



Ms Violet Molete

ICASA

subscriptioninquiry@icasa.org.za

4 October 2019

Dear Ms Molete

JOINT WRITTEN SUBMISSIONS BY THE SOS COALITION AND MEDIA MONITORING AFRICA ON THE DRAFT FINDINGS DOCUMENT ON THE INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES

1. INTRODUCTION

- 1.1. In Notice 573 published in Government Gazette No. 42391 dated 12 April 2019, ICASA invited written submissions on its Draft Findings Document on the Inquiry into Subscription Television Broadcasting Services (“the Findings Paper” and “the Inquiry”). The date for submissions of which was extended to 27 August 2019 as a result of the extension provided for in Notice 895 published in Government Gazette 42520 dated 7 June 2019. The Authority further extend the closing date for submission of written representations to the Draft Findings Document from 27 August 2019 to 4 October 2019 at 16:00.

1.2. The SOS Coalition:

- 1.2.1. The SOS Support Public Broadcasting Coalition (SOS) is a civil society coalition that advocates for the presence of robust public broadcasting in the public interest to deepen our constitutional democracy. The coalition represents trade unions, non-governmental organisations (NGOs), community-based organisations (CBOs), community media, independent film and TV production sector organisations; academics, freedom of expression activists and concerned individuals.
- 1.2.2. SOS campaigns for an independent and effective public broadcaster. We engage with policy makers, regulators, and law makers to secure changes to promote citizen friendly policy, legislative and regulatory changes to public and community broadcasting public broadcasting.
- 1.2.3. The Coalition campaigns for the above by:
 - 1.2.3.1. Lobbying for transparency and accountability by all institutions governing public and community broadcasting: Parliament, the Ministry and Department of Communications, the Media Development and Diversity Agency (MDDA), the SABC, the Universal Service and Access Agency of South Africa (USAASA) and to the Competition Commission.
 - 1.2.3.2. Promoting a constructive, engaged role with all stakeholders, including industry bodies such as the National Association of Broadcasters (NAB) and the National Community Radio Forum (NCRF), as well as a range of NGOs, CBOs, campaigns and others.
 - 1.2.3.3. Researching international best practices to inform all aspects of our work.
 - 1.2.3.4. As part of its lobbying work the Coalition writes submissions, commissions research, engages the media, organises public meetings and where appropriate pickets and protests. Our contributions in advocating for a public-interest-focused public broadcaster have been recognised by the broadcasting sector, the media, the courts, and Parliament as being immensely valuable
 - 1.2.3.5. Overall, the work that SOS does has helped to contribute to the growing public understanding of the SABC as “our” public broadcaster – one that must not be captured by the state or by a particular faction of the ruling party, and one that must service the information and entertainment needs of the citizens of the country.

1.3. Media Monitoring Africa:

- 1.3.1. MA is Media Monitoring Africa (“MMA”) is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.
 - 1.3.2. MMA’s vision is a just and fair society empowered by a free, responsible and quality media.
 - 1.3.3. In the last 24 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has, and continues to challenge media on a range of issues always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law making processes.
 - 1.3.4. MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available – all of which can be found on MMA’s website. (www.mediamonitoringafrica.org)
- 1.4. MMA and SOS thank ICASA for the opportunity of making these written submissions and respectfully request a joint opportunity to make oral submissions at any hearings that ICASA may decide to hold as part of the Inquiry.

2. NATURE OF THIS SUBMISSION

- 2.1. SOS and MMA have extensive experience in acting in the public interest on matters of freedom of expression and both organisations have extensive experience in contributing to ICASA-process with regard to broadcasting.
- 2.2. Further, and as ICASA is aware, SOS and MMA are concerned about the broadcasting environment as a whole, although traditionally their area of focus has been on the public broadcaster, the SABC.

- 2.3. In responding to the issues raised in the Findings Paper, SOS and MMA do not necessarily deal with all issues raised in the Findings Paper or in the order in which they arise in the Findings Paper, nor do they confine themselves to the issues canvassed in the Findings Paper.
- 2.4. In making these submissions, SOS and MMA are attempting to assist ICASA in realising the depth and breadth of the challenges facing the television sector and the role of the effective monopoly player, MultiChoice, in creating the landscape that all television, public, commercial and community, free to air and subscription, finds itself in.
- 2.5. In these submissions, SOS and MMA are going to confine their comments on the Findings Paper to the actions that ICASA has proposed to take in respect of the subscription broadcasting sector and to point out where, in our view, more action needs to be taken by ICASA in protecting the public interest in the subscription broadcasting sector.

3. ASSESSING THE EFFECTIVENESS OF COMPETITION

- 3.1. SOS and MMA have noted the various positions which are proposed to be adopted by ICASA in regard to the effectiveness of competition, namely, that ICASA found ineffective competition in the following markets¹:
 - 3.1.1. retail distribution of basic tier subscription television services;
 - 3.1.2. retail distribution of satellite-based free-to-air television services;
 - 3.1.3. retail distribution of premium subscription television services; and
 - 3.1.4. the wholesale acquisition of premium content for distribution in South Africa.
- 3.2. We agree with and welcome ICASA's findings in this regard.
- 3.3. SOS and MMA have noted ICASA's findings that over-the-top services (OTTs) are "an out of market constraint on subscription television services"².
- 3.4. While we agree with and welcome ICASA's assessment of the impact of OTTs at this time, for the reasons put forward by ICASA in the Findings Paper, we think it imperative that the final Findings Paper contains an enforceable commitment on the part of ICASA to review the OTT sector every 3 years with a view to assessing whether or not OTTs remain an "out of market constraint" or

¹ See paragraphs 7.3.6 to 7.3.16 of the Findings Paper.

² See paragraph 1.2.3 of the Findings Paper.

whether the market dynamics have changed to such an extent that OTTs (whether provided on a subscription or pay-per-view basis) constitute a direct competitor to subscription broadcasting. We are of the view that this is particularly necessary given the abject failure of the migration to DTT and the recent failure of the only licensed free-to-air DTT provider, Kwese TV, announced just last month. In this regard we strongly disagree with ICASA's assessment regarding the "imminent migration to digital broadcasting". We are of the view that satellite television (whether provided on a free-to-air or on a subscription basis) is likely to be the only manifestation of digital television for the medium to long-term in South Africa.

4. IDENTIFYING LICENSEES WITH SIGNIFICANT MARKET POWER

4.1. In the Findings Paper, ICASA found that MultiChoice, in all the identified markets where there is in effective competition (these are referred to in paragraph 3.1 above) "possesses significant market power on the basis of high market shares and the nature of its vertical integration which the Authority considers to harm competition"³.

4.2. SOS and MMA agree with and welcome this assessment.

5. IMPOSITION OF PROCOMPETITIVE LICENCE TERMS AND CONDITIONS – CONTRACT DURATION

5.1. In the Findings Paper, ICASA proposes to limit the duration of exclusive contracts entered into by licensee with significant market power to 3 years and to prohibit the automatic renewal of contracts entered into by licensee with significant market power⁴ to ensure content is available to other broadcasters, subscription as well as free-to-air.

5.2. SOS and MMA agree with and welcome these proposals. However, we note that in certain instances the licensee with significant market power is also the distributor and rights-holders of content, particularly, local content. We therefore believe that the 3 year limit on exclusive contracts, must apply to itself as rights-holder too.

6. IMPOSITION OF PROCOMPETITIVE LICENCE TERMS AND CONDITIONS – RIGHTS SPLITTING AND UNBUNDLING

6.1. In the Findings Paper, ICASA proposes to limit the ability of MultiChoice to obtain access to rights as a single distributor.⁵ In this regard, ICASA proposes that rights be split into different platform

³ See paragraph 1.5.2 of the Findings Paper.

⁴ See paragraph 1.6.1.1 of the Findings Paper.

⁵ See paragraph 1.6.1.3 and 1.6.1.4 of the Findings Paper.

rights, namely, subscription rights, free-to-air rights and OTT rights, to prevent “a ‘winner-takes-all’ outcome”⁶ which limits entry by other distributors resulting in ineffective competition.

6.2. SOS and MMA agree with and welcome these proposals.

7. IMPOSITION OF PROCOMPETITIVE LICENCE TERMS AND CONDITIONS – WHOLESAL MUST OFFER

7.1. In the Findings Paper, ICASA finds that imposing a wholesale-must-offer requirement on MultiChoice with regard to MultiChoice’s premium sports channels/rights/content may be a “feasible remedy” to impose on MultiChoice as a licensee with significant market power⁷.

7.2. SOS and MMA agree with and welcome these proposals but we note that ICASA was extremely tentative, vague and unclear in this regard and we are of the respectful view that the final Findings Paper and consequential regulations must provide for a wholesale-must-offer requirement to be imposed on MultiChoice (or anyone else that gains significant market power in the subscription broadcasting market) not only in respect of its competitors in the subscription television market but also in respect of its competitors in the South African free-to-air television and OTT markets too. Further, SOS and MMA are of the view that ICASA ought to indicate in the final Findings Paper, that the position of the public broadcaster, the SABC, is *sui generis*, given its public mandate which requires it to broadcast certain premium sports content that constitutes national sporting events. Consequently, wholesale must offer requirements may be an insufficient remedy in the case of the SABC.

8. IMPOSITION OF PROCOMPETITIVE LICENCE TERMS AND CONDITIONS – FSPTW HOLLYWOOD MOVIES

8.1. In the Findings Paper, ICASA finds that FSPTW Hollywood movies are premium content⁸. ICASA proposes to limit the number of studios that a licensee with significant market power may enter into exclusive agreements with, to half of the Hollywood movie studios operational at any time.

8.2. SOS and MMA agree with and welcome these proposals but we note that ICASA was extremely tentative, vague and unclear in this regard and we are of the respectful view that the final Findings Paper and consequential regulations must provide for a triennial review of the number of Hollywood studios and a listing thereof to ensure measurable and quantifiable adherence to the

⁶ See paragraph 1.6.1.3 and 1.6.1.4 of the Findings Paper.

⁷ See paragraphs 8.3.9 to 8.3.11 of the Findings Paper.

⁸ See paragraph 8.3.12 of the Findings Paper.

FSPTW Hollywood movie studio limits proposed to be imposed on MultiChoice and any other licensee that requires significant market power.

9. IMPOSITION OF PROCOMPETITIVE LICENCE TERMS AND CONDITIONS – SET-TOP-BOX INTEROPERABILITY

9.1. In the Findings Paper, ICASA finds that “switching from one service provider to another can be limited by the lack of set-top box interoperability”⁹.

9.2. SOS and MMA agree with and welcome these findings. However we note that ICASA was extremely tentative and vague in this regard as it said that “should the Authority go ahead with this remedy [namely, requiring set-top box interoperability], it will embark on a separate and standalone consultation and public participation process”. We are of the view that this is simply insufficient and not in the public interest and that the final Findings Paper must contain an undertaking to promulgate set-top box interoperability regulations not only for subscription broadcasting services but for all satellite services, whether subscription or free to air.

10. ISSUES THAT ICASA HAS FAILED TO ADDRESS ADEQUATELY IN THE FINDINGS PAPER - ADVERTISING

10.1. SOS and MMA are extremely concerned that ICASA’s Findings Paper does not tackle the vexed issue of market power with regard to television advertising sufficiently. As we said in our initial submissions:

“One of the few provisions is section 60(4) of the ECA which prohibits the subscription broadcaster from having advertising or sponsorship, or a combination thereof, as their largest source of annual revenue. The aim of this section is clearly to prevent a situation where a successful subscription broadcaster is able to monopolise advertising as well as subscription income, thereby endangering not only other subscription broadcasters but free to air broadcasters too.

As shown in PwC’s Entertainment and Media Outlook Report, 2016-2020¹⁰ subscription revenue significantly outstrips the total advertising pool. This reality has made meaningless the legislative requirement that a Pay TV operator’s revenue from advertising must never exceed its subscription revenue. DStv could take 100% of the available advertising revenue, leaving none for any other television operator, and still not breach this requirement. SOS

⁹ See paragraph 8.3.13 of the Findings Paper.

¹⁰ <https://www.pwc.co.za/en/assets/pdf/enm/entertainment-and-media-outlook-2016-2020.pdf>

believes it is essential that ICASA, together with the Competition Commission, urgently investigate and squarely address this advertising issue.

Ultimately SOS and MMA are of the view that section 60(4) of the ECA will require to be amended to ensure that advertising remains the lifeblood for free to air broadcasting which was the original intention of the provision. SOS and MMA are of the view that ICASA must commission an international benchmarking research exercise in regard to appropriate levels of advertising allowed on monopoly or dominant subscription broadcasters.”

10.2. SOS and MMA notes ICASA's statement in the Findings Paper that it will “consider whether there was a need for intervention in this regard”¹¹. SOS and MMA are of the respectful view that ICASA cannot simply postpone the consideration of the advertising issue to some unspecified future date but must deal with the issue head on, given the existential threat it poses to commercial, public and community free-to-air television licensees. Consequently, SOS and MMA requests ICASA to ensure that the final Findings Paper contains an enforceable undertaking to commission an international benchmarking research exercise to ascertain appropriate levels of advertising to be allowed on subscription services of licensees with significant market power.

11. ISSUES THAT ICASA HAS FAILED TO ADDRESS ADQUATELY IN THE FINDINGS PAPER – MUST CARRY

11.1. SOS and MMA are extremely concerned that ICASA's Findings Paper does not tackle the issue of must carry sufficiently. As we said in our initial submissions:

Section 60(3) of the ECA provides that ICASA must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programs provided by a public broadcast service licensee (our emphasis). While ICASA has indeed prescribed Must Carry Regulations¹², the results have not been beneficial to public broadcasters generally and to the SABC in particular.

.....

Further, while section 60(3) of the ECA requires that fees be paid for channels subject to the Must Carry Regulations are “subject to commercially negotiable terms”, the Must Carry Regulations themselves, at section 6(1) thereof, provides that the Public Broadcasting Service licensee must offer a television programmes, at no cost, to a subscription licensee upon a request from the subscription licensee” (our emphasis). In SOS and MMA's

¹¹ At paragraph 6.5.7 of the Findings Paper.

¹² Notice 1271 published in Government Gazette Number 31500 dated 10 October 2008.

respectful view this is undermining the financial viability of the SABC which ICASA is enjoined to protect in terms of section 2(t) of the ECA, and, in any event is ultra vires the provisions of section 60(4) of the ECA. If ICASA does not act to rectify its Must Carry Regulations or face legal challenges on a number of grounds including being ultra vires the ECA.

We are aware that the SABC has called upon ICASA to review and amend its Must Carry Regulations and that ICASA has refused to do so. However, SOS and MMA are of the respectful view that the Inquiry process demands that no regulations be out of bounds for discussion and possible amendment if they have a direct bearing on the subject matter of the Inquiry. SOS and MMA would support the SABC in any legal challenge based on the ultra vires nature of the must carry regulations.

12. ISSUES THAT ICASA HAS FAILED TO ADDRESS ADQUATELY IN THE FINDINGS PAPER – EPG

12.1. SOS and MMA are extremely concerned that ICASA's Findings Paper does not tackle the issue of pro-competitive access to the Electronic Programme Guide (EPG).

12.2. As SOS and MMA suggested in its initial submissions, ICASA ought to ensure that all free to air broadcasters carried on the DStv platform are ranked as the first set of channels on DStv's EPG as follows: Public Broadcasting Channels, Commercial Broadcasting Channels and Community Broadcasting Channels. SOS and MMA respectfully submit that ICASA deals fully with the EPG issue in its final Findings Paper.

13. ISSUES THAT ICASA HAS FAILED TO ADDRESS ADQUATELY IN THE FINDINGS PAPER – INFORMATION TO BE COLLECTED

13.1. SOS and MMA are extremely concerned that ICASA's Findings Paper does not tackle the issue of requiring broadcasters to submit market-related information on a regular basis to allow for appropriate reviews of different broadcasting and OTT markets.

13.2. As we submitted in our initial submission, *"SOS and MMA are of the view ICASA should ensure that it regularly collects critical market related broadcasting information. SOS and MMA note that information is collected for ICASA's ICT sector review reports however the information gathered for broadcasting and OTT services is extremely limited. This needs to change. The reports need to include detailed market information for broadcasting that can be compared year on year. Information that needs to be included is as follows: broadcasting revenue disaggregated in terms of subscription, advertising, sponsorships, licence fees etc and then further disaggregated to show which broadcasters are earning subscription revenue, advertising etc. Also, information needs to include the rights owned by different broadcasters, ownership and control information and*

viewership figures.” SOS and MMA respectfully requests ICASA to ensure that this issue is fully addressed in the final Findings Paper.

14. ISSUES THAT ICASA HAS FAILED TO ADDRESS ADQUATELY IN THE FINDINGS PAPER – COLLECTING THE SABC LICENCE FEE

14.1. SOS and MMA are extremely concerned that ICASA’s Findings Paper does not tackle the issue of requiring subscription broadcasters with significant market power to collect television licence fees from its subscribers and pay these over to the SABC.

14.2. As SOS and MMA said in their original submissions:

Another issue that would contribute to competition and would also assist ICASA in meeting its objective of ensuring the viability of the SABC in terms of the ECA, would be for ICASA to require that MultiChoice be responsible for the collection of the SABC licence fee (provided for in terms of the Broadcasting Act) from the nearly 6 million subscribers that it has. This level of licence fee collection compliance would go a long way to assisting the SABC in overcoming its current financial crisis and to be in a financial position to compete for better programming and local content development for the benefit of all South Africans.

14.3. SOS and MMA respectfully requests ICASA to ensure that this issue is fully addressed in the final Findings Paper.

15. ISSUES THAT ICASA HAS FAILED TO ADDRESS ADQUATELY IN THE FINDINGS PAPER – LOCAL CONTENT AND TERMS OF TRADE FOR INDEPENDENT PRODUCERS

15.1. SOS and MMA are of the view that a glaring omission in the Findings Paper is the issue of the power of MultiChoice as a licensee with significant market power to engage unfairly with the independent production sector., including writer, performers, producers and others.

15.2. SOS and MMA are of the view that the final Findings Paper must address this issue. In particular we are concerned to ensure that ICASA recognises its responsibilities in regard to enforcing its Regulations on the Commissioning of Independently-Produced South African Programming¹³. We are of the view that ICASA appears to have become moribund in this regard and does not appear to play an active role in ensuring fair terms of trade for independent producers that contract to produce local content for subscription broadcasters with significant market power. Issues that we are of the view must be addressed in the final Findings Paper include, but are not limited to a

¹³ Notice 1598 in Government Gazette 32767 dated 1 December 2009.

stipulation that no subscription broadcaster with market power may “blacklist” any independent producer for developing content for another broadcaster or OTT service provider.

16. SOS and MMA trust that these additional submissions will be of assistance to ICASA in finalising the Position Paper on Subscription Television or final Findings Document, as the case may be.
17. Please do not hesitate to contact SOS and/or MMA should ICASA have any queries or require any further information.

Thank you

Yours Sincerely

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National Co-ordinator, SOS

Also on behalf of MMA