MultiChoice and M-Net's representations in ICASA's Subscription Television Inquiry (Non-Confidential)

15 January 2021

Team

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Structure of presentation

Introduction

MultiChoice’s growth and success story

The relevant market context

The shortcomings of ICASA's market definitions and assessment of competition

The limitations of ICASA’s proposed licence conditions

Adverse consequences of the proposed remedies

Critical shift in policy framework applicable to audio visual services

Evaluation against the legal framework: what the law requires of ICASA

What next?

Introduction: why are we here

MultiChoice and M-Net welcome the opportunity to make this representation to ICASA

- The Draft Findings Document describes a market that is narrow and which excludes OTT operators. Based on this conclusion, ICASA finds that the market is not competitive. This is not our lived experience

- We are therefore here today to demonstrate that the market is much broader than what is defined in the draft findings and in fact that the market is fiercely competitive

- Our world has changed dramatically. We knew these changes were happening and have said as much in our submissions to the Authority since the launch of this Inquiry in 2016. No one, however, could have predicted the pace and speed at which that change has accelerated. Even the content value chain has changed with studios evolving from being content producers to retailers of audio visual services direct to consumers. In addition the basis on which rights are sold – the windowing value chain is now being undermined by these self same retailers

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Introduction: why are we here

- We will specifically demonstrate to ICASA that:
  - OTT operators are our biggest competitors and a real threat
  - Currently competition is fierce and will continue to grow rapidly and in a disruptive way
  - Seismic and unprecedented shifts are taking place, threatening all traditional broadcasters, forcing them to evolve
  - Policy makers have recognised this shift and are overhauling the policy and legislative framework
  - Regulation of the nature proposed by ICASA will disadvantage traditional broadcasters and favour OTT operators, have unintended consequences and not deliver the results that ICASA anticipates

- Today we will provide ICASA with information on these current market realities, followed by our economists and counsel who will address you on the economics and the legal requirements

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Introduction: unprecedented change

- The Inquiry is being conducted in a time of **massive and unprecedented changes** in the audio-visual services market which ICASA must take into account on a **forward-looking basis**

- These key changes in the competitive landscape establish that there is:

  - a **broader market for electronic audio-visual services** in which competition is effective and intensifying

  - no need for imposition of pro-competitive conditions on any licensee

- In addition, the publication of **three key policy documents** since issuing of the Draft Findings Document in April 2019 signals a **radical overhaul** of the applicable policy, legislative and regulatory framework:

  - Draft Audio & Audio Visual Content Services White Paper
  - Competition Commission's Paper on Competition in the Digital Economy
  - Report of the Presidential Commission on the Fourth Industrial Revolution

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Introduction: changes in policy framework

The White Paper makes two pivotal points:

“Audio and audio-visual content consumption via the internet are fundamentally transforming the South African audio and audio-visual landscape creating a broader content market than traditional broadcasting” (1.1.16)

“Attempting to regulate broadcasting as one did in the past no longer makes sense in an era of diverse content available on multiple platforms, as satellite and the internet can deliver local and international content anywhere in the world” (2.1.10)

communications & digital technologies
Department:
Communications & Digital Technologies
REPUBLIC OF SOUTH AFRICA

All 3 policy documents recognise a broader audio-visual services market in which:

- Traditional broadcasters compete with internet based streaming services
- Regulation should be technology neutral and agnostic to the business model adopted by a market player
- Regulations do not distort the market and ensure regulatory parity

competitioncommission

Introduction: changes in policy framework

These developments:

- Support MultiChoice's submissions on the relevant market, and the effectiveness of competition in that market
- Confirm that the Authority's draft findings, which discount the presence and significance of OTT players, are out of touch with market realities

In summary:

- The Inquiry has been overtaken by events and ICASA simply cannot proceed to make the draft findings final
- The Authority must abandon these flawed draft findings

We trust that this panel will engage with our representations with an open mind and willingness to depart from the draft findings as required

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A true South African success story

MultiChoice is a true South African success story to be celebrated

A local, homegrown company that has grown organically through its long-term investment in:

Local and international content	Satellite and broadcast infrastructure, technology and distribution systems	Employment, skills development and transformation of the industry

– Taking risks to develop and grow its business when other companies were reluctant to do so
– Managing costs effectively

MultiChoice is a significant direct and indirect contributor to the industry, various parts of the value chain, other sectors and the SA economy

MultiChoice is an investment and transformation-driven company

Investment: supply chains, local content and development of talent (FY2020)

40%

of group general entertainment content expenditure on local content (excluding local sport)

Group created

3 850

hours of local content on an annual basis

Results in thousands of jobs in the value chain

MultiChoice TALENT FACTORY

Investing in the future of the SA creative industry

3 key touch points namely: film academy, MultiChoice Talent Factory portal and masterclasses

Significant investment in sports content, including supporting developmental leagues (DStv Diski; Rugby Challenge; Netball Challenge)

1 197

accredited installers employing 2 924 technicians

R1.3bn

invested in local decoder manufacturing

MultiChoice actively invests in transformation

Transformation of value chains and staff (FY2020)

Local procurement

R10.4bn

80% of which was with B-BBEE compliant suppliers

R4.9bn

to small and medium enterprises

4 641

employees

3 521 of which are permanent

84%

Black Employees

56%

of senior management is black (44% women)

71%

black directors (33% women)

R176m

Skills Development Spend

90%

spent on black talent

50%

spent on female talent

1 304

employees formally trained

R1.9bn

to suppliers with black female ownership of at least 30%

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We distribute wealth to black South Africans through Phuthuma Nathi

Launched in
2006

Over
80k
shareholders

R13.4bn
Dividend pay out since inception

Steady growth in PN share price since inception

We contribute significantly to SA tax revenues (FY2020)

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Total Tax Contribution
R7.3bn

=

Taxes paid
R3.3bn

+

Taxes collected
R4.0bn

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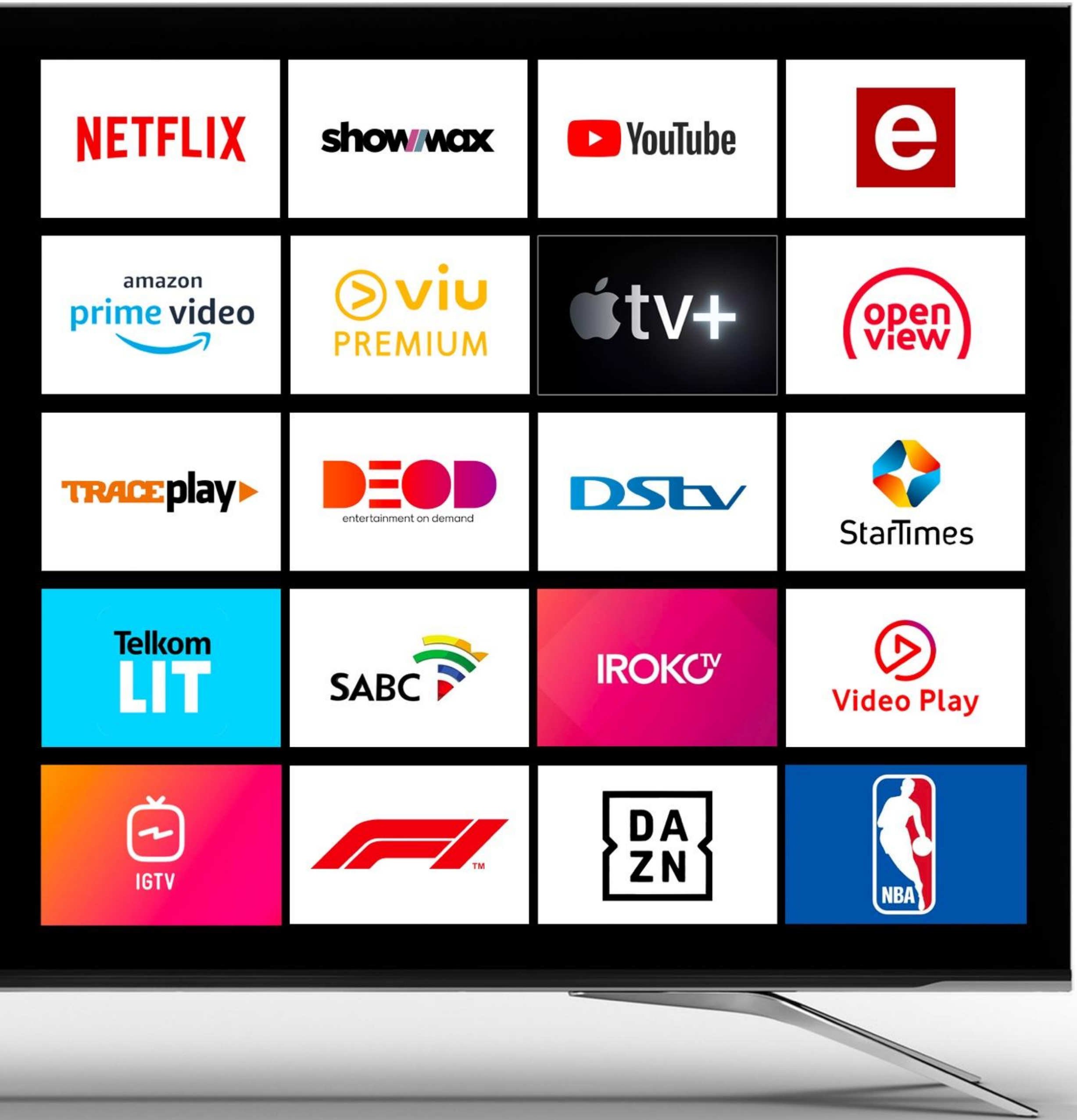

Rapid, dramatic changes to audio-visual landscape

Continued dramatic and accelerated shifts in competition

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Market development: 2010 - 2020

Excludes pirated content available online

Types of Players[1]	2010	2015	2020
OTT Sports			
Telcos			
SVOD			
AVoD/Social			
Broadcasters			
	Local & broadcast oriented competition	Competition intensifies in SA market	Undeniably competitive environment driven esp. by OTT and a global marketplace

Plummeting mobile broadband prices support massive streaming uptake

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Data prices have dropped significantly

~60%

*Decrease in Vodacom effective **price per MB since 2017***

SIM-only pricing is extremely aggressive and doesn’t require a contract

Provider	Deal	Term	Cap	Price	R/GB
Vodacom	Red hot special	24 mo.	**40GB**	**R199**	**<R5**
MTN	Mega deal special	24 mo.	**40GB**	**R199**	**<R5**
Telkom	Feb deal of the month	24 mo.	**20GB**	**R119**	**<R6**
Afrihost / MTN	LTE pricing	Month to month	**60GB**	**R199**	**<R4**
Afrihost / MTN	LTE pricing	Month to month	**120GB**	**R349**	**<R3**
Afrihost / MTN	LTE pricing	Month to month	**200GB**	**R549**	**<R3**

Source: Vodacom Annual Integrated Reports, My Broadband, Business Live, company websites

Plummeting fixed broadband prices support massive streaming uptake

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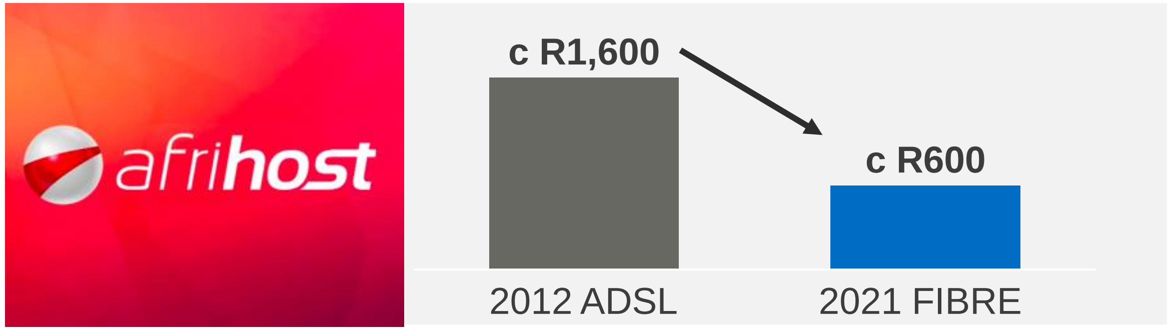
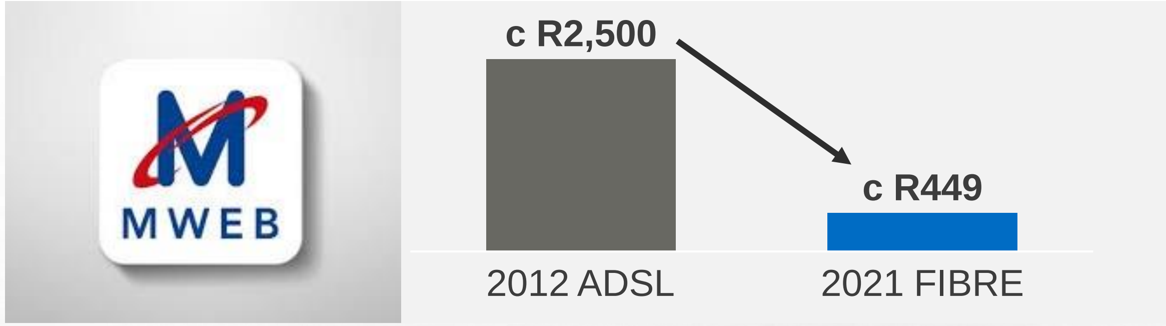
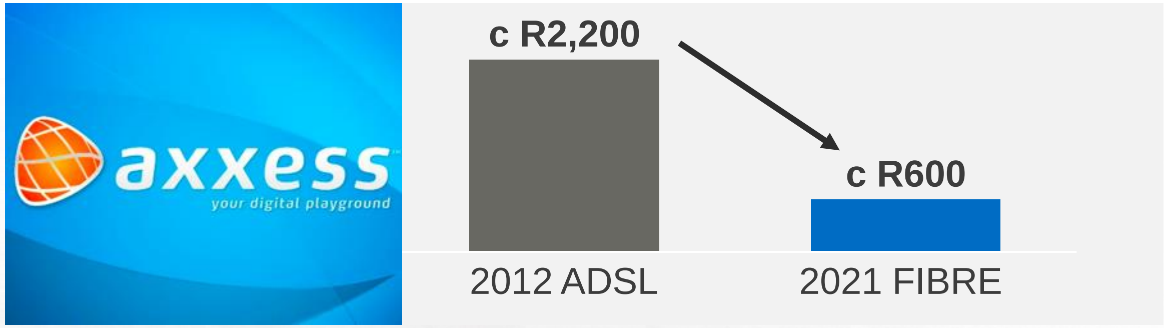
Comparison of 10Mbps Uncapped Prices in 2012 vs 2021







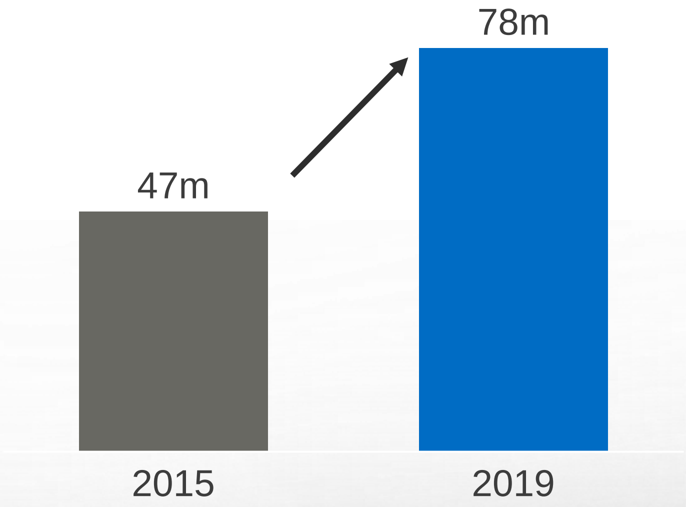
Source: My Broadband
Notes:: ADSL pricing includes line rental for voice and data (as they are sold bundled). Openserve pricing used for fibre prices

Falling prices have caused rapid growth in access to broadband

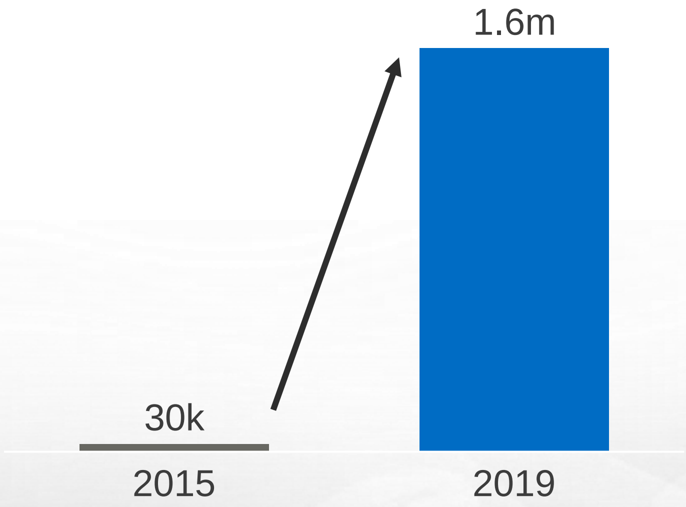
1 **Rapid Growth of broadband ecosystem and internet use**

Number of broadband subscriptions, SA

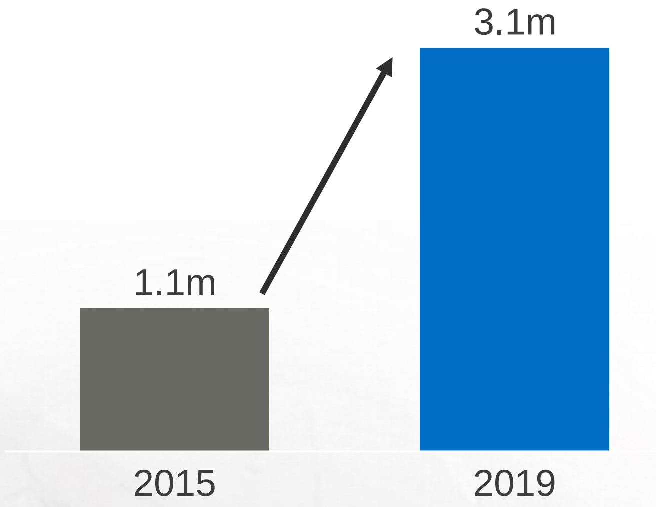
Mobile broadband



FTTH/B



Total fixed broadband[1]



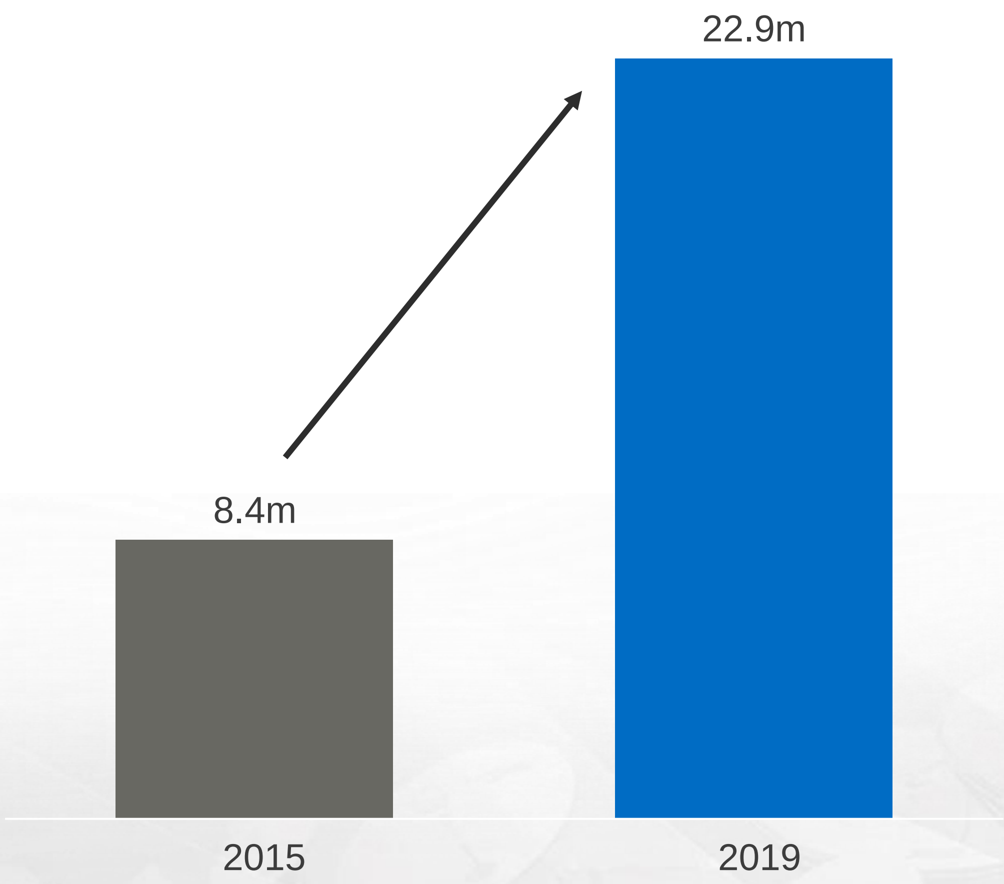
Source: ICASA The State of the ICT Sector Report in South Africa 2020; Statista, Strategy Analytics, Digital TV Research, World Wide Worx, PWC Entertainment and Media Outlook 2015-2019

[1] Fixed broadband includes FTTH/B + DSL + other fixed (wired broadband); excl. wireless broadband in form of terrestrial fixed-wireless + satellite broadband = 231,687 in 2019

Leading to exponential increase in streaming of video services in SA

2 Evolving consumer behaviour to online viewing

OTT Video Users, SA



Source: Statista, Strategy Analytics, Digital TV Research, World Wide Worx, PWC Entertainment and Media Outlook 2015-2019

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OTT has disrupted traditional broadcasting (both pay and FTA)

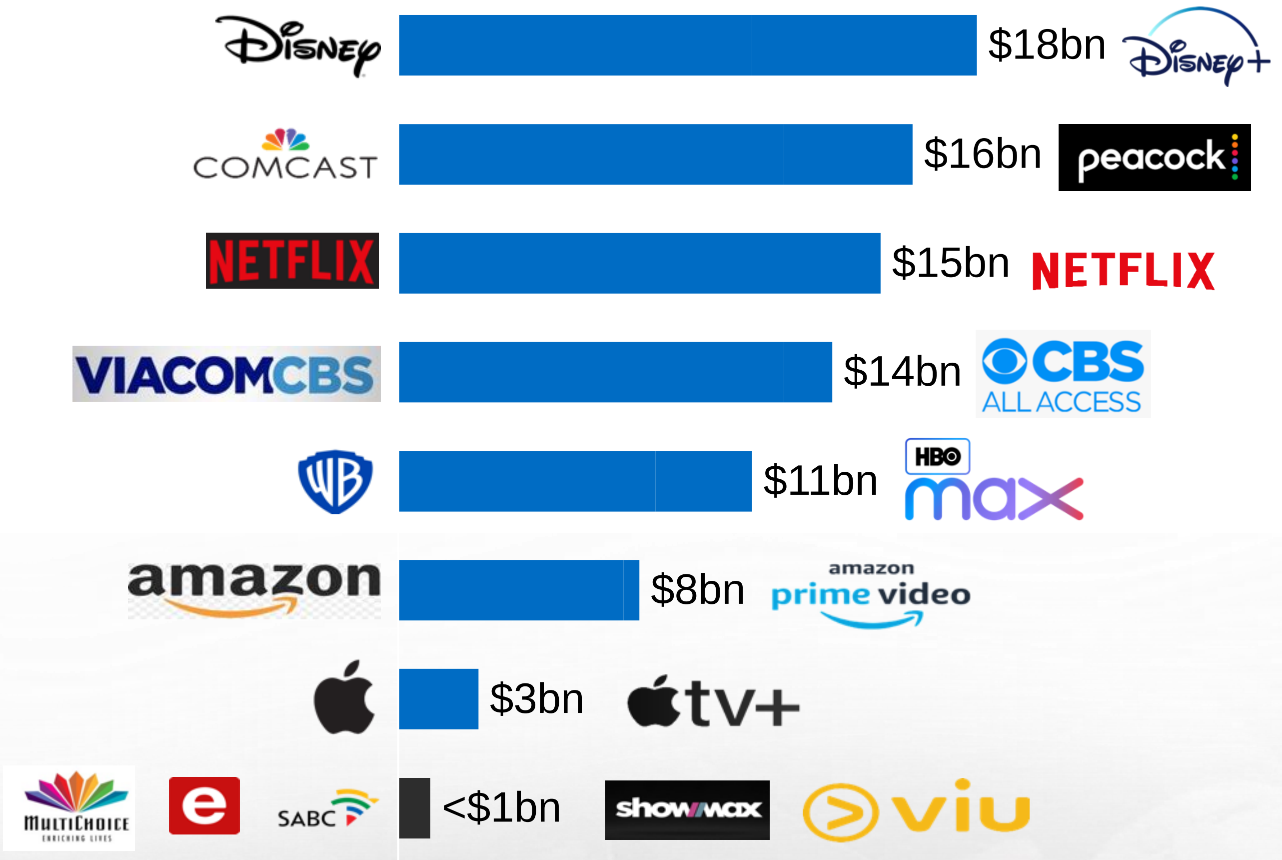
Broadcasters in SA at a disadvantage vs major OTT players

OTT Competitive Advantages	Global OTT Players	Local Broadcasters
Enter market without a licence	✓	✗
Use existing broadband infrastructure	✓	✗
No Legacy costs	✓	✗
Spend billions of US dollars on content	✓	✗
Invest huge sums of money on product development	✓	✗
Leverage huge global subscriber bases	✓	✗

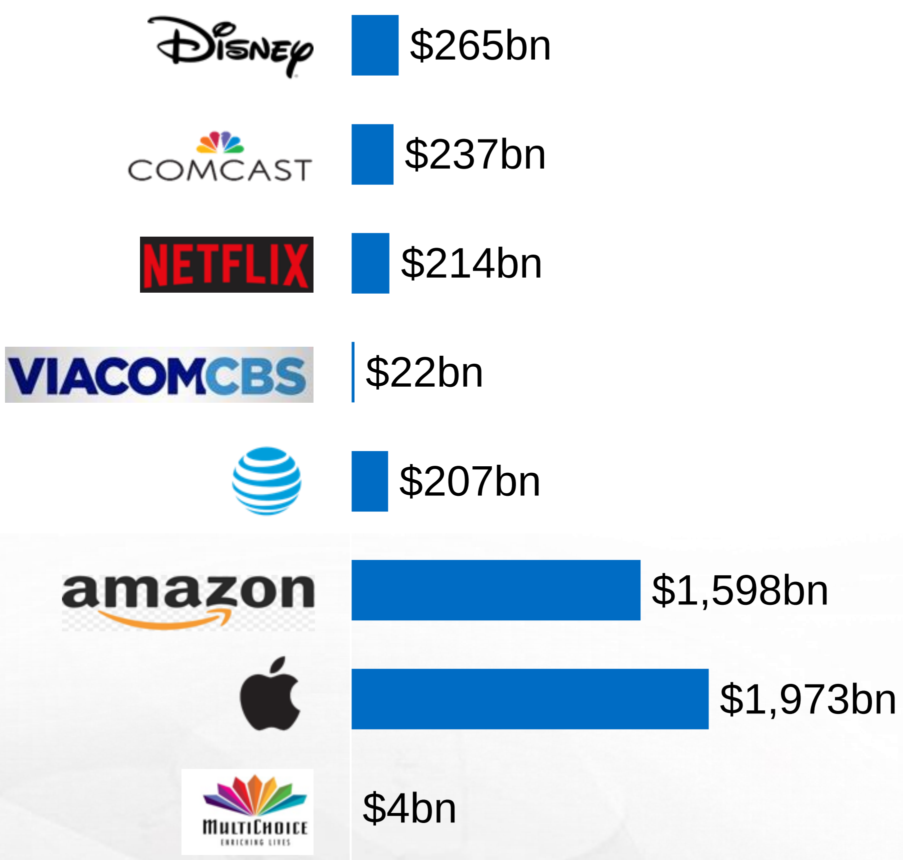
Source: MoffettNathanson, company websites

MultiChoice must compete against these global gorillas

Content spend, 2019



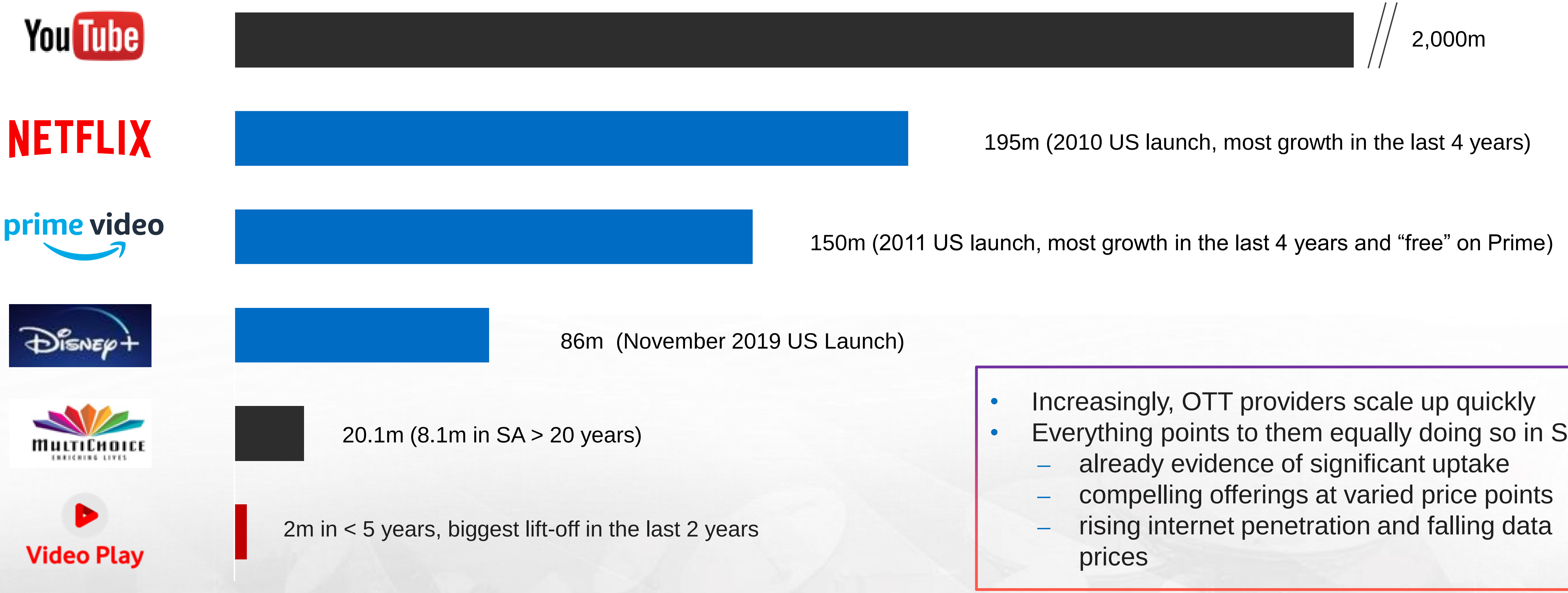
Market Capitalisation



Notes: AT&T own Warner Bros
Source: MoffettNathanson, company websites; Trading View

OTTs continue to scale up easily and quickly with permanent impact

Subscriptions/Users, latest available data as at December 2020



- Increasingly, OTT providers scale up quickly
- Everything points to them equally doing so in SA
  - already evidence of significant uptake
  - compelling offerings at varied price points
  - rising internet penetration and falling data prices

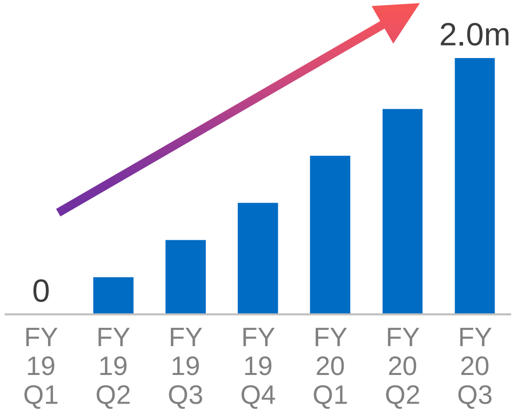
Source: Company reports, BMO Capital

Other OTT players in SA scaling up across consumer segments

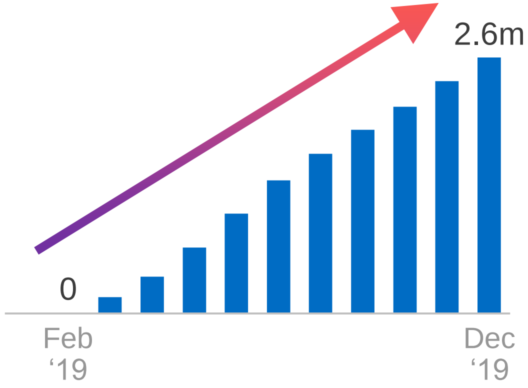
For example: Video Play | viu | YouTube

USERS AND GROWTH

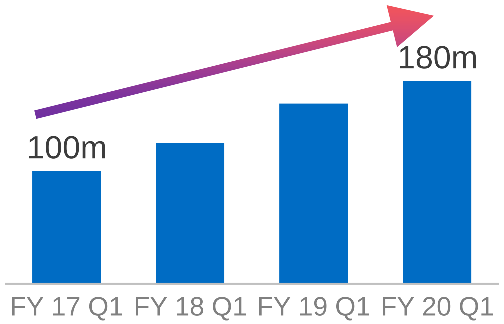
Video Play – Active users, SA



viu – Android downloads, SA



YouTube – Visit growth Mar 17 – Mar 20, SA



OFFERING

Video Play

- **Local & international movies and series, kids content etc.**
- Packages range from R5/ day to R99/month
- **Able to leverages across existing mobile subscriber base (including mass market)**

viu

- **Broad target audience with both FTA and paid for content** (R69/month, R20/week or R5/day)
- **Includes:**
- Bollywood films, African series & movies, South Asian shows
- EPL FTA football (via OpenView)
- Exclusive rights to select popular SABC programmes

YouTube

- **Vast array of free content for all audience types including:**
- FTA local content
- Kids programmes
- Sport (e.g. NBA Africa & BT sport)
- User generated content

Source: Vodacom Investor relations and SimilarWeb

Other recently launched OTT services in SA

Status in SA	Launched		
Providers	Apple tv+	HUAWEI VIDEO	DAZN
Key Threats	• **Free** with all iphone, iPad, iPod touch, Apple TV or Mac purchases • **>3.5 million iOS mobile users in SA** • **Strong brand** • **Marketing firepower**	• **Launched with >10 000 hours of content and 30 million short videos clips** • **29% mobile market share in SA** • **Strong brand**	• **Strong war chest of sporting rights** (Champions League, La Liga, Serie A) • **Global purchasing power** • **Huge financial muscle** • **Launched in >200 countries in December 2020**

Other OTT players poised to launch their services in SA

Status in SA	Launch Imminent			
Providers	Disney+	peacock	discovery+	HBO max
Key Threats	• **Incredible arsenal of content & brands** (LucasFilms, Fox, ESPN, Marvel, Pixar, National Geographic, Hulu) • **Significant cost advantage** from box office revenue • **Some content may be available exclusively on own service** (e.g. UK & New Zealand)	• **Comcast's streaming service** • **Disruptive advertising model** • **Incredible content library** (Dreamworks, Sky, NBC Universal, Xfinity) • **Certain Comcast content may be exclusive to Peacock**	• **Discovery's OTT streaming service –** global launch 4 January 2021 • **Combines Discovery's current DTC offerings –** Eurosport Player and D Play • **Very wide content slate** (general entertainment and sports) • **Some content may only be available on Discovery+**	• **Warner Brothers' streaming service** • **Recently announced its disruptive windowing model - simultaneous release of movie content to this service** • **Massive content library rivalling Disney Very wide content slate** (general entertainment, news and sports) • **Exclusive availability of some movies on HBO Max**

HBO Max launch: changing the movie consumption landscape

- AT&T Warner Media announced in December 2020 that, effective 2021, it would release globally all its films on its direct-to-consumer OTT service HBO Max at the same time these are released in cinemas
- Eliminates windowing by collapsing the theatrical window and the Transaction Video on Demand window into a single window, with potential exclusive availability of the movie content on the HBO Max OTT service on release. This invalidates ICASA's conclusions on windowing
- Results in partial, if not full, disintermediation of traditional broadcasters from HBO movies
  - This means movies become even less important to the content curation strategies of traditional broadcasters as they compete with direct-to-consumer offerings of studios among other competitors
- Discredits ICASA's market definition and contemplated remedies
- As with the launch of Disney+, this direct-to-consumer offering increases the plethora of choices available to consumers

OTT entry has led to content explosion but also increased content fragmentation

OTT has created highly fragmented marketplace filled with many options, each with its own particular content offering

- Large global OTT players, including Netflix and Amazon, have evolved from being just aggregators to being **large-scale content creators & providers of retail services**
- Some content creators, sporting bodies and studios, who previously supplied their content to traditional broadcasters, have now launched their own direct-to-consumer offerings
- This has resulted in:
  - Some consumers spreading viewing across a growing range of multiscreen services
  - BUT being confronted with multiple apps, payment methods and access portals
  - Popular international content no longer being available to traditional broadcasters (e.g. a wide range of Disney movies and programming, Netflix originals like Orange is the New Black)
  - Significant numbers of pay TV subscribers switching to consuming a range of OTT services

OTT entry has led to content explosion but also increased content fragmentation (2)

Traditional broadcasters globally have responded by including OTT services on their set top boxes

- This **extreme fragmentation of video entertainment services** has created a role for **aggregation of services** by consumers, broadcasters and device manufacturers

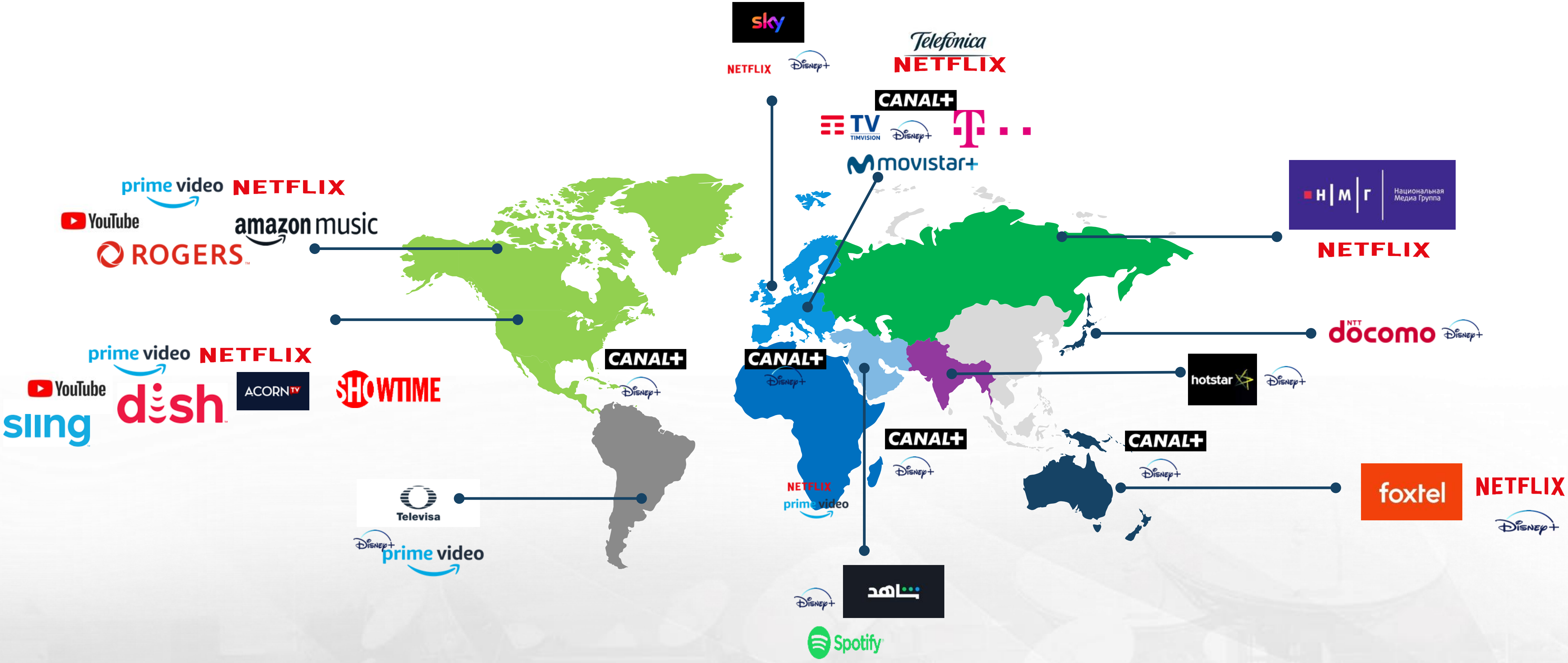
- Convergence of consumer electronic (CE) devices, means OTT apps are accessible to consumers on any connected devices including:
  - smart TVs
  - laptops, tablets, smartphones
  - gaming systems (Playstations, Xbox etc)
  - streaming boxes (Apple tv,Telkom Lit, Roku) etc

- These enable consumers to self-aggregate and enjoy the convenience of viewing their chosen video entertainment at any time, in any place on any device

- Changing dynamics have compelled traditional broadcasters to adapt by aggregating OTT services on their set top boxes

OTT integration with broadcasters are common across the world

95 Broadcasters globally had aggregated OTT services by end of 2019



Aggregation of services is commonplace and normal: UK example

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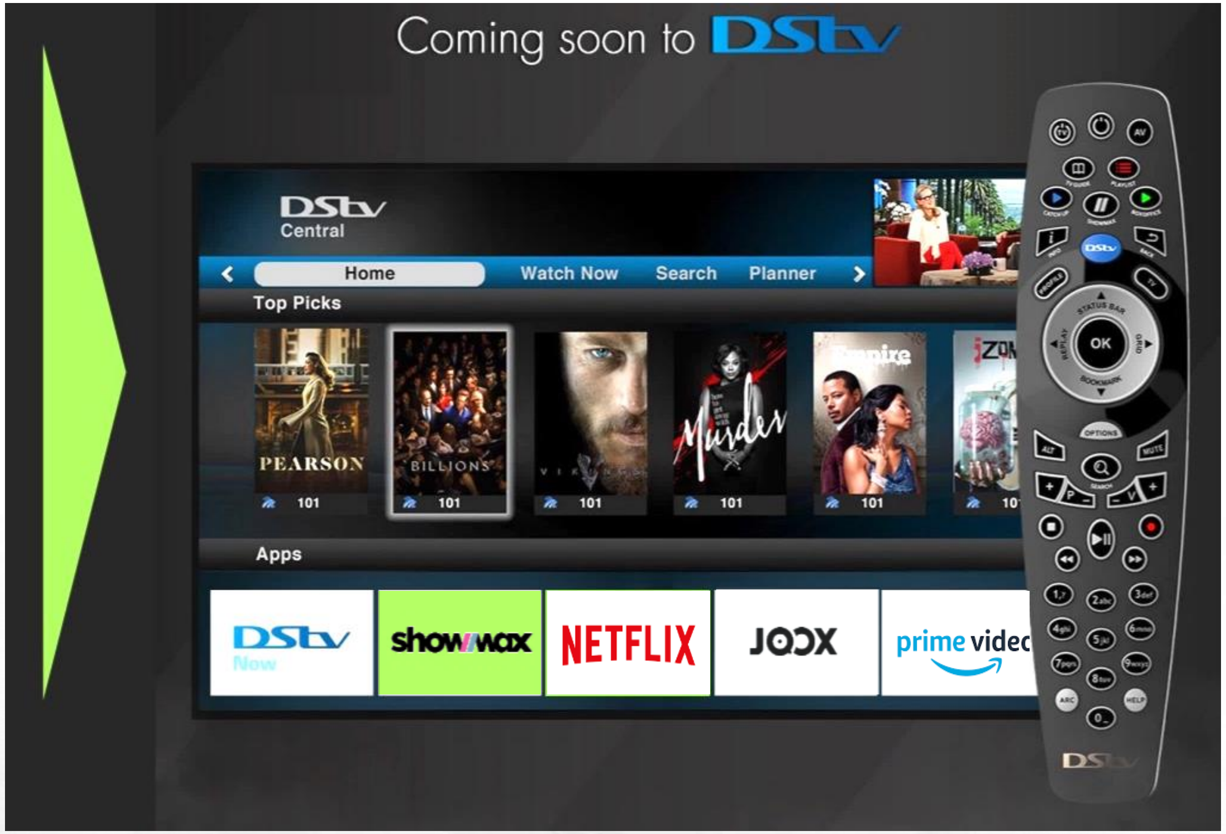
SKY Q	BT YouView	Virgin TV V6	Freeview Play	Consumer Electronic device (e.g. smart TV, smartphone)
sky box sets	BT TV	sky cinema	CBS catchup CHANNELS UK	
Disney+	NOW TV	vevo	NOW TV	NOW TV
NETFLIX	NETFLIX	NETFLIX	NETFLIX	NETFLIX
Spotify		itv HUB	itv HUB	Disney+
BBC iPlayer		BBC iPlayer	BBC iPlayer	
	prime video	prime video	UKTV Play	prime video
YouTube		YouTube	My5, 4	YouTube
			horror BITES	

Like others, MultiChoice is extending its aggregation model to include OTT partnerships

Recently announced non-exclusive distribution agreements with Netflix & Amazon Prime Video

- Netflix & APV offerings can now also be accessed via the new MultiChoice decoder & an internet connection
- Subscribers can add the cost of services to their DStv bill
- By providing DStv subscribers with convenient access, MultiChoice –
  - Hopes to keep subscribers on the DStv platform even if they downgrade to a lower DStv offering
  - Earns additional revenue as SVoD providers pay a fee to MultiChoice for distribution and subscription collection



OTT services are available on numerous consumer electronics in RSA

PlayStation

Ultra-link android TV

Ematic TV Box

Xbox

Seiki Android TV Dongle

Telkom LIT TV Box

Amazon Fire TV

Apple TV

Xiaomi Mi TV Box

Xperience Android TV Box

Also available on:

smart TVs, smart devices (smart phones, tablets, laptops/PCs) and web browsers

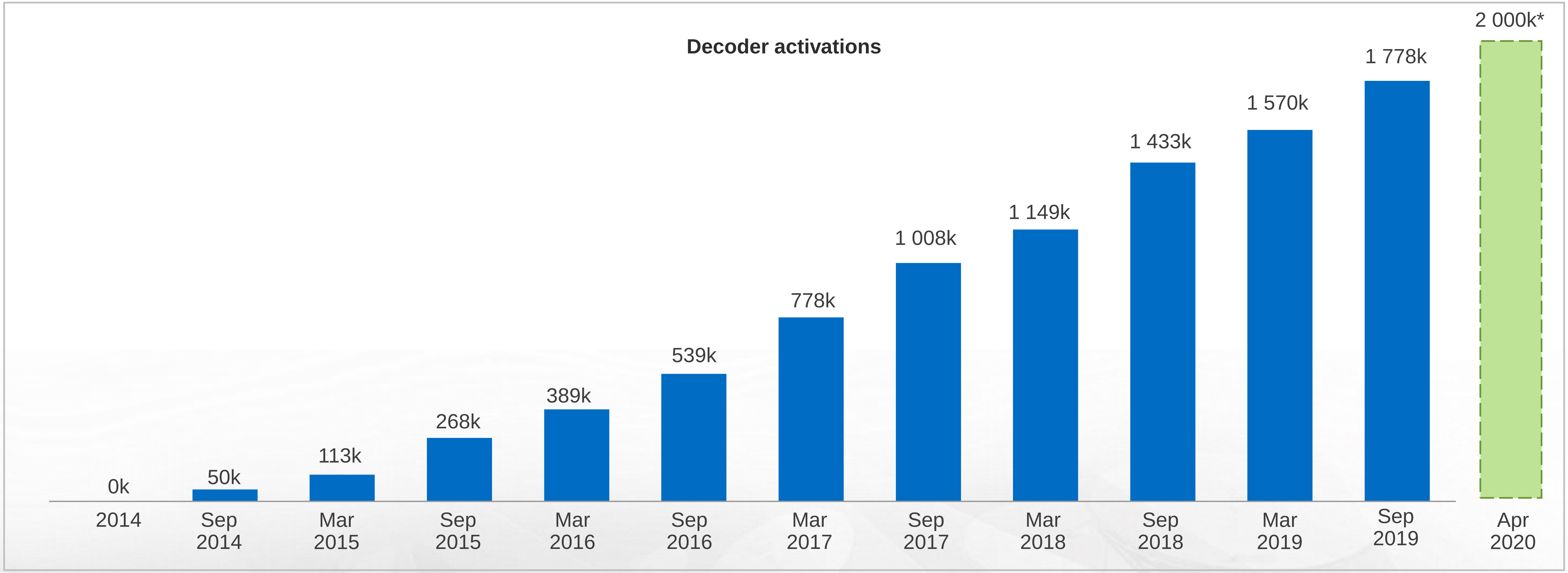
The services can be **synced across various devices using the user's Google or Apple ID**

NETFLIX · DStv Now · showmax · prime video · viu PREMIUM · TRACE play · Video Play · YouTube · IROKO TV · tv+ · DEOD

OTT impact is amplified by strong local FTA competition

Strong competition from FTAs continues

OVHD Decoder Sales showing continuing strong growth



Source: eMedia Holdings Investor Relations; *https://www.openview.co.za/ accessed at 12h57 on 16 April 2020; TAMS

OVHD continues to grow on the back of high quality content

eMedia Investments

"This is indeed an impressive growth achievement for the platform, more so in an increasingly competitive digital era, where viewers enjoy diverse content and platform alternatives at the simple push of a button.

The fact that we can celebrate viewership in two million homes around the country is testimony that our viewers approve of the quality of our Openview content. As eMedia gears to release its annual financial results in the coming weeks, we look forward to seeing how the 2 million activations have positively impacted our financial results. This will also assist with our planning and projections for additional content in our 2020/21 fiscal,"

Antonio Lee, COO

https://www.openview.co.za/campaigns/two-million - 27 May 2020

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Traditional Pay TV is fighting to survive and remain competitive

Direct and observable impact of OTT on traditional Pay TV

[CONFIDENTIAL]

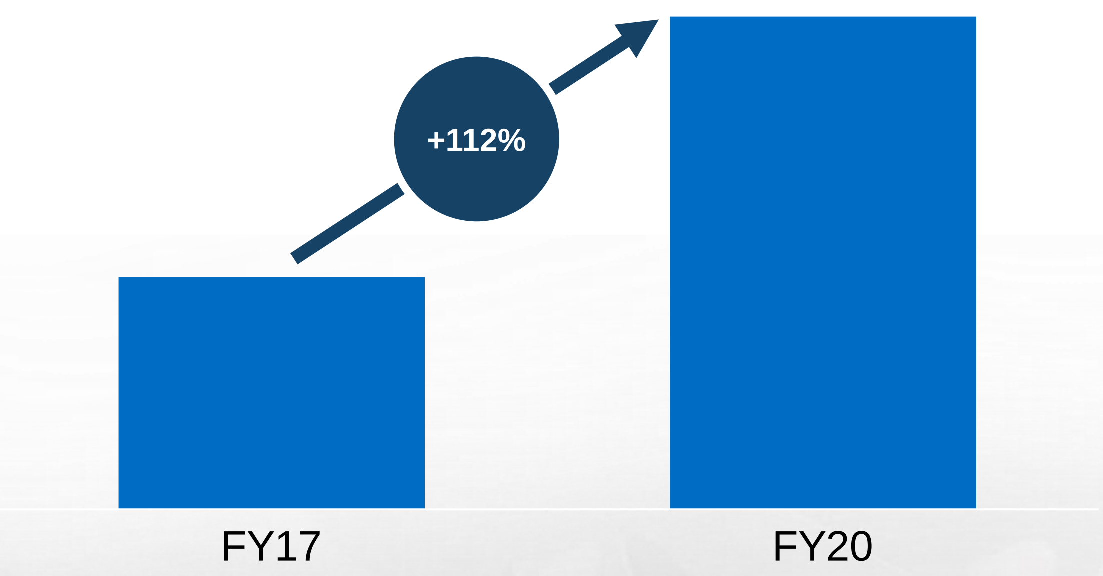
Access to broadband enabling cord-cutting and cord-shaving

[CONFIDENTIAL]

Given FTA and OTT competition, we are increasing our investments

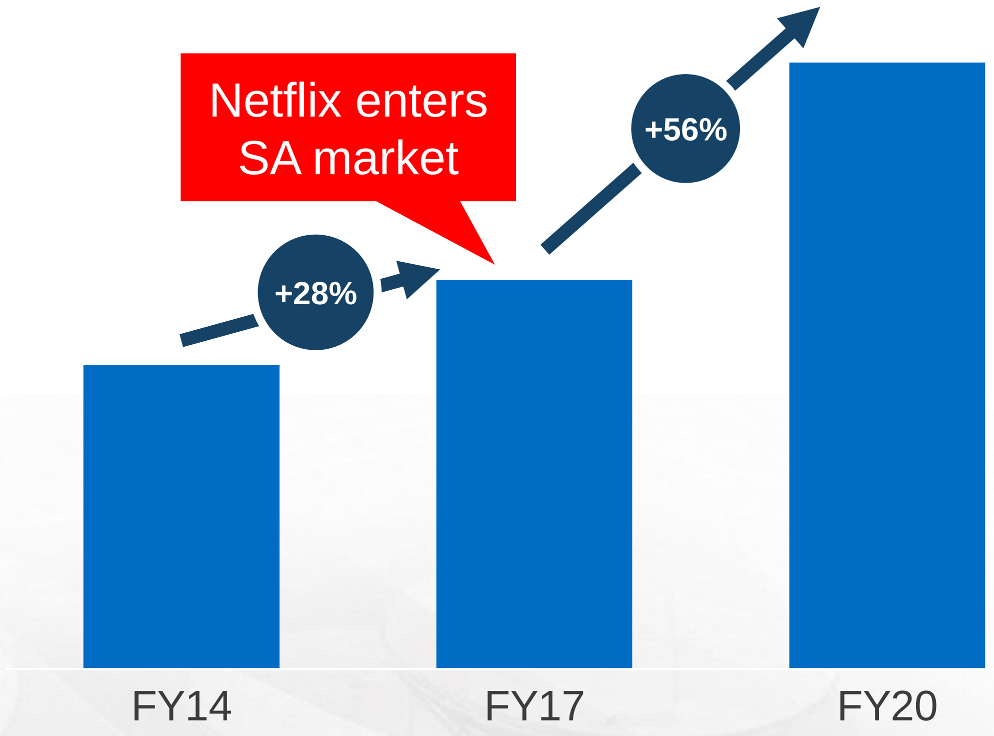
MCSA has intensified its retention efforts

Increase in retention spend – South Africa
Financial years (April – March)



MCSA increasing its investment in local content as key differentiating strategy

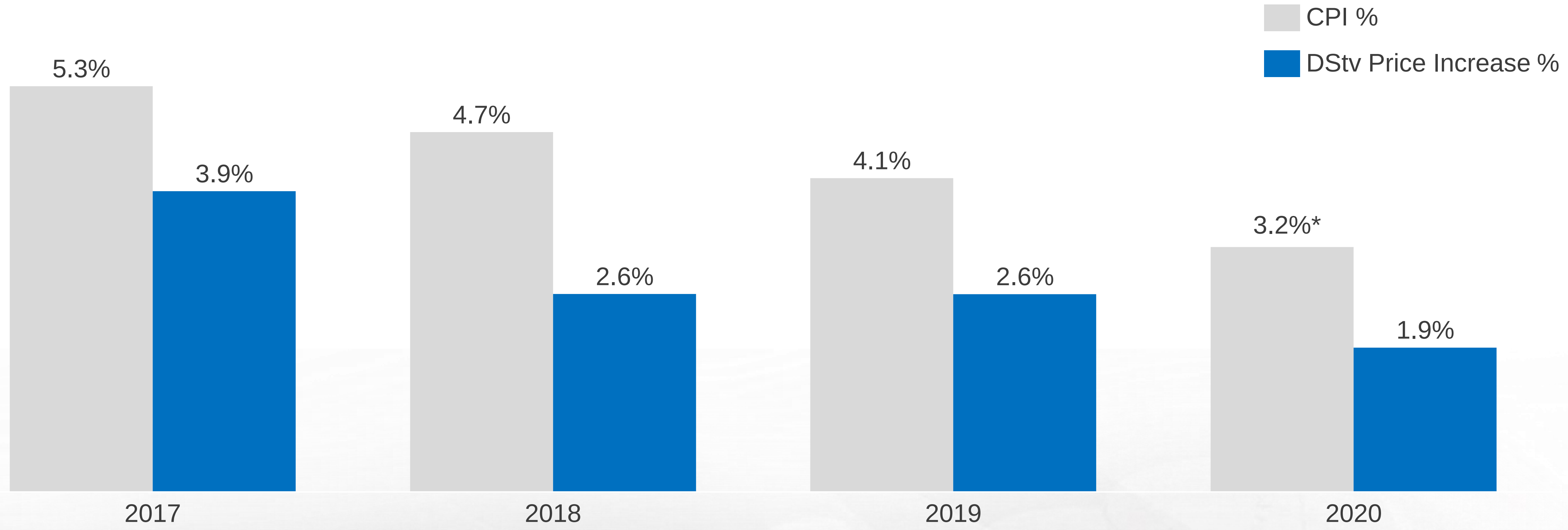
Increase in local content spend – South Africa
Financial years (April – March)



Source: Company data

Increased competition impacting pricing

Average DStv price increases lagging behind inflation despite rising content cost and other value-adding efforts



Source: Company data, StatsSA
Notes: * CPI refers to average annual figures, except 2020 which refers to the average for the 11 months ending November (latest available figures). DStv packages refer to Premium, Compact+/Extra, Compact, Family, Access & Easyview

Market realities are more competitive and complex, require adaptation

We are in a period of dramatic and rapid change and disruption

- **The competitive environment is undoubtedly intensifying**
  - The rise of OTT services, is the single most important development since the advent of Pay TV
  - It is resulting in the disintermediation of traditional Pay TV broadcasters
  - Many major new competitors are global firms with massive scale & resources dwarfing MultiChoice
  - Many more OTT firms (including global giants) are poised to enter in the short term
  - Increasing OTT competitiveness is complemented by sharpened local competitive dynamics through FTA
  - FTAs are performing well in local content-backed offerings, SABC and e.tv programming have a significant following and OVHD has had significant growth
- **Traditional Pay TV is fighting to survive and remain competitive – this is a trend observed globally and it is no different for MultiChoice**

Regulation must embrace market realities (1)

Any regulation must not hinder competition

- Regulators elsewhere are acknowledging the significant disruption that OTT is creating with respect to local broadcasters
- This is also being recognised by proposed changes to government policy:

"The whole media system is experiencing a digital revolution and is in transition… The driving force behind this revolution as in other sectors is the Internet. <u>The change it brings is not merely more content and more content providers, it is the overthrowing of the current broadcasting distribution ecosystem and a change in the way that viewers consume audio and audiovisual content.</u> – Draft White Paper on AAVCS Policy Framework, October 2020, p.21

"Hence going forward issues requiring change include (but may not be limited to):

A restructuring of ICT governance bodies <u>to better align with the trends in technology which e.g. reduces differences between broadcasting and internet services"</u> – Report of Presidential Commission on the Fourth Industrial Revolution, published in Government Gazette 23 October 2020, page 42

Regulation must embrace market realities (2)

Any regulation must not hinder competition

- s67 prescribes that regulation must be pro-competitive and must seek to achieve effective competition in the sector
- A comprehensive analysis and accurate reflection of market dynamics demonstrates:
  - a broad market
  - which is highly competitive, and becoming increasingly more competitive
  - in which MultiChoice (and other traditional broadcasters) are fighting to adapt and survive
- **ICASA is urged to recognise that regulations in these conditions will disempower a local entity, with a track record of investment and innovation**
- **Global giants will compete with all local firms, unconstrained by regulation**
- The contributions and ability of MultiChoice to adapt and compete effectively should not be undermined by regulation that is not fitted to market realities

ICASA's market definition and competition analysis excludes critical forces of current and future competition

Economic analysis is the foundation of an ICASA Market Inquiry

The four steps of the s67 ECA Market Inquiry

4. Consider possible pro-competitive remedies
3. Consider significant market power (SMP)
2. Assess effectiveness of competition in those markets
1. Define the relevant market(s)

Only if the first two steps are done properly can SMP and potential remedies be accurately determined

The ability of the identified constraints to be effective on a forward looking basis

Relevant market = identifies all the relevant competitive constraints on the provider

ICASA's findings are based on a faulty foundation

ICASA's findings and conclusions do not meet the analytical standards set by s67

- Neither the core economic principles nor the statutory instructions required for market definition have been applied
- As a result, ICASA's market definition leaves out critical sources of competitive constraints. This renders the market definition inoperable – and misleading – as a framework for regulatory decision-making
- s67 requires assessment on a forward-looking and dynamic basis. Instead, the Draft Findings look backward and are static
- ICASA's own consumer survey and other key evidence have been misinterpreted or not taken into account. A lack of objective criteria, for example on premium content, has resulted in circular reasoning and serious contradictions

Consequently, the findings largely ignore the massive and irreversible structural changes in the market for audiovisual entertainment. These changes acknowledged in the White Paper and other policy documents

The resulting conclusions are invalid. The effect would be to place South African pay TV providers at a profound disadvantage to unfettered and powerful global competitors

Market definition: Identifying competitive constraints

'Market definition' should discipline the competitive assessment by identifying all the relevant/material constraints on the products/services being investigated

- A relevant 'market' is the collection of **all other products that 'constrain' the focal product being assessed**
  - "Constrain" means that the firm producing the focal product is forced to take into account that alternatives are available

- A 'constraint' requires that **a material group of consumers will switch to the rival in response to an increase in price** (or reduction in quality) by the focal producer.
  - **Not all consumers need to switch – just enough** to dissuade the focal firm from raising prices

This is formally encapsulated in the **SSNIP** or **hypothetical monopolist** test, which looks for the smallest set of products (starting from the focal product) such that:

A hypothetical monopolist over that set of products could raise prices by a small but significant & non-transitory amount (a 'SSNIP'), usually 5-10%, without losing so many customers that the price rise is unprofitable

Need to establish

- To which other products would the consumers that are most likely to switch (i.e. those at the margin) divert?
- How much switching would occur if the price of the focal product were to be increased by **5-10% in real terms**?

Market definition: Assessing the boundaries of the market

MultiChoice
ENRICHING LIVES

Focus is on viable alternatives for the consumer

Need to understand what products **consumers** consider credible **alternatives**

But the Draft Findings focus on *product characteristics*, not how consumers choose between alternatives

Requires an assessment of switching by marginal consumers

Not <u>all</u> consumers need to switch, only enough **marginal consumers** to make a price increase unprofitable

But the Draft Findings focus on the *'typical consumer'* instead of marginal consumers.

Assessment of constraints is factually informed and evidence based

Constraints are considered in aggregate

Collectively products can still pose a constraint, even if no individual product significantly constrains pricing of the focal product on its own, especially for differentiated products

But the Draft Findings consider alternatives to Pay TV one-by-one, instead of considering the aggregate loss of customers to the various alternatives

Chains of substitution must be considered

Continuous chains of substitution mean that non-adjacent products can indirectly constrain the focal product

ICASA agrees that these should be considered, but then misapplies the concept in the Draft Findings

Market definition: Using surveys to identify constraints

MultiChoice
ENRICHING LIVES

Consumer surveys

Consumer surveys are a tool often used to inform the market definition exercise (as well as the competitive assessment)

Surveys are used to explore how consumers substitute between products, in particular in response to changes in relative prices (and/or quality)

In this inquiry the central questions are:

- Are Pay TV suppliers unconstrained?
- What would happen if Pay TV prices increased relative to other formats?
- Would viewers switch, and to what?
- Would enough subscribers switch to render a price rise unprofitable?

ICASA's consumer survey

ICASA commissioned a consumer survey after the 2018 oral hearings & relies on this extensively for its market definition

BUT the ICASA survey did not ask a single question on how the respondent would react to a Pay TV price increase

Instead the survey asked questions about:

- TV consumption patterns
- Reasons for choosing Pay TV packages
- Choice of hypothetical packages

None of these probe when and to what extent consumers would switch in response to a Pay TV price increase

The ICASA survey is not a reliable basis for determining switching behaviour and hence market definition
It is also no longer current in a fast moving market

Market definition:
Unsupported conclusions are reached from the ICASA survey

‘Separate markets for Pay TV and FTA’

- ICASA claims it is unlikely that viewers generally would switch from Pay TV to FTA in response to a price increase
- This is based on survey finding that better quality signal is the strongest reason for purchasing a basic DStv package over FTA
- **This does not tell us about the switching behaviour of critical (marginal) customers in response to a price rise *for Pay TV***

‘Separate markets for Pay TV and OTT’

- ICASA cites its survey as finding that a lack of sports content on OTT is a ‘key reason’ it would not satisfy subscriber needs
- However, <1% of Compact/Compact Plus subscribers (the only group for whom this figure is reported) indicated they would not subscribe to Netflix (in addition to their current package) due to the lack of sport on Netflix
- **This again tells us nothing about how many respondents would switch from their current Pay TV package to OTT if prices rise**

These survey findings cannot be used, as ICASA does, for concluding markets are separate

Market definition: Case precedent from other jurisdictions

- **Factual findings** on market definition cannot be transposed from one jurisdiction to another or one time period to another
- Yet ICASA **relies on the conclusions** of certain international precedents to support its findings, and **misapplies** the findings in those cases

Example: ICASA relies on the *Liberty Global/Ziggo* merger case (European Commission, 2014 and 2018) as relevant precedent for the assessment of the relationship between Pay TV and OTT services

But this decision cannot tell us whether OTT services represent a significant constraint on Pay TV in SA at the retail level

- The EC left open whether linear services (Pay TV) and non-linear OTT services are in the same retail market
- ICASA incorrectly suggests retail markets were defined using broadcasting windows (this instead related to EC's upstream analysis of upstream markets for the licensing and acquisition of content)
- 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'*

In any event, European precedent in retail AV markets continues to evolve post-*LG/Ziggo*: in more recent cases (e.g. *Telia/Bonnier* EC, 2019), the question of FTA vs. Pay TV was left open, as was the distinction between OTT and other distribution modes. Evidence overwhelmingly that in countries where OTT penetration is more significant, traditional TV viewing has majorly declined.

Market definition: OTTs
ICASA's findings

MultiChoice considers OTT providers like Netflix, YouTube, Disney+, HBO Now & Peacock to be an existential competitive threat. It is dedicated to responding to this challenge.

Yet the Draft finds that OTT services are not a constraint on Pay TV. It cites three reasons

- **Viewing patterns**: a reported high incidence of linear television viewing amongst South Africans
- **Lack of access to broadband**: the assertion that good quality broadband access is limited and expensive
- **Differences in content**: the claimed lack of live sport or news content on OTT offerings (and on Netflix, in particular)

None of these reasons survive scrutiny

- **Viewing patterns: the linear versus non-linear distinction is spurious**:
  - OTT services can & do offer linear content e.g. Netflix Direct, YouTube, Showmax and Startimes ON
  - Traditional broadcasters are also offering VOD functionality. DStv's 'Catch-up' allows for VOD functionality in Pay TV and SABC has made content available on demand via YouTube and subsequently Viu
  - *Dispositively*: non-linear viewing offers a competing option to **any** linear time-slot (with massively greater options) & is thus a particularly powerful constraint. In fact, Catch-up bingeing (non-linear) now commands a large and growing share of viewing

Market definition: OTTs
ICASA's survey contradicts the Draft Findings

- **Broadband access is already sufficiently widespread for DSTV viewers to switch to OTT on a massive scale**

DStv respondents that watch TV on an alternative device (ICASA survey)

77%	81%	84%
of surveyed EasyView, Access or Family subscribers	**of surveyed Compact/ Compact Plus subscribers**	**of surveyed Premium subscribers**

*Alternative devices include: a desktop or laptop, cellphone or smartphone, tablet, iPad, games console or other media player.

- Three-quarters of DStv subscribers already watch TV on other devices – so they have sufficient broadband for streaming
- [CONFIDENTIAL]
- This demonstrates that enough marginal consumers have access to Broadband for OTT to be a relevant constraint
- Vodacom's data cost fell by 30% in April 2020 and is slated to fall by another 40% in April 2021

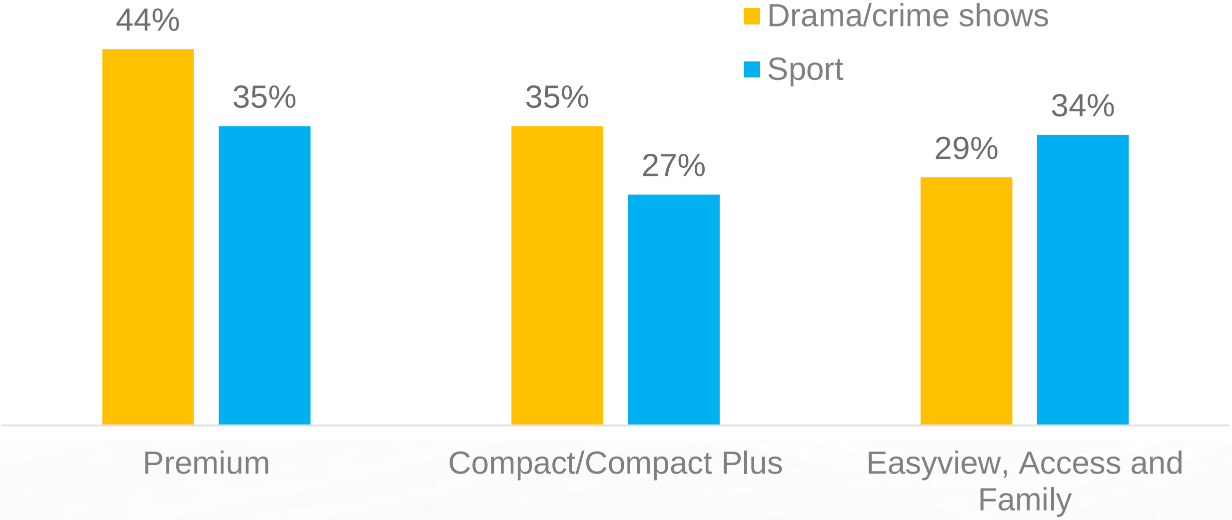
[1] Internal data, see slide 40

Market definition: OTTs
ICASA's findings

- **Differentiation in content**

Sport would not stop a large number of DStv viewers from switching between Pay TV & OTT

ICASA Survey:
Top 3 content genres: Drama/crime vs. sport



ICASA's survey indicates:

- **For two-thirds of all DStv viewers, sport is NOT one of the top genres**
- **Drama/crime is listed in subscribers' top 3 content genres more often**

First-run Hollywood movies is by no means a distinct category

- Netflix is now by far the largest 'Hollywood' studio with the most Academy Awards nomination in 2020
- Series and features from OTTs like Disney, HBO Max, Netflix & Amazon Prime are now the most desirable content. For DStv viewers whose top genre is drama/crime, numerous quality exclusive series on OTTs are a compelling drawcard
- Release windows have collapsed, as is evident from decisions by Disney, Universal and Warner. Streaming and TVOD are the winners, and cinema exhibitors and traditional Pay TV the big losers

Market definition: OTTs
The correct conclusion

Consider Netflix

Annual spend on original content is **$15 billion** compared to MultiChoice's **<$1billion**

Has **183 million subscribers** compared to MultiChoice Group's **7 million**

Recently launched **R39 & R59 per month mobile plans in SA**

Consider Vodacom

44.3 million mobile subscribers in SA alone

2 million customers engaged on the VideoPlay platform in SA by Dec 2019

Service being rolled-out across the continent

'Our digital ambition is to become a leading go-to brand for all things entertainment in video (Video Play), music (MyMuze), gaming (PlayInc & related gaming products), lifestyle (Vlive) & various sports offerings.'

Consider Disney (future entrant)

Annual original content spend of **$18 billion** & the most powerful content library in the world

After just 18 months, **Disney+ has 87 million** subscribers

It is producing **100 original Pixar, Marvel, Star Wars and Disney series and features** for streaming

- **OTT entrants follow a powerful and competitive business model that is reshaping the competitive landscape**
  - Low cost entry and content distribution via use of existing broadband ecosystems
  - Able to leverage off massive regional/global subscriber bases and huge original content generation
- **MultiChoice is directly affected**
  - Premium subscriptions have fallen [CONFIDENTIAL], which is more than [CONFIDENTIAL]
  - The four largest DStv bouquets across all levels have seen significant falls in real prices in the last three years
  - MultiChoice is excluded from the burgeoning content produced by creators that do their own streaming

OTTs provide a powerful and growing constraint on DStv. They are in the same retail market and also compete in content acquisition. It is inconceivable that ICASA does not recognise this.

Market definition: FTA
ICASA's findings

ICASA finds that FTA is a limited constraint, if at all. This is based on:

- **Product differences:** ICASA refers to differences in price points, content proposition and quality and business models
- **The propensity for FTA viewers to switch to Pay TV:** focuses on claimed tendency for FTA viewers to migrate to Pay TV

ICASA's findings are at best inconclusive

- **The wrong direction of consumer switching was considered**
  - The propensity for FTA viewers to switch to Pay TV is the basis of ICASA's findings. But this is irrelevant. What matters for finding out whether FTA constrains Pay TV is switching from Pay TV to FTA: this was not tested
- **Households can make trade-offs between products like FTA and Pay TV even if the content differs**:
  - Consumers take into account price-quality trade-off when choosing between differentiated services
  - Combinations of different FTAs, and FTA & OTTs, were ignored
- **Competition in eyeballs and advertising**
  - FTA, traditional subscription services & OTT compete for advertising.This is an additional constraint on a hypothetical monopolist of Pay TV services: subscriber switching also leads to a loss of advertising revenue too

Market definition: FTA
The correct conclusions

The evidence suggests that:

- **FTA is an alternative for many consumers of Pay TV and a growing constraint on Pay TV**
  - For example, OVHD has now surpassed 2 million activations, an increase of more than 50% since October 2017
- **FTA TV offerings have been expanding and improving in recent years, increasing the constraint placed on Pay TV, particularly for low income subscribers**
  - When MultiChoice attempted to increase EasyView prices in 2015, it was forced to reduce the price back to its original level on account of losing a large number of subscribers
- **FTA channels have well-established positions which are associated with popular, high quality local content and sports**
  - Local content (drama, soapies & reality series) is important for building audiences for electronic audio-visual services in SA (& elsewhere in Africa)
  - There is an extensive range of sports rights available to FTA TV
    - OVHD has acquired the FTA rights to EPL, La Liga and boxing matches in South Africa
    - SABC recently acquired FA Cup and Bundesliga FTA rights for the next two seasons; SABC also broadcasts PSL matches, cricket, boxing and other sports

Market definition: premium content
ICASA's findings

ICASA finds that markets are segmented by 'premium' versus 'non-premium' content

- **ICASA designates the following content as 'premium':** Hollywood FSPTW movies and series and live sport (specifically soccer, rugby and cricket matches)
- **Presumably, everything else is designated as 'non-premium' content**

This distinction is not based on any objective criteria or analysis

- ICASA defines 'premium' content by listing a number of specific content rights for which DSTV pays
- No objective criteria used to qualify content as 'premium'

This has resulted in circular reasoning and untenable contradictions

- The reasoning is circular and thus invalid: universe of premium content identified as that available on DStv and this is used as a basis for defining a separate Pay TV market
- This results in contradictions that would not make sense to viewers
  - First-run Hollywood movies are labelled 'premium' while highly popular Netflix and other streaming original content (movies, documentaries and series) is not
  - Content labelled as 'premium' is available on lower-tier Pay TV bouquets as well as on FTA services (e.g. PSL, EPL, FA Cup, Bundesliga, cricket, rugby)

Market definition: premium content
Assessment of switching would have resulted in different outcomes

ICASA defines separate markets around 'premium' content on the basis of perceived descriptive "differences", but without assessing consumer switching

- The Draft Findings have no analysis of the **responses that a hypothetical monopolist supplier of 'premium' and 'midrange' content could get if it were to impose a price increase**
- This is not done at either level in the value chain where content matters – wholesale and retail

Not considering switching results in errors at both levels in the value chain

Retail level	Wholesale level
There is no analysis or quantification of what would happen if a monopoly supplier of premium sport were to raise prices: would viewers switch in response, in what proportion?	There is no analysis or quantification of what would happen if a retailer (broadcaster) faced an increase in the price of 'premium' content.
As sport is not a critical factor for a large number of subscribers, customer switching will be large	If it could shift its budget to the plethora of other available content which can be used to build an audience, then the retailer would switch

Market definition: premium content
The correct conclusion

Seismic shifts have occurred in recent years in audio-visual content

- **Content that may traditionally have been labelled 'premium' has evolved significantly:**
  - MultiChoice has shown that major Hollywood studios are now less important (this is also acknowledged by Government in its proposed AAVCS Policy Framework)
  - The whole concept of 'windows' is narrowing and collapsing
  - There has been a proliferation of highly valued series, documentary, movie and reality TV content produced by various non-traditional players
  - Similar trends are appearing for sport, with new genres developing that retailers can bid for and OTT players are acquiring rights to sports content traditionally purchased by broadcasters
  - Local content is recognised as a key differentiator important for building audiences by broadcasters and OTT providers

- **The success of OVHD and various OTT services** demonstrates that:
  - Audiences are diverse
  - A wide variety of content can be used to build an audience & impose constraints

The range of content that can be used to build audiences is much broader than it used to be, broadening the relevant content markets

Market definition
Overall conclusions

"Audio and audiovisual content consumption via the internet are fundamentally transforming the South African audio and audiovisual landscape <u>creating a broader content market than traditional broadcasting</u>."

Draft White Paper on AAVCS Policy Framework, October 2020, p.25

Effectiveness of competition: Required framework

Effectiveness of Competition requires assessing all competitive constraints (consistent with market definition)

What the EoC needs to cover

1. **Barriers to entry (and expansion)**

- Nature of barriers and whether they cannot be overcome by an efficient & appropriately resourced entrant
- Market dynamics that have or could impact on such barriers

2. **Dynamic character and functioning of markets**

- From an economic perspective this should include:
  - Actual and potential competitors
  - Impact of technological changes and convergence on entry barriers and competitor set
  - Market characteristics and nature of competition
  - Shifting consumer behaviour which facilitates entry and growth of new entrants

Note: EoC needs to be *evidence-based* and *forward-looking*

- If a market position is unlikely to be durable in the foreseeable future, *ex ante* regulation is not appropriate

EoC in ICASA's Draft Findings

- ICASA's EoC assessment proceeds from a flawed market definition
  - Critical sources of competition from OTT, FTA, and varied content have been incorrectly left out
- Hence, the EoC analysis cannot be relied upon
  - It would have to be redone based on recognition of multiple constraints

Effectiveness of competition: Barriers to entry
Entry costs

ICASA considers the following to be significant barriers to entry:
- **Lack of Set-top Box (STB) interoperability and these costs being 'sunk'**
- **The inability of StarSat customers to utilise MultiChoice dishes**
- **The ‘hassle factor’ of switching Pay TV provider**

But, OTT has changed the nature of entry, reducing entry barriers

- Entry looks very different for OTT: emergence of broadband ecosystem (available in particular to Pay TV subscribers) has effectively eliminated need to invest in & develop a physical distribution platform for content
  - Delivery platform is now the internet & smart devices. No need to develop, supply & subsidise STBs or dishes
  - Represents a fundamental shift in the delivery technology and has substantially reduced the cost of entry

Evidence shows that non-OTT entrants can and do launch effective DTH platforms

- ICASA fails to test whether any of these factors translate into insurmountable entry costs
- Entrants have a proven ability to launch their own DTH platforms and grow subscriber bases (e.g. OpenView)
- Entry and rapid growth of OVHD demonstrates that lack of STB interoperability is not a prohibitive barrier to entry, leaving ICASA's conclusion unsubstantiated

All these show that there are no insurmountable entry barriers, and they are declining

Effectiveness of competition: Barriers to entry
Switching costs

OTT has greatly reduced customer switching costs

- No STB is needed: this hardware cost is eliminated
- ICASA’s survey indicates that **over 3/4 of DStv subscribers already watch TV on other devices** (e.g. laptop, tablet, smartphone, games console) *[see slide 55]*
  - These customers need no additional hardware to access OTT services
  - And they have sufficient broadband for video streaming
  - Hence can easily switch to OTT (cord-cut / cord-shave)
- Smart TVs can be used to access OTT services
  - Otherwise a video-streaming device may be used (e.g. Google Chromecast, Telkom Lit Box)
- ICASA has provided no evidence of a material ‘hassle factor’ of switching provider
  - Moreover, OTT offers easy, convenient customer signup options with no lock-in period (e.g. month-to-month)

DTH: Lack of STB interoperability has not prevented consumers from taking up services of other DTH platforms

- Cost of STBs has declined significantly over time and is subsidised by providers *[MC’s Oct 2019 submission, para 551.1]*
- Contrary to ICASA’s claim, customers can and do re-use existing DStv satellite dishes by simply repositioning them for use with competitors' services (e.g. StarSat’s) *[MC’s Oct 2019 submission, para 549.2]*

Switching costs are materially declining in electronic audio-visual services

Effectiveness of competition: Barriers to entry
Premium content

ICASA's finding: 'premium content' constitutes a barrier to entry

- ICASA's reasons: scarcity, cost of premium content and long-term exclusive contracts

ICASA's analysis does not support this finding

- It is based on an unsubstantiated and questionable segmentation of premium / non-premium content *[Slide 60]*
- ICASA does not test its assumption that access to particular content is essential for entry *[Slide 62]*

Content is a dynamic and contestable space

Explosion of content provides opportunities to acquire & package content into bundles attractive to SA audiences
[MC's Oct 2019 submission, paras 633-640]

Including:

- International and other foreign entertainment and sports content
- Local content which is highly popular and can be developed or commissioned at a low cost

The success of OVHD & various OTT services demonstrates that audiences are diverse & a wide variety of content can be used to attract subscribers

Dynamics of content rights at the wholesale level: ICASA provides no analysis of this

- Appropriately resourced and capable entrants are able to contest for content rights, including sports *[MC's Oct 2019 submission, paras 662-666]*
- Retailers are able to make trade offs between alternative content to build audiences

Effectiveness of competition: Market dynamics
ICASA's findings

ICASA's findings

- **Market shares are unlikely to change significantly. This is a signal of a lack of effective competition**
- **MultiChoice's introduction of bouquets at different price points is anti-competitive**
- **On this basis, competition is unlikely to be effective**

ICASA's market share analysis is not an indicator of EoC

- When the market definition is wrong, market shares are meaningless. In this instance, market shares do not reflect the gains made by the OTT players
- *In any event*
  - No economically sound basis is provided for the prediction that market shares will remain stable
  - Even with stable market shares, competitive dynamics in pricing and service offering can be intense (and are)
  - Market shares may underplay the importance of new entrants and threat of further entry

MultiChoice's pricing changes are pro-consumer and evidence of effective competition

- Offering different bouquets increases consumer choice
  - Moreover, this business model is used globally in Pay TV
- To the extent that competition lowers prices, this benefits consumers
  - A claim of 'limit' pricing would need to be proven, which ICASA has not done

Effectiveness of competition: Market dynamics
No dynamic / forward-looking perspective

Importance of a dynamic, forward-looking perspective

- ICASA acknowledges that *ex ante* regulation is inappropriate where foreseeable market developments indicate a market position is not durable, yet the assessment is mostly static and backward-looking
- This is a major deficiency in this inquiry, in light of seismic shifts in audio-visual entertainment

ICASA's findings do not reflect dynamism of the market or how it is evolving

- Draft Findings dismiss the rise of OTT in a single paragraph in its retail market assessment. Yet:
  - Global OTT operators such as Netflix, Amazon and DAZN have entered and are building their South African customer bases *[slides 16, 26]*
  - Further entry likely to occur within the review periods: Peacock & Disney appear poised for entry *[slide 27]*
  - These players have competitive advantages over MultiChoice in distribution, unit costs, scale & access to content *[slide 23-27]*
- Non-global entrants and players are also large and active
  - Well-established FTA broadcasters e.g. OpenView successfully launched in 2013 (2 million activations) *[slide 36]*
  - Large local telcos and regional players, such as Vodacom Video Play (with more than 2 million customers using the platform) *[slide 57]*

Competitive impact on MultiChoice is material

- Increasing numbers of cord-nevers, evidence of cord-shaving and cord-cutting behaviour *[slide 40]*
- DStv Premium new additions have declined by [CONFIDENTIAL], and [CONFIDENTIAL] of churned Premium subscribers are watching OTT

Market definition
Overall conclusions

ICASA's narrow market delineations are the result of flawed approaches to market definition and flawed analysis, and ultimately do not capture all relevant competitive constraints and effects

The evidence supports broader relevant markets than those defined by ICASA

Retail level

- Rapid technological development and changing content consumption patterns have caused significant disruption, lowering entry barriers and switching costs
  - There is now an extensive selection of free and paid-for content services, across a variety of platforms (DTH, OTT and FTA)
  - Such services are increasingly consumed by Pay TV subscribers singly or in combination as an alternative to Pay TV
    - This is clear from the increasing numbers of cord-nevers and evidence of cord-shaving and cord-cutting behaviour

Wholesale level

- ICASA's proposed delineation of markets into 'premium'/'non-premium' content is not robust & out of line with market realities
- 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

Effectiveness of competition
Overall conclusions

1. Barriers to entry

- **Any conceivable barriers to entry have been lowered by technological advancements and other market changes**
  - Emergence of broadband ecosystems (available in particular to Pay TV subscribers) has eliminated the need for providers to invest in and develop a physical distribution platform for content
  - Also, switching costs for consumers are greatly reduced
  - Explosion of content provides opportunities to acquire & package content into bundles attractive to SA audiences including:
    - international and other foreign entertainment and sports content
    - local content which is highly popular and can be developed or commissioned at a low cost

2. Market dynamics

- **MultiChoice already faces competition and significant competitive constraints**
  - Entry is already occurring with even more providers poised to enter
  - Competitors have significant competitive strengths and advantages and are able to compete for attractive content Evidence shows that subscribers opting for OTT services is having a meaningful impact on MultiChoice
  - MultiChoice's responses & innovations are consistent with competitive responses to constraints

3. These constraints and shifting dynamics are increasing and will continue into the future

Economic analysis is the foundation of an ICASA Market Inquiry

The four steps of the s67 ECA Market Inquiry

4 Consider possible pro-competitive remedies

3 Consider significant market power (SMP)

2 Assess effectiveness of competition in those markets

1 Define the relevant market(s)

No sound basis for assessing SMP, let alone remedies has been established

ICASA's analysis does not cover the current critical sources of competition or their future evolution

ICASA's market definition leaves out the critical competitive constraints

Limitations of ICASA's approach to assessing pro-competitive licence conditions

The panel's approach to the remedies proposed in the Draft Findings

- On the facts presented by the MultiChoice executives and the economic analysis which the panel has heard, there is no basis for the narrow market definition in the Draft Findings, or for the finding that there is ineffective competition. The question of remedies should not even arise

- I will deal with what is required of this panel if it somehow arrives at a different conclusion

- In competition regulation, remedies for ineffective competition are considered with great caution because **interference with markets can cause unintended harm**

- If the issue of remedies is canvassed, the panel must revisit the recommendations in the Draft Findings as they are not legally sustainable

Legal framework for consideration of remedies

- s67(4) requires that –
  - "***appropriate and sufficient***" licence conditions be imposed in order to "***remedy the market failure***"
- The provision encapsulates two key requirements for competition remedies, viz. that a remedy -
  - must be directed at **a particular market failure** which has been (accurately and reliably) identified
  - must address the market failure **effectively** and **proportionately**
- A remedy will be effective if it is likely to address the market failure within a reasonable period of time
- A remedy will be proportionate if it –
  - is **necessary** to achieve its goal
  - is **no more extensive than necessary** to achieve its goal
  - does not cause **adverse effects** which are disproportionate to the goal

ICASA must evaluate the effectiveness and proportionality of any proposed remedy

- International best practice requires a **rigorous and detailed impact assessment** before any regulatory intervention.

Tesco PLC v Competition Commission [2009] CAT 6

- The UK Competition Commission published a report following an inquiry into competition in the UK grocery retail market

- The report was challenged on the ground that the Commission **had failed to evaluate the effectiveness and proportionality** of a remedy which it recommended.

- The Competition Appeal Tribunal upheld the challenge
  - The Report contained only *"bald and general statements of the Commission's belief in the [remedy's] eventual effectiveness"*
  - The Report did not fully and properly assess the risk that the remedy might have adverse effects on consumers
  - The analysis required of the Commission included *"examining and taking account of relevant considerations, such as the effectiveness of the remedy, the time period within which it will achieve its aim, and the extent of any adverse effects that may flow from its implementation"*

ICASA's failure to comply with the required standards

- The Draft Findings propose remedies without any evaluation of
  - how and in what time period the remedy would address a specific market failure
  - the potential unintended consequences of the remedy (including harm to competition or consumers)
  - whether the benefits of the remedy outweigh the costs
  - whether a less invasive remedy is available

Example 1: Rights unbundling by platform unjustified and ill-conceived

MultiChoice
ENRICHING LIVES

ICASA's Position	Missing from ICASA's Position

Two paragraphs deal with rights unbundling:

- Merely reference conditions used by EC for sale of sports rights
- Incorrectly state that PSL rights sold as a single bundle across all distribution channels
- Simplistically claim that there is no reason that winner-takes-all approach should apply for the PSL

ICASA makes no effort at all to demonstrate with objective evidence

- the detriment to competition the remedy is intended to address
- whether benefits will emerge from granting multiple operators access to content when it is clear that a large volume of content is available & capable of building audiences
- how compulsory rights unbundling will increase competition
- whether the remedy will do so without resulting in more damage than good

Ignores likely negative consequences for rights holders, licensees and consumers

- higher costs and inconvenience for consumers who purchase more than one subscription (e.g. for linear TV and on-demand) for the same content
- restricting a buyer's ability to provide content via multiple distribution modes limits the ability of broadcasters to respond to consumer preferences and limits competition between linear and other broadcasters (also to the detriment of consumers)
- loss of synergies between distribution modes may result in higher costs (and possibly higher retail prices to consumers)
- loss of exclusivity is likely to reduce rights owners' revenue & thus commercial viability & product quality

Contrary to what ICASA assumes, proposed remedy likely to leave everyone worse off

Example 2: Rights splitting speculative and damaging

ICASA's Position

Merely speculates that:

- Rights splitting facilitates access by new smaller entrants who **may not** afford entire package of rights
- Rights splitting "***should***" enhance overall competition in the long-run

Missing from ICASA's Position

No demonstration of the relevant competition detriment resulting from bundled rights

No substantiation (evidence-based or otherwise) of claim that competition will be enhanced in the long-run

No consideration of likely harms that result from proposed remedy:

- higher costs and inconvenience for consumers as need to purchase multiple subscription packages (e.g. to see all matches or all matches of their favourite team)
- for consumers who subscribe to only one service, results in loss of enjoyment from the forgone matches
- reduced incentives for broadcasters to invest in sport & production quality as a result of a smaller package of rights
- diminished revenues for rights owners dampens investment by rights owners
- diminished investment impacts negatively on consumers and results in wider harm for the development of the sport

No demonstration with evidence that claimed benefits outweigh harm of proposed remedy

Remedies in light of recent policy developments

- The remedies proposed in the Draft Findings would undermine two key objectives outlined in the recent policy documents:

  - **regulatory parity;** and
  - **fair competition**

  between the traditional operators (who are currently subject to the costs of compliance with a regulatory framework) and the OTT operators (which are not currently regulated)

- By imposing these remedies, ICASA will undermine important policy objectives of government and the competition regulator

Adverse consequences of the proposed remedies

What is at stake here?

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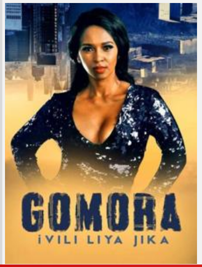
- ICASA's Draft Findings ignore the harms (impact) caused by its proposed remedies
  - **<u>No reasons provided for not considering and balancing these harms with claimed benefits</u>**

Local broadcast industry will be restricted in its ability to adapt to market dynamics with spillover effects on the industry and other parts of the value chain:	Irreparable damage to local content production industry as there will be less income to invest in local content	Irreparable harm to the sports industry and related businesses which depend on sport
~~R6.2bn~~	**~~3 850~~**	**~~700~~**
Spend on local content and local sport p.a.*	Hours of local content produced p.a.	Local sport productions p.a.



SuperSport
World of Champions

What is at stake here? (2)

– **<u>Strangling MultiChoice does not guarantee access to rights, will impact other licensees, jeopardise jobs, erode tax base and cause harm with no benefits to the country</u>**

Remedies advantage international OTT players that do not contribute significantly to the economy and are largely unregulated

Remedies jeopardize jobs in the broadcasting industry value chain

Erosion of the tax base which is already under severe strain because of current state of the economy

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Remedies reduce wealth for black SAns

~~R13.4bn~~

Dividend pay out since inception

Critical shift in policy framework applicable to all audio-visual services

Draft White Paper on Audio and Audio-Visual Content Services

- The Draft White Paper was published for public comment on 9 October 2020
  - Outcome of work by expert panel appointed to address issues raised in the 2015 ICT Policy Review report and to formulate statutory definitions that would underpin the new policy framework

- The Draft White Paper recognises a broader market of Audio and Audio-Visual Content Services (AAVCS)

> ***"Audio and audiovisual content consumption via the Internet are fundamentally transforming the South African audio and audio visual landscape creating a broader content market than traditional broadcasting"[1]***

  - The market includes traditional linear broadcasting services, non-linear on-demand services and video sharing platforms (i.e. OTT services)

- It proposes changes to the regulatory framework that seek to bring OTT services into the regulatory net

> ***The narrowness of the current statutory definition of broadcasting services and overly platform-specific approach to its application by the regulator is failing to capture the range of new audiovisual content services proliferating online beyond the borders of nation states"[2]***

[1 & 2] Draft White Paper on AAVCS Policy Framework, October 2020, p.25 and 49 respectively

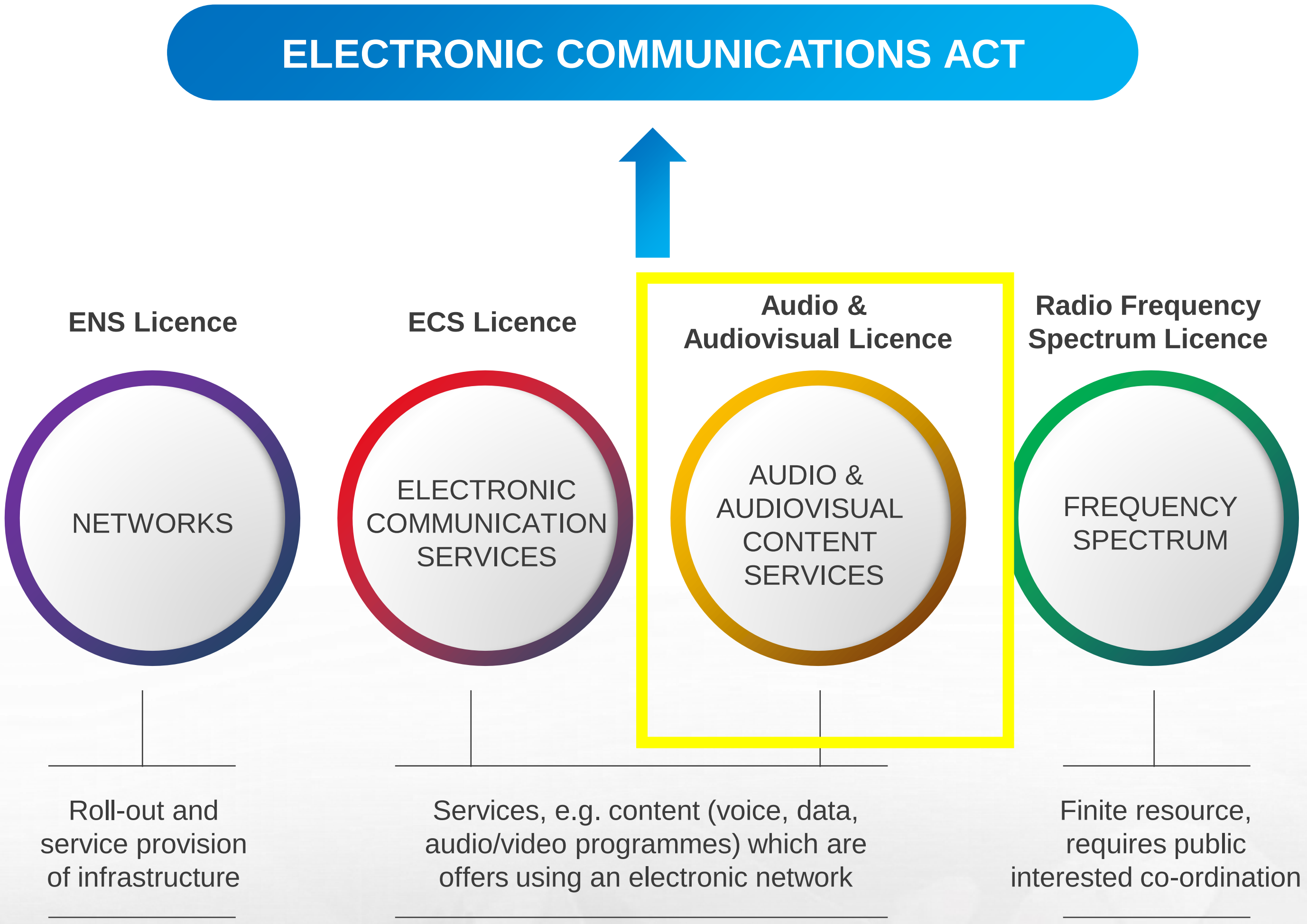
Current regulatory system in SA – outdated and requires change

ELECTRONIC COMMUNICATIONS ACT

ENS Licence	ECS Licence	Broadcasting Licence	Radio Frequency Spectrum Licence
NETWORKS	ELECTRONIC COMMUNICATION SERVICES	BROADCASTING SERVICES	FREQUENCY SPECTRUM
Roll-out and service provision of infrastructure	Services, e.g. content (voice, data, audio/video programmes) which are offers using an electronic network		Finite resource, requires public interested co-ordination

- Broadcasting services are the only content services that require a licence in order to operate
- Broadcasters are subject to more than 40 separate sets of regulations
- Other audio-visual services, including OTT services currently do not require a licence and are not subject to any regulation

Proposed New Framework



Updating licensing framework to create ***"a level playing field between competing services"***[1] by:

- **Defining a broader AAVCS licence category to include new content platforms** (e.g. VOD/Streaming & video sharing platforms, i.e. OTTs) in addition to traditional broadcasting
- **Relaxing existing regulation for traditional broadcasting** (after reviews by ICASA)

[1] Draft White Paper on AAVCS Policy Framework, October 2020, p.50

Key implications of the Draft White Paper for ICASA's Subscription Inquiry

- Policy is alive to the ***"unprecedented disruptive change"***[1] occurring in the SA audio-visual landscape and that this change:
  - Is resulting in ***"the overthrowing of the current broadcasting distribution ecosystem and a change in the way that viewers consume audio and audiovisual content."*** [2]
  - Has created a **broader audio-visual services market** that is not limited to just traditional broadcasting, let alone subscription broadcasting

- Going forward, **there is no policy basis for ICASA to exclude OTT services as competitors**

- Policy is consistent with our submissions that traditional broadcasters compete with OTT services for audiences, advertising and/or subscription revenues – this has implications for market definition

- Sports rights – clarifies that any allegations of anti-competitive conduct lie with the Competition Commission

- Allows up to 49% foreign ownership in broadcasting licencees.
  - This removes investment constraints for foreign investors, which has implications for current and future potential competition

[1 & 2] Draft White Paper on AAVCS Policy Framework, October 2020, p.21.

Competition Commission's paper on the digital economy

Commission accepts disruption of traditional broadcasting by OTT services & cross-platform competition[1]

- The Competition Commission recognises that digital markets are very dynamic and highly disruptive with competition taking place across platforms (traditional broadcasters compete with OTT providers)

"[R]egulation in these and other sectors should adopt a technology –neutral approach without differentiating between traditional operations or whether they operate on a digital platform"

"Unequal application of regulation means that the firms making use of these platforms have a competitive advantage over the traditional operators. This is because they have little or no costs of compliance with regulations"

- In favour of regulations aimed at levelling the playing fields & cautions against regulations that distort the market & competition

[1] See Competition Commission Position Paper on Competition in the Digital Economy, p.47

Competition Commission's paper on the digital economy (2)

Relevance to the Subscription Inquiry

- ICASA's market definition and competition assessment should fully recognise and accept competition between traditional broadcasting services and OTT services
- ICASA's views on SMP and market failure are erroneously formed around platforms and do not reflect the reality of competitive dynamics in electronic audio-visual services
- Proposed remedies, which unjustifiably restrict MultiChoice, impair its investments and advantage its competitors are inappropriate and unwarranted

[1] See Competition Commission Position Paper on Competition in the Digital Economy, p.47

Evaluation against the legal framework: what the law requires of ICASA

The requirements for imposing pro-competitive licence conditions

- Under s67(4) of the ECA, ICASA may only impose pro-competitive licence conditions if four requirements are met. ICASA must –
  - define the relevant market
  - find ineffective competition in the relevant market
  - find that a licensee in the relevant market has significant market power
  - design conditions that appropriately address the competition concerns

ICASA must take account of changing market conditions

- When it dos so, ICASA must, in terms of s67(4A) of the ECA, consider both the "***dynamic character and functioning***" of the market and relative market power on a **forward-looking** basis

- On the evidence before it –

  – ICASA is directly concerned with a **dynamic** and **rapidly-changing** sector

  – there have been **seismic changes** and **disruption**, both in consumer behaviour and in the distribution of audio-visual content

  – these **changes have escalated** in pace and intensity since the commencement of the Inquiry

The administrative law requirements

- The Inquiry is an **exercise of public power** and **administrative action**
- In its conduct of the Inquiry ICASA must meet the standards of **lawfulness, rationality, reasonableness** and **procedural fairness** set out in the Constitution and the Promotion of Administrative Justice Act
- Those standards require that this panel must –
  - consider all representations on the Draft Findings Document **conscientiously,** with an **open mind,** before reaching any final findings, and with a **willingness to depart from the draft findings** if necessary
  - evaluate all the evidence before it **impartially, critically and holistically**
  - make final findings which **are both rational and reasonable**

ICASA's flawed evaluation

- MultiChoice's executives and economics experts have today demonstrated ways in which the Draft Findings Document does not contain or reflect –
  - an open-minded, robust, rigorous and holistic assessment of the facts and evidence presented throughout the Inquiry
  - proper consideration on a forward-looking basis of key developments in the market
- ICASA's failure, in each distinct s67 step, to –
  - rigorously and objectively assess the evidence as a whole; and
  - appropriately apply legal and economic principles,

leads to fundamental flaws in **market definition** and the **assessment of competition**, which in turn results in deficiencies in the consideration of **whether any licensee has SMP** and the evaluation of **remedies**

What the evidence shows

- Properly evaluated, the evidence before ICASA demonstrates unequivocally that –
  - there is a broad market for electronic audio-visual services
  - there is robust and rapidly growing competition in that market
  - there is no factual or legal basis to intervene in that market
- These realities are –
  - recognised and confirmed in the government's Draft White Paper on Audio-Visual Content Services and the Competition Commission's recent paper on the digital economy
  - the basis for government's conclusion that the regulatory framework must be radically overhauled
- There is no basis for the narrow market definition, the findings on ineffective competition or SMP, or the proposed licence conditions in the Draft Findings

The avenues available to ICASA

- ICASA may:
  - make a finding that there is a broad market for electronic audio-visual services in which there is effective competition and no basis for the imposition of pro-competitive licence conditions on any licensee

  or

  - find that in **current** circumstances, with a **dynamic and rapidly changing industry** and a **regulatory overhaul underway** as contemplated in the Draft Audio and Audio Visual Content Services White Paper, it is unable to find that the requirements for the imposition of pro-competitive conditions are met

  and

  - exercise regulatory forbearance by not intervening in the market at this stage

Concluding remarks

What next?

- MultiChoice and M-Net have drawn a detailed picture of the dynamic and evolving competitive landscape, the applicable legal framework, and the contribution which our business makes to the South African economy

- Against this backdrop we urge ICASA to make findings which accord with our legal counsel’s submissions, and turn its focus to developing and implementing a new regulatory framework for all electronic audio-visual services in South Africa in line with the vision in the Draft White Paper.

- That vision will ensure the regulatory parity which is required for MultiChoice and M-Net to continue to invest and innovate as we strive to compete against global players

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We thank ICASA for the opportunity to make these representations

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