

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

**RESPONSE BY THE PREMIER LEAGUE TO ICASA'S
DRAFT FINDINGS DOCUMENT: INQUIRY INTO SUBSCRIPTION TELEVISION
BROADCASTING SERVICES**

4 OCTOBER 2019

Submitted for and on behalf of The Football Association Premier League Limited

by DLA Piper UK LLP

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1. EXECUTIVE SUMMARY

- 1.1 The Premier League has serious concerns regarding the flawed process ICASA has followed in this inquiry. Despite failing to consult with the Premier League at any stage, ICASA has chosen at this late juncture to include Premier League football as premium content despite providing no evidence or justification for such finding and to propose the imposition of a series of wide-ranging and disproportionate remedies which would apply to the sale and exploitation in South Africa of the rights of the Premier League and many other rights holders. These proposals have been made without any proper consultation or assessment of their impact on the Premier League, other rights holders or consumers and are misconceived.
- 1.2 The Premier League believes that ICASA's definition of the relevant markets is much too narrow and does not take account of the way in which consumers make content-related purchasing decisions.
- 1.3 Furthermore, even if ICASA had successfully delineated the relevant markets (which it has not), the Draft Findings contain no evidence of ineffective competition or consumer harm in those markets, or an analysis of how ICASA's proposed remedies will be in the public interest by producing effective competition and promoting consumer benefits.
- 1.4 The remedies proposed by ICASA are unnecessary and disproportionate. When reaching its final conclusions, ICASA should reconsider its proposals and take into account the serious risk that its preferred remedies would cause significant harm to consumers, the audio-visual services industry in South Africa, local content producers (such as the PSL) and international content owners (such as the Premier League).
- 1.5 ICASA should at all costs avoid an outcome where the natural operation of the market is prevented or distorted by unnecessary or disproportionate regulatory intervention. Maintenance of the *status quo* would, therefore, be a more appropriate and proportionate result of this inquiry.

2. INTRODUCTION

- 2.1 This response to the "Draft Findings Document: Inquiry into Subscription Television Broadcasting Services" (the **Draft Findings**) published by the Independent Communications Authority of South Africa (**ICASA**) in April 2019 is submitted for

and on behalf of The Football Association Premier League Limited (the **Premier League**) by DLA Piper UK LLP.

- 2.2 The Premier League is a private limited company whose shareholders are its member football clubs which participate in the Premier League competition in each football season (which runs annually from August to May). The Premier League has responsibility for organising and administering the Premier League competition (which is the apex of the football league pyramid in England and Wales) including the sale of the broadcast rights to the Premier League competition.
- 2.3 This response focuses on the key issues of ICASA's flawed process; ICASA's market definition/market power analysis; the lack of any evidence of consumer harm; ICASA's unnecessary and disproportionate proposed remedies; and the detrimental impact of the proposed remedies on rights holders and ultimately consumers.
- 2.4 The Premier League's response explains its serious concerns about the significant errors set out in the Draft Findings on the basis of the Premier League's extensive experience of the effect that misguided regulatory intervention can have on rights holders and consumers.
- 2.5 The Premier League is not to be taken as agreeing with or accepting any issues or conclusions in the Draft Findings which are not directly addressed in this response.

3. PROCESS

- 3.1 The Premier League has serious concerns regarding the process ICASA has followed in respect of its inquiry into subscription television broadcasting services. In particular, the Premier League is alarmed by ICASA's lack of engagement with the Premier League and, potentially, other affected rights holders, and is concerned that the process followed by ICASA has not complied with the requirement under the Promotion of Administrative Justice, Act 3 of 2000 (**PAJA**), South Africa's common law and the Constitution of the Republic of South Africa, Act 200 of 1993 (the **Constitution**) that administrative action must be procedurally fair. The Constitution, common law and PAJA also require administrative action to be reasonable. There are two elements to reasonableness, namely rationality and proportionality. For administrative action to be rational it must be supported by evidence and information.

Proportionality may be defined as the notion that one ought not to use "*a sledgehammer to...crack a nut*".¹ The Premier League is also concerned that ICASA's Draft Findings do not comply with the administrative law requirements of reasonableness (not least due to the lack of procedural fairness which has resulted in the findings being based on incomplete evidence and information).

- 3.2 PAJA requires administrative action to be procedurally fair and recognises that what constitutes a fair procedure depends on the circumstances of each case.² It requires that adequate notice of the nature and purpose of proposed administrative action, as well as a reasonable opportunity to make representations must be given. These are mandatory procedural requirements prescribed under PAJA and failure by ICASA to comply with these are grounds for judicial review of the process. PAJA provides that where an empowering provision empowers an administrator to follow procedures different from those prescribed under PAJA, the administrator may do so provided that the "*different*" procedure is "*fair*". Albeit that ICASA appears to have complied with the procedural requirements prescribed in the Independent Communications Authority of South Africa, Act 13 of 2000 (**ICASA Act**), the notice procedure prescribed in the ICASA Act could not, in the circumstances, reasonably have been expected to bring the inquiry to the attention of foreign parties, such as the Premier League, and is therefore not fair. Failure adequately to notify foreign stakeholders flies in the face of the *audi alteram partem* principle which requires that parties affected by administrative action should be given an opportunity to participate in the decisions that will affect them and, crucially, a chance of influencing the outcome of those decisions.
- 3.3 The Premier League understands that at no previous stage during this inquiry has Premier League football been named as "*premium content*" or have remedies been proposed which would directly affect it. However, at this very late juncture remedies are being proposed by ICASA which would potentially gravely undermine the Premier League's audio-visual rights model in South Africa. These are remedies which if pursued would likely cause substantial harm to the Premier League and its

¹ *S v Manamela* 2000 (3) SA 1 (CC) para 34.

² PAJA, sections 3(1) and (2).

member clubs, the other rights holders and sports affected by ICASA's proposed remedies and consumers in South Africa.

- 3.4 Yet despite the seriousness of the potential ramifications of ICASA's proposals, the Premier League has not been directly contacted by ICASA and asked for its views on ICASA's proposed remedies, nor was notice of the inquiry given in a manner that was likely to bring the inquiry to the attention of foreign parties, such as the Premier League. The Draft Findings were published in April 2019 and yet it was only in September 2019 that the Premier League learned that it was referenced by name in a couple of the key paragraphs of the Draft Findings³, giving it just over a fortnight to respond to what is a complex and potentially far-reaching set of Draft Findings and proposed remedies. This is not an appropriate way to consult with or regulate any stakeholder. To make matters worse, the Premier League actually met with ICASA in late January 2019 to discuss listed events legislation (see further below) and no mention was made at that meeting of the fact that ICASA was shortly to publish the Draft Findings which would categorise the Premier League as "premium content" and propose far-reaching regulatory intervention in relation to the sale and exploitation of the Premier League's rights.
- 3.5 As such, the Premier League most certainly has not been provided with "*an opportunity to comment and participate meaningfully in the inquiry*" as claimed in the Draft Findings⁴. This means that ICASA's final findings will be based on limited and incomplete input and evidence from affected parties, calling into question the very basis on which such findings are made. That is simply not the way that a regulatory investigation should be conducted and does not comply with ICASA's statutory obligations of procedural fairness.
- 3.6 ICASA's Draft Findings also seem to ignore the huge resultant impact of its proposed remedies on rights holders and their stakeholders (both domestically and outside of South Africa). The broadly defined concept of "premium content" in the Draft Findings means that rights holders and their industries within and beyond South

³ Even then, through the use of the term "EPL" in two relevant paragraphs only, paragraphs 1.3.13 and 5.17.8. The term is not defined, nor is it a brand officially recognised by the Premier League.

⁴ Draft Findings, paragraph 3.1.4.

Africa will be seriously affected by ICASA's proposed intervention. The Premier League has seen no evidence that ICASA has undertaken any proper proportionality or impact assessment with regard to the potential effect on rights holders and rights values of its intervention and the resulting detrimental effect that this would have on consumers.

- 3.7 Finally, the Premier League notes that ICASA is concurrently proposing separate regulatory intervention in the South African audio-visual content market, in particular by revising the listed events regulations. The Premier League makes no comment on (and should not be taken as agreeing with) the listed events proposals but notes that those proposals would (if implemented) see a significant amount of popular sports content reserved for exploitation on free-to-air (FTA) television, thereby directly affecting the purchasing decisions of South African consumers. It would be premature and unreasonable to implement any of the far-reaching proposals set out in the Draft Findings without waiting to see how the changes to the listed events legislation affect the relevant market(s).
- 3.8 The revision of the listed events regulation (especially to the extent proposed by ICASA) has the potential to be transformative. The availability of popular content on free-to-air television could completely alter market dynamics and result in FTA channels becoming a substitute for subscription channels for a significant number of consumers. The fact that the impact of this has been ignored out of hand further undermines the basis of ICASA's conclusions.
- 3.9 Concurrent regulation on these related topics will mean that ICASA will be unable properly to assess the effect of each of its interventions on the relevant market, producing an unclear and confused picture that is contrary to regulatory best practice. Therefore the conclusion at paragraph 2.3.6 of the Draft Findings that the "*process is wholly distinct to the Inquiry and has no bearing on the preliminary findings reached herein*" is flawed.

4. MARKET DEFINITION

- 4.1 This section explains the Premier League's concerns with certain aspects of the market definition adopted by ICASA. In particular, the Premier League submits that ICASA has made serious errors as regards market definition which undermine the integrity and reliability of its conclusions including:

- 4.1.1 failure to appreciate the significance of FTA and over-the-top (OTT) services as competitive constraints on subscription pay-TV;
 - 4.1.2 failure properly to consider the impact of the introduction of listed events legislation;
 - 4.1.3 flawed analysis of wholesale markets; and
 - 4.1.4 misdefinition/mischaracterisation of the premium content market.
- 4.2 These submissions are explained below.

General considerations

- 4.3 In its notice on the definition of the relevant market, the European Commission explains that:

"Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure".⁵

- 4.4 Further, paragraph 3.2 of ICASA's Guidelines for Conducting Market Reviews, March 2010 states that:

"Defining a market is an exercise in establishing the boundary within which the provision of particular products or services may be grouped. A "market" is the interplay between consumer demand for and the supply of a specific product or service, including geographic availability. The exercise of defining a market involves identifying a particular product or service supplied by one or more suppliers and evaluating whether the same or similar consumer-desired outcome may be achieved

⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03)

through the consumption of other products/services, if available. This exercise implies that the original hypothesis is that the desired consumer outcome may only be achieved from the consumption of a particular product or service. If it may be shown that the same/similar desired outcome may be achieved through the consumption of additional products/services, then the definition of the market has to be expanded to include these additional products/services. The Authority may use the Hypothetical Monopolist Test, including the Small (but) Significant Non-transitory Increase in Price (SSNIP) test, as well as other alternatives, including the examination of 'practical indicia', during the process of defining a market".

- 4.5 Finally, the importance of properly defining the relevant market has also been recognised as a necessary precursor to the assessment of competitive consequences by the Competition Appeal Court. In *JD Group Limited and Profurn Limited in re: JD Group Limited and Profurn Limited*⁶ the Competition Appeal Court stated as follows:

"This problem of market definition is not only common to South Africa. In France v The Commission (case No. 68 – 94, C –34/35, a judgment of the European Court of Justice given on 31 March 1998) the court states 'A proper definition of the relevant market is a necessary precondition for any assessment of the effect of concentration on competition'. Similarly, in a case which has been cited often by this Court and the Tribunal, Brown Shoe Company v United States [1962] USSC 112; (1962) 370 US 294, the court held 'Thus as we have previously noted: 'determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one, which will substantially lessen competition within the area of effective competition. 'Substantiality' can be determined only in terms of the market affected' ".

- 4.6 Any market regulation must therefore be based on a properly conducted market definition exercise, particularly as ICASA is required to consider the existence of effective competition and identify significant market power (both of which depend heavily on a correct definition of the market) before imposing licence conditions. Market definition could, and likely will, therefore determine the outcome of the investigation by providing the foundations for an assessment as to whether

⁶ (28/CAC/May03) [2004] ZACAC 1; [2004] 1 CPLR 31 (CAC) (13 January 2004).

intervention is required. For this reason, the market definition assessment needs to be durable and not be subject to change based on foreseeable technological changes which are already exerting an influence on markets or are anticipated to do so (i.e. potential competition). It should be coherent, predictable and consistent with economic principles.

4.7 In the case of the fast evolving broadcasting markets with which ICASA is concerned, the Premier League has noted three developments in South Africa and elsewhere that should be taken into consideration in defining markets:

4.7.1 the rapid rollout of broadband infrastructure and the proliferation of smartphones;

4.7.2 the ability of OTT providers to build compelling propositions on the basis of attractive and original programming including content which they themselves produce (such as drama and reality series including local content); and as a result,

4.7.3 the popularity and rapid growth of OTT services, which are changing consumption patterns and constraining pay-TV providers.

4.8 Market definition relies heavily on the SSNIP (or hypothetical monopolist) test which defines product markets based on how consumers react to a small but significant increase in prices of 5% to 10% over a period of a year. Products to which consumers would switch following such a price change are included in the same product market, since they would be regarded as substitutes by consumers. However:

4.8.1 it is rarely possible for the authorities to gather the necessary data to conduct a SSNIP test assessment and therefore various inferences often have to be made;

4.8.2 by focusing entirely on the reaction of consumers to changes in price, the SSNIP test takes no account of non-price factors such as quality of service and innovation which cannot be assessed when the authority considers the likely reaction of consumers to a theoretical price increase; and

4.8.3 in fast moving markets in which there is rapid technological change such as broadcasting, authorities should hesitate to impose onerous licence conditions or take other remedial action where there is a strong likelihood (based, for

example, on the impact of that technology in other geographic markets with similar characteristics) that the technology will result in the change that the relevant authority is seeking. As explained below, this is the case as regards ICASA's assessment of the impact of OTT services which underestimates the impact of such services and risks imposing unnecessary but onerous licence conditions on incumbents with a concomitant impact on both domestic and international rights holders (including the Premier League) to the detriment of, inter alia, sport.

Failure to appreciate the significance of FTA/OTT as competitive constraints

ICASA's analysis of the constraint from FTA television is flawed

- 4.9 At paragraph 5.10, ICASA states its finding that "*free-to-air and subscription services belong in separate relevant product markets*"⁷. The Premier League believes that this conclusion is flawed due to a number of significant errors.
- 4.10 First, since market definition is based on the reactions of consumers to a small but significant price increase on the part of a hypothetical monopolist of (in this case) subscription pay-TV services, ICASA's findings on market definition must be based on evidence of likely consumer reactions in those circumstances and it is significant that ICASA has not relied on any evidence of how consumers have previously reacted when MultiChoice has sought to raise prices. Nor did ICASA's consumer survey address this point. Moreover, the Draft Findings fails to consider the number of pay-TV subscribers that give up their subscriptions. Therefore, ICASA's analysis of the manner in which consumers may have migrated from FTA to subscription services is totally irrelevant.
- 4.11 Second, the Draft Findings fail to take into account the impact of the Premier League's FTA package. During the last three football seasons this package of rights (comprising the right to broadcast live one FTA match every Saturday in South Africa (and other sub-Saharan African countries) together with weekly preview, magazine and highlights programmes) was held by Econet and exploited latterly by SABC, and for the three seasons commencing with the 2019/20 season this package

⁷ Draft Findings, paragraph 5.10.28.

will be held by Infront and exploited on FTA television by eTV in South Africa. Thus, a much larger number of Premier League matches are available on FTA television in South Africa than are available in most countries outside Africa. It is entirely possible that in response to a small but significant increase in price, a consumer might decide to switch to FTA television only and it is possible that there is an increased likelihood of a consumer making such a decision following the Infront/eTV deal. The Draft Findings contain no evidence on this point.

- 4.12 Third, as mentioned in section 3 above and paragraphs 4.43 to 4.46 below, ICASA is currently conducting a consultation with regard to extending South Africa's listed events legislation. This will further extend the amount and quality of sport available on FTA television. The Draft Findings are therefore undermined by their failure to consider whether, following a change in listed events legislation, pay-TV subscribers would be more likely to switch to FTA services in the event of a small but significant price rise, and if so, to what extent.
- 4.13 Fourth, since what matters is the extent to which consumer switching in the event of a small but significant price increase would constrain a hypothetical monopolist from increasing prices, it follows that constraints should be considered in the aggregate. In other words, if consumers would switch to a combination of FTA and OTT services (or if some consumers would switch to FTA and others to OTT), this could be a sufficient constraint. Again, the Draft Findings contain no evidence of whether and to what extent this would be the case.

OTT services

- 4.14 ICASA's conclusion that OTT services should not be seen as part of the market for the distribution of television services amount to a serious flaw which undermines the Draft Findings' conclusions. In Africa and elsewhere, OTT services are emerging that allow providers to surmount market entry difficulties. In part, this has become possible because of a rapid increase in smartphone penetration as mobile operators promote pay as you go business models aimed at potential subscribers who do not have accounts or credit histories and who form a key part of the target market for OTT services.
- 4.15 The Premier League's experience is that OTT services are a major competitive threat to subscription pay-TV services and OTT services can and do launch rapidly, due to the lack of structural, legal and regulatory barriers to entry. Indeed, while a traditional

broadcaster such as MultiChoice will have invested huge amounts in its distribution network and platform, the cost for a new OTT player to enter the audio-visual market is tiny in comparison. In particular, the incremental cost for an OTT operator in a different geographic market to launch its services in a new geographic market is relatively small, in part, because OTT operators are not subject to the same regulatory framework as traditional broadcasters (or indeed sometimes any regulatory framework at all).

4.16 There are many examples across the world of OTT services that have successfully launched and have displaced an established pay-TV operator. It is incumbent upon ICASA to explain why the threat of such entry would not constrain a hypothetical monopolist.

4.17 ICASA identifies three factors, differences in content⁸, broadband access and cost⁹ and viewer experience¹⁰ which, together with the question of whether OTT services are complementary rather than a substitute to traditional television broadcasting services, lead it to conclude that OTT services are outside the market for subscription pay-TV services. Not only is ICASA's reasoning weak, it underplays the potential competitive threat from OTT services and thereby the competitive constraint that OTT services represent.

4.18 Furthermore, ICASA's conclusions are fundamentally undermined by its failure to analyse the existing players providing OTT services, changes in viewing patterns and demand and to conduct a forward looking assessment of how changing demand is likely to be met in the future.

4.19 ***Differences in content***

4.19.1 ICASA states that "*the most significant distinction in terms of offering between linear subscription television and OTTs remains the unavailability of*

⁸ Draft Findings, paragraphs 5.12.9 - 5.12.16.

⁹ Draft Findings, paragraphs 5.12.17 - 5.12.26.

¹⁰ Draft Findings, paragraphs 5.12.27 - 5.12.45.

premium live sport content on OTT services"¹¹. Further, ICASA states that "[t]he consumer survey conducted by the Authority revealed that access to sport and latest movie channels is a key driver for premium subscription television uptake".

4.19.2 While it cannot be denied that sport is important content, the consumer survey revealed a wide variation in motivations for watching television and therefore that a wide variety of programming can be the basis of successful broadcasting businesses. In its summary of the findings of the consumer survey, at paragraph 2.6.4, ICASA includes the following:

4.19.2.1 "*Movies are the most watched content, followed by drama series, news and sport*";

4.19.2.2 "*Movies are the most popular content amongst all subscriber groups, except FTA viewers, who watch news most frequently*";

4.19.2.3 "*Movies, sport and drama series are mentioned most frequently when personal preference is addressed*"; and

4.19.2.4 "*More movie options and updated drama series are the most desired content*".

4.19.3 ICASA goes on to quote the Netflix CEO who states that Netflix "*are trying to focus on movies and TV shows ...[w]e don't have live sport*"¹². ICASA erroneously concludes that "[t]his quote puts paid the argument whether OTTs pose a competitive constraint on subscription broadcasting". To the contrary, what the quote from the Netflix CEO demonstrates is the way in which operators can base their market penetration strategy on different genres of core programming, in the case of Netflix, "*movies and TV shows*". The success of Netflix's strategy demonstrates conclusively that an operator does not need to offer live sport in order to compete successfully in the market for audio-visual services.

¹¹ Draft Findings, paragraph 5.12.10.

¹² Draft Findings, paragraph 5.12.15.

4.19.4 In support of this, DAZN, the self-proclaimed "*first global pure-sport live and on-demand streaming service*"¹³ demonstrates that OTT operators base their strategy on different genres, while also refuting ICASA's point that OTT players do not impose a competitive constraint on traditional sports broadcasting. DAZN, a sports streaming service which reaches over 400 million monthly users across 37 markets in 18 languages and has acquired Premier League rights in multiple markets across the world, is a clear example of the competitive constraint that an OTT operator exercises on traditional sports broadcasters.

4.19.5 Therefore, although ICASA states that live sports content is unavailable on OTT services in South Africa, this ignores the rapid pace of market developments in many other countries as well as South Africa itself:

4.19.5.1 global OTT players have been investing heavily in live sport by acquiring rights (e.g. Twitter has acquired global rights to distribute 140 hours across 28 tournaments of the PGA Tour, Facebook acquired localised OTT rights to the UEFA Champions League, La Liga, MLB and the PGA Tour among others, Amazon has acquired in certain markets rights to live stream US Open tennis, ATP tennis and 20 UK Premier League matches and DAZN has launched its sports streaming service in numerous markets and invested in a wide range of sports and competitions); and

4.19.5.2 there is live sport on OTT services in South Africa. For example:

- (a) Vodacom Video Play has streamed live football content including the 2018/19 FA Cup;
- (b) Cell C's Black OTT service offers sports;
- (c) the Star Times app offers live sports; and
- (d) YouTube has a dedicated channel for live NBA Africa games.

¹³ See further: <https://media.dazn.com/en/>.

4.19.6 ICASA disregards the fact that live sport is just one of many attractive programming genres available for exploitation by broadcasters (as the success of operators such as Netflix demonstrates). Moreover, the grant of exclusive rights to sports programming allows a provider to invest in the presentation of that sports programming, distinguish its service and build its subscriber base rapidly.

4.20 ***Broadband access and cost***

4.20.1 ICASA reaches the conclusion, based on its consumer survey, that "*the cost of data and access to high speed internet [is] limiting the ability of viewers to migrate to the OTT offerings*"¹⁴. In reaching this conclusion, ICASA has made a number of serious flaws.

4.20.2 First, in the context of a market definition exercise based on the SSNIP test, the purpose of the inquiry is to consider whether the subscribers to the premium subscription pay-TV services of a hypothetical monopolist would switch to OTT services in the event of a small but significant price rise. That is the basis for determining whether OTT services are a constraint on providers of subscription premium pay-TV services. The penetration of broadband that is relevant is therefore not the "*23 million South Africans who have permanent internet access*"¹⁵ but that portion who subscribe to subscription premium pay-TV services.

4.20.3 Second, given the success of OTT as a platform for market entry in other jurisdictions, ICASA's conclusion that OTT operators are unlikely to be successful due to poor quality broadband and high data costs is unconvincing. ICASA makes no effort to outline differences between South Africa and other markets or to conduct a comparative analysis with other markets with similar levels of broadband penetration and costs and the impact on OTT competition and penetration.

4.20.4 Third, ICASA makes no effort to analyse projected trends in pricing of data

¹⁴ Draft Findings, paragraph 5.12.17.

¹⁵ Draft Findings, paragraph 5.12.28.

including the packages that mobile operators offer to consumers. This is particularly surprising given that ICASA refers to regulatory efforts to reduce the price of data¹⁶. Since ICASA states that it "*expects that through these interventions data prices are likely to decrease gradually over time*", the impact of this should be taken into account in its assessment of how consumer perceptions are likely to evolve and the impact on market definition. Moreover, the current widespread roll out of fibre and the anticipated introduction of 5G which is expected to be commercially available in South Africa within approximately five years will allow greater broadband speeds to be provided in a more stable manner and is likely to drive down data costs for 4G. ICASA makes no effort to analyse the implications of these developments.

- 4.20.5 ICASA also does not seem to appreciate that consumers are able to access OTT programming via OTT apps on smart TVs and through set-top boxes and that, where access is via mobile broadband, mobile apps allow "casting" to television sets.
- 4.20.6 ICASA has wholly disregarded the success of OTT services provided by operators such as Netflix which offer a wide range of attractive movies and series but no live sport. Since movies and series are regarded by ICASA as premium content, it is very difficult to see why ICASA does not regard Netflix as competing with MultiChoice for subscribers who value movies and series.
- 4.20.7 Finally, ICASA has completely ignored the global trend for OTT services offered by operators such as DAZN which are dedicated to sports programming and, in particular, live sport. As explained above, OTT operators face very low barriers to entry and there is every likelihood that new sports-based OTT services will be launched in future in South Africa by operators such as DAZN. Just because ICASA has ignored such global trends in its analysis does not mean that ICASA is entitled to disregard such trends or that the prospect of such services launching in South Africa does not operate as a competitive constraint on MultiChoice.

¹⁶ Draft Findings, paragraph 5.12.26.

4.21 *Viewer experience*

4.21.1 ICASA's conclusions in this section are tainted by its conclusion that overall broadband penetration is relevant to the constraint faced by MultiChoice.

4.21.2 First, as mentioned above, since the purpose of the exercise is to consider whether consumers of premium pay-TV services would switch to OTT services (and therefore whether OTT services should be included in the relevant market), overall levels of broadband penetration are not relevant to the enquiry. What is relevant is the level of broadband penetration among MultiChoice's customers. Since many such customers already have broadband subscriptions, a decision to switch to OTT would not (contrary to ICASA's assertion at paragraph 5.12.24) take into account the cost of internet access as well as the subscription fee, given that the cost of internet access has already been committed for purposes unrelated to the OTT subscription (e.g. to send and receive emails etc).

4.21.3 Second, ICASA asserts that smartphones are "*not the best platform for streaming content*"¹⁷ and that there is a "*high preference for linear television as a mode of audio-visual consumption in the South African context*"¹⁸ without any evidence to support these statements and contrary to its summary of the consumer survey from which it is apparent that a large quantity of video content is watched on smartphones. We would also cross-refer ICASA to our comment at paragraph 4.20.5 above.

4.21.4 Third, ICASA's conclusions are flawed by its failure to take account of the growth of mobile data usage and smartphone penetration, its failure to consider to what extent this is fuelled by video usage and the implications of this for the penetration of OTT services.

4.21.5 Fourth, ICASA's statement 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*

¹⁷ Draft Findings, paragraph 5.12.28.

¹⁸ Draft Findings, paragraph 5.12.39.

*South African context limits the current ability of OTTs to be reasonable or credible substitutes*¹⁹ is based on weak evidence (the BRCA Establishment Survey, which revealed that the TV set is the preferred mode of audio-visual content for South Africans but did not reveal how many South Africans also use smart phones or the internet, nor how they would react to changes in relative prices and is therefore of little relevance to considerations of market definition). Further, the statement is not supported by ICASA's consumer survey.

4.22 *Substitutes or complements*

ICASA states that "*to a large extent OTT services are more of a complement than a substitute to traditional television broadcasting services*"²⁰. Again, ICASA's findings are undermined by its failure to consider whether sufficient consumers would switch to OTT services in response to a small but significant increase in price. Further, ICASA's findings are backward, rather than forward, looking and do not consider how OTT services are developing and are likely to develop. In this context, the *Liberty/Ziggo* merger case on which ICASA relies, in which the European Commission made no decision concerning market definition, does not assist ICASA.

Flawed analysis of wholesale markets

4.23 At paragraph 5.14, ICASA explains its conclusion that there is an upstream wholesale market for channel provision. ICASA has however failed to explain how its conclusions are affected by the ease with which retailers can switch to acquiring content and establishing an OTT service as an alternative to retailing pre-packaged channels.

4.24 Further, as mentioned above, OTT services are already supplying live sport and other content in (and into) South Africa and such services already constrain the providers of channels at the wholesale level. Indeed, many channel providers also provide a non-linear version of their channel in response to shifting consumption patterns (e.g. to allow consumers to catch up).

¹⁹ Draft Findings, paragraph 5.12.39.

²⁰ Draft Findings, paragraph 5.13.1.

- 4.25 ICASA fails to explain the impact of these services on its definition of a wholesale channel market and in particular whether, in the event of a small but significant increase in price in relation to linear channels, subscribers would switch to non-linear services. ICASA refers to the licensing of first-run film content in windows as a reason to exclude non-linear movies, but does not properly consider the availability of, or the possibility of switching to, non-linear services that carry a mixture of films and first run drama series, which is the model that has proved highly successful for Netflix.
- 4.26 As far as sport is concerned, ICASA concludes that "*it is a fallacy that linear and non-linear content is currently readily substitutable in South Africa*"²¹. This conclusion is contradicted by the evidence referred to above and is undermined by its failure to consider the impact of such evidence and in particular the rapid pace of change in the audio-visual services industry.
- 4.27 ICASA has decided that "*there are separate markets for premium and non-premium content, and therefore separate channels*"²² without any supporting reasoning.

Misdefinition/mischaracterisation of the premium content market

- 4.28 ICASA's findings on the existence of an alleged premium content market are fundamentally undermined by its failure to define premium content, or to establish criteria to allow premium content to be identified, in a way that is consistent with its consumer survey. Instead, ICASA seeks to identify wholesale markets for the supply and acquisition of: (i) premium content; and (ii) non-premium content for distribution in South Africa²³. ICASA states that in reaching this determination, it took account of five factors: (a) the SSNIP test; (b) characteristics of premium and non-premium content; (c) responses to the discussion document; (d) internal research; and (e) case precedent.
- 4.29 However, as explained below, none of the factors in (a) to (e) mentioned by ICASA

²¹ Draft Findings, paragraph 5.15.7.

²² Draft Findings, paragraph 5.15.9.

²³ Draft Findings, paragraphs 5.17.26 - 5.17.27.

actually support its determination reached. To the contrary, the evidence referred to by ICASA is either thin, irrelevant or contradictory.

The SSNIP test

4.30 Although ICASA asserts that it has based its decision in part on the SSNIP test²⁴, it has not done so. Its conclusions are based on supposition and conjecture including that *"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"*²⁵. This unsubstantiated generalisation ignores ICASA's own consumer survey which attested to the popularity of content other than live sport. ICASA bases its conclusion in part on the rising cost of sports rights including the fact that *"[i]n the South African context, the cost of broadcasting rights for the English Premier League soccer is said to have increased thirty-fold over the past 25 years to 2017"*. The cost of Premier League and other sports rights is not relevant to the SSNIP test and the fact that Premier League rights have risen in price since 1994 is hardly surprising since pay-TV and the Premier League competition were in their infancy then and in the intervening 25 years, the quality of the product licensed by the Premier League has increased very substantially (for the benefit of consumers), in part funded by licence fees payable by licensees in South Africa and elsewhere. ICASA's purported application of the SSNIP test therefore demonstrates nothing about whether there is a premium content market.

Characteristics of premium and non-premium content

4.31 ICASA refers to the fact that *"Hollywood movies are sold in windows that clearly delineate different types of distributors, indicating that such movies cannot be equated to any other content"*²⁶. ICASA wrongly concludes that what it regards as the price discrimination inherent in the windowing model means that content providers

²⁴ Draft Findings, paragraph 5.17.1.

²⁵ Draft Findings, paragraph 5.17.2.1.

²⁶ Draft Findings, paragraph 5.17.2.6.

can segment customers according to demand elasticities and prevent reselling from one group to another. Although windowing demonstrates that the value of a Hollywood movie differs depending upon the length of time that has elapsed from its first release, the existence of windows for films does not mean that operators cannot attract subscribers by broadcasting other types of content. The attractiveness of other types of content to consumers is clear from ICASA's consumer survey which demonstrated (*inter alia*) the appeal of drama series and local content to consumers. First-run films are certainly attractive to consumers but so is a variety of other content. Moreover, there are many other producers and/or distributors of highly attractive first run films across the world other than Hollywood studios including providers of OTT services such as Netflix and Amazon. Further, in its market definition, ICASA includes "series" which are not referred to in any of the cases cited by ICASA as premium programming but which demonstrate that a broadcaster can use appealing programming other than first run movies and live sport to build an attractive proposition for consumers.

- 4.32 In relation to sports programming, ICASA states that "*it is noteworthy that certain sports federations have repeatedly sold their content rights (on an all-inclusive basis) exclusively to a single broadcaster over a significant period of time. This is illustrative of the limitations faced by content rights owners and indicative of the constraints on their bargaining power given the limited buyer alternatives available*"²⁷. The Premier League has sold its rights exclusively in South Africa and elsewhere not because of "limitations" it faces, but because when rights are sold exclusively, a licensee is able to distinguish its services through their identification with the Premier League and other content providers and is prepared to invest in the product and technology in a way which would not be the case in the absence of exclusivity.

Responses to the Discussion Document/Internal research

- 4.33 ICASA states that "*research indicates that sports programming remains a driver of domestic and global growth for traditional television*"²⁸ but the evidence given does

²⁷ Draft Findings, paragraph 5.16.5.

²⁸ Draft Findings, paragraph 5.17.2.8.

not support this conclusion. The quotes from Arthur Goldstruck and the CEO of MultiChoice simply indicate that companies apply a variety of different business models successfully based on different types of programming.

- 4.34 ICASA relies upon a point in its discussion document that "*content also has different appeal depending on the characteristics of particular audiences. For instance, whilst blockbuster movies would appeal to a lot of people across different countries, the same cannot be said about sporting events, which tend to depend on a nation's culture, tastes and preferences*"²⁹. Although this statement is true to a certain extent, it underlines the need for ICASA's conclusions to be firmly underpinned by a robust consumer survey that asked probative questions about consumer preferences and switching behaviour in the event of price rises. ICASA's conclusion from the survey that "*movies, sport and drama series are mentioned most frequently when personal preference is at play*"³⁰ is simply insufficiently probative as to consumer preferences and switching behaviour to be of any use for the purposes of market definition.
- 4.35 Further, ICASA's statement demonstrates that case precedent from other jurisdictions is of limited value.

Case precedent

- 4.36 As mentioned in the preceding paragraph, the Premier League believes that cases from other jurisdictions have limited value (it is wrong to refer to them as "case precedent", since they do not have any precedential effect in a legal sense).
- 4.37 In this case, the cases that ICASA has referred to are for the most part so old that they have lost any value as "precedents" for ICASA to rely on since all of them pre-date the inception of OTT services. The document "*Media Market Definitions in EC Competition Law – Recent Developments*"³¹ dates from 2004 and the three merger

²⁹ Draft Findings, paragraph 5.17.3.

³⁰ Draft Findings, paragraph 5.17.4.

³¹ https://ec.europa.eu/competition/sectors/media/documents/chapter_1_ec_final.pdf. The document is a review of relevant case law which has no legal status (and is not a "document defining relevant markets in the media sector" as asserted by ICASA at paragraph 5.17.4).

cases to which ICASA refers, *Viacom Channel 5 Broadcasting*, *NewsCorp/BSkyB* and *British Interactive Broadcasting/Open* date respectively from 2014, 2010 and 1999. Moreover, in the most recent of those decisions, *News Corp/BSkyB*, the European Commission stated that its market investigation was "*not conclusive as regards the possible segmentation of the market for licensing of audiovisual content in relation to the UK and Ireland*" and made no determination as regards market definition. Neither was a determination made by the European Commission in the *Liberty Global/Ziggo* case.

- 4.38 Having referred to the *Liberty Global/Ziggo* case in which the European Commission cited "*differences in price and ability to attract viewers*" as reasons to distinguish between "*the acquisition of rights for premium content and the acquisition of rights for non-premium content*"³², ICASA decides that the following is premium content:

"(a) Hollywood premium FSPTW movies and series; (b) major live soccer matches including Bafana Bafana, FIFA World Cup, PSL, EPL, UEFA, La Liga, Bundesliga, Ligue 1 and Serie A live soccer matches; (c) major live rugby matches, including Rugby Championships, Super Rugby, World Rugby Sevens Series and the Currie Cup Premier Division and the Super 14; and (d) live cricket matches, including the IPL, T20, ODI and test matches involving the Proteas".

- 4.39 Neither this paragraph nor the rest of the Draft Findings contains any analysis whatsoever concerning consumer preferences, prices or viewing figures to justify why any particular sport or competition has been included in this list. Just because consumers mention sport as one type of programming content that they enjoy does not give ICASA carte blanche to include all "major" football, cricket and rugby matches within the definition of premium content without an analysis explaining what it is about the programming that renders it "premium". The list effectively includes all international football, rugby and cricket matches regardless of their appeal to consumers in South Africa. No effort has been made by ICASA to apply the SSNIP test or to assess whether such matches have any appreciable effect on competition in any relevant market in South Africa. This is a fundamental flaw in ICASA's reasoning and Draft Findings.

³² Draft Findings, paragraph 5.17.6.

4.40 As far as films are concerned, ICASA has made no effort to explain why Hollywood FSPTW movies and series are regarded as premium to the exclusion of other movies and series. This is not supported by ICASA's consumer survey which did not distinguish between Hollywood films and series and films and series produced outside Hollywood.

4.41 ICASA goes on to make an equally flawed statement as follows:

"In South Africa live rugby, cricket and PSL soccer matches are regarded as the top three sporting codes with a large following and offered on exclusive basis on television. Therefore, the three sporting codes can be viewed as premium content. However, live soccer, rugby and cricket also differ in terms of characteristics and the profile of followers. Rugby and cricket have traditionally been seen as having a large following from the white community whilst soccer on the other hand has more black followers. Thus, a broadcaster is unlikely to substitute soccer for rugby or cricket. Despite these differences, the Authority does not deem it necessary to further divide the markets in terms of sporting code"³³.

4.42 This paragraph is totally meaningless. If particular programming is premium content, then, following ICASA's previous reasoning, it can be used to drive subscriptions to a particular pay-TV service. The above statement seems to suggest that some premium content is not substitutable for other premium content which is a conclusion that cannot be drawn without conducting a SSNIP test analysis. Just because a TV service showing premium content in a particular genre may wish to show as much of it as possible does not mean that it would not be possible for a service to be successful with programming content in a different genre or genres.

Failure to take account of ICASA's listed events consultation

4.43 At the same time as it is undertaking the current investigation into subscription television broadcasting services, ICASA is also consulting on the Draft Sports Broadcasting Services Amendment Regulations, 2018 which aim to ensure access by South Africans to televised national sporting events and sports of national interest.

³³ Draft Findings, paragraph 5.17.13.

The amendments also seek to ensure that FTA and subscription broadcasters secure sport rights content through a competitive bidding process on a non-exclusive basis.

- 4.44 The amendments would introduce a new list of sporting events and codes, divided into three groups. Certain national sporting events would have to be broadcast in the form of full live coverage on FTA (Group A), subscription broadcasts (Group B) and by both categories of broadcasters (Group C). Group A includes premium and major sports events such as the Summer Olympic Games, Paralympics, FIFA World Cup, Africa Cup of Nations, Rugby World Cup and ICC Cricket World Cup, that must be broadcast by FTA. If no FTA licensee can acquire the sporting rights for the events cited in Group A, subscription pay-TV operators will be permitted to bid for the rights on a non-exclusive basis. Further, the national sporting events listed in Group B (Super 14 Rugby, All Africa Games, Supa 8 Cup, Currie Cup, Two Oceans Marathon and Comrades marathon, among others) must be offered to a subscription broadcaster on a non-exclusive basis under sub-licensing conditions. Group C is non-premium content, geared at minority and developmental sporting events to be broadcast by FTA and subscription broadcasters.
- 4.45 The existing regulations do not specify a television broadcaster category. This permits the national sporting events listed in Regulation 5 to be acquired and broadcast by either FTA or pay-TV subscription broadcasters. The draft regulations would require Group A events to be offered to FTA broadcasters and Group B events would need to be offered to pay-TV broadcasters. Group C events would be offered to both categories of broadcasters.
- 4.46 In the context of the Draft Findings, the Premier League submits that ICASA's findings are flawed by its failure to take into account the impact of changes to the listed events regulations on its market definition findings and particularly whether the availability of attractive sports programming on FTA television by virtue of the draft regulations would increase the likelihood of a pay-TV subscriber switching to FTA (either alone or in combination with OTT services) following an increase in prices by MultiChoice.

5. CONSUMER HARM

Introduction

- 5.1 The Premier League is concerned by ICASA's failure to take into account consumer harm within its assessment of the effectiveness of competition on the relevant markets, and its failure to do so brings the reasonableness of ICASA's findings into question. While ICASA contends that it is not required to assess consumer harm, there is no basis for this contention as any assessment of the effectiveness of competition, and the need to impose remedies, must necessarily consider the nature of competition and its outcomes including the impact on consumers. That is something which ICASA has entirely failed to do. As such, the integrity and reliability of ICASA's conclusions are undermined, as ICASA has failed to demonstrate an adverse impact on consumers with regard to price, quality or choice, has not provided any evidence of any lack of innovation or technical development and has failed to consider the impact of its proposed remedies on consumers.
- 5.2 The Premier League's submissions on consumer harm are developed in the following sub-sections:
- 5.2.1 consumer welfare as a fundamental pillar of competition law;
 - 5.2.2 ICASA's obligations under the Electronic Communications, Act 36 of 2005 (ECA) and its approach to considering the effectiveness of competition;
 - 5.2.3 lack of evidence of consumer harm; and
 - 5.2.4 conclusion.

Consumer welfare as a fundamental pillar of competition law

- 5.3 It has long been established that consumer welfare is a fundamental pillar of competition law. A clear statement to this effect can be found in a 2005 speech of Neelie Kroes, a former European Commissioner for Competition:

"Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources".³⁴

³⁴ SPEECH/05/512, 15 September 2005.

5.4 Additionally, Joaquín Almunia, another former European Commissioner for Competition, stated in a speech in 2010:

*"All of us here today know very well what our ultimate objective is: competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions".*³⁵

5.5 These statements are clear: competition law has the ultimate aim of promoting consumer welfare, which must consequently be the driving force behind the regulation of competition. Therefore, an assessment of competition cannot take place in the abstract without a consideration of consumer welfare. This is because, while a market may appear *prima facie* anti-competitive (for example, because of market power or underlying particular market characteristics such as high market shares or a small number of market participants), it does not necessarily follow that there is any consumer harm attributable to that market.

5.6 In turn, if there is no actual consumer harm, then the likelihood is that the market in question is operating naturally with no negative effects on consumers. In such circumstances, the market would not require regulating and the regulator should not intervene. Indeed, additional regulation could lead to unintended consequences for consumers and, ultimately, worse outcomes than the *status quo*.

5.7 This is reflected by the European Commission in its best practice guidance on enforcement proceedings:

*"... some cases will be discarded at a very early stage because they are not deemed to merit further investigation ... the Commission focuses its enforcement resources on cases where it appears likely that an infringement may be found, in particular on cases with the most significant impact on the functioning of competition in the internal market and **risk of consumer harm** ..."* (emphasis added).³⁶

³⁵ SPEECH/10/233, 12 May 2010.

³⁶ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU; OJ C 308, 20.10.2011; para 13.

- 5.8 This point is further supported by guidance that is applicable to market investigations in the UK:

*"Outcomes of the competitive process in their different forms in a market—eg prices and profitability, levels of innovation, product range and quality—can also provide evidence about its functioning. Evaluating these outcomes helps the [CMA] determine whether there is an [adverse effect on competition] and, if so, **the extent to which customers may be harmed by it, ie the degree and nature of 'customer detriment'**. This can be an important factor in any later consideration of possible remedies"* (emphasis added).³⁷

- 5.9 On this basis, it is clear that an assessment of consumer benefit and consumer harm is vital in determining whether an authority should be concerned with a certain market (in particular, if the market displays characteristics that may otherwise be considered to be warning characteristics) and whether that authority should impose additional remedies on that market.

- 5.10 The Premier League submits that an assessment of consumer welfare should always be carried out as part of a full and complete market assessment by a regulator. Without knowledge as to consumer benefit and consumer harm, an authority cannot be well-placed to make an informed decision about that market, including as to remedies.

- 5.11 It naturally follows that the integrity and reliability of ICASA's conclusions are undermined due to this fundamental flaw in its assessment of the markets in question.

ICASA's obligations under the ECA and its methodology for considering the effectiveness of competition in the Draft Findings

- 5.12 ICASA has certain statutory obligations under the ECA which it must adhere to in its analysis of the effectiveness of competition in the relevant markets. In particular:

³⁷ Competition Commission's *Guidelines for market investigations: Their role, procedures, assessment and remedies*; CC3 (Revised) (April 2013) (still applicable to the UK's Competition and Markets Authority).

"When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things— (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".³⁸

5.13 However, ICASA interprets this obligation narrowly, and while it sets out what factors it must take into account in its assessment of the effectiveness of competition, it does not acknowledge that it should consider consumer harm in parallel with each of these factors. Indeed, ICASA explicitly states in its response to MultiChoice's submissions:

"... MultiChoice contends that what constitutes 'ineffective competition' must be a state of competition which results in significant harm to consumers. The Authority disagrees with this contention ... Consumer harm is what some competition authorities are required to prove, in ex post investigations".³⁹

5.14 However, while ICASA is correct that competition authorities are often required to prove consumer harm in an investigative context (for example, to prove a restriction by effect under Article 101 of the Treaty on the Functioning of the European Union), this is not the sole remit of an analysis of anti-competitive effects (or consumer harm). For the reasons set out above, namely to ensure a complete assessment and appropriate consideration of remedies, an assessment of consumer harm should also be undertaken in a number of different scenarios. Indeed it seems quite remarkable for a regulator to propose extensive and wide-reaching remedies without a full and proper consideration of the impact on consumers. To maintain the position in its final findings that consumer harm is not a relevant consideration would therefore be an error on ICASA's part, which could be seen as a breach of its statutory obligations under the ECA.

³⁸ ECA, section 67(4A).

³⁹ Draft Findings, paragraph 6.3.18.

- 5.15 Indeed, ICASA implicitly recognises the importance of considering consumer harm through its evaluation of the factors set out in the ECA. It considers consumer benefit and/or harm (albeit that it is an incomplete and/or unsubstantiated assessment) on a number of occasions, for example:
- 5.15.1 when considering barriers to entry, it discusses switching costs (or lack thereof) and their effect on consumers;⁴⁰
 - 5.15.2 it discusses the evolution of subscription services, including new services introduced by MultiChoice in response to competition. These new services ultimately provided new options for consumers at differing price points;⁴¹ and
 - 5.15.3 it discusses the benefits to consumers of bundling, under a heading of barriers to entry.⁴²
- 5.16 This demonstrates that an assessment of the effectiveness of competition cannot be undertaken in the abstract, and supports the Premier League's submission that ICASA has committed a fundamental flaw in its assessment of the markets in question by not considering consumer harm.

Lack of evidence of consumer harm

- 5.17 For the reasons set out above, it is vital to evaluate (and demonstrate) consumer harm if ICASA is to impose reasonable and appropriate remedies. However, the Draft Findings demonstrate that ICASA has not undertaken this exercise. Indeed, while there are a few examples where ICASA has considered consumer welfare, it primarily evidences either market participants innovating and adapting as a result of competition, or pro-competitive aspects of the market that result in consumer benefits. For example, one market participant, MultiChoice, has introduced and/or developed a number of different products across a number of different platforms in

⁴⁰ Draft Findings, paragraphs 6.5.12 and 6.5.13.

⁴¹ Draft Findings, paragraphs 6.5.21 to 6.5.22.

⁴² Draft Findings, paragraphs 6.5.47 to 6.5.48.

response to competition.⁴³ This has resulted in consumer benefits directly related to the nature of the market.

5.18 Further, in relation to its rights, the Premier League submits that these are sold in a manner which results in benefits (not harm) to consumers which have not been considered by ICASA. For example, since the Premier League sells its "Live Package" exclusively in South Africa, while also selling a "FTA Package" separately for exploitation on FTA television in South Africa:

5.18.1 consumers who are pay-TV subscribers benefit from being able to access all Premier League matches from a single provider without incurring multiple subscription fees;

5.18.2 FTA viewers can watch one live Premier League match per weekend without incurring any subscription fees at all;

5.18.3 the Premier League can maximise the value of its content, which means that it can in turn invest in improving production value, which increases the attractiveness of the sport to consumers in South Africa and other parts of the world; and

5.18.4 a holder of Premier League rights can differentiate its product offering, innovatively package content and promote and market the content to the benefit of viewers.

Consumer harm conclusion

5.19 Competition law has the ultimate aim of promoting consumer welfare. As such, an assessment of competition cannot take place in the abstract without considering consumer welfare, as without that assessment an authority:

5.19.1 cannot accurately determine the effectiveness of competition on a market (i.e. whether it needs to intervene in the first place); and

⁴³ Draft Findings, paragraphs 6.5.21 to 6.5.22, 6.5.47 to 6.5.48 and 6.5.54 to 6.5.55.

5.19.2 cannot effectively regulate that market (to attempt to do so would risk promoting anti-competitive effects which may ultimately harm competition and consumers).

5.20 On this basis, and because ICASA has not demonstrated any consumer harm, it naturally follows that there is a fundamental flaw in ICASA's assessment of the markets in question. This flaw undermines the integrity and reliability of ICASA's conclusions, and the Premier League invites ICASA to revise its assessment to take account of the market realities.

6. PROPOSED REMEDIES

6.1 The Premier League regards ICASA's proposed remedies as unwarranted, draconian and likely to be harmful to rights holders and consumers. If such remedies are pursued by ICASA then they will, for the reasons outlined below in this section 6, seriously adversely affect domestic and international rights holders active in South Africa and will have been imposed despite ICASA failing to establish any consumer harm, ineffective competition or wrongdoing.

6.2 The Premier League also has serious concerns regarding the process followed by ICASA in this inquiry. Although ICASA's proposed intervention is likely to cause significant economic harm to the Premier League's member clubs, the wider football community and consumers more generally, the Premier League has not prior to September 2019 received any documentation relating to, or invitation to comment on, this inquiry. It is not acceptable for a regulator to impose draconian remedies which will have a significant adverse impact on a stakeholder without consulting fully and extensively with that stakeholder.

6.3 ICASA's failure to consider the impact of the proposed remedies on rights holders is legally flawed and calls into question the legitimacy of its proposals. Even if ICASA were correct that there is ineffective competition in the identified markets (which it is not), ICASA must ensure that any proposals to remedy such ineffective competition take into account the effect that such proposals would have on other relevant parties (including the Premier League). It is the Premier League's firm view that ICASA's proposed remedies, if implemented, are so far-reaching and disproportionate they will have a serious financial impact on rights holders around the world (including the Premier League and domestic rights holders such as the PSL) and a significant negative impact on consumers in South Africa.

- 6.4 Indeed, the Premier League anticipates that the effect of ICASA's proposed remedies on domestic sports in South Africa would be especially acute (given that their rights have a greater value in South Africa than elsewhere) and potentially undermine those content owners' abilities to create a consumer product capable of competing successfully with other African and global competitions. ICASA has failed to give proper consideration to the damaging consequences of their proposed remedies for all stakeholders including rights holders and consumers.
- 6.5 The Premier League notes ICASA's power under section 67(4) of the ECA to *"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"*.
- 6.6 Putting aside ICASA's failure to demonstrate the existence of ineffective competition, the Premier League has two overarching concerns regarding the structure of ICASA's proposed remedies:
- 6.6.1 firstly, many of the proposed remedies (particularly those relating to the term and packaging of "premium content") in practice seem to be imposed on and regulate the behaviour of the rights holders of "premium content" rather than MultiChoice. The appropriateness and, indeed, lawfulness of such intervention is therefore unclear as is ICASA's jurisdiction to intervene in this way; and
- 6.6.2 secondly, if the remedies were implemented by imposing licence conditions on MultiChoice and a relevant rights holder sold its rights for a period in excess of any regulated limit on contract duration imposed by ICASA, or in the form of a single bundled package, MultiChoice would not be eligible to win those rights. The proposed remedies would therefore prevent MultiChoice from competing in any relevant market at all. This would produce an inappropriate and disproportionate outcome especially in circumstances where ICASA has not actually demonstrated that there is ineffective competition in any relevant market.
- 6.7 The Premier League also notes ICASA's failure in the Draft Findings to consider the impact of the proposed remedies on other stakeholders including rights holders and consumers. ICASA's assessment of its proposed remedies is cursory and incomplete and its findings are flawed.

6.8 Taking each of the proposed remedies in turn:

Reducing contract duration

- 6.8.1 The duration of rights contracts is a matter for rights holders to decide, taking account of and balancing all of the complex factors relevant to the sale of audio-visual rights. Save in exceptional circumstances (and only then when particular content has been demonstrated to have an appreciable effect on competition), a regulator such as ICASA should not be involved in the setting of contractual duration. Such an intervention by a regulator would be particularly inappropriate and disproportionate in relation to rights to overseas sporting competitions like the Premier League, especially when ICASA has not provided any evidence whatsoever that such rights have an appreciable effect on competition in any relevant market in South Africa.
- 6.8.2 The Premier League would also caution that a strict limit on the duration of rights contracts could have unintended consequences. By way of example, some properties (e.g. the FIFA World Cup) are only in fact held on a quadrennial basis and so naturally lend themselves to a longer rights duration.
- 6.8.3 Furthermore, bidders (including new entrants) may actually prefer the certainty of longer term contracts and value the opportunity to monetise their investment in a rights property over a prolonged period. This is particularly the case where significant initial costs are required (e.g. in production facilities, staff and promotion) and therefore a longer time horizon is necessary to earn a return on investment. As such, artificially limiting the duration of rights deals could have the perverse effect of reducing contestability and competition.
- 6.8.4 Therefore, a blanket restriction on the length of rights agreements may in fact harm competition and be to the longer term detriment of consumers.

Prohibiting the automatic renewal of contracts

- 6.8.5 The Premier League has no comment to make on this proposal at this stage but reserves the right to comment on any licence condition in order to ensure that it is appropriate and proportionate.

Rights splitting

- 6.8.6 The Draft Findings fail to recognise the important role that content exclusivity plays in delivering benefits such as service differentiation and innovation. Unwarranted interference in the packaging of rights and the consequent loss of exclusivity may lead to a decrease in those benefits with negative impacts on consumers in South Africa.
- 6.8.7 Contrary to ICASA's finding, the Premier League also anticipates that new entrants in the market would actually prefer the so-called "winner-takes-all" outcome of traditional rights processes as content exclusivity encourages investment in innovative new services by incentivising the service provider to offer a product that is compelling and unique to subscribers and thus ensure that the service is valued by and attractive to consumers.
- 6.8.8 Exclusivity is also valued by consumers as it means that those interested in a particular event/competition are able to watch that event/competition on the services of a single broadcaster (i.e. multiple subscriptions are not required).
- 6.8.9 The Premier League is not aware of any precedent for a regulator mandating that a national football league be required outside of their own domestic market (a) to split their rights into multiple packages; and (b) not to sell all of those packages to a single buyer. Any move by ICASA to do so here would be wholly unjustified. This is a drastic remedy which can only ever be appropriate where "must have" content has a material appreciable effect on competition and has only been required by regulators such as the European Commission in a limited number of cases and only in the domestic market of the rights holder. It should only ever be a remedy of last resort and is not appropriate in relation to overseas rights holders.
- 6.8.10 The proposed remedy also ignores the fact that the Premier League has for more than a decade made a second package of live rights available in South Africa. This package, which contains the non-exclusive right to make a live transmission of one Premier League match per weekend fixture programme (in the key Saturday afternoon timeslot), is reserved for exploitation by a FTA broadcaster only (i.e. it cannot be exploited on a subscription channel). This is because the Premier League looks at each geographic market separately and uses its skill, judgment and experience to devise an audio-

visual rights strategy appropriate to that market. That is not a role which ICASA is qualified to perform.

Unbundling

- 6.8.11 The "unbundling" of rights (i.e. requiring a different licensee of rights for each platform) would have the effect of completely neutering exclusivity and undermining all of the benefits that exclusivity is recognised as delivering for stakeholders including rights owners, rights buyers and consumers. The acquisition of exclusive content is used by broadcasters in order to differentiate their services, packaging and pricing from that of their competitors and provides an incentive for broadcasters to invest in the creation of innovative and attractive services that are valued by consumers. That enables broadcasters to generate advertising and subscription revenues based on consumer uptake and that in turn provides a sound basis for further investment by broadcasters in the attractiveness and quality of those services. In short the sale of content on an exclusive basis creates a virtuous circle which delivers significant benefits for rights holders, broadcasters and consumers. If ICASA takes the regressive and retrograde step of mandating the "unbundling" of rights, those benefits would be lost and the consequences would be extremely negative for stakeholders including rights holders, broadcasters and consumers.
- 6.8.12 For many years market practice across the world has been to sell rights for exploitation on a technology-neutral basis. The European Commission recognised this as far back as 2006 in its commitments decision with the Premier League and departing from this widely-established position now would risk stifling innovation and the launch of new services and would only harm consumers in South Africa.
- 6.8.13 The proposed remedy of unbundling would not only reduce demand from traditional broadcasters who will not be enthused by the prospect of acquiring rights to unbundled content for exploitation by means of satellite (for example) on a non-exclusive basis whilst another operator acquires (for example) the internet rights to the same unbundled content. The remedy would also preclude the exploitation of unbundled content on an exclusive basis via OTT services. Since the growth in, and success of, OTT services

across the world has been built on the use of exclusive content, this disproportionate, harmful and regressive remedy would deter new entrants from launching new OTT services in South Africa and would generally dampen investment in audio-visual services in South Africa. In short, such a misconceived remedy would fly in the face of global trends and would cause significant harm to the development of, and to levels of investment and innovation in, the South African content and distribution industry to the detriment of consumers.

- 6.8.14 The harm caused by such a misguided remedy would not end there and would also be felt by rights holders. If ICASA effectively mandates the exploitation of unbundled content on a non-exclusive basis (as described in paragraph 6.8.13 above), that will depress the valuation of rights to that unbundled content by all broadcasters (whether traditional broadcasters or OTT operators) which will lead to lower rights values and reduced investment in that unbundled content and therefore to lower quality content for consumers to enjoy. This will not only have a detrimental impact on rights holders and their stakeholders but will cause further harm to consumers. None of this has been properly considered by ICASA.
- 6.8.15 If forced to unbundle its rights and sell them on a completely non-exclusive basis, the Premier League may have to consider withdrawing from the sale of its rights in South Africa. The very fact that ICASA could even consider such a retrograde remedy as unbundling clearly demonstrates that rights holders such as the Premier League (and not ICASA) are best placed to understand and judge how their rights should be made available for sale.

Wholesale must-offer

- 6.8.16 The Premier League has direct experience of the effect of a wholesale must-offer remedy as a result of Ofcom's attempt to impose such a remedy on Sky in the UK. That remedy was deeply flawed and was rejected by the UK Competition Appeal Tribunal.
- 6.8.17 A wholesale must-offer remedy, in particular, is likely to give rise to unintended consequences for content owners such as the Premier League and domestic South African rights holders. This is because such a remedy will potentially affect competition in the upstream content acquisition market.

One risk of such a remedy is that the incentive for other platform operators/retailers to bid for content affected by the remedy will be removed if they are able to purchase MultiChoice's affected channels at a downstream wholesale level on terms which disincentivise them from creating their own channels and services.

- 6.8.18 The remedy risks creating free-riding problems for rights holders and may reduce the incentive on MultiChoice to bid for affected content if MultiChoice has obligations imposed on it which limit MultiChoice's ability to monetise the rights it has acquired and recoup its investment. This is heightened in markets where there are only a limited number of buyers of rights (as is suggested to be the case by ICASA in South Africa).
- 6.8.19 Any reduction in the platform operators'/broadcasters' incentive to bid for each affected rights holder's rights would reduce competition for that rights holder's rights and distort the natural sales process. Distortion in the upstream content rights market will no doubt give rise to a diminution in value of that rights holder's rights which will in turn have an adverse effect on stakeholders in that content and consumers as a whole. This would, of course, be replicated for all rights holders whose content is included (or might be included) on any of the relevant channels and services.
- 6.8.20 To see why the remedy undermines the competition for rights, first consider the case in which the winner of the rights is unable to recover the cost of obtaining rights. In this case the winner has to pay for the rights, but its competitors do not as they can obtain the rights in the regulated wholesale market. Therefore all bidders will reduce their bids as a result; in the extreme the rights would be worthless as all bidders would prefer not to win but obtain the rights in the regulated wholesale market.
- 6.8.21 The setting of a regulated wholesale price is hugely complex and fraught with risk and difficulty. The bottom line is that if the wholesale price is set low enough to attract entry into the retail market, the wholesale remedy will be seriously likely to undermine the competition for rights and as a result the price paid for those rights. The natural consequence of this is that rights owners (such as the Premier League and domestic South African sports rights

owners) will reduce their investment in producing content because they no longer have the funds available to invest at current levels.

6.8.22 Reduced investment will lead to lower quality content, which will be detrimental to consumers. Because investment in intellectual property is not dependent on the retail channel it will not only be MultiChoice's consumers or consumers in South Africa that receive this lower quality product, but consumers throughout the world: in the case of the Premier League (and football in general) all those that watch or attend football matches; and in the case of South African sport all those that watch or attend South African sport. Therefore implementing ICASA's proposed remedy will have a detrimental impact on consumers and ICASA has failed to take this into account.

6.8.23 Even if ICASA (wrongly) ultimately decides to pursue a wholesale must-offer remedy, there are a number of key issues which would need to be decided in relation to the pricing and the terms of the wholesale remedy before it could come into operation and the Premier League reserves the right to make further submissions on those issues.

6.8.24 The draconian and complex nature of a wholesale must-offer remedy means that it would be likely to be the subject of legal proceedings for many years. This was most certainly the experience of Ofcom in the UK, where the Competition Appeal Tribunal's adverse judgment regarding Ofcom's wholesale must-offer obligation on Sky played a very significant role in Ofcom's eventual decision to scrap the remedy.

Limiting access to the number of Hollywood movie studios

6.8.25 The Premier League is not best placed to comment on whether it is appropriate for ICASA to limit the number of Hollywood studios that MultiChoice may enter into exclusive agreements with. However, the Premier League once again notes that the Draft Findings do not contain any evidence of consumer harm or ineffective competition flowing from the number of Hollywood studios with which MultiChoice has exclusive agreements and also that many of the major OTT players (which ICASA excludes from its definition of the relevant market) already have deals in place with Hollywood studios and many other important producers of feature films.

6.8.26 The Premier League also notes that there seems to be very limited correlation between the consumer survey findings and the "premium content" that is the subject of ICASA's proposed remedies (i.e. the consumer research highlights the popularity of movies and drama yet ICASA's definition of premium content means that the proposed remedies focus primarily on sport and barely cover movies and drama, with the exception of certain content produced by six Hollywood studios). This would suggest that the proposed remedies are significantly misdirected in focus.

Set-top box interoperability

6.8.27 Although the Premier League lacks the relevant local knowledge to comment on the specific set-top boxes used by the relevant distributors in South Africa, the Premier League would be surprised if a lack of interoperability between such set-top boxes was a major inhibitor on the swapping of content services by consumers.

6.8.28 In any event, the role of set-top boxes in the delivery of audio-visual content to consumers is only likely to decline in the short to medium term as increasingly more content is delivered by means of the internet. Therefore, regulation in this area seems untimely and unnecessary.

More appropriate remedies

6.9 As explained above, the Premier League regards the remedies proposed by ICASA as misguided, unnecessary and wrongly focussed. However, if ICASA still believes that *ex ante* intervention is necessary in the South African audio-visual market then there are areas identified by ICASA in the Draft Findings which would appear to be more appropriate recipients of regulatory attention and higher administrative priority.

6.10 For example, if ICASA is correct in its assertion that the OTT sector is underdeveloped in South Africa due to limited internet access and relatively high data costs, it would seem illogical for ICASA to intervene by imposing draconian remedies on MultiChoice and rights holders. Instead, the powers of South African regulators would be better employed in seeking to quicken and broaden the roll-out of cheap, reliable and universally available internet (fixed and/or mobile) access.

- 6.11 Similarly, if analogue FTA television in South Africa is losing viewers to MultiChoice/DStv for reasons of signal quality (with some such viewers then become paying subscribers of MultiChoice/DStv, even if only in the basic tier), then it would surely be better to address the issue of analogue signal quality by ensuring digital switchover happens as soon as possible. A conclusion that FTA television is not substitutable for subscription satellite television is hard to justify when the diagnosed reason for that is poor FTA infrastructure, and the proposed remedies would do nothing to solve the infrastructure problem.
- 6.12 Moreover, regulatory action so as to ensure that the future digital terrestrial television network in South Africa has the capability of encrypting broadcast signals with a view to enabling the carriage of subscription television broadcasting services on that network would seem a much more focussed and proportionate way to promote enhanced competition in the South African audio-visual programming market.
- 6.13 The example remedies set out in the paragraphs immediately above have the advantage of facilitating growth and competition in the South African audio-visual industry for the benefit of consumers without risking the potentially seismic problems for rights holders and consumers that ICASA's proposed remedies are likely to cause.

7. CONCLUSIONS

- 7.1 By way of conclusion:
- 7.1.1 ICASA has (a) followed a flawed process in this inquiry; (b) failed to consult with affected stakeholders including the Premier League; and (c) not conducted a proper impact or regulatory assessment;
- 7.1.2 ICASA's market definition is deficient and fails to take into account the competitive threat of FTA television and OTT services;
- 7.1.3 ICASA has not demonstrated any ineffective competition or consumer harm in its identified markets; and
- 7.1.4 ICASA's proposed remedies are unnecessary and disproportionate and are likely to have a serious adverse impact on consumers and on affected rights holders including the Premier League.

7.2 In view of the above and, in particular, ICASA's flawed process, the Premier League reserves all of its rights and remedies including without limitation its rights to (a) make future submissions relating to this inquiry; and (b) contest ICASA's findings and/or proposed remedies.

**DLA PIPER UK LLP
FOR AND ON BEHALF OF
THE FOOTBALL ASSOCIATION PREMIER LEAGUE
4 OCTOBER 2019**