability of investing in these competitions and providing free content to community television stations would be eroded. In other words, the business case for undertaking these investments would not exist because MultiChoice would be unable to make reasonable returns on its investment from a smaller package of rights. Since grassroots development provides a feeder system for senior teams and senior competitions, any developments that adversely affect the viability of continued grassroots developments would affect senior club teams and the national teams, with long-term implications for the quality of the sports content and of the electronic audio-visual services. There would also be adverse consequences for the personnel that are employed to produce and broadcast

692 These grassroot sports programmes have expanded since their launch, with MultiChoice intensifying its investments. For example, the MultiChoice Diski Challenge was followed by the introduction of the MultiChoice Diski Shield. In May 2019, the MultiChoice Diski Challenge was expanded into a full league format, increasing the costs of running the competition. Matches in the MultiChoice Diski Challenge and Shield competitions are played in community stadiums and consumers may watch free of charge. MultiChoice Diski Challenge games are also provided to six community television stations free of charge.

grassroots competitions, including interns who obtain practical exposure from such work.

748 With lower investment, the consumer experience will be negatively impacted. Consumers taking out multiple subscriptions may also experience different service quality across the various providers, depending on the level of investment in content production and in broadcast and delivery technology.

Impact on rights values and investment by rights owners

749 Rights unbundling is likely to reduce the value of the rights to buyers, as complementarities between the matches are forgone, consumer demand may be lower and investment in the rights is likely to be inhibited. This is likely to reduce the amount that retailers, collectively, are willing to pay for the rights compared to the sale of a single package. As a result, rights owners are likely to receive less revenue from the sale of their rights. This will dampen investment by rights owners and inhibit innovation in the creation of content, resulting in poorer quality and/or less content being available for acquisition by broadcasters. Ultimately, if regulation to split rights is binding on the seller (i.e. if the regulation restricts the rights owner from selling its rights in a way that would maximise revenues), consumers are likely to suffer, with less innovation, less choice of content and poorer quality of content.

750 In this context, it is important to note that – unlike in other jurisdictions – sports leagues in South Africa receive little or no funding from government, and revenues from ticket sales and merchandise are also small. Thus, their primary source of revenue is from the sale of television rights and from sponsorship (which is directly linked to the distribution of sports rights). Any licence condition that interferes with the sale of sports rights on an exclusive basis risks reducing the revenue accruing to sports leagues, which will directly reduce the investments they can make in grassroots development of the sport, payments to and hence the attraction and retention of players and coaches, development and hosting of competitions and the quality of sports facilities. These effects will have adverse consequences for local sports and undermine consumers' enjoyment of and benefits from those sports.

Limit number of Hollywood movie studio contracts

751 ICASA asserts that first subscription pay TV window (FSPTW) Hollywood[693] movies are premium content and proposes that a licensee with SMP should be able to enter into agreements with (at most) half of the six major Hollywood movie studios at a time, freeing up the other half to competitors (paragraph 1.6.1.6 of the Draft Findings). This remedy proposal provides the clearest indication that ICASA has failed to demonstrate that the failure of TV licensees is due to the contracts held by MultiChoice, i.e. to a lack of access to content. ICASA accepts that two of the six studios that it has identified have no contracts with MultiChoice. Hence, these studios have content that is not held by MultiChoice and is already available to its competitors. This raises two critical questions. First, why have rivals not acquired this content? Second, what is the rationale and efficacy of the remedy being proposed by ICASA? It is clear from this the reason for failure of TV licensees and lack of entry is not absence of access to content.

752 The proposal to limit the number of Hollywood movie studio contracts that a broadcaster may obtain on an exclusive basis is similar to the rights splitting proposal discussed above: the only difference is that in this case the relevant products are movies from different studios rather than different matches within a league or series. Accordingly, the general principles and criticisms discussed above also apply to this proposal; again, the potential benefits are uncertain and are outweighed by the detriments from the approach, discussed below.

<u>Restricted range of content available from one broadcaster</u>

753 While there may be fewer complementarities between movies from different studios than between matches within a series, the restriction is nonetheless liable to reduce consumer utility from the bigger bundles that could otherwise be made available. Consumers wishing to have access to a broad range of movies may have to take out multiple subscriptions, experience inconvenience and incur

693 In the Draft Findings (e.g. para 5.10.21) ICASA refers to "*Hollywood's six major studios*" and mentions specifically 20th Century Fox, Warner Bros., Paramount, Sony, Universal and Walt Disney.

higher equipment costs. Others will simply settle for a smaller package, saving the additional subscription but forgoing content that they value.

754 Studios concentrate on different movie genres (dramas, romcoms, indies etc.) at different points in their production journeys and may change this focus over time. While studios may pre-announce their movie releases and indicate their plans for future productions, such announcements do not give a comprehensive picture of their full output over the duration of a broadcaster's contract. A restriction on the number of Hollywood studio contracts may therefore mean that a broadcaster will be prevented from acquiring certain genres of content even though that content is of little consequence to the competition concern identified by ICASA. This may also result in a particular broadcaster having a limited range of content genres to offer to its subscribers, reducing consumer benefits from its service. In a world where studios are increasingly going direct to the consumer and bypassing traditional broadcasters and OTT services such as Netflix are not subjected to similar restrictions, the proposed remedy has the effect of unduly restricting the ability of a single broadcaster to adapt and compete effectively. As well as amounting to undue interference with the commercial activities of operators, the proposed remedy is premised on the presumption – not underpinned by any research by ICASA – that MultiChoice acquires all content produced by the identified studios. This is incorrect.

Implementation issues

755 The remedy may also be difficult to implement in practice. Given that the Hollywood studios sell their rights at different times, the number of bidders faced by each will be affected by potential buyers' existing contract holdings: a potential buyer will be unable to bid if, at that time, it already holds contracts with half of the studios. Consolidation by the studios may also present difficulties. If a merger brings another studio (or a higher proportion of movie output) under the same entity and contract, this might – unintentionally and through no conduct of MultiChoice – bring about non-compliance and compel divestment of a contract.

Wholesale must-offer obligation

756 A wholesale must-offer obligation (WMO) obliges a licensee with SMP that wins certain rights to offer them to other retailers, on terms and conditions that will be imposed by ICASA. In principle, a WMO might apply to the rights themselves, allowing rivals to sublicense the rights and use these to produce their own content (e.g. to film and produce their own match coverage), or to the content or channel produced by the buyer from those rights (e.g. a sports channel). ICASA cites the example of the WMO imposed by Ofcom on Sky's premium sports channels in 2010 (and withdrawn following a review in 2014/15).

757 As for the previous remedy proposals, it is unclear what competition detriment(s) a WMO is intended to address. ICASA cites its imposition and subsequent removal by Ofcom in the UK (Draft Findings paragraphs 8.3.9 – 8.3.10), and notes its use as a merger remedy (footnote 174), but does not explain why a WMO might be an appropriate remedy for South Africa. Without this the benefits are uncertain and cannot simply be assumed. Meanwhile, there are a number of drawbacks to such an approach, as has been pointed out by the UK Competition Commission (which, notably, ICASA fails to mention). These and other detriments are discussed below. Given these, the net impact derived from a cost-benefit analysis would be negative. Although the following discussion focuses on a WMO relating to a channel, similar points apply to a WMO requiring sub-licensing of the rights themselves.

Limits retail differentiation

758 A WMO prevents a TV distributor from differentiating its retail offering from those of its competitors by providing its content exclusively, eliminating this important aspect of competition. When one retailer shows attractive content exclusively, its rivals must compete more vigorously by cutting their prices and/or obtaining attractive content of their own. While consumers may benefit from the wider availability of the channel (assuming that this would not be wholesaled to other retailers in the absence of the regulation), the weakening of retail competition is detrimental to consumers, who are likely to face higher prices and, potentially, less investment in alternative content than would occur in its absence.

759 The motivation for imposing a WMO remedy is particularly questionable if this were to take place alongside other proposed remedies that split and unbundle rights and reduce contract terms for MultiChoice. There is no coherent reason to force MultiChoice to sublicense the small portion of content that would remain in its hands following adoption of these measures. The effect of the proposed set of remedies would be to cripple MultiChoice by preventing it from adapting to the changes which are evidently taking place at a rapid pace. MultiChoice would be left in a situation where it, alone, is unable meaningfully to differentiate itself, thereby affecting its ability to compete. MultiChoice is concerned that ICASA has limited appreciation of the practical implications of the remedies it is proposing.

Lower investment in the channel

760 A WMO reduces incentives for a distributor to invest in the quality and marketing of the channel, as it knows that its investments will benefit other retailers as well as itself. This is particularly important when the channel producer is integrated with the distributor, as incentives to invest in the channel itself will also be undermined. This point was acknowledged by the French competition authority when it declined to impose a WMO obligation on Groupe Canal Plus in relation to its sports channels, stating: *"[T]he ability to leverage the exclusivity of a channel represents for GCP, just like it does for independent channel providers, an important incentive to invest in quality content."*[694]

Reduced incentives to bid for, and hence values of, content rights

761 A WMO is likely to reduce the amounts bid for content rights, for two reasons. The licensee facing the prospect of a WMO will have a lower value of the rights used to produce the channel, as it will be compelled to share this with its retail rivals, thus is likely to bid less for the rights. Meanwhile, as beneficiaries of the WMO, other retailers have less incentive to bid significant amounts for the rights themselves and, indeed, may prefer to see these remain in the hands of the regulated licensee so that they can then obtain them on favourable terms.

694 Autorité de la Concurrence, Décision n° 12-DCC-100 du 23 juillet 2012 relative à la prise de contrôle exclusif de TPS et CanalSatellite par Vivendi et Groupe Canal Plus, para 700.

762 To the extent that ICASA is concerned about a lack of competition to acquire rights and a high proportion of rights remaining in the hands of one buyer, a WMO is liable to perpetuate that situation. As the UK Competition Commission commented when stating its intention not to consider a WMO (were such remedy to be required) in its Movies on Pay TV Market Investigation:

> *"We have significant concerns that a WMO remedy, certainly one of unlimited duration, would be likely to extinguish any potential rivalry between pay-TV operators in bidding for FSPTW movie rights and dilute, if not eradicate, incentives to innovate. Sky's pay-TV rivals would have little incentive to bid against Sky for FSPTW movie rights as they would be the ultimate beneficiaries of these rights under the terms of the WMO remedy."*[695]

763 Given that the licensee and rival retailers are likely, ordinarily, to be major bidders for the rights, the reduced incentives for all of these players are likely negatively to impact on the revenue earned by rights owners and the quality of the content they produce. This impact also explains the opposition of rights sellers, such as top soccer leagues (including the EPL) to the imposition of a WMO on a major buyer of their rights.[696] It is notable that the PSL is critical of ICASA's proposed remedies, arguing that they "*limit participation of buyers in bids which undermines demand and consequently revenue for the PSL thus unduly interfering with the normal working of the market for acquisition of rights*" (Draft Findings paragraph 8.2.34).

Implementation difficulties

764 A WMO condition is not straightforward to implement. It is insufficient simply to instruct that the channel is wholesaled to rival retailers: its terms must also be determined by the regulator, including the wholesale price, the scope of the

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695 UK CC, Movies on Pay TV Market Investigation, Notice of Possible Remedies under Rule 11 of the Competition Commission Rules of Procedure, 19 August 2011, para 41.

696 During Ofcom's Pay TV investigation, which culminated in the WMO imposed on Sky in 2010, several sports federations submitted to Ofcom that the proposed WMO regulation would reduce their revenues and undermine their ability to invest in high-quality sporting events. In addition, notwithstanding Ofcom's claim that its decision preserved the interests of rights owners, the EPL was sufficiently concerned to join Sky's appeal against Ofcom's decision (and a number of other sports federations also intervened in the appeal).

content to be wholesaled (which may require specifying that particular content or content of a given quality is included in the channel), the beneficiaries of the regulation, and any other terms that may be imposed by the wholesaler (e.g. payment terms or measures to protect against piracy). While a lower wholesale price may increase the likelihood that rival retailers will pay for the channels, this will reduce the value of the channel and the underlying content rights, including investment in the channel and payments for the rights contained within it.

Set-top box interoperability

765 ICASA suggests that set-top box (STB) interoperability will facilitate consumer switching from one service provider to another by avoiding the need for new a STB, and potentially other customer premises equipment (CPE) such as a satellite dish, thus lowering switching costs and inconvenience to consumers (Draft Findings paragraph 8.3.13).

766 The claim that lack of STB interoperability is a significant barrier to switching and, by extension, to competition has not been objectively established and is not supported by evidence. As discussed in Part D of this submission, ICASA has not assessed the costs of STBs or other elements (such as dishes) that it claims form barriers to switching, hence it is not in a position to claim that switching costs are high, let alone that STBs are a major contributor to any such costs.

767 The growth in subscriptions to the lower-priced DStv bouquets – bought predominantly by consumers who have lower incomes and are first-time subscribers, who might therefore be expected to be reluctant to purchase STBs – demonstrates the cost of STBs has not been a barrier to uptake of new multi-channel services. The rapid growth of OpenView HD (OVHD) provides similar evidence that STB costs are not a barrier to entry. It is also important to note that STBs are in some ways similar to mobile devices: consumers upgrade to newer, more advanced versions of STBs (e.g. PVRs) as they do for mobile devices. If the cost of STBs were prohibitive, as ICASA suggests without objective demonstration, one would not see operators innovating on and introducing new STBs into the market.

768 Moreover, the cost of STBs has fallen significantly, in part owing to technological advancements and provision of subsidies by providers. In fact, in its latest results, OVHD notes that *"The reduction [in operating costs] is mainly due to the reduction in subsidy from R150 to R75 per box in October as well as the exit from the SES contract. Despite the reduction in subsidy, Openview set-top box activations continue to grow at an average of 35 000 per month. At the end of the period, a total of 1 574 395 (2018: 1 149 217) boxes have been activated…."*[697] This reflects additions of 425,178 subscriptions to its service in one year, meaning that even higher prices for OVHD STBs (through a 50% reduction in subsidies) have not led to a reduction or slowdown in uptake of services.

769 While the benefits of STB interoperability have not been demonstrated and are likely to be small, its costs would be high, as detailed below.

Implementation difficulties

770 Achieving STB interoperability would require industry-wide action, hence this is not a remedy that can be imposed on a single operator. Such a measure would have a massive impact on operators other than MultiChoice, including other subscription and FTA broadcasters on satellite platforms, conditional access (CA) vendors and STB manufacturers in South Africa. This would require a separate inquiry under a different section of the Electronic Communication Act, as it would apply to all broadcasters and not just those with SMP, to investigate possibility of interoperability and would require the involvement of the South African Bureau of Standards (SABS), as the standards setting body in South Africa.

771 The efficacy of this remedy being imposed now, at a point when there are multiple means of accessing electronic audio-visual services other than STBs, is also highly questionable. For example, consumers are increasingly accessing services via the internet with no requirement for STBs. While ICASA appears minded to pursue such a condition, it states that it will undertake further work and

[697] eMedia Holdings Limited Reviewed Condensed Consolidated Annual Results for the Year Ended 31 March 2019, p. 2.

a separate consultation to assess the technical complexities surrounding STB interoperability before proposing it as a licence condition on players with SMP. These and other potential adverse effects are described next.

Technical complexities and costs

772 STB interoperability is difficult to implement in practice, which explains the dearth of successful examples and observations of failed attempts across the world. Over the past two decades several countries have attempted this, yet they have not found a cost effective way to achieve CA interoperability in STBs without compromising security. India, which started an inquiry on STB interoperability in 2010, is still trying to find a solution: in the past five years India has undertaken a number of consultations and many workshops with industry without yet arriving at a commercially implementable mechanism that meets the criteria of being reasonable, cost effective and not compromising the security of the platforms that rely on CA to protect their content. Any solution, if achieved, is likely to be highly specific to their broadcasting and regulatory environment and may involve compromises on security.

773 MultiChoice's STBs are designed and produced for its own operations. STBs form part of a larger broadcast ecosystem for which they were purpose-built to work seamlessly with bespoke MultiChoice head-end systems enabling functionality such as electronic programme guides, editorial and AI-based recommendations systems, advertising systems, satellite push-VOD to hard drives, internet-delivered content connectivity, dedicated messaging to communicate with subscribers about their subscriptions, subscriber self-service, decoder telemetry, etc. CA security systems are also operator-specific: to make them interoperable, STBs would need to be developed upfront with the capability to have multiple security systems, which would significantly reduce overall security as eventual compromise of the common security system will affect all operators. Even if this could be achieved, there would be limitations on functionalities used by consumers, especially for more advanced STBs, e.g. PVR functionality, storage space (unless larger, exponentially more expensive hard drives are used to store content potentially from multiple operators), etc.

774 In consequence, a requirement to make STBs interoperable with other services will introduce complexities, inflexibility for operators to differentiate their offerings and additional costs. For example, the inclusion of multiple security systems and larger hard drives would increase the costs of the STB. In the event of such an STB developing problems, the boxes may need to be replaced and providers of electronic audio-visual services may be reluctant to take responsibility for an STB that is also used by other providers. These increased costs would need to be recovered from consumers, resulting in higher prices. It is important to note that STB interoperability cannot be applied to those STBs that are already in the market or have already been designed and are in production, therefore future-looking introduction in the face of rising OTT would be folly.

775 As highlighted above, successful interoperability will require co-ordination by the industry to ensure compatibility with other services. For example, in contrast to mobile devices, where manufacturers have comprehensive common standards coordinated at the GSM level, there are very limited common standards in broadcasting: each operator uses a combination of these basic standards and its own bespoke systems to enable differentiated offerings. Ensuring that such common standards exist will require the involvement of the SABS. This is a very complex exercise, which may be difficult to achieve and is likely to result in significant delays and compromises before new interoperable STBs can be manufactured and distributed, let alone have any effect on existing in-market STBs. This doubtful remedy can also not be applied to a single provider but would need to apply to all providers. It will also stifle innovation in this space to a mediocre common denominator, as discussed in paragraphs 777 to 778 below.

Security concerns

776 The proposed remedy is likely to impact on encryption, and there will be severe unintended consequences if a common CA systems is enforced. If all subscription retailers have to use the same conditional access (CA) system, there is a risk that some of those retailers will not adequately maintain the security of the CA system, increasing the risk of piracy. If the common security system is breached for whatever reason, then the entire CA system, all operators and their STBs and the smart cards of all subscription retailers would have to be replaced, at enormous cost. It is unclear who would be liable for security breaches and from whom such costs would be recouped. Ultimately, such costs are likely to be passed on to consumers, at least to some degree.

Decreased incentives to invest in STB development

777 Competition in the electronic audio-visual services market extends beyond content and includes the convenience and functionality of STBs, which affects the consumer's experience. Differentiation is achieved through choices of conditional access systems, modulation standards, compression standards, operating systems/middleware, electronic programme guides, recording options (including storage space and special end-user applications) which retailers use to generate a unique customer experience. MultiChoice invests significantly, compared to its competitors, in the development of its STBs in all the above respects as well as in the in-built customer service capabilities of its STBs. Competitors may have different strategies in relation to their services and STBs: for example, in contrast to MultiChoice, OVHD does not invest in its STBs and therefore does not offer any support to its customers beyond standard manufacturer warranties.

778 STB interoperability is likely to reduce the licensee's incentive to invest in the development and roll-out of innovative STBs (e.g. MultiChoice's Explora), as its rivals will share in (i.e. "freeride" on) such investments (since consumers will be able to continue using the STB after switching to rival services). In addition, rivals' incentives to differentiate themselves by developing their own, innovative STBs

will also be inhibited. Thus, the measure is likely to stifle competition and innovation in STB design and functionality, to the disadvantage of consumers.

779 There is also a risk that STB technology will ossify because a new STB design would likely need to be approved by the industry, restricting the ability of any single player unilaterally to deploy a STB with enhanced functionality. For example, the design of new STBs that integrate TV and OTT functionality, or which include "catch-up" capability, recording capabilities or enhancements to EPG, may be inhibited by the need for wider industry approval, reducing consumer benefits from new STBs.

Equipment subsidies and other consumer detriments

780 Pay TV and FTA (e.g. OVHD) broadcasters typically subsidise their STBs and installation costs as a means of encouraging consumers to use their services, in the expectation of recouping the subsidy over the course of the subscription. Mandating STB interoperability is likely to discourage broadcasters from subsidising these costs because of the increased risk of free riding by competitors, thereby increasing the costs that must be borne upfront by consumers. In other words, consumers will pay higher prices for STBs than they do in the absence of interoperability. Free riding itself may also have impacts on the STB manufacturing sector, and could reduce competition in that sector.

781 Consumers may also be disadvantaged because of reduced STB functionality (e.g. PVR functionality, impact on storage space and added costs). As things stand, MultiChoice invests significantly in the STBs ecosystem to enhance and support the consumer experience. These investments include providing repairs and warranty services that are beyond the standard manufacturer warranties. When STBs go beyond manufacturer warranty, MultiChoice (unlike OVHD for example) still invests in capabilities to maintain and repair STBs for consumers. This after-sales service involves costs and logistics associated with collecting STBs from consumers, sending them for repairs and replacement of faulty STBs. With forced interoperability, there will be limited incentives for MultiChoice to continue doing this as it will be to the benefit of its competitors. This means, as in the case of OVHD, once STBs are beyond the standard manufacturer

warranties, consumers would have to either purchase new STBs or incur the full costs associated with repairing and maintaining the STBs.

782 MultiChoice also invests significantly in retail channels to promote the sale of its STBs by retailers. Interoperability is likely to result in a scale-back on those investments as this would be akin to MultiChoice subsidising its competitors. This will in turn result in retailers facing reduced incentives to sell STBs. As such, the proposed remedies may indirectly impact the distribution of STBs.

Asymmetric impacts between distribution technologies

783 Finally, a regulation requiring STB interoperability within a single distribution technology (e.g. between DTH providers only) will impose the above costs on providers which operate primarily on this technology but not on competitors which use other technologies. This would be extremely undesirable, since regulation would then interfere with competition between distributors on different technologies and may distort consumer choices between these. This would be an unintended consequence of the condition, which regulators should seek to avoid.

PART F: CONSTITUTIONAL ISSUES RAISED BY THE DRAFT FINDINGS

Introduction

784 MultiChoice has previously addressed the constitutional and statutory requirements to which ICASA and this Inquiry are subject. Those submissions are set out more fully in Part A and Part F of MultiChoice's 2017 submissions and Appendix C of the 2018 supplementary submissions.[698] Those requirements – which have substantive and procedural components are referred to and incorporated in these submissions.

785 In conducting the Inquiry ICASA is required, among other things, to make findings which are based on an open-minded, rigorous evaluation of the evidence as a whole, and are rationally related to accurate and reliable evidence.

786 Additionally, in terms of section 67 of the ICASA Act, ICASA is required to make findings on two sets of issues –

786.1 first, the definition of the relevant markets, whether there is ineffective competitive in the relevant markets, and whether any licensee has significant market power in the relevant markets (the market issues); and

786.2 second, if ICASA finds that there is ineffective competition and that any licensee has significant market power in the relevant markets, appropriate and sufficient pro-competitive licence conditions which should be imposed on those licensees with significant market power to remedy the market failure (the remedies issue).

[698] In Part F of MultiChoice's 2017 submissions, MultiChoice also referenced concerns that had been raised in correspondence between MultiChoice and ICASA between the launch of the Inquiry and mid-May 2017 (para 860). Those concerns were not repeated as they were stated to be on record. MultiChoice noted that all its rights as regards ICASA's conduct in this Inquiry were reserved. MultiChoice continues to reserve its rights.

787 ICASA is also obliged to afford interested parties a hearing on all aspects of the Inquiry (and not only some of them).

Rigorous and rational evaluation of the evidence

788 In these submissions, MultiChoice has demonstrated and submits that the preliminary findings do not meet the requirements set out in Part A and Part F of MultiChoice's 2017 submissions, including the requirements summarised in paragraph 785 above.

789 ICASA has failed to conduct a robust assessment of the issues that it is required to investigate, and has made preliminary findings that are in some instances unsubstantiated; in some instances substantiated by reference to "evidence" that is not accurate or reliable; and in many instances contradicted by clear and compelling evidence provided to ICASA.

790 Additionally, as a consequence of ICASA's failure to define relevant markets based on a rigorous assessment of the objective facts and evidence provided to ICASA, its attempt to define relevant markets does not stand scrutiny. On that basis –

790.1 ICASA may not proceed to the next stage of the Inquiry, namely considering whether there is ineffective competition in the relevant markets; and

790.2 ICASA's assessment of competition, based on incorrect market definitions, is fundamentally flawed.

791 Accordingly, ICASA's findings fail to meet the legality standards of lawfulness and rationality.

792 Final findings demonstrating the same deficiencies will be judicially reviewable on the grounds of unlawfulness, and substantive and procedural irrationality.

793 Moreover, as submitted below, ICASA's final findings will be judicially reviewable on the grounds of unlawfulness, procedural irrationality and procedural unfairness, if ICASA fails to make final findings on the market issues and (if

necessary) the remedies issue in separate, sequential steps, each involving consultation with interested persons.

Procedural considerations

794 The Draft Findings raise two important procedural issues.

795 The first is that the flaws in the Draft Findings, which are identified in the body of these representations, cannot be effectively addressed in written representations alone, without an opportunity for engagement with ICASA in an oral hearing (the oral hearing requirement).

796 The second is that ICASA has failed to address the separate substantive issues to be determined in the Inquiry, in separate and sequential steps. As MultiChoice submitted in its previous representations, on the basis of a legal opinion by senior counsel which was furnished to ICASA,[699] ICASA is required, in respect of each of the two sets of issues on which ICASA is required to make findings (being the market issues and the remedies issues referred to in paragraph 786 above), ICASA must conduct the Inquiry on the basis of two sequential steps, each subject to consultation.

797 The Draft Findings include ICASA's draft findings on the market issues as well as its draft findings on the remedies issue.

798 In conducting the Inquiry and making its final findings (the Inquiry Findings), ICASA is exercising a public power in terms of sections 4B and 4C of the ICASA Act, and is subject to the standards of lawfulness and rationality encompassed in the constitutional principle of legality.[700]

799 The conduct of the Inquiry and the Inquiry Findings also constitute administrative action as defined in section 1 of the Promotion of Administrative Justice Act, 3 of

699 MultiChoice's 2017 submissions, Part F and Appendix C to MultiChoice's 2018 supplementary submissions.

700 See Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC), para 20.

2000 (PAJA), and are subject to the standards of lawfulness, reasonableness, and procedural fairness prescribed in PAJA.[701]

800 If the oral hearing requirement and the two-step requirement are not addressed, the Inquiry Findings will be judicially reviewable on grounds including unlawfulness, procedural irrationality and procedural unfairness.

The oral hearing requirement

801 Section 4B of the ICASA Act, which governs the conduct of inquiries by ICASA, sets out a procedural framework in terms of which ICASA is required to furnish interested persons with an opportunity to make both written and oral representations on the subject matter of an inquiry.[702]

802 Implicit in the framework is the principle that in an inquiry conducted by ICASA, an interested person who has made written representations must also be furnished with an opportunity to make oral representations.

803 The ICASA Act accordingly requires ICASA to afford interested persons the opportunity to make both written and oral representations in respect of all aspects of the Inquiry, and in this case, including on the Draft Findings.

804 It is no answer to this contention that interested persons were afforded the opportunity to make oral representations in respect of ICASA's Discussion Document. The Discussion Document set out ICASA's thinking at a very early stage of the Inquiry. The Draft Findings contain ICASA's preliminary findings at an advanced stage of the inquiry, based on evidence and assumptions which were not addressed (and could not be addressed) at the public hearings held in May 2018.

805 As ICASA has implicitly acknowledged, by furnishing interested persons with an opportunity to make fresh written representations in respect of the Draft Findings,

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701 Appendix C to the 2018 supplementary submissions, para 3.
702 Sections 4B(2) and 4B(6) of the ICASA Act.

the oral representations made in respect of the Discussion Document do not preclude the necessity for oral representations in respect of the Draft Findings.

806 Interested persons must therefore be afforded the opportunity to make oral representations to ICASA on the Draft Findings as a matter of lawfulness. This opportunity is also required as a matter of procedural rationality and procedural fairness.

807 The standard of procedural rationality requires ICASA to take all such procedural steps as are necessary to ensure that it is able to make Inquiry Findings which are substantively rational.[703] In the light of the range of issues in respect of which MultiChoice submits that ICASA has misdirected itself on economic principles and key facts, ICASA will not be in a position to make substantively rational Inquiry Findings without engaging with MultiChoice in an oral hearing.

808 As a matter of procedural fairness, ICASA will not have complied with its obligation, under section 3(2)(b)(ii) of PAJA, to give MultiChoice "*a reasonable opportunity to make representations*", if it does not permit MultiChoice to make oral representations on the issues in respect of which it submits that ICASA has misdirected itself on economic principles and key facts.

The two-step requirement

809 ICASA is required to address the market issues and the remedies issue in separate steps, each subject to consultation, as a matter of lawfulness, procedural rationality and procedural fairness.[704]

[703] Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC), paras 68 to 70, and 74.

[704] Appendix C to the 208 supplementary submissions, para 7.

810 The issues to be determined by ICASA in the Inquiry, and the sequence in which they must be determined, are evident from section 67(4) of the ECA, which deals with the regulations to be made by ICASA "following an inquiry".[705] ICASA must -

> "prescribe regulations defining the relevant markets and market segments and 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".[706]
>
> (emphasis added)

811 On its plain language, section 67(4) of the ECA requires the market issues to be determined before the remedies issue is considered. Depending on ICASA's findings on the market issues, the remedies issue may not even arise.

812 If the remedies issue does arise, ICASA must identify "*appropriate and sufficient licence conditions*" to be imposed on specific licensees (i.e. licensees who have significant market power in the defined market). The wide scope of the licence conditions which might be imposed is indicated by the conditions set out in section 67(7) of the ECA.

813 The question of what conditions are appropriate and sufficient must be determined in relation to the nature, extent and source of the specific harm which the conditions are required to address. Effectiveness and proportionality are key requirements of conditions which are imposed to remedy competition harm.[707]

814 Section 4B(2) of the ICASA Act, read with section 67(4) of the ECA, requires ICASA, first, to invite and consider representations on its proposed findings on the market issues, and thereafter to make final findings on the market issues; and second, depending on its findings on the market issues, to invite and

705 Regulations made under section 67(4) must be based upon ICASA's findings in a prior inquiry. If the Inquiry Findings are to be relied upon as a foundation for regulations in terms of section 67(4), they must address the key issues which must be canvassed in the regulations, including the market issues and the remedies issue.

706 Section 67(4) of the ECA.

707 See Neils and others, Economics for Competition Lawyers (2011) p. 445 for the statement that "[o]ptimal [competition] remedies are those that are effective at achieving the policy objectives, in a manner that is proportionate to the severity of the competition problem, and at the same time not unnecessarily costly or time-consuming to implement".

consider representations on its proposed findings on the remedies issue, and thereafter to make findings on the remedies issue.

815 The substantive rationality of the Inquiry Findings in respect of the remedies issue will depend on whether the licence conditions proposed by ICASA are "*appropriate and sufficient*" to address ineffective competition and significant market power in the defined market. The "*appropriate and sufficient*" benchmark requires a rational relationship between the conditions proposed and the harm identified by ICASA.

816 As a matter of procedural rationality, ICASA cannot make substantively rational final findings in respect of appropriate conditions until it has (a) made final findings in respect of the harm which must be addressed; and (b) engaged with interested and informed stakeholders, such as MultiChoice, on the viability, implications, operationality and likely effects (including unintended effects) of the conditions which it proposes to deal with the market issues, as finally determined.

817 Procedural fairness under PAJA requires that interested persons are afforded "*adequate notice of the nature and purpose*" of ICASA's proposed findings on the market issues and the remedies issue,[708] and "*a reasonable opportunity to make representations*" in respect of those proposed findings.[709]

818 ICASA will not have met either requirement if it publishes its final findings on the remedies issue before separately (a) consulting on its proposed findings on the market issues; (b) making its final findings on the market issues; and (c) consulting on its proposed findings on the remedies issue.

Conclusion

819 The legal standards governing the conduct of the Inquiry require ICASA –

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708 Section 3(2)(b)(i) of PAJA.
709 Section 3(2)(b)(ii) of PAJA.

819.1 to afford interested persons who have made written representations on the Draft Findings, an opportunity to make oral representations on the Draft Findings;

819.2 to publish its final findings on the market issues after considering the written and oral representations of interested persons;

819.3 after publishing its findings on the market issues, and if necessary, to publish draft findings on the remedies issue, and afford interested persons the opportunity to make both written and oral representations on those draft findings; and

819.4 to publish its final findings on the remedies issue after considering the written and oral representations of interested persons.