



Ms Refilwe Ramatlo

ICASA

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4 December 2017

Dear Ms Ramatlo

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

1. INTRODUCTION

1.1. In Notice 642 published in Government Gazette No. 41070 dated 25 August 2017, ICASA invited written submissions on its Discussion Document on the Inquiry into Subscription Television Broadcasting Services (“the Discussion Paper” and “the Inquiry”). The date for submissions of which was extended to 4 December 2017 as a result of various extensions provided for in the Government Gazette.

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 Discussion Paper, SOS and MMA do not necessarily deal with all issues raised in the Discussion Paper or in the order in which they arise in the Discussion Paper, nor do they confine themselves to the issues canvassed in the Discussion 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.

3. LEGAL AND COMMERCIAL FRAMEWORK WITHIN WHICH THE INQUIRY IS BEING CONDUCTED

3.1. As ICASA is aware, from a broadcasting point of view, there are three pieces of governing legislation, namely the Broadcasting Act, 1999, the ICASA Act, 2000 and the Electronic Communications Act, 2005 (the ECA).

3.2. At the time of the transition to democracy:

3.2.1. the Independent Broadcasting Authority Act, 1993 (the IBA Act) governed broadcasting and established the then broadcasting regulator, the Independent Broadcasting Authority (the IBA). While the IBA Act has been repealed by the ECA, we will refer to it from time to time in this submission to give historical context to the current television broadcasting landscape;

3.2.2. there was one subscription broadcaster, M-Net which had been licensed during the Apartheid era;

3.2.3. there was one community television broadcaster, Trinity Broadcast Network, operating out of the former Ciskei;

3.2.4. there were television services operated by the SABC and also BOP TV operated out of the former Bophuthatswana and which was incorporated into the SABC in due course;

3.2.5. Section 49(1)(a) of the IBA Act prohibited a person from controlling more than one commercial television broadcasting licence;

3.2.6. The IBA Act established the IBA to regulate broadcasting in the public interest but the IBA Act did not specifically mention various technology platforms through which broadcasting could be provided such as: satellite, analogue or digital terrestrial, cable etc; and

3.2.7. The existing television operators were grandfathered and soon new television entrants were licensed, e-TV for example as a national commercial broadcaster and, in time, new subscription television licensees.

3.3. In 2005 the IBA Act (as well as the Telecommunications Act, 1996) were repealed and replaced with the ECA.

3.4. In paragraph 1.2 of the Discussion Paper, ICASA gives an overview of the subscription broadcasting sector as follows:

3.4.1. MultiChoice which owns two commercial subscription services, namely M-Net and DStv;

3.4.2. StarSat; and

3.4.3. Deukom¹.

3.5. In our view ICASA is insufficiently detailed in relation to the licensing history of subscription broadcasters in this country which history is essential to understanding our current broadcasting landscape. In this regard:

3.5.1. M-Net was licensed by the Apartheid government;

3.5.2. DStv launched operations in 1995 without a licence from the IBA, despite the IBA having a statutory mandate as the regulator of broadcasting services in South Africa and despite the IBA Act prohibiting the provision of a broadcasting service without a licence. No action was ever taken against it for operating without a licence;

3.5.3. Starsat was licensed by ICASA on 2007; and

3.5.4. Deukom's application for a subscription licence was not successful in 2007 and ICASA refused them a licence². However, Deukom was then apparently licensed in 2012 but was not part of any Invitation to Apply process (as required in terms of the ECA) nor were Reasons for Decision given, as far as we are able to ascertain, in relation to such licensing process.

3.6. In terms of section 92(3) of the ECA, "where's sections of the related legislation and the IBA act did not apply to broadcasting services pending a recommendation by the Authority, the equivalent sections in this Act will not apply to such services until the recommendation has been adopted in the National Assembly. Although this appears opaque it is a reference to a provision which said that the ownership and control provisions of the IBA Act did not apply to subscription broadcasting

¹ Note that Deukom is a broadcaster of German-language channels only and therefore has very limited appeal nationally.

² See Reasons for Decision – Applications for Commercial Satellite and Cable Subscription Broadcasting Licences. November 2007 at paragraph 8.18. http://thornton.co.za/resources/Subscription_Reasons.pdf

services pending a recommendation thereon by the IBA. Consequently the ownership and control provisions of the ECA also did not apply pending a recommendation by ICASA.

3.7. By 2007, M-Net had enjoyed 21 years of its Open Window on SABC, allowing it, during Prime Time, to showcase its terrestrial subscription service and to advertise the DStv subscription offering by its parent company MultiChoice – in operation, unlicensed, for 12 years already. It was clear that the joint-ownership of two subscription broadcasting services was creating a behemoth in the television sector. And yet, without any public process or any public participation at all, ICASA chose, in paragraph 5.8.2 of the Reasons for Decisions on the 2007 Satellite Licensing Process³, to extend MultiChoice's ability to control two commercial television licenses as well as numerous newspapers, despite the prohibition thereon in section 65(1)(a) of the ECA.

3.8. That two different subscription licensing processes (namely 2007 and 2012) have resulted, effectively, in a single, struggling competitor to DStv, namely Starsat, does not only highlight issues of market failure, but, respectfully, of regulatory failure in this sector too.

4. WHAT IS THE CORRECT MARKET DEFINITION WHEN CONSIDERING MARKET INTERVENTIONS?

4.1. SOS and MMA are of the respectful view that ICASA is mistaken by choosing, in the Discussion Paper, to narrowly confine its suggested pro-competitive measures to the subscription broadcasting market only.

4.2. As ICASA itself stated: "the Authority has also received numerous requests to examine the subscription broadcasting sector in relation to the impact on free to air broadcasters"⁴ our emphasis. SOS and MMA can find no compelling reason why ICASA has failed to do so.

4.3. Indeed, we would go further, the serious allegations of state capture involving MultiChoice, including:

4.3.1. the excessive fees paid to Guptas for ANN7 and the once-off R25million rand payment allegedly to enable the Guptas to influence the former Communications Minister Faith Muthambi as evidenced in the latest "Guptaleaks"⁵ stories carried by a number of news outlets;

4.3.2. the fee of R100m paid to the SABC for its non-free to air channels on DStv in return for changing its position on encryption (to one of non-encryption) as is evidenced by the minutes

³ http://thornton.co.za/resources/Subscription_Reasons.pdf

⁴ At paragraph 1.2.12 of the Discussion Paper.

⁵ <https://www.dailymaverick.co.za/article/2017-11-24-guptaleaks-multichoice-paid-the-guptas-millions/>

of an SABC/MultiChoice meeting dated 6 June 2013, a copy of which minutes is attached hereto as Annexure A,

raise the horrifying spectre of MultiChoice having in fact paid millions of Rands to the Guptas to ensure that Minister Muthambi and the SABC went against stated ANC and digital terrestrial television (DTT) policy to provide for a non-encrypted Set Top Box (STB) for DDT. The ramifications of these allegations, if true, reflect a company not only with monopoly power in the description television sector, but with the ability to capture state actors, to act in its own commercial interests with regard to the future of television for the entire nation.

- 4.4. Just as a number of political parties have voiced deep concerns regarding MultiChoice's involvement in state capture, with the Democratic Alliance and the Economic Freedom Fighters calling for a full parliamentary enquiry into MultiChoice's conduct, so ICASA, as the Constitutionally-mandated broadcasting regulator, cannot ignore the furore around this issue and the implications for the broadcasting sector as a whole, including free to air television and the digital future of the nation.
- 4.5. Sadly, in the face of increasingly erratic policy determinations coming out of the Department of Communications since the splitting of that department into two (an irrational move given the reality of convergence and something that has not been done anywhere else in the world), ICASA has, in our view, failed to give sufficient direction on broadcasting related matters. The effect of this is a broadcasting environment that has remained largely unchanged and undeveloped since the advent of democracy. ICASA appears willing to take the lead from a dysfunctional executive, something that cannot be in the public interest.
- 4.6. Another area that SOS and MMA are concerned about is the lack of action on the need for appropriate regulation of Over the Top (OTT) services. In this regard, SOS and MMA note with dismay ICASA's assertion that "access to broadband and high data costs remain a crucial deterrent to the growth of mobile television"⁶. All of the evidence internationally is that OTT services are fundamentally changing the way audiences consume audio-visual content and that regulators must act to prevent a situation where OTT services cannibalise traditional broadcasting because of the light- or no-touch regulatory approaches adopted. A clear indication of where the country ought to be heading is provided in the national integrated ICT Policy Discussion Paper of 2014⁷, the fifth (and largest) chapter of which is headed "Policy Options: Audio and Audio-Visual Content Services" and gives a clear blueprint on coherent regulation for the audio and audio-visual content sector, including broadcasting and OTT services. In this regard, SOS and MMA are of the

⁶ At paragraph 1.2.7 of the Discussion Paper.

⁷ <http://www.ellipsis.co.za/wp-content/uploads/2014/11/National-Integrated-ICT-Policy-Discussion-Paper.pdf>

respectful view, that conducting an enquiry into subscription broadcasting, without reviewing the whole television sector, and indeed the audio-visual sector as a whole, and without updating the 2010 Position Paper on Internet Protocol Television (IPTV) and Video On Demand (VOD) Services⁸, will only further hinder the development of audio-visual content sector in the country. Accordingly we therefore call on ICASA to expand the scope and terms of the Enquiry.

5. CONCURRENT JURISDICTION OF ICASA AND THE COMPETITION COMMISSION IN REGARD TO SUBSCRIPTION TELEVISION

5.1. The Discussion Document notes that ICASA and the Competition Commission have 'concurrent jurisdiction' and that at present the Competition Commission is in the process of 'investigating abuse of dominance in the television broadcasting sector'. The Discussion Document states that the 'Authority will consult with the Commission as and when necessary'. However, SOS believes that this approach is problematic.

5.2. The Discussion Document should include a full update on the Competition Commission's investigation. There should be significantly more engagement with this investigation and the details of progress should be reflected in the Discussion Paper and a joint approach developed in accordance with the Memorandum of Understanding Entered into between ICASA and the Competition Commission. We therefore call on ICASA to ensure that a full update by the Competition Commission is included in the final Position Paper.

6. POLICY, LEGISLATIVE AND REGULATORY FRAMEWORK OVERVIEW: SUBSCRIPTION TELEVISION – ADVERTISING, MUST CARRY AND SPORTS OF NATIONAL INTEREST.

6.1. The ECA contains very few restrictions on subscription broadcasting services, particularly so since ICASA, without an appropriate public rule-making process, unilaterally decided that sections 65 and 66 of the ECA do not apply to subscription broadcasting services as is more fully set out above.

6.2. 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.

⁸ Notice 770 published in Government Gazette Number 33436 dated 3 August 2010.

- 6.3. As shown in *PwC's Entertainment and Media Outlook Report, 2016-2020*⁹ 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 believes it is essential that ICASA, together with the Competition Commission, urgently investigate and squarely address this advertising issue.
- 6.4. 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.
- 6.5. Similarly, 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 Regulations¹⁰, the results have not been beneficial to public broadcasters generally and to the SABC in particular.
- 6.6. The Discussion Paper states that according to e-TV, free to air broadcasters have overall been losing viewers due to these regulations. SOS believes that the Discussion Paper needs to thoroughly investigate these issues. This issue cannot be left as mere anecdotal evidence.
- 6.7. Further, while section 60(4) 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 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.
- 6.8. 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

⁹ <https://www.pwc.co.za/en/assets/pdf/enm/entertainment-and-media-outlook-2016-2020.pdf>

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

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.

7. MARKET OVERVIEW

7.1. Subscription Broadcasting:

- 7.1.1. SOS and MMA note that important information is missing from this overview contained in paragraph 4.3 of the Discussion Paper.
- 7.1.2. SOS and MMA note the figures presented in paragraphs 4.3.2 and 4.3.3. of the Discussion Paper. SOS and MMA note that the discussion in paragraph 4.3.2 does not reflect the fact that the overall largest percentage of revenue generated in the television sector is from subscriptions - approximately 76%. The diagram in paragraph 4.3.3. reflects these figures but with no comment. The Discussion document's focus is on advertising revenue. However, the document does not reflect on the fact that this only makes up 18% of the overall revenue figures. Mention is made of the fact that MultiChoice owns 98% of the subscription market (paragraph 4.3.5). SOS notes that the figures presented thus indicate that almost the entire subscription revenues i.e. R21bn is earned by MultiChoice. This point is not made explicit. However, over and above that, a substantial portion of the overall television sector's advertising budget is also earned by MultiChoice. The percentage of the advertising budget earned by MultiChoice needs to be reflected in the Discussion Document. This is to ensure a more accurate reflection of revenue flows in the television sector as a whole and the overall amount of revenue earned by MultiChoice across the television sector. SOS believes this information is critical for ICASA and the Competition Commission to assess MultiChoice's market power.
- 7.1.3. SOS and MMA note that ICASA's ICT Sector Reports, 2015¹¹ and 2016¹² indicate the amount of revenue generated by the broadcasting sector in terms of advertising. However, they do not reflect on the percentage of advertising that goes to subscription versus free to air television broadcasters. SOS and MMA believe this disaggregation of the figures is essential. ICASA needs to ensure that this information is made available as regards the ICT Sector reports and also as regards the final Position Paper to be developed as a result of the Inquiry.

¹¹ <https://www.ellipsis.co.za/wp-content/uploads/2015/10/ICASA-ICT-Trends-29092015.pdf>

¹² <https://www.ellipsis.co.za/wp-content/uploads/2015/10/ICASA-Report-on-State-of-SA-ICT-Sector-2016.pdf>

7.1.4. SOS and MMA note the discussion in paragraph 4.3.5 of the Discussion Paper about the growth in subscription broadcasting services in South Africa. However, SOS notes that the following critical point is not reflected – that subscription services are becoming dominant in the television sector overall. According to the Discussion Paper the overall number of households in South Africa is 16m, of these households 80% have television. This means that approximately 12.8m households have television. The Discussion Paper states that in 2016, 6.39m households had subscription TV and that the predictions are that these numbers will grow to 7m households in 2018 i.e. more than 50% of households. This again points to the overall dominance of MultiChoice in the television sector in terms of viewers. The Position Paper must reflect this critical truth and fully explore its implications.

7.2. Public Service Television:

7.2.1. The Discussion Paper deals with SABC-provided television only cursorily.

7.2.2. SOS and MMA believe that this is a significant problem. As discussed previously, ICASA needs to look at competition issues in terms of the overall television sector. The Position Paper thus needs to explore viewership and revenue trends in the public broadcasting sector in detail. Further, the Position Paper needs to look at issues of access to content by the public broadcaster – something that has a direct bearing on the STB encryption issue dealt with above. SOS and MMA also note, with disquiet, the Discussion Paper's curious failure to consider exclusion of the SABC/MultiChoice archive competition contract and case. The matter has been heard all the way up to the Constitutional Court which considered whether or not the Competition Commission ought to have considered whether or not the contract constituted a notifiable merger – an extraordinary state of affairs between a commercial subscription broadcaster and the public broadcaster. Judgment in the case has been reserved by the Constitutional Court.

7.3. Community Television Broadcasting:

7.3.1. Again, the Discussion Paper deals with community television broadcasting services only cursorily. Again, SOS and MMA believe this is a problem.

7.3.2. While community television is not a particular area of focus for SOS and MMA, they are of the view that where a community television broadcaster is carried on a subscription broadcasting platform:

7.3.2.1. the fee paid by the subscription broadcaster to the community television broadcaster ought to be transparent to the public;

7.3.2.2. there should be no exclusivity requirement for such content, that is, community television broadcasters ought to be able to be carried on a number of subscription broadcasting platforms; and

7.3.2.3. there should be no concomitant obligation to support the host subscription broadcaster's regulatory position. In this regard, we understand from the Cape TV's Submission to the Inquiry that a number of community broadcasters were required to support MultiChoice's non-encrypted STB position.

7.3.3. One of our members, Cape TV is also adamant that the "Must Carry" rules applicable to the SABC ought to apply to community broadcasters too. This is because most community television broadcasters are entirely dependent on DSTV for the majority of their audiences. Consequently we are of the view that ICASA must interrogate whether or not the "Must Carry" rules applicable to the SABC ought to apply to community broadcasters too.

7.4. Commercial Free to air Television:

7.4.1. The Discussion Paper deals with free to air television briefly. It states that e-TV, launched in 1998, and to date it is the only free to air television broadcaster in the country.

7.4.2. The Paper then notes that in 2013, an e-TV subsidiary company, Platco Digital launched OpenViewHD on satellite with approximately 25 channels. Finally, the Paper states that in 2015 ICASA began a process of licensing free to air commercial broadcasters but that all five applicants were eventually rejected because they did not comply with the 'ITA or provisions of the EC Act'. In this cursory summary of the issues the Discussion Document does not reflect on the following, namely, that:

7.4.2.1. it is a significant problem that e-TV remains the only commercial free to air broadcaster in the country and that it has played this dominant role for close on 20 years; and

7.4.2.2. given the uncompetitive nature of the South African television market there are in fact significant structural hurdles to the launch of new free to air commercial channels. The Position Paper must address these issues.

7.5. Subscription Television:

7.5.1. The Discussion Paper reflects on the launch of M-Net in 1986 and the launch of DStv in 1995. In terms of M-Net the Discussion Paper states that M-Net was given an open window during primetime that was initially an hour and then extended to two hours. The Discussion Paper

states that the open window was closed due to competition concerns – there was an understanding that new subscription broadcasters would find it difficult to access free to air viewers in the same way that M-Net had in an analogue environment. In a footnote the Discussion Paper notes that the EC Act includes cross-ownership provisions that prevent the same company from owning print and television licences and that these same provisions were included in the IBA Act before that. However, Naspers was exempted from these provisions under the IBA Act and then the EC Act. Naspers was thus allowed to own both television licences and newspapers. SOS and MMA believe that this is a cursory explanation of the history. Some of the critical issues that have NOT been explored include the following, namely that:

- 7.5.1.1. the IBA Act included a grandfather clause protecting the M-Net licence ‘under existing conditions’. As part of this arrangement, M-Net was allocated valuable, scarce terrestrial frequencies – a highly unusual allocation for a subscription broadcaster;
 - 7.5.1.2. that M-Net was given two channels not just one, again unusual for a terrestrial subscription broadcaster;
 - 7.5.1.3. that the ‘open window’ slot (which is also dealt with above) gave M-Net access to significant advertising revenue and opportunities to attract free to air audiences to Pay TV. Originally, the ‘open time’ window was to be closed as soon as M-Net broke even, namely as soon as it signed up 150 000 subscribers. M-Net achieved this in two years but in fact the window remained open for 19 more years. This had an adverse effect on the SABC and later on e-TV. The free to air broadcasters were forced to compete with M-Net, a subscription broadcaster, during primetime viewing;
 - 7.5.1.4. there were a number of aspirant entrants to the satellite broadcasting sector but, as has been more fully set out above, MultiChoice launched a satellite subscription service in 1995 without a licence; and
 - 7.5.1.5. NASPERS was exempt from cross-ownership regulation, as has been more fully set out above, and that this has contributed to its dominance across the entire media sector, not just in broadcasting.
- 7.5.2. Consequently, the Position Paper to be published as a result of the Inquiry must deal with and reflect specific advantages given to Naspers, M-Net and DStv and the implications thereof for the broadcasting sector as a whole.

7.5.3. The Discussion Paper also very briefly reflects on the launch of On Digital Media/ TopTV and the fact that TopTV was subsequently acquired by StarTimes. SOS and MMA believe again that this is a very cursory explanation of the history. SOS and MMA note the complaint submitted by ODM/ TopTV to the Competition Commission (to which ICASA will have access given its MOU therewith) and the arguments made as regards the role of MultiChoice in preventing the successful launch of TopTV. In summary, the complaint involves the following:

7.5.3.1. In November 2008 ODM started negotiations with SuperSport to acquire two channels SuperSport 3 and SuperSport 4. (SuperSport is a wholly owned subsidiary of MultiChoice. Its main activities include acquisition, packaging and scheduling of sports programming. As reflected in the Discussion Paper MultiChoice and SuperSport have secured the vast majority of sports broadcasting rights relating to leading sporting events in South Africa and internationally on an exclusive basis.)

7.5.3.2. Protracted negotiations between TopTV and MultiChoice went on till just before the launch of TopTV. In the end however SuperSport did not supply any channels. With the breakdown of these negotiations TopTV launched at a disadvantage.

7.5.3.3. Also, it is important to note that at the point that TopTV was about to launch its new packages, MultiChoice brought out new packages that undercut TopTV.¹³

7.5.4. Finally, the Discussion Paper reflects on the launch of Deukom. SOS and MMA note, as is more fully set out above, that it seems that the launch of this subscription service was (again) illegal. As discussed in the Discussion Paper there were two licencing processes for subscription broadcasters – one in 2007 and one in 2012. No mention is made of Deukom applying for a licence after the 2007 licensing process in which its application for a licence was rejected. The Discussion Document needs to reflect on the specifics on the licensing and launch of Deukom.

7.6. Impact Of OTT Services

7.6.1. The Discussion Paper reflects on developments in OTT services. It states that there are three main services operating in South Africa – ShowMax (Naspers owned); Netflix (US owned) and DEOD. What is not pointed out however is that once again, Showmax, (the largest South African-owned service) is a Naspers-owned service. Also, the Discussion Paper does not reflect on the fact that a number of other South African OTT services were launched and then

¹³ See media coverage that came out at the launch of TopTV. <http://www.channel24.co.za/Columnists/TopTV-vs-DStv-20100503-5>.

collapsed. This is a critical issue. It points to the fact that Naspers dominates every sector of the media bar radio, that all other services are dwarfed by its dominance and that its dominance stretches into new services such as OTT.

7.6.2. SOS and MMA note that the Broadcasting Act and the ECA exclude OTT services from broadcasting definitions which means that they are not subject to regulation by ICASA. We are of the view that this is problematic. SOS and MMA are of the view that OTT services should be regulated as they are in the European Union. OTT services in South Africa need to carry certain obligations e.g. these services need to be taxed, have BEE requirements, have local content requirements including language content and so forth. As has been set out above, ICASA's Position Paper on IPTV and VOD Services is wholly inadequate to deal with the regulatory challenges faced by our broadcasting sector in the face of OTT services and must be revised and updated in accordance with international best practise for the regulation of OTT services as are set out in Chapter 5 of the ICT Process Discussion Paper as discussed above.

7.7. Digital Migration:

7.7.1. The Discussion Paper very briefly reflects on the progress made as regards digital migration. No mention is made of the near collapse of this programme and the role that MultiChoice has played in this collapse. The Discussion Paper entertains a short discussion on the impact of DTT services on subscription services in Europe, the USA and Kenya. The Paper states that given the varied impact of DTT on subscription services it is not clear what the impact of DTT will be on subscription services in South Africa. SOS and MMA contend that this discussion sidesteps the fundamental questions, debates and issues linked to DTT.

7.7.2. One of the major goals of DTT was to sustain and grow the free to air broadcasting market.¹⁴ The importance of the free to air market was highlighted in the original DTT Policy, 2008. DTT offered the opportunity for the SABC and other free to air broadcasters to thrive in the new evolving digital, multichannel environment. From 1995 DStv has offered a bouquet of channels. However, the SABC has been restricted to three free to air channels and later to five channels. Note that one of these channels has been restricted to the DStv pay platform.

7.7.3. The DTT project was launched in 2002 and initially made progress. However, later there were a number of set-backs. These included government's delays when it suddenly decided to reconsider its adoption of the European standards – DVB-T. However, even more significant delays were created as regards the ongoing vociferous debates on encryption of set top

¹⁴ See the objectives of the DTT policy Section 1.2.3 and Section 6.1.6

boxes. SOS and MMA believe that the inclusion of encryption software in the STBs would have allowed for greater competition in the broadcasting sector as a whole and would have particularly benefited free-to-air broadcasters. The encryption software allowed for the following:

- 7.7.3.1. Interoperability of set top boxes critical for opening up the market to a number of services
- 7.7.3.2. Opening up the possibilities for free to air broadcasters to access premium high definition content. International content providers prefer to sell their content to broadcasters that can encrypt the content because this limits piracy.
- 7.7.3.3. It is SOS and MMA's contention that MultiChoice has been ruthless in its pursuit of the principle of non-encryption of STBs to the detriment and ultimate collapse of the DTT programme.
- 7.7.3.4. MultiChoice sought to undermine government's policy of encryption through entering into a deal with the SABC in 2012. The SABC had long proposed the launch of a 24 hour news channel – critical to news provision in the digital environment - but there were problems with government funding. (Government constantly refused to pay for the launch of this channel.) MultiChoice then, in a confidential deal with the SABC, agreed to fund the 24 hour news channel and also an entertainment channel, Encore, using the SABC's archive material. These were launched on the DStv pay platform.
- 7.7.3.5. As is discussed above the SABC/MultiChoice deal has been a major problem and the subject of lengthy litigation. At the heart of this confidential 'deal' was a clause that stipulated that the SABC needed to reverse its position on encryption and support a position of non-encryption even though this was counter government policy at the time. The SABC agreed to this. The SABC executive that brokered this deal, Hlaudi Motsoeneng received an unprecedented bonus which is alleged to have been as high as R33m.
- 7.7.3.6. The SABC's sudden reversal of its position on encryption put it at logger heads with free to air broadcaster, e-TV. The initial proposals for DTT were around the launch of a free-to-air platform with e-TV and a number of community broadcasters. This platform had a real possibility of competing with DStv's multi-channel subscription platform. In the wake of the SABC's reversal of its position on encryption, the proposals around this platform all but collapsed. Thus directly strengthening the DStv platform.

- 7.7.3.7. As time passed the encryption debates became more and more heated with no resolution in sight. However, in 2013 Minister Yunus Carrim came up with a compromise position that allowed for encryption software to be included in the box but its use was not mandatory. Also, if the encryption software was to be used at some later point by a subscription television service, that licensee would have to pay the government for the use of the system.
- 7.7.3.8. Even this compromise position however was seen as unacceptable by MultiChoice. MultiChoice lobbied hard against the Minister. The company took out full page adverts in the Sunday papers against him. Eventually he was removed post the 2014 elections and a seemingly-more compliant Minister, Minister Faith Muthambi was appointed. Minister Muthambi reversed the DTT policy and stated that set top boxes would NOT have the capabilities to encrypt broadcast signals.
- 7.7.3.9. It is important to note that MultiChoice lobbied both the community television sector and the small black manufacturers sector, led by NAMEC to support their position on encryption. In both cases the strong lobbying split the institutions rendering them completely dysfunctional. In both cases certain members of these organisations - that were supportive of MultiChoice's position of non-encryption - were offered incentives e.g. certain community television stations were offered equipment and studios. Also, it was reported by Amabhungane journalists in 2015 that the faction of NAMEC that supported MultiChoice's position on non-encryption was offered a major joint contract with MultiChoice and a Chinese manufacturer, Skyway Digital, to manufacture set top boxes.¹⁵ The latest scandal reported by News24 and others (as has been set out above) has been about MultiChoice's 'questionable payment' of R25m to ANN7 and its increase of its annual payment to ANN7 from R50m to R141m. These payments were revealed in the 'Gupta Leak' emails. The payments came after the Gupta family appeared to assist former Minister of Communications, Faith Muthambi in getting President Zuma to transfer certain broadcasting powers to her department. Following the transfer of these powers, Muthambi then reversed course and amended the Digital Migration Policy to provide for the non-encryption of STBs.
- 7.7.3.10. The issue of encryption has been subject to extensive litigation. The matter has been taken as far as the Constitutional Court where MultiChoice eventually won the case. The Constitutional Court¹⁶ held that the Minister of Communications had the right to make policy and therefore to change her mind on policy positions. We are still waiting

¹⁵ See Amabhungane reporting - <https://mg.co.za/article/2015-05-28-multichoice-accused-of-hijacking-digital-tv>

¹⁶ http://www.judiciary.org.za/doc/Court-Case-08-June-2017_Judgment_CCT-140-16.pdf

for a formal announcement from government on the way forward on DTT and the issue of encryption.

- 7.7.3.11. The delays in the implementation of DTT have led the country to a point that the entire project is now jeopardy and the substantial funding that has been paid by government to implement DTT and the roll out of DTT infrastructure is now in jeopardy. Indeed in a Radio 702 interview given on Monday 27 November 2017, the new Minister of Communications, Ms Kubayi, intimated that her Department's view is that DTT is 2006 technology and that new initiatives would render the debate regarding encryption of STB's "null and void". What exactly this means remains to be seen
- 7.7.3.12. SOS and MMA believe that it is critical that these issues are dealt with fully in the Position Paper as they are part of the factual backdrop to necessary and effective regulation of subscription broadcasting.
- 7.7.3.13. Finally, SOS and MMA believe that it is critical that the allocation of space on the DTT muxes is discussed. The final *Digital Migration Regulations, 2012* stipulated that SABC would get 85% of Multiplex One and community television was to get 15%. In terms of Multiplex two e-TV was to be given 50% and M-Net 40%. M-Net was given this hefty allocation despite its tiny audience and the fact that DStv, another MultiChoice company, as discussed, already owns 98% of the subscription satellite market.
- 7.7.3.14. The *Promotion of Diversity and Competition Regulations, 2014* then allocates space on a third multiplex. The regulations allocate up to 45% of Multiplex 3 to 'one or more commercial subscription broadcasters' and 55% to 'one or more commercial free to air television broadcasting licensees'. (The final 10% was set aside for test or trial services.) It is important to look at the implications of these allocations. M-Net's position has been entrenched on the digital terrestrial platform. The new subscription broadcaster (or broadcasters) have only been allocated 45% of multiplex three. MMA, in its submissions on the DDT Regulations at the time, noted the unfair allocations to MultiChoice.

7.8. Siyaya TV:

SOS and MMA note the curious references to Siyaya TV throughout the Discussion Paper. The Paper refers to this subscription service as if it is operational, certainly it refers to it as being a rights holder in respect of South African soccer. However, SOS and MMA note that Siyaya TV is, in fact,

not operational. The Position Paper needs to reflect this reality and to enlighten the public as to the reasons for its failure to become operational.

7.9. Market Analysis:

SOS and MMA note that the Discussion Paper outlines detailed proposals for a market analysis under sections 5, 6, 7 and 8. The Coalition is broadly in agreement with the process outlined. However, as discussed, the Coalition believes that the Inquiry is too narrowly defined. As argued throughout this submission, the Inquiry needs to analyse competition issues in terms of the television sector as a whole (and, in many instances, in terms of audio-visual content services as a whole) – not just subscription television. SOS and MMA believe that one of the critical issues not given priority in the Discussion Paper is the impact of MultiChoice on the free to air television broadcasting sector: public, commercial and community. This must be addressed in the Position Paper.

8. RESPONSES TO CERTAIN SPECIFIC QUESTIONS POSED:

8.1. Premium Content:

- 8.1.1. SOS and MMA note that the ECA specifies in section 60(1) that “subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free to air broadcasting of national sporting events”. These events are identified by ICASA after consultation with the Minister of Communications and the Minister of Sport.
- 8.1.2. The ECA provides that ICASA must develop related regulations on this issue. ICASA first developed regulations in line with this in 2003. In 2008, ICASA began to review these, publishing new regulations in 2010 – *The Sports Broadcasting Services Regulations, 2010*. The regulations stipulate that only national sporting events will be considered. They further state that the regulations are aimed at sports that are ‘significant’ rather than just popular and criteria are set out to define ‘significance’. In terms of the regulations, a pay TV operator that acquires one of the listed events must inform free to air broadcasting licensees within five days of the opportunity to tender for these.
- 8.1.3. SOS and MMA have looked at international precedent in this regard. SOS and MMA note that this type of regulation is often referred to as ‘anti-siphoning’. These anti-siphoning rules are based on ensuring free to air access by audiences to a list of defined sports and/or other events that are deemed by a Minister and/ or a regulator as of national or significant interest. In many countries regulation is extended to national events more broadly – so royal weddings, important funerals cannot also be exclusively shown on Pay TV. SOS and MMA believe that it is important to including national events in the regulations. SOS and MMA have looked at

regulations in detail in the Australian and UK jurisdictions. In summary, the Australian regulations include the following – the Minister of Culture and Communications drafts a list of events, the rights of events listed cannot be offered to pay TV operators however an event is delisted if no free to air broadcaster has bought the rights by 12 weeks before the event. In the UK the Secretary of State compiles the list. There are two tier events – category A must have live free to air broadcast and category B allows for delayed free to air coverage and packages.

- 8.1.4. The SOS and MMA research shows that the South African legislative regime (and therefore its regulatory provisions) are vague and do not provide, for example, for issues such as the cost of access to listed rights. These concerns have been raised in a range of forums by, among others, the SABC. In essence, the SABC has stated the following: that the rules allow for subscription broadcasters to charge high rates to free to air broadcasters for subsidiary rights and that policy and law should ensure reasonable rates for sub-licensing. The SABC proposed that a fee of 25% of the cost was appropriate. The SABC stated that the rules should stipulate that subscription broadcasters must conclude agreements with free to air broadcasters timeously (proposed at least three months before an event) so that these services have sufficient time to recoup costs from advertisers/ sponsors.¹⁷ We support these proposals being included in ICASA regulations on national sporting events and we would support broadening the definition to national events in the ECA.
- 8.1.5. The Discussion Paper outlines a number of barriers to entry for new players in the upstream market. These include the scarcity of premium content. Further, the Discussion Paper talks about the rising costs of premium content including sports rights and gives examples of the rising costs of sports rights. For instance e-TV lost its rights to the UEFA Champions League and the SABC lost its rights to the Premier Soccer League due, in some part at least, to the issue of costs. A further issue is the issue of long term contracts and the ‘cosy relationships’ created by these long-term relationships. The problem is that even when contracts come to an end it is difficult for the new entrant to outbid the incumbent. Content rights holders have built up trust with the incumbent. SOS and MMA want to point out the particular problems faced by TopTV in acquiring sports rights when they launched.
- 8.1.6. SOS and MMA note the following international cases that deal with these issues and is of the view that ICASA needs to assess all these interventions for possible implementation in South Africa:

¹⁷ See Lloyd, L (2017) Review of Exclusive Content Rights (Premium Content and Sporting Rights of National Interest), SOS: Support Public Broadcasting Research Document, 14 July 2017.

- 8.1.6.1. In 2003 European Competition authorities set a number of conditions to address potential competition issues in approving the acquisition of Australian media group NewsCorp of Italian Pay TV operator Telepiu. Conditions imposed included 'must offer rules' to ensure wholesale access to premium content (movie and sports rights) held by NewsCorp; rights owners were given permission to cancel their ongoing contracts with NewsCorp with no penalties and future rights contracts were limited to two years for football clubs and three years for film producers; NewsCorp was barred from blacking out second window movie rights; NewsCorp was also compelled to grant satellite competitors access to its own platform under fair and reasonable conditions and to grant licences to its proprietary CAS technology.¹⁸
- 8.1.6.2. In 2011 the US Federal Communications Commission approved the acquisition by Comcast of content rights holder NBC Universal, on condition, among other things, that they share programming with competing cable and telecommunications services and the (then new) web-based services such as Netflix.
- 8.1.6.3. In the UK, there have been lengthy battles between the regulator and operator BskyB over rules that the Pay TV service must make its premium sports channels available to its competitors at regulated prices. Ofcom first made this decision in 2010 but it was subsequently overturned by BskyB and then reinstated by Ofcom on appeal. The regulator has recently relaxed its rules arguing that BskyB does now offer wholesale access to its content. At the same time the British regulator introduced rules to address barriers faced by competing broadcasters to access first subscription Pay TV window movie rights. Ofcom restricted the number of major movie studios that BskyB could licence exclusive first pay window content from.
- 8.1.6.4. In Singapore the regulator has imposed cross-carriage measures requiring pay television providers to offer each other's content (cross carriage rules) and to compete on quality of service and cost rather than on content.
- 8.1.6.5. In other instances, competition regulators have imposed remedies on rights holders. For example, in Europe the competition regulator has made a series of rulings on sports rights – setting rules for the German Football League, FA Premier

¹⁸ See - http://ec.europa.eu/competition/mergers/cases/decisions/m2876_en.pdf

League and UEFA for example. These essentially bar the rights holders from selling all rights to one media player and limit the length of rights holders.¹⁹

8.1.7. SOS and MMA agree that the rights that are listed in Table 1 'Key sports and movie rights' in regard to Question 17 in the Discussion Paper are the premium rights and SOS notes of the ten rights listed, eight rights are held by MultiChoice. SOS and MMA note that this is untenable and that no competition in subscription broadcasting (or indeed in television as a whole) can take place where premium content is held 80% by a single operator. SOS and MMA agree that it makes sense to use the number of rights as a unit of measure for market share calculation purposes as queries in Question 18.

8.2. Vertical Integration:

8.2.1. SOS and MMA believe that vertical integration is a significant problem. SOS notes the following in terms of the vertical integration of MultiChoice:

- 8.2.1.1. it distributes its channels via its own proprietary STBs;
- 8.2.1.2. it owns the conditional access software company Irdeto that provides conditional access technology;
- 8.2.1.3. MultiChoice Africa manages subscription management services to all television services owned by the company;
- 8.2.1.4. it owns Orbicom responsible for signal distribution and platform management;
- 8.2.1.5. it owns DStv and M-Net – satellite and terrestrial subscription broadcasters and developers and aggregators of content;
- 8.2.1.6. it owns content provider SuperSport that holds most of the sports rights and packages sports programming;
- 8.2.1.7. it owns M-Net that is a licensee and a channel and a channel provider to DStv;

¹⁹ European Commission, 'Press Release: Competition: Commission makes commitments from FA Premier League legally binding', 22 March 2006, Brussels, accessed from <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/356&format=HTML&aged=0&language=EN&guiLanguage=en> and European Commission, 'COMMITMENTS OF THE FAPL (NON-CONFIDENTIAL VERSION)' accessed from http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_132_7.pdf

- 8.2.1.8. it owns DStv media sales responsible for the sale of airtime and sponsorship, marketing and market research;
- 8.2.1.9. it owns Digital Media responsible for the development of emerging platforms and products for the group including streaming, VOD, portals and mobile broadcasting;
- 8.2.1.10. it owns streaming video company ShowMax; and
- 8.2.1.11. it owns GoTV the DTT subscription service broadcasting in South Africa and across Africa which, we understand, was to be incorporated into M-Net's digital incentive channels on the DTT platform.

8.3. Competition Law vs Regulator-Specific Regulation:

SOS and MMA agree with ICASA's preliminary view that competition law alone is not sufficient to deal with possible market failures. As stated in the Discussion Paper generally competition law is applied ex-post and sector specific law is applied ex-ante. SOS and MMA believe that it is critical that both sector specific and competition law is applied to ensure ex-post and ex-ante interventions.

8.4. Barriers to Entry:

- 8.4.1. SOS and MMA agree that all the barriers to entry covered in the Discussion Paper are at issue. The barriers covered include the following: brand loyalty, switching costs, bundling and regulatory barriers.
- 8.4.2. However, in terms of broader regulatory barriers, SOS and MMA do not agree with the particular example mentioned i.e. invitations to apply for subscription broadcasting licences. SOS and MMA believe that ITAs are entirely appropriate. However, there are other barriers to entry of both subscription AND commercial free to air television. These include:
 - 8.4.2.1. unworkable and irrelevant advertising limits for the monopoly player which allow it, legally, to take the entire television advertising spend without crossing a legislative barrier. This presents a barrier to entry not only of other subscription broadcasters but of free to air broadcasters too;
 - 8.4.2.2. cross media controls that do not apply to subscription broadcasters. This ruling by ICASA without any public process (as has been more fully set out above) has meant that a single company, NASPERS, can control vast swathes of the print and online media as well as the two largest subscription broadcasters, one of which,

DStv is in nearly half the households of the country. Surely a daunting prospect for any would be competitor, free to air or subscription?; and

- 8.4.2.3. the emergence of new international OTT players such as: Amazon, Netflix, Facebook, Google and YouTube. The sheer scale and growing dominance of these new entities make barriers to entry for new players significant. Not only is competition global but these players do not need the physical infrastructure that traditional broadcasters need. Further these new players are not subjected to the same responsibilities and regulations as broadcasters are faced with.

8.5. Market Share Calculation:

- 8.5.1. The Discussion Paper states that the level of concentration at the downstream market level can be determined by using the number of subscribers, subscription revenue or advertising revenue. The Paper states that the Authority is planning to use numbers of subscribers. The Paper goes on to say that MultiChoice's subscribers have been growing over the years and have reached 5.7m in 2017. StarTimes had 200 000 at its height and this has now dropped to 60 000 and Deukom has 4000. The Paper states that MultiChoice thus has an almost pure monopoly.
- 8.5.2. SOS and MMA are of the view that while MultiChoice's monopoly can be calculated in terms of numbers of subscribers. However, a better measure would be to consider both subscribers as well as revenue generated from advertising and sponsorship. In terms of both of these measures MultiChoice dominates the television broadcasting market – both subscription and free to air.

8.6. Market Power Calculation:

SOS and MMA contend that market power can be shown in terms of the following factors:

- 8.6.1. Numbers of subscribers;
- 8.6.2. Percentage of overall subscription revenue;
- 8.6.3. Percentage of overall advertising revenue;
- 8.6.4. Percentage of overall TV revenue;
- 8.6.5. Numbers of rights owned; and
- 8.6.6. Vertical integration in the television market.

8.7. Proposed Remedies:

ICASA requested the public to comment on each of the remedies discussed in the Discussion Paper and indicate their possible applicability in the South African context. SOS and MMA set out their comments below:

8.7.1. Shorten exclusive contracts re premium content

SOS and MMA agree with this proposal and agree that ICASA should explore European Union proposals in this regard.

8.7.2. Introduce unbundling of rights

SOS and MMA agree with this proposal and are in favour of the European Commission's approach to the sale of sports rights. This includes that rights should be sold on open tender, rights must be unbundled allowing for more than one buyer, no excessive exclusivity (a term of three years should be the norm) and no automatic renewal of contracts.

8.7.3. Impose rights splitting

SOS and MMA agree with this proposal. Rights splitting requires a rights owner to split content rights and sell them to more than one broadcaster. SOS and MMA believe that this is an essential intervention in the South African market. This will give new entrants to the broadcasting market (both subscription and free to air) the possibility of survival.

8.7.4. Impose wholesale must offer

SOS and MMA are in agreement with the 'wholesale must offer' recommendation. SOS and MMA note the OfCom and BskyB example and the fact that the matter was finally resolved in favour of BskyB i.e. BskyB was eventually not compelled to comply with the 'wholesale must offer' provisions. However, SOS believes that the market conditions are different in South Africa and that the online market is not as developed as that in the UK and nor will it be for a number of years. SOS and MMA thus contend that this recommendation should be explored. Further, SOS and MMA note that TopTV specifically used this BskyB case in its complaint to the Competition's Commission and stated that it was essential to their long-term survival and sustainability that this particular measure – wholesale must offer - was in place.

8.8. Open up dominant firm's network and introduce STB interoperability

SOS and MMA are of the view that these measures (which involve a number of sub-measures) must be implemented. The Discussion Paper discusses this issue in relation to OfCom's regulations

as regards BskyB. With these measures in place, new channels have been distributed directly to consumers through the BskyB infrastructure. Ofcom regulates the prices that can be charged and where these channels are listed on the Electronic Programme Guide (the EPG). In this regard, given MultiChoice's dominance throughout the television market (terrestrial and satellite, free to air and subscription), SOS and MMA note that the opening up of MultiChoice's infrastructure should be required. This ought to include:

- 8.8.1. ensuring that all free to air broadcasters carried on the 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;
 - 8.8.2. ensuring access by all broadcasters to DStv's STB. In our view, given that its STB is in nearly 50 percent of households and that it appears from the latest GuptaLeaks and SABC Minutes that MultiChoice was instrumental in the failure of the DTT project (thereby stifling the ability of existing broadcasters to grow), the STB is, in effect, an "essential facility" as defined in section 1 of the ECA. The effect of this will be to provide for regulatory oversight by ICASA and/or the Competition Commission of access to DStv's STB. In our view, existing and new subscription broadcasters, whether satellite or terrestrial, as well as existing and new free to air broadcasters, whether satellite or terrestrial, ought to have access to DStv's STB; and
 - 8.8.3. greater transparency with regard to Multichoice's channel acquisition policies and payments to channel providers as part of the strategy to open up its Network. The recent GuptaLeaks revelations as to the amounts paid for ANN7 vs the eNCA news-channel and the fluctuations in the amount of those payments which appeared to bear no relation to audience figures make it clear that there is a role for ICASA in this regard. The idea is not new. As ICASA is aware, the ECA makes provision for ICASA supervision of contractual issues in relation to facilities leasing and interconnection in the electronic communications services sphere to promote competition. There is no reason not to institute the same in order to support competition in the television sector.
9. ISSUES NOT DEALT WITH IN THE DISCUSISON PAPER BUT WHICH OUGHT TO BE CONSIDRED BY ICASA IN THE INTERESTS OF DEVELOPING A THRIVING BROADCASTING SECTOR
- 9.1. 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.

- 9.2. 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.

9.3. AVOIDING AN INFORMATION AGE APARTHEID

- 9.3.1. SOS and MMA are of the view that all of the pro-competition mechanisms referred to above are necessary to avoid a new form of Information Apartheid in terms of which access to critically important news and information devolves along class and race lines. That is, rich and middle class people have access to premium content including: sports, the latest series and movies, and top quality news and current affairs programming while poorer largely black citizens have access to poor quality free to air television characterised by an inability to compete successfully with subscription television offerings.
- 9.3.2. SOS and MMA are of the view that ICASA has particular responsibility to avoid the above scenario given the numerous and patents regulatory failures that have characterised the regulation of television since the transition to democracy in 1994. These failures not only include the inability to licence more than one free to air commercial television broadcaster in 20 years but also to ensure a competitive subscription broadcasting environment. It is clear that ICASA (and its predecessor, the IBA) have allowed MultiChoice to become not only dominant but indeed virtually monopolistic not only in the subscription television sector but in the television sector as a whole.
- 9.3.3. While ICASA must ensure that it regulates all audio-visual services sensibly, ensuring that OTT services, too, contribute to South Africa's growth and prosperity through taxation, broad Based Black Economic Empowerment, local content and cultural industry development, ICASA has a special responsibility to regulate traditional television broadcasting in such a way as to promote diversity of voices and services in the public interest for the benefit of all South Africans.

9.3.4. The idea of subscription broadcasting as a small niche service meeting the needs of moneyed elite simply does not fit the South African market experience. DStv is in nearly 50% of all households. With this massive consumer penetration comes the responsibility to act in ways that protect and promote competition and that create sustainable television broadcasting landscape. DStv was left alone, without any regulatory compliance requirements, for the first 12 years of its operation. In the 10 years since its licensing, it has become clear that ICASA has been unable, if not unwilling, to regulate subscription broadcasting, and DStv in particular, in a manner that promotes the public interest in a stable and thriving television sector. SOS and MMA contend that this must change.

9.3.5. Further, there must be a far greater focus on our emerging digital reality. The impact of bigger OTT players be considered.

10. SOS and MMA trust that these submissions will be of assistance to ICASA in finalising the Position Paper on Subscription Television.

11. Please do not hesitate to contact SOS and/or MMA should ICASA have any queries or require any further information.

Thank you

Yours Sincerely

Dudetsang Makuse

National Co-ordinator, SOS

Also on behalf of MMA