

APPENDIX D:

RESPONSE TO THIRD PARTY SUBMISSIONS

Please see the attached.

APPENDIX D: RESPONSES TO THIRD PARTY SUBMISSIONS

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INTRODUCTION

- 1 Several parties have made submissions in response to ICASA's Discussion Document and in their oral presentations to ICASA (between 7 and 11 May 2018) which directly relate to MultiChoice. To the extent that MultiChoice anticipated those issues and addressed them in its comprehensive December 2017 submission in response to the Discussion Document, MultiChoice's submissions will not be repeated here. However, certain of the issues raised by the third parties were not addressed in MultiChoice's submission. In this document, MultiChoice responds to those issues, and also highlights areas of common cause between MultiChoice and other parties. (The fact that MultiChoice does not respond to every issue and/or allegation raised against it must not be construed as an admission as to the truth or correctness thereof.)

IDENTITY OF THIRD PARTY RESPONDENTS IS INFORMATIVE

- 2 Most responses are from actual or potential OTT competitors (Kwesé/Liquid, Cell C, Telkom, Vodacom) and FTA competitors (e.tv and SABC), sports rights owners (PSL, SARU, CSA) and community broadcasters. The sole submission by another Pay TV licensee, Deukom, focuses on regulatory barriers and unintended consequences of more regulatory intervention for small broadcasters. No other Pay TV licensees have made any submissions.
- 3 The identities of third party respondents has a number of implications for ICASA's Inquiry. First, the mere fact that so many OTT and FTA service providers have elected to participate in this Inquiry itself demonstrates that they compete with MultiChoice (or intend to do so), indicating the boundaries of the relevant market and competitiveness within that market.
- 4 Second, the identities and interests of these third parties need to be borne in mind when considering their opinions. A leading text in competition economics cautions regulatory authorities about reliance on information they receive from certain categories of interested third parties.¹ Writing in the context of mergers, but equally applicable to the ICASA Inquiry, Professor Massimo Motta (the prior

¹ Massimo Motta (2004), *Competition Policy: Theory and Practice*, Cambridge University Press, p240

Chief Competition Economist at the European Commission's Directorate General for Competition) states:

*"Clearly, claims from rival firms that the merger will be anti-competitive should be received with great scepticism from the authorities: The fact that rivals complain about the merger probably signals that there might be significant efficiency gains. If anything, then, their complaint might be taken as a first indication that the merger will improve welfare.... Anti-trust authorities should accordingly scrutinise their [rivals'] complaints with extra care."*²

- 5 ICASA must be mindful of the fact that current and future competitors to MultiChoice (the OTT and FTA players) have strong incentives to engage in regulatory gaming in order to improve their own position in the market by weakening MultiChoice. In so doing, they may seek to present this highly dynamic market as one fraught with insurmountable competition problems warranting extensive interventions that would benefit them.
- 6 The need for scepticism and high levels of care is greater when claims are made without robust supporting evidence and coherent economic reasoning. Most claims made in the submissions by MultiChoice's competitors (actual or potential) are not backed up by any supporting evidence. This is in contrast to the extensive submission made by MultiChoice, where a huge amount of evidence was provided in response to the Discussion Document. As such, bald assertions made by MultiChoice's competitors hold no probative value whatsoever and cannot be accepted as evidence and fact.
- 7 Furthermore, the core of some of the submissions can be broken down to "we want what MultiChoice has". This is not a sound basis for regulatory intervention and is itself likely to stifle competition by disincentivising innovation and investment. It appears that some of the evidently self-interested parties do not wish to take the necessary commercial risk by making the required investments and, instead, are seeking to use the regulator to subsidise their private commercial interests.

² Massimo Motta (2004), *Competition Policy: Theory and Practice*, Cambridge University Press, p240

- 8 For example, Liquid Telecom/Econet Media Ltd state in their submissions that they launched Pay TV services in 2016/2017 in nine other African countries, but took a *"clear decision not to launch a [Pay TV] service in South Africa due to ... the existing barriers to entry in the South African [Pay TV] market ... Econet Media has made detailed submissions because of its intention to expand its [Pay TV] service offerings into the South African market as soon as it becomes feasible for it to do so."*³ However, as became evident during the hearing, the only reason Kwesé did not launch a DTH service in SA was because it required a licence. Kwesé has launched in other markets against MultiChoice with the same product offering, and therefore MultiChoice's position in the market is clearly not the reason.
- 9 Of all the third party submissions to ICASA, Kwesé's are also by far the most substantive and vociferous in arguing that competition is confined to the narrow Pay TV market which is ineffective and unconstrained by OTT for the foreseeable future, and that a host of far-reaching remedies be imposed on MultiChoice.
- 9.1 However, Kwesé has itself launched its OTT service, Kwesé Play, in SA which indicates that commercially it believes there is a strong appetite for OTT offerings amongst consumers. This is in direct contradiction to the message it wishes to convey before ICASA, namely that OTT has no potential for many years, which is clearly regulatory gaming designed to try and justify a narrow market such that MultiChoice is found dominant and competition ineffective. Cell C would seem to be engaging in the same strategy.
- 9.2 The inherent contradictions in this position are further evident by the fact that, whilst for market definition purposes they wish to argue OTT does not compete with DTH, for remedy purposes they wish to be included amongst the competitors that should benefit from access to MultiChoice's content.

³ Liquid Telecom submission, p2, para 6; and Econet Media/Kwesé submission, p3, para 1.2

- 10 This is but one example which reveals the strong incentives of actual or potential competitors to engage in regulatory gaming and to use this Inquiry to weaken MultiChoice and advance their own position for launching an audio-visual service in SA.

RELEVANT MARKETS

Q1: Theoretical approach to defining relevant markets and market segments

Two-sided markets

Issue

- 11 A number of third party submissions (in particular, Cell C, Telkom and Kwesé) have mentioned two-sided markets in the context of whether FTA is in the same retail market as Pay TV.
- 12 Cell C asserts that where a licensee does not make the majority of its revenue from advertising/sponsorship, the market is not two-sided, and to classify it as such would *"unnecessarily complicate the Inquiry"*.⁴
- 13 By contrast, Telkom acknowledges that the audio-visual services market is two-sided (with subscribers and advertisers respectively forming the two sides) and notes that the *"knock-on effects of a price increase on one side of the market onto the other side should be considered in understanding whether the price increase would be profitable"*.⁵
- 14 Like Telkom, Kwesé acknowledges that broadcasting markets can be seen as two-sided and that *"[i]n general, the market power of the incumbent is constrained in two-sided markets due to the fact that two sets of customers – advertisers and subscribers in the current case – have to be kept on the platform"*.⁶ Kwesé suggests, however, that in the current case MultiChoice is not

⁴ Cell C submission, p7

⁵ Telkom submission, p9, para 18

⁶ Kwesé submission, p4, para 2.1.3 and p13, paras 5.2.2-5.2.3

constrained by the two-sidedness of the market because *"both sets of customers have little or no substitution possibilities"*.⁷

MultiChoice response

- 15 Cell C is incorrect in its assertion that that where a licensee does not make the majority of its revenue from advertising/sponsorship the market is not two-sided.
- 15.1 A market can be two-sided even if no revenue at all is earned from one side, as is the case, for example, with free newspapers, Internet search and, indeed, FTA TV, which MultiChoice has submitted falls within the same relevant market as Pay TV.⁸
- 15.2 Furthermore, just because the majority of revenue is not earned from advertising does not eliminate the fact that a subscription service will still realise additional negative revenue effects on advertising were it to raise prices and lose subscribers. These effects still exist and need to be included in the analysis.
- 16 MultiChoice agrees with those third party submissions that broadcasting markets (and, more appropriately for ICASA's Inquiry, the market for electronic audio-visual services in SA) are two-sided.
- 17 Moreover, MultiChoice agrees with Telkom and Kwesé that to fully understand the constraints on a hypothetical monopolist (and thereby define markets according to the well-recognised principles of market definition), one should take into account not only constraints on the side of the focal product being considered (e.g. constraints on traditional Pay TV broadcasting services from alternatives for subscribers), but also the constraints on the other side of the market (e.g. constraints on traditional Pay TV broadcasting services from the alternatives available to advertisers on the other side of the market). In particular, if a traditional Pay TV broadcasting service provider raises its prices to subscribers, this will have negative effects on the provider's profitability, not only from

⁷ Kwesé submission, p4, para 2.1.3

⁸ MultiChoice submission, pgs159-167, paras 313-332

diversion of subscribers to other services (including FTA TV and OTT services), but also from the "knock on" effect on its advertising revenues from the fall in subscribers on viewing figures, since reduced subscriber numbers will reduce the revenues that the provider can earn from advertisers.

- 18 Indeed, interactions between the two sides may imply that the relevant market includes alternative media options that are substitutes for advertisers, including FTA TV and OTT, as well as other online advertising, radio, print media and outdoor advertising, since the hypothetical monopolist may need to control these in order to be able to implement a profitable SSNIP.
- 19 MultiChoice does not agree with Kwesé that it is not constrained by the two-sidedness of the market because *"both sets of customers have little or no substitution possibilities"*. Kwesé does not explain why it believes advertisers do not have strong substitution possibilities outside of MultiChoice, such as FTA TV, OTT, other online advertising, radio, print media and outdoor advertising. Kwesé merely argues, on the subscriber side of the market, that *"there are no large competing subscription television broadcasters that subscribers can turn to in the event of a price increase"*.⁹
 - 19.1 Even here, MultiChoice does not agree, since Kwesé has overlooked that MultiChoice is facing intense competition on the subscriber side from global OTT giants, massive local telcos, regional Pay TV services and the FTA TV broadcasters.
 - 19.2 Furthermore, it is precisely because the market is two-sided that FTA (TV and OTT) offerings are able to compete with subscription services. Free audio-visual services monetise the large audiences they generate from offering attractive content through generating advertising revenue. This provides them with strong incentives to invest in attractive content and draw audiences away from other sources of audio-visual services for consumers, including subscription services.

⁹ Kwesé submission, p4, para 2.1.3 and p13, para 5.2.3-5.2.5

Cellophane fallacy

Issue

- 20 A number of third party submissions argue that ICASA should take account of the "cellophane fallacy" when implementing the SSNIP test. As Telkom argues: *"when prices are already at a monopoly level, it might seem that certain products are substitutes, while they in fact would not be considered substitutes at competitive price levels"*.¹⁰

MultiChoice response

- 21 The cellophane fallacy is a valid critique of a SSNIP test in a non-merger context when the test is based on current prices that are at supra-competitive levels. However, it must be noted that the cellophane fallacy cannot be presumed - as Kwesé seeks to suggest - without providing any shred of evidence. The cellophane fallacy is not relevant in the current South African context, since prices in SA are not currently at supra-competitive levels.
- 22 As established in Part C of MultiChoice's submission, MultiChoice and other traditional Pay TV broadcasters in SA currently face intense competition from global OTT giants (both subscription and free), large local telcos and regional Pay TV services, as well as competitive pressures from FTA TV broadcasters. As a result of this competition, prices for traditional Pay TV services are currently at competitive price levels rather than supra-competitive levels. This is demonstrated in MultiChoice's submission, where it is observed that (i) quality-adjusted prices for the DStv bouquets have fallen significantly for many years,¹¹ and (ii) MultiChoice has also responded to competition in many other ways, including investments in new content, investments and innovation in technical

¹⁰ Telkom submission, p7, para 11. See also, more generally on cellophane fallacy: Telkom submission, p7, paras 11-12 and Kwesé submission, p4, para 2.1.2, p14, para 5.2.5 and p22, para 5.8.5

¹¹ MultiChoice submission, p124, para 224, pgs170-171, paras 338-341 and pgs280-284, paras 568-573

platform services including QTT platforms, STB functionality, pricing and subsidies.¹²

Qs5, 6 & 17: ICASA's definition of premium content and other content that is premium in South African context

Issue

- 23 A number of third party submissions have made suggestions regarding how premium content should be defined.

MultiChoice response

- 24 As MultiChoice has submitted, the term "premium" has no clear and objective unitary meaning and it is consequently not a useful term for the purposes of ICASA's Inquiry and certainly should not form a basis for the delineation of relevant markets.¹³

- 25 The wide range of views on what constitutes "premium" content in the third party submissions further emphasises the diversity of interpretations of this term, supporting MultiChoice's submission that the term "premium" is not meaningful or useful for ICASA's Inquiry. For example:

- 25.1 The Competition Commission asserts that a definition of "premium" content that includes *"live sport, among other entertainment genres such as blockbuster movies, latest local and international series"* is aligned with internationally accepted approaches.¹⁴ This is an inclusive definition, not delimited to any particular sports, nor any particular type of movies or series content, nor any particular windows.

¹² MultiChoice submission, pgs279-297, paras 567-590

¹³ MultiChoice submission, pgs173-177, paras 350-363; pgs313-325, paras 627-646.3

¹⁴ Competition Commission submission, p7, para 6.6

25.2 The Competition Commission further suggests that *"there are some movie series such as the James Bond movies who not only derive their premium character from the first window release only but the fact that they are part of a suite of highly popular movies. In this regard, although the movies within the series might be old, as a collective they are considered to be premium"*.¹⁵ This approach lends itself to no natural boundary for what qualifies as "premium", since the Competition Commission would presumably need then to include, for example, all Harry Potter movies, all Hunger Games movies, all Toy Story movies, etc. within its definition of "premium" notwithstanding that many of these may be several years old. Furthermore, it would also need to include older entertainment content outside the movie genre if it fulfils the popularity criteria, such as popular local and international series.

25.3 In its submission Kwesé asserts that premium content is content most likely to be effective in driving subscriptions and therefore (i) must have broad appeal, and (ii) limited availability on FTA.¹⁶ Kwesé suggests that sports, movies, local and international series, local content, and all the content on entire channels (e.g. Mzansi Magic and kykNET) may be "premium" because they have become popular and draw large audience numbers.¹⁷ While a range of content is popular (and therefore popular content is not scarce), this extended meaning of the term "premium" further supports the conclusion that "premium" content is not a unitary or objective concept and is therefore not helpful for delineating markets. Anyone can invest in and popularise content, including local content, meaning that under such an approach it is virtually impossible to delineate boundaries for relevant markets by reference to this definition of "premium".

¹⁵ Competition Commission submission, p6, para 6.3

¹⁶ Kwesé submission, p17, para 5.5.2

¹⁷ Kwesé submission, pgs18-19, para 5.5.6

- 25.4 Kwesé's view is also that content such as children's content, comedy, reality television and genre-specific channels may in the future be considered to be "premium" content if they start generating higher viewing numbers.¹⁸ Again, this demonstrates that the term "premium" is too vague and subjective to be useful for the purposes of an objective inquiry into the electronic audio-visual services sector.
- 25.5 In its presentation to ICASA, Kwesé proposes yet another definition of "premium", namely "content which has a wide appeal, has no substitutes and is time critical in terms of its attractiveness to audiences". MultiChoice notes that this definition may include much content on SABC and e.tv. That a single respondent can have so many different definitions of "premium", encompassing so much varied content, further illustrates the lack of utility of the concept. It is a concept that means whatever the beholder wants to define it as, and has no clear unitary meaning. Such an approach is also inconsistent with the conceptual approach to market definition.
- 25.6 Kwesé also suggests that price differentials between bouquets offered by a single Pay TV operator indicates that the operator values certain content more highly than others (in other words, considers it premium).¹⁹ The fact that an operator may have a number of bouquets at different price points, reflecting different amounts and quality of content as well as different amounts of value-added services and reflecting differences in willingness to pay of consumers for those different bouquets does not help to define any particular content as "premium". Moreover, this says nothing about the fundamental question of the ability of other operators to build audiences around other content, which is not informed by vague language.

¹⁸ Kwesé submission, p19, para 5.6.1

¹⁹ Kwesé presentation to ICASA, 10 May 2018, slide 23

- 25.7 e.tv proposes that WWE, Italian Premier Soccer League and National American Basketball be added to ICASA's wide list of premium content.²⁰
- 25.8 Cell C submits that a definition of "premium" should be as objective as possible, but its own suggested definition requires subjective judgments to be made and is in any event unworkable. Cell C suggests that "premium content" be defined as *"valuable content determined to be valuable either by a financial or public interest standard, and/or that is made available on bouquets that are priced so as to be priced above the price of the majority of content or subject to a retail buy-through, or both"*.²¹ The first part of this description calls for subjective judgment around "valuable content" which may be determined based on vague standards (financial or public interest) where threshold levels can only be subjectively and arbitrarily set. Alternatively, the second part defines "premium" content as content made available on bouquets that are *"priced above the majority of content or subject to a retail buy-through, or both"*. However, in the case of MultiChoice's bouquets, this would include much of the content on the Premium and Compact bouquets additional to cheaper bouquets, regardless of whether the content is particularly valuable.
- 25.9 Telkom shares MultiChoice's concern that the various definitions provided in the submissions make clear that there is no exact definition of premium content.²² Telkom then proposes that emphasis be placed on high audience ratings and time-sensitivity, but is ultimately vague in its own definition, suggesting that premium content is not necessarily available on the highest priced subscription package and may include simply *"content which will draw the most viewers"*.²³

²⁰ e.tv submission, p13, para 50.

²¹ Cell C submission, p11

²² Telkom submission, p11, para 25

²³ Telkom submission, p11, para 26

- 26 These proposals by various respondents support MultiChoice's submission that the term "premium" has no objective unitary meaning and is consequently of no use in the context of ICASA's Inquiry. In particular, in relation to market definition, the relevant question is one of the constraints on a hypothetical monopolist of a focal product: the term "premium" does not assist in answering that question. These submissions also make clear that there is no scarcity of content that is viewed as capable of driving audiences and subscriptions: the respondents are indicating in these submissions that a wide range of content is capable of doing this.
- 27 The citing of an extensive range of content by other parties demonstrates that such content cannot be considered scarce and undermines the claim that premium content (whatever this may mean) is a unique driver of subscriptions to which competitors need access in order to build an audience.
- 28 MultiChoice's submission shows in detail that in recent years there has been an explosion of popular, quality content and that this content is neither scarce, nor costly to acquire.²⁴ This is the case, for example, as regards local content, international series, movies and sports rights. The range of content now considered capable of attracting a larger audience or being of relatively higher value has greatly expanded, and no single electronic audio-visual service provider is capable of acquiring, let alone scheduling, the vast range of popular content available today.
- 29 Difficulties in determining what may be considered popular or of higher value is further compounded by the fact that the relative value of content is evolving. MultiChoice's submission shows that previously popular content may lose some of its value, and new entertainment content or sports properties have increased in value.²⁵ Cell C also observes that defining sub-sets of premium and non-premium content is not useful, since content markets change all the time as viewing trends change.²⁶

²⁴ MultiChoice submission, pgs314-325, paras 632-646.3

²⁵ MultiChoice submission, p311, para 626.3 and p317, para 636

²⁶ Cell C submission, p10

- 30 As MultiChoice demonstrated in its submission, given the volume of content which is available locally and internationally, a critical skill for any electronic audio-visual service provider is selecting content which is likely to appeal to its target market, and then ensuring that this content is attractively packaged, scheduled and promoted to the public and subscribers in a manner which will raise the popularity of that content and build an audience.²⁷ It is for this reason that the list of premium content cannot simply be defined by what MultiChoice holds (which is essentially the approach taken by Kwesé). MultiChoice developed and marketed this content and there is an equal opportunity for other providers to do the same.

Q8: ICASA's definition of the retail market

OTT in separate market from traditional Pay TV?

Issue

- 31 Kwesé states that it is important to recognise that the distinction between TV broadcasting and OTT is becoming blurred through convergence, and refers, as authority for this, to publications of the EC and the OECD.²⁸
- 32 However, Kwesé then proceeds to argue for separate markets for traditional Pay TV and OTT services, on the basis that:
- 32.1 demand-side substitutability is limited because (i) MultiChoice sells premium movie content bundled with premium sport and non-premium content and so it is not possible to subscribe only to premium film content and (ii) premium films are made available in different release windows;

²⁷ MultiChoice submission, pgs325-331, paras 647-654

²⁸ Kwesé submission, p23, para 5.9.2

32.2 supply side substitutability is limited because OTT players cannot easily start to supply traditional Pay TV services (because a subscription licence is needed for the latter);²⁹ and

32.3 during the oral hearings, Kwesé supplemented its argument for separate markets largely on the basis of viewership trends and the penetration and cost of broadband in SA.³⁰

33 Telkom acknowledges that electronic audio-visual services markets are dynamic and quotes from an OECD paper to the effect that rapid technological progress in industries such as the media industry can lead to the convergence of formerly separate markets.³¹ Telkom advises ICASA that *"the rapid (and often unforeseeable) changes in technology can create uncertainty in market definition"* and the impact of OTT and digital migration needs further consideration in ICASA's assessment of relevant markets.³² Telkom submits that ICASA's Discussion Document has given insufficient attention to MultiChoice's arguments that Pay TV services compete with OTT services.³³ Telkom recommends that ICASA evaluate this *"in more detail and more formally, since designing appropriate regulation needs to be sufficiently forward-looking w.r.t. potential changes in technology, specifically in telecommunications markets"*.³⁴

²⁹ Kwesé submission, pgs23-24, paras 5.9.3-5.9.4

³⁰ Kwesé presentation to ICASA, slides 31 to 45

³¹ Telkom submission, pgs7-8, para 14

³² Telkom submission, p8, para 14. Telkom also suggests that *"[g]iven the potential impact of technological change, it is ... important to periodically review the market definition"* (p8, para 16)

³³ Telkom submission, p12, para 30

³⁴ Telkom submission, pgs12-13, para 30

- 34 Telkom agrees with ICASA that *"broadband penetration in SA is insufficient into all areas and markets to provide a clear substitute for subscription TV across the country and to all audiences"*.³⁵ However, Telkom acknowledges, as MultiChoice has argued,³⁶ that *"consumers who subscribe to premium television content are likely to also have access to sufficient broadband speeds required to utilise OTT services"*.³⁷
- 35 Telkom then asserts that *"premium subscription TV typically offers first-window movie and series content, whereas OTT players do not"*.³⁸ Telkom concludes from this that *"OTT does not currently offer enough of a constraint to subscription TV for it to be included in the same market"* however *"this may change in the foreseeable future and should be regularly evaluated by ICASA"*.³⁹

MultiChoice response

- 36 MultiChoice agrees with Telkom that the electronic audio-visual services market is dynamic, that the impact of OTT and digital migration needs further consideration by ICASA and that the Discussion Document has given insufficient attention to MultiChoice's arguments that traditional Pay TV services compete with OTT services, which ICASA should evaluate more carefully. MultiChoice also agrees with Telkom that traditional Pay TV subscribers are likely to have access to broadband with sufficient speeds for OTT services.
- 37 MultiChoice disagrees with Kwesé's suggestion that traditional Pay TV and OTT services are in distinct markets. In particular, Kwesé's demand side arguments are simply descriptions of the characteristics of the products, rather than considerations of whether other products would or would not act as effective constraints on an attempt by a hypothetical monopolist to impose a SSNIP.

³⁵ Telkom submission, p13, para 31

³⁶ MultiChoice submission, p230, para 493

³⁷ Telkom submission, p13, para 31

³⁸ Telkom submission, p13, para 31

³⁹ Telkom submission, p13, para 31

37.1 Although it is not possible to receive certain first Pay TV window movies without subscribing to the DStv Premium bouquet, this fact does not imply that traditional Pay TV is in a separate market from OTT services: even if a hypothetical monopolist were to make its movie channels available in a similar way, its ability to profitably impose a SSNIP may be restricted by high quality OTT movie and series offerings (among other things). Indeed this is precisely what the UK Competition Commission found in its Movies on Pay TV Market Investigation, identifying strong evidence that consumers valued range and price as much as the relative newness of content. Hence the lack of first Pay TV window content did not prevent that Authority finding a single market for OTT and Pay TV.

*"LOVEFiLM and Netflix are proving attractive to many consumers, which reinforces our view that consumers care about range and price as well as having access to the recent content of major studios"*⁴⁰

37.2 Similarly, the fact that movies are made available in different release windows does not imply that traditional Pay TV and OTT are in distinct markets – what matters is whether OTT services act as significant constraints on the prices that can be charged by traditional Pay TV services. This may be the case even if the quality of the OTT services is much lower (provided the price is correspondingly lower). As explained in MultiChoice's submission,⁴¹ first window rights have been declining in importance as the range and volume of attractive content has proliferated in recent years and such rights are less important for consumers than having a range of movies at a good price. In any event, there is nothing to preclude the rights in any release window being acquired by an OTT operator (this includes both PPV rights and first subscription Pay TV window rights). Moreover, the first-run self-commissioned or self-produced content that is exclusively on many

⁴⁰ UKCC, 2 August 2012, *CC Confirms Views in Pay-TV Movies*, Competition Commission Press Release. <http://webarchive.nationalarchives.gov.uk/20140402145741/http://www.competition-commission.org.uk/media-centre/latest-news/2012/Aug/cc-confirms-views-in-pay-tv-movies>

⁴¹ MultiChoice submission, p317, para 636.1

OTT offerings (e.g. Netflix) rivals the first-run content available for acquisition by traditional Pay TV services and represents a strong substitute for subscribers seeking high quality audio-visual entertainment options.

38 The additional "evidence" that Kwesé provided during the hearing does not in any way show that OTT should be in a separate market:

38.1 Kwesé's analysis of the role of OTT commences with a misplaced reliance on the BRC Establishment Survey⁴² to claim that the majority (97%) of South Africans watch TV on a TV set.⁴³

38.1.1 At the outset, the question asked by BRC to generate the results cited by Kwesé is: "*When last, if at all, did you watch TV*"⁴⁴ on a TV set, cellphone, tablet, etc. The question is not about audio-visual content more broadly. Instead, its focus is on linear broadcast television viewed on a TV set. It is no surprise that most South African's watch broadcast TV on a TV set. However, this does not cover other forms of video content that is relevant for this Inquiry, being all substitutes for Pay TV. In its oral submission, Cape Town TV also raised the results of the Establishment Survey. As indicated, this survey was designed to measure traditional TV viewing and confines other audio-visual services to "online subscription services" viewed on a TV set. This does not consider viewing/consumption patterns more generally, nor the plethora of viewing options available to subscribers as substitutes. Furthermore, the Establishment Survey considers the SA population as a whole rather than Pay TV subscribers.

⁴² Kwesé presentation to ICASA, 10 May 2018, slide 32

⁴³ Cape Town TV also made a similar point during its presentation to ICASA using the BRC Establishment survey

⁴⁴ Establishment Survey Questionnaire July – December 2017, p5

38.1.2 On the contrary, MultiChoice has provided a vast amount of evidence on the consumption of audio-visual content in SA, including by its own subscribers, which shows the prevalence of watching audio-visual content on a range of devices, particularly mobile devices, and particularly amongst younger viewers. This evidence, which is directly relevant, has been ignored by Kwesé.

38.2 Kwesé notes that a much higher proportion of households have a TV set than Internet access at home and from this concludes that few subscribers are able to substitute to OTT.⁴⁵ Whether or not more households have TV versus Internet access says nothing about the constraint that OTT places on traditional Pay TV,

38.2.1 It is also the case that not all TV households have Pay TV, and therefore any observation on TV households more generally is uninformative of Pay TV households.

38.2.2 Furthermore, not all households have to have access to the Internet for OTT to be a constraint on Pay TV – what matters for ICASA's market definition assessment is whether a sufficient number of marginal subscribers would switch to OTT to render unprofitable an attempted SSNIP. This may also be a sufficient number of marginal subscribers to certain bouquets only, given chains of substitution and other constraints acting on lower-priced bouquets.

38.2.3 MultiChoice has shown that a high proportion of its subscribers have access to the Internet. In fact, the figures cited by Kwesé demonstrate the high potential for switching, showing that 56% of households have access to the Internet at home and 96% have cellphone access. In addition, consumers do not need to have access to the Internet at

⁴⁵ Kwesé presentation to ICASA, 10 May 2018, slide 33

home as they can and do use WiFi at work or in public spaces to access content over the Internet.

38.3 Kwesé also provides data for those with access to a TV versus a smart phone in "poor households" (SEM1) and "rich households" (SEM10), comparing those who watch TV relative to those who access the Internet.⁴⁶ This segmentation analysis is irrelevant for determining constraints for market definition and the role of marginal consumers in exerting a constraint.

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

38.3.2 The fact that 1.5% of viewers of a specific DStv channel fall in SEM1 and that Internet access for SEM1 might be low, does not mean that OTT is not a constraint. The argument that *"for some of these [viewers], the total cost of OTT will be too high to switch"*⁴⁷ does not provide a basis for excluding OTT from the market. As MultiChoice has explained, it is not necessary that all consumers must have access to broadband, or a smartphone, in order for OTT to be a constraint. Kwesé also does not recognise the role of FTA as a constraint on the lower end of the market, including FTA OTT services.

38.3.3 For the high end, Kwesé shows that access to the Internet and smartphones is in fact very high. To then argue that *"not all rich households have the devices necessary to switch to OTT"* and *"some of these households will not want to spend*

⁴⁶ Kwesé presentation to ICASA, 10 May 2018, slides 43-45

⁴⁷ Kwesé presentation to ICASA, 10 May 2018, slides 46

*the additional money*⁴⁸ demonstrates that Kwesé fails to appreciate that not all rich households need to have a smart phone for OTT to be a constraint. Instead, Kwesé wrongly focuses on the behaviour of certain groups of subscribers rather than marginal subscribers which is what matters for assessing constraints.

- 38.4 Kwesé states that Internet penetration in SA is lower than in other countries.⁴⁹ This is a pointless exercise as this relative penetration rates says nothing about constraints on Pay TV in SA. The lower penetration rates observed in SA than in some other countries simply reflects the lower income levels in SA, where the penetration of Pay TV subscribers will also be lower. For MultiChoice's addressable market, Internet penetration is high and this is what matters when considering constraints and the propensity of consumers to switch.
- 38.5 Similarly, showing that Internet speeds are slower in SA than in more developed countries (notably the countries which are all in the top 15 in terms of broadband penetration rates) does not prove that OTT should be excluded from the market.⁵⁰ What is relevant is whether the broadband speeds that are achieved in SA are capable of supporting OTT services. Based on even the evidence put up by Kwesé, which itself is dated over a year ago, this is evidently the case. Kwesé shows that the average connection speed in SA was 6.7 Mbps in Q1 2017 and cites Netflix's recommended speeds of only 3 Mbps for SD channels and 5 Mbps for HD channels. Clearly broadband speeds are sufficient to support its OTT service. Furthermore, Kwesé relies on data published a year ago (Q1 2017). One would expect the average speed

⁴⁸ Kwesé presentation to ICASA, 10 May 2018, slides 46

⁴⁹ Kwesé presentation to ICASA, 10 May 2018, slides 43-45

⁵⁰ Kwesé presentation to ICASA, 10 May 2018, slide 34

to be faster in 2018 and certainly faster going forward, which is the relevant consideration for a forward-looking assessment.

38.6 Kwesé provides a further comparison between the price of broadband in SA to other developed countries.⁵¹ Once more, these comparisons are irrelevant and even misleading as Kwesé compares SA to selected countries where broadband is relatively cheap and does not disclose that the costs in SA are in fact significantly below the world average provided by the ITU. More importantly, these costs do not reflect the cost of broadband for audio-visual content – MultiChoice has shown that data costs for broadband are significantly discounted and often zero-rated (i.e. free). Kwesé's presentation also fails to acknowledge that the figures provided are for 2016 while broadband prices have dropped significantly in SA since then, as has been demonstrated by MultiChoice.

38.7 Kwesé then estimates the cost of broadband in SA for OTT, to allegedly show that the total cost of OTT (broadband costs plus the OTT subscription) is higher than the cost of Pay TV in order to suggest that consumers would not switch to OTT.⁵²

38.7.1 This exercise is, again, senseless as it does not recognise that OTT uses the existing ecosystem of existing devices, and consumers generally have broadband in any event for other uses. As such, the incremental costs of broadband associated with switching to OTT is not the full cost of a broadband subscription, as has been applied in Kwesé's estimations.⁵³ In fact, given the plethora of discounted or zero-rating data for audio-visual content, for many

⁵¹ Kwesé presentation to ICASA, 10 May 2018, slide 36

⁵² Kwesé presentation to ICASA, 10 May 2018, slides 37-41

⁵³ MultiChoice does not deal with the actual estimations and assumptions of their estimation as the exercise has no logical value and so there is no point in addressing the estimations provided. This should not be interpreted to mean that Kwesé's estimations, even on its flawed framework, are correct

consumers the incremental costs of broadband for audio-visual content is zero.

38.7.2 Kwesé attempts to deal with this problem by asserting that whilst households might already have access to broadband, some of these connections would not be fast enough, some may have insufficient data, or there might not be an optimal device for watching OTT content. These points are mere assertions, unsupported by any evidence whatsoever. In fact, the evidence put up by Kwesé on speeds and the high proportion of households who do in fact already have Internet access at home directly contradicts this assertion. Zero-rating also means none can have insufficient data. MultiChoice has shown that for its own subscribers, broadband penetration is high, which precisely shows that consumers already have broadband and can readily switch to OTT services without incurring the costs computed by Kwesé.

38.8 Kwesé asserts that OTT is a complement, and not a substitute, citing several articles.⁵⁴ Kwesé fails to acknowledge the sheer body of evidence put forward by MultiChoice on the extent of cord-cutting and cord-shaving internationally and how this is also evident in SA. Kwesé fails to recognise that in international jurisdictions, the trend is to include OTT in the market with traditional TV, precisely because they are constraints. Even if customers cord-shave (as opposed to cord-cut), this is a competitive constraint as MultiChoice has to compete to try to prevent this from happening. The launch of Showmax does not suggest that OTT is a complement – Showmax is precisely a competitive response to OTT as MultiChoice has to provide its own OTT service in an effort to retain customers and dissuade them from switching.

⁵⁴ Kwesé presentation to ICASA, 10 May 2018, slide 42

38.9 Kwesé's attempt to show why the UKCC's 2012 Movies on Pay TV Market Investigation (which found that OTT services belong in the same market as traditional Pay TV services) does not apply to SA,⁵⁵ is wrong and fails to appreciate the role of constraints in defining markets as discussed above.

38.9.1 The UKCC also considered the role of different movie release windows and therefore to use this as a basis for distinguishing the case from SA is misleading, as is the claim that in SA there is limited substitutability because one is licensed and the other is unregulated.

38.9.2 The argument that broadband was far more developed in the UK fails to recognise that the UKCC decision was taken six years ago, with OTT services having been included in the market at a time when the UK's broadband market would not have been as developed as it is today, yet OTT operators were far less developed than they are today, technologically and in terms of their overall content offering. For reasons already explained, the state of SA's broadband ecosystem is not a basis for excluding OTT services from the market in SA.

38.10 Kwesé argues that OTT services should be in a separate market on a forward-looking basis in the short-term given that it is not known when OTT services will be affordable for households.⁵⁶

38.10.1 This ignores the role of marginal consumers and that not all consumers need to have access to the Internet for OTT to be a constraint. It also mischaracterises OTT costs for households, which are in fact low. The incremental costs of broadband are significantly reduced for audio-visual consumption and are often zero.

⁵⁵ Kwesé presentation to ICASA, 10 May 2018, slide 31

⁵⁶ Kwesé presentation to ICASA, 10 May 2018, slide 47

38.10.2 Besides, these statements are directly contradicted by Kwesé's own commercial behaviour in launching Kwesé Play, an OTT service, and building a production base in SA with 500 employees.. It seems highly unlikely that Kwesé would launch an OTT service in SA if it genuinely believed that OTT services were unaffordable and would not find a sufficient market amongst consumers. Rather, the launch of Kwesé Play is consistent with all the evidence that has already been provided which shows that OTT services are expanding rapidly and already place a significant constraint on Pay TV services today. In MultiChoice's view, this is indicative of regulatory gaming on the part of Kwesé, who is seeking to free-ride on MultiChoice's investments, instead of developing, marketing and distributing its own content which it is already doing in other markets.

38.11 Ultimately, in an attempt to exclude OTT from the market, Kwesé puts up spurious analyses that do not demonstrate separate markets at all. Its approach is not consistent with basic principles of market definition or the body of evidence that has been presented by MultiChoice. Kwesé's assertion that not enough customers will switch to OTT in response to a SSNIP is a mere assertion, unsupported by any evidence.

39 More generally, and as explained in MultiChoice's submission,⁵⁷ the relevant retail market includes services on all distribution technologies, including DTH, DTT, IPTV and OTT, and linear as well as non-linear services.

39.1 As explained in that submission, there is a trend in international decisions to finding that non-linear services, including OTT services, belong in the same market as traditional Pay TV services. This includes the UKCC in its 2012 Movies on Pay TV Market Investigation. The trend reflects that, from a viewer's perspective, the distribution

⁵⁷ MultiChoice submission, Part C, pgs143-151, paras 271-286

technology is typically unimportant: what matters is the content delivered and the viewer experience. As these can both be more or less the same with any technology (including DTH and OTT), viewers will consider these as alternatives.

39.2 Moreover, whatever the case may have been in the past in SA or other countries, MultiChoice has demonstrated in its submission that today a hypothetical monopolist of traditional Pay TV services would be constrained from profitably implementing a SSNIP due to the widespread availability of alternatives including, significantly, OTT services provided over SA's rapidly expanding broadband infrastructure and connected smart device ecosystem.⁵⁸

40 It is noteworthy that numerous submissions to ICASA's Discussion Document recognise the importance of OTT as well as the negative impact this has had on revenues for both FTA and Pay TV service providers:

40.1 The SABC states that this Inquiry is taking place in the context of the *"proliferation of ... OTT ... players using broadband infrastructure."*⁵⁹

40.2 According to e.tv:

*"The participation of Over-the-Top (OTT) players in the advertising market which is unregulated is beginning to erode the revenue base for the FTA and subscription-television."*⁶⁰

40.3 SOS/MMA calls on ICASA to widen the scope of the Inquiry to cover the audio-visual sector as a whole.⁶¹ It states:

"SOS and MMA note with dismay ICASA's assertion that 'access to broadband and high data costs remain a crucial deterrent to the

⁵⁸ MultiChoice submission, p143, para 273

⁵⁹ SABC submission, p2

⁶⁰ e.tv submission, p4, para 12

⁶¹ SOS/MMA submission, p8, para 4.6

*growth of mobile television'. 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."*⁶²

*"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."*⁶³

and

*"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.... SOS and MMA are of the respectful view, that conducting an enquiry into subscription broadcasting, without reviewing the whole television sector, and indeed the audio-visual sector as a whole... will only further hinder the development of audio-visual content sector in the country."*⁶⁴

40.4 Vodacom clearly states that demand for content via LTE is a crucial development that shapes the market for digital content and challenges regulatory regime.⁶⁵ This development means that content can be

⁶² SOS/MMA submission, p7, para 4.6

⁶³ SOS/MMA submission, p24, para 8.4.2.3

⁶⁴ SOS/MMA submission, p7, para 4.6

⁶⁵ Vodacom submission, p22, para 56

delivered via multiple substitutable transmission platforms at both the wholesale and retail levels.

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

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

It was noticeable based on the text and questions of the Discussion Paper ... that the Authority had pre-determined the relevant markets as being subscription television broadcasting without providing any data or information to demonstrate rationally how they arrived at that conclusion and on what basis they have dismissed the wider audio-visual ... market which would have included international and local Over-The-Top (OTT) audio-visual media providers, currently available in the South African ... market. ...

*OTT is a very serious future threat to all traditional broadcasters in South Africa in terms of competition with foreign service providers who have no regulatory constraints, while at the same time representing an opportunity as a platform that can drive the future growth of the industry. ... we believe OTT as a force of digital disruption cannot be ignored by the regulator when determining current and future relevant markets."*⁶⁶

- 40.6 Cricket South Africa (CSA) expresses the view that the rapid growth of broadband within SA in the near future will unlock new opportunities in

⁶⁶ ACT-SA submission, pgs1-2, paras 1.5, 1.7 and 1.8

respect of live streaming and that this may result in new revenue streams for sports bodies.⁶⁷

FTA in separate market from traditional Pay TV?

Issue

- 41 The Competition Commission takes the view that ICASA's theoretical approach to market definition accords with globally recognised principles insofar as it relates to the consideration of demand and supply side substitution, but argues that the process of market delineation should be determined by the business model adopted by the firms and the technical platforms that they use to broadcast content.⁶⁸ This would appear to be a suggestion that FTA and Pay TV should be defined in separate markets simply because they apply different business models and use different technical platforms.⁶⁹
- 42 Kwesé similarly argues that *"FTA and subscription television have fundamentally different business models, which are further enforced by regulations"*.⁷⁰ Kwesé also points to a number of European precedents that have found FTA and Pay TV to be in separate markets where these precedents have often relied again on differences in business models as well as price differences.⁷¹ Kwesé also questions whether there is enough *"premium sport content screened by FTA broadcasters to significantly constrain the prices charged by pay television"*.⁷²
- 43 Telkom, similarly, asserts that *"subscription broadcasting cannot be substituted with FTA, since subscription TV offers premium content as well as a more comprehensive bouquet of channels"*.⁷³ However, Telkom then observes that *"this might vary with the introduction of FTA multi-channel DTT in particular in*

⁶⁷ CSA submission, para 5.3

⁶⁸ Competition Commission submission, p5, para 4.1.4

⁶⁹ Cell C, by contrast, *"does not consider the technical aspects of Pay TV to be particularly relevant to market definition except insofar as they confirm MultiChoice's vertically integrated nature"*. Cell C submission, pgs7-8

⁷⁰ Kwesé submission, p21, para 5.8.3

⁷¹ Kwesé submission, p21, para 5.8.2

⁷² Kwesé submission, p22, para 5.8.4

⁷³ Telkom submission, p12, para 29

*relation to cheaper bouquets (that exclude premium content).*⁷⁴ Telkom then observes that ICASA has not considered whether the split between FTA and Pay TV applies to all Pay TV bouquets and will continue to do so in the near future.⁷⁵

- 44 Cell C's arguments that FTA TV and Pay TV are in separate markets appear somewhat contradictory. On the one hand, Cell C argues that *"[i]n the context of supply-side and demand-side substitution, the type of access [to content] and the type of content that MultiChoice is able to obtain would tend to suggest that the market should be defined as narrowly as possible, in other words, it should be confined to the pay tv market"*.⁷⁶ On the other hand, Cell C recommends that ICASA *"use the category 'audio-visual content' rather than 'TV content' since content is produced for distribution, use or viewing by consumers in a variety of different forms allowing it to be made available over a wide variety of platforms and devices"*.⁷⁷ This acknowledges that the same content can be broadcast over any platform (which logically includes both FTA TV and Pay TV platforms), contradicting Cell C's earlier assertion that the nature of content suggests the market should be defined around Pay TV only.

MultiChoice response

- 45 As explained in MultiChoice's submission, the principles of market definition (founded in the economic literature and well-established and applied among competition authorities and regulators around the world) include that (i) there should be a rigorous, fact-based assessment (which must factually assess the sector in SA at the time of the Inquiry rather than reliance on historical international precedents), and (ii) the relevant market definition question is one of competitive constraints. Among the implications of a focus on competitive

⁷⁴ Telkom submission, p12, para 29

⁷⁵ Telkom submission, p12, para 29

⁷⁶ Cell C submission, p7

⁷⁷ Cell C submission, p10.

constraints is that differences in product characteristics, prices and business models do not necessarily imply that products belong in separate markets.⁷⁸

- 46 ICASA's Discussion Document largely ignored these principles. The submissions of the Competition Commission and Kwesé also ignore them.

46.1 The suggestions by the Competition Commission and Kwesé that the process of market delineation should be determined by differences in business models and technical platforms ignore the principle that one should focus on constraints, rather than product characteristics: i.e. one should ask whether a hypothetical monopolist would be constrained from profitably implementing a SSNIP due to demand or supply side alternatives, not whether the hypothetical monopolist has a different business model or a product delivered over a different platform.

46.2 Kwesé's observation that European authorities have on occasions found FTA and Pay TV to be in separate markets ignores both principles: the relevant context is the supply of electronic audio-visual services in SA at this time, not the supply of such services in other countries at various times in the past. References to international precedents do not reflect a careful assessment of constraints on MultiChoice in SA at the present time.

- 47 What matters for ICASA's market definition assessment is whether a sufficient number of marginal subscribers would switch to the range of alternatives available to them to render unprofitable an attempted SSNIP by the hypothetical monopolist of traditional Pay TV services, and whether FTA services are significant among those alternatives.

47.1 It must be emphasised here that it is the reactions to a SSNIP of marginal subscribers that matters (not the reactions of infra-marginal or average subscribers), and also that it is the combined effect of all

⁷⁸ MultiChoice submission, pgs127-131, paras 229-238

constraints that should be considered, not the effect of one constraint at a time.

47.2 As such, even if FTA only offered an alternative to marginal subscribers to lower-priced bouquets, it would still meaningfully contribute to the overall constraint on traditional Pay TV and would be included in the relevant market as a result.

48 When one considers the aggregate constraints on a hypothetical monopolist of traditional Pay TV services, there are good reasons and strong evidence to support a relevant retail market that includes both FTA TV and FTA OTT services. These reasons are set out in MultiChoice's submission.⁷⁹

48.1 First, FTA TV and Pay TV services are in fundamental competition for viewers, especially for lower-priced bouquets, as articulated by both FTA broadcasters in SA, namely the SABC and e.tv.

48.2 Second, the strong preferences of South African viewers for local content and the extensive amount of local and international sport broadcast on FTA mean that FTA TV is a strong constraint on Pay TV services in SA. This is particularly the case when the alternative of FTA TV is considered in combination with the option of out-of-home (OOH) viewing (of live sports content in particular). Kwesé's⁸⁰ claims on the limited availability of sports on FTA are factually incorrect and inconsistent with the evidence provided by MultiChoice on the vast amount of local sports that is available on FTA in SA.⁸¹

⁷⁹ MultiChoice submission, Part C, pgs142-171, paras 269-343

⁸⁰ Kwesé presentation to ICASA, 10 May 2018, slide 28

⁸¹ MultiChoice submission, Appendix 4

48.3 Third, as Telkom has observed, developments in FTA distribution technologies are further enhancing the appeal and constraint that FTA TV represents for Pay TV: both DTH FTA (OpenView) and DTT platforms offer FTA broadcasters a multi-channel and HD environment allowing for a varied and rich audio-visual experience that is even more clearly substitutable for DStv offerings.

48.4 Fourth, free online content accessed over OTT platforms (including pirated content) adds a further and growing FTA constraint on traditional Pay TV.

49 The SABC states:

*"Types of broadcasters cannot be neatly boxed into separate markets as subscription broadcasters compete with FTA broadcasters for audiences, advertising and sponsorship revenue, content and sports rights."*⁸²

50 MultiChoice further observes that marginal subscribers need not switch entirely away from traditional Pay TV services to have a significant constraining effect on the hypothetical monopolist that were to attempt a SSNIP.⁸³ This is because many marginal subscribers may respond to an attempted SSNIP by "cord-shaving", moving from a higher-priced bouquet to a lower-priced bouquet, while substituting other services (e.g. FTA TV or a combination of FTA TV, OOH viewing and OTT services) for the channels that they no longer get from their traditional Pay TV service.

Separate retail markets for premium and basic tier bouquets

Issue

51 Kwesé has argued that basic and premium tier bouquets fall in different markets because they attract audiences in different LSM groups and also different advertisers as a result.⁸⁴

⁸² SABC submission, p3

⁸³ MultiChoice submission, pgs131-132, paras 239-241 and p230, para 493

⁸⁴ Kwesé submission, p20, para 5.7.2

- 52 Cell C argues for separate premium and non-premium retail markets, but without any analysis, and further calls for ICASA to explain why there should be a different number of retail markets compared to the number of content acquisition markets.⁸⁵

MultiChoice response

- 53 MultiChoice's submissions under Q5, 6 & 17 above regarding the deficiencies in the term "premium" for market definition purpose and its failure to address the question of constraints on a hypothetical monopolist to preclude a profitable SSNIP, apply equally here.
- 54 Those constraints, in the context of the South African electronic audio-visual services market, include all services sold at different price points, notwithstanding that these services may have different mixes of subscribers from the various LSM groups. As explained in MultiChoice's submission, for market definition purposes it is the significance and behaviour of marginal subscribers that matter when assessing whether a hypothetical monopolist of one product (e.g. a higher priced product) would be constrained by other products (e.g. lower-priced products).⁸⁶ Kwesé's suggestion falls into the trap of emphasising the alleged behaviour of average (infra-marginal) rather than marginal subscribers. As explained by MultiChoice,⁸⁷ consumers view different DStv bouquets at different price points and containing different amounts of content as close substitutes offering comparable value for money and frequently switch between them. Changes in the price of or the content within one bouquet will result in substitution both to higher- and lower-priced bouquets. A chain of substitution thereby links all packages at different price points.

⁸⁵ Cell C submission, p12. Cell C appears to take the view that the breadth of retail markets in terms of content should mirror the breadth of upstream content acquisition markets, so that if there are six separate upstream content acquisition markets for various genres of content, there should be six corresponding retail markets

⁸⁶ MultiChoice submission, pgs131-132, paras 239-241 and p230, para 493

⁸⁷ MultiChoice submission, Part C, p157, para 307

- 55 Regarding Cell C's request for an explanation of why there should be a different number of retail markets compared to the number of content acquisition markets, there is no reason for the number of markets at one functional level to be the same as the number of markets at another functional level. The question at each level is always: what are the competitive constraints on a hypothetical monopolist? In MultiChoice's view, there is in fact a single upstream market for content and a single retail market, without any premium versus non-premium distinction. This is based on a principled analysis of competitive constraints at each level, not a mechanical assumption that the number of markets at one level should equal the number of markets at another level.

Q9: ICASA's definition of upstream wholesale markets for channel provision

Issue

- 56 Cell C and Telkom both propose that ICASA identify a wholesale market for premium channels and another wholesale market for non-premium channels. However, neither give any principled basis for their proposals.⁸⁸ Regarding further sub-division, Cell C suggests it *"may be appropriate to define premium and non-premium content without any sub-markets because in time a sub-market is bound to change because viewing preferences and trends change"*.⁸⁹

MultiChoice response

- 57 As explained in MultiChoice's submission,⁹⁰ there is no relevant upstream market for the wholesale supply of channels. A hypothetical monopolist of wholesale channels would be constrained from profitably implementing a SSNIP by significant direct and indirect constraints from non-linear content:
- 57.1 First, retailers would have the direct alternative of acquiring non-linear content libraries instead of packaged channels.

⁸⁸ Cell C submission, p13; Telkom submission, p13, para 34

⁸⁹ Cell C submission, p13

⁹⁰ MultiChoice submission, pgs202-205, paras 430-436

- 57.2 Second, a hypothetical monopolist of wholesale channels would be constrained indirectly, but effectively, by the many non-linear offerings that today constrain retail suppliers of linear channels.
- 57.3 Third, a hypothetical monopolist would be further constrained by the alternative for retailers to acquire content directly from content owners and self-supply the content aggregation and channel packaging activity.
- 58 Even if ICASA were to define markets for the wholesale supply of channels, MultiChoice submits that there would be no basis under the well-accepted principles of market definition for defining separate markets for premium and non-premium channels. As explained above, the term "premium" is not useful for identifying the boundary of the relevant market. This disqualifies it as a basis for market delineation as well as any further role in ICASA's Inquiry. More fundamentally, the delineation of market boundaries around the term "premium" does not derive from an analysis of competitive constraints on a hypothetical monopolist, and therefore does not follow the well-accepted principles of market definition that offer ICASA a reliable basis for market definition, and which ICASA has stated it will rely on for market definition purposes.
- 59 Moreover, even with respect to content that may historically have been referred to as "premium", high quality content that is attractive to subscribers has proliferated and content that may historically have been referred to as "premium" is much less significant for attracting subscribers than it may once have been. Audio-visual retailers today do not require access to this content in order to compete and can instead build offerings from other content to attract subscribers. In short, there is plenty of content that is substitutable for content that has historically been referred to as "premium".
- 60 For the same reason, MultiChoice agrees with Cell C that it is inappropriate to define sub-markets for the wholesale supply of channels of particular genres. As MultiChoice has previously submitted to ICASA, not only are viewing preferences fluid, but at any point in time retailers do not need any particular channel genre and instead view all channels as substitutable, which would preclude a

hypothetical monopolist of a particular genre of channel from profitably implementing a SSNIP.

Q11: ICASA's definition of upstream wholesale markets for content provision

Issue

- 61 Cell C proposes a number of narrow content acquisition markets, specifically: (a) a market for the aggregation of first window movies for wholesale distribution in SA; (b) a market for the aggregation of live sport in SA; (c) a market for the aggregation of non-premium audio-visual content for retail distribution in SA. Cell C clarifies that (a) and (b) need not be defined separately with there being just two content markets: one for the aggregation of premium content at the wholesale level and the other for the aggregation of non-premium content at the retail level.⁹¹
- 62 Telkom observes that there is some fluidity in content and that *"channels sometimes themselves successfully make a sporting event premium which was not previously"* and for these reasons *"definitions should not be set in stone"* but instead *"be adaptable and flexible to address a fluid market"*.⁹²

MultiChoice response

- 63 Cell C's proposals are simply assertions of relevant markets based on some distinct characteristics of particular content, without any grounding in the principles of market definition. However, market boundaries should not be determined solely by reference to product characteristics, since products that differ in their characteristics can constrain each other and fall within the same relevant market.

⁹¹ Cell C submission, pgs14-15

⁹² Telkom submission, p14, para 36

- 64 By contrast, MultiChoice's submission applies well-accepted economic principles of market definition to the facts in SA to conclude that the relevant upstream market consists of the acquisition of both content and channels (there being no separate market for the supply of wholesale channels), that there is no relevant distinction to be drawn around "premium" content, and all content genres should be included within the same relevant upstream market.
- 65 Telkom's observations are relevant: viewer preferences for content are fluid and, moreover, broadcasters can develop content that may become successful. An example is how SuperSport has developed the PSL. Therefore, broadcasters do not need to acquire any particular content to be successful and all content is substitutable.

Q12: ICASA's definition of an upstream wholesale market for technical services

Issue

- 66 Kwesé argues for distinct markets to be defined for technical services for different transmission platforms on the basis that for a Pay TV broadcaster *"the cost of switching between Pay TV transmission platforms (e.g. satellite or digital terrestrial) are prohibitively high, limiting the demand-side substitution between these platforms"*.⁹³ Kwesé also argues that ICASA's market definition *"incorrectly implies that these fall within the same relevant market"*.⁹⁴

MultiChoice response:

- 67 In SA, as elsewhere globally, DTH, DTT and OTT technologies are in competition as means of transmitting audio-visual services. The various technologies are viable and competitive alternatives for distributors, content and channel producers, and consumers, and hence form a single relevant market.

⁹³ Kwesé submission, p28, para 5.13.4

⁹⁴ Kwesé submission, p28, para 5.13.4

- 68 In response to the argument of Kwesé that there are prohibitively high costs for a Pay TV distributor to switch between transmission platforms, MultiChoice considers that the costs for a Pay TV distributor to switch from a DTH platform to an OTT platform are not significant (let alone "prohibitively high"). Internationally, several Pay TV distributors (such as Sky) that previously relied on DTH transmission have now launched OTT platforms, without incurring excessive costs. Indeed, Kwesé is itself on both the DTH and OTT platforms in many markets. It does not offer a DTH service in SA only because of licensing issues, not barriers to operating on that platform.
- 69 In any event, switching by Pay TV distributors between different transmission platforms is not the only relevant form of substitution when considering the breadth of the relevant market. A content or channel producer may choose to be distributed over one transmission platform or another, and consumers may switch between different transmission platforms. These other two forms of switching must also be considered when considering the ability of a hypothetical monopolist of one transmission platform profitably to impose a SSNIP. For example, if a SSNIP by a hypothetical monopolist of DTH transmission services were attempted, the increase in costs may result in higher transmission fees charged by the DTH distributor to channel producers (or lower licence fees paid to channel producers) and higher subscription prices to consumers. The channel producers and consumers may then switch to other transmission platforms, undermining the ability of the distributor to pay the transmission monopolist and therefore undermining the profitability of the SSNIP.
- 70 There is a single relevant upstream market for technical services across all distribution technologies.
- 71 MultiChoice largely agrees with the submissions of Vodacom insofar as the upstream market for technical services corresponds to Vodacom's proposed market for "transmission services".

- 71.1 Vodacom argues that there exists a market for "broadcasting transmission services",⁹⁵ and observes a number of European decisions that have remarked on *"[t]he trend of increased penetration of alternative transmission platforms capable of rendering the same or competing broadcasting content [that] may have an effect on the manner in which transmission platform competitive constraints are considered"*.⁹⁶
- 71.2 Vodacom goes further to argue (as submitted above) that there is a single market containing all transmission platforms due to *"derived-demand dynamics"*,⁹⁷ and emphasises *"the emergence of LTE as a significant competitive constraint to other upstream wholesale transmission platforms"*.⁹⁸
- 71.3 Vodacom quotes from an EC decision concerning broadcasting transmission services markets in Finland that emphasises the *"transition towards non-linear access to content, and on mobile devices"* and the *"potential competition of alternative transmission platforms such as cable, IPTV or OTT services"* and that *"the completion of mobile LTE networks can be expected to add another method of delivery of (high quality) content to end users, throughout the entire territory of Finland"*.⁹⁹

⁹⁵ Vodacom submission, pgs18-19

⁹⁶ Vodacom submission, p19, para 48

⁹⁷ Vodacom submission, p20, para 49. Specifically, Vodacom states: *"transmission platform interchangeability is a function of the extent to which geographic and population coverage and penetration is reached beyond a particular threshold. This threshold of availability has an effect on retail market and demand substitutability. That is, given the broader broadcasting relevant market is driven by derived-demand dynamics, the availability of a transmission platform to retail subscribers avails a competitive constraint to the prevailing transmission platform. This availability also entails that the relevant market must necessarily be understood as encompassing the alternative transmission platform."*

⁹⁸ Vodacom submission, p22, para 55

⁹⁹ Vodacom submission, p22, para 55

71.4 Vodacom then argues that "[t]he driver for the demand of access to digital content via LTE networks is a crucial development which invariably shapes the structure of the retail market for digital content and challenges the foundations of regulatory authorisation regimes" and argues for regulation "to embrace technology neutrality".¹⁰⁰

71.5 Vodacom concludes:

*"As transmission platform[s] increasingly become substitutes in the rendering of multiple services at both wholesale and retail levels, the process of defining relevant markets will become more important for purposes of appreciating the competitive dynamics in the services that are capable of being rendered on alternative transmission platforms."*¹⁰¹

CONSIDERATION OF EFFECTIVENESS OF COMPETITION

Q14: Factors for determining the effectiveness of competition

The EU three-part test

Issue

72 A number of submissions suggest the use of the EU three-part test as the appropriate approach to determining the effectiveness of competition in the market¹⁰² and argue either that ICASA should examine each of these specifically or that ICASA should find each of these to be satisfied. The three parts include determining whether –

72.1 there are high and non-transitory entry barriers,

72.2 the market tends to competition on a forward-looking basis; and

¹⁰⁰ Vodacom submission, p22, para 56

¹⁰¹ Vodacom submission, p23, para 56

¹⁰² These include Cell C submission, p15; Telkom submission, p15, para 39; and Kwesé submission, p30, para 6.1.2

72.3 competition law alone can address any market failures.

- 73 Vodacom's submission also devotes many paragraphs to Market 18 in the EC's original list of markets recommended as susceptible to ex ante regulation (i.e. the market for broadcasting transmission services).¹⁰³

MultiChoice response

- 74 MultiChoice does not agree with the proposals of limiting ICASA's assessment to these three factors. The first two factors of the test are cited under s67(4A) of the ECA as two aspects which ICASA must consider in its assessment, amongst a list of broader factors. Consistent with this, submissions have also suggested that ICASA's factors are far narrower than what is listed in their own market review guidelines.¹⁰⁴
- 75 Furthermore, each of these third party submissions misunderstands the three criteria test as a test of whether a market exhibits ineffective competition and should be regulated.¹⁰⁵ The three criteria test is not itself a test of effectiveness of competition. It is only a test of whether a market should be considered to be susceptible to ex ante regulation and for that reason requiring a market analysis to be carried out to assess whether the market is effectively competitive or not.¹⁰⁶ That assessment would be done by the national regulators in their own jurisdictions. The EC has explained the distinction as follows:

"Overall, the three criteria test differs from the assessment of whether one or more operators active on a particular market have significant market power,

¹⁰³ Vodacom submission, pgs7-8, para 19-20 and pgs18-23, paras 45-56

¹⁰⁴ Telkom submission, p15, para 39

¹⁰⁵ Cell C submission, p15; Vodacom submission, p5, para 15; and Kwesé submission, p30, para 6.1.2 (although Kwesé later appears to appreciate the nuance in para 6.1.3)

¹⁰⁶ Article 15(1) of EC, *Directive for a Common Regulatory Framework for Electronic Communications Networks and Services*, 2002/21/EC, OJ EC L108/33, 7 March 2002, requires the adoption of a *Recommendation on Relevant Product and Service Markets* that identifies markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations. As the EC has itself observed: *"The Commission [...] first considers the characteristics that may render a particular market susceptible to ex ante regulation"* (emphasis added); EC, *Explanatory Note Accompanying the Commission Recommendation on Relevant Product and Service Markets*, Commission Staff Working Document, SWD(2014) 298, 9 October 2014, p8. The EC goes on to caution that regulation must be targeted and balanced and should avoid imposing excessive burdens on operators that would stifle investment and innovation

even though both analyses may make use of similar indicators. The three criteria test focuses on overall market characteristics and structure, for the sole purpose of identifying those markets that are susceptible to ex ante regulation. The assessment of significant market power instead determines whether an operator active in a market that has been identified as susceptible to ex ante regulation, should be made subject to ex ante regulation. While a market may meet the three criteria for the purposes of the Recommendation, and is therefore listed as susceptible to ex ante regulation, regulation on the identified market in an individual Member State may not be warranted. On the other hand, however, if a market does not meet or no longer meets the three-criteria test, ex ante regulation is not or would no longer be warranted.

In this context, for the imposition, maintenance, amendment or withdrawal of obligations, Article 16(2) of the Framework Directive requires a determination on the basis of a market analysis of whether a relevant market is effectively competitive."¹⁰⁷ (emphasis in original)

- 76 As the ICASA process is one of determining whether competition is in fact ineffective, it necessarily must go beyond the three criteria test of the EC in order to make such an assessment. The legislation and ICASA's own guidelines confirm this too.
- 77 In any event, none of the three criteria is satisfied in the context of the South African electronic audio-visual services market, and the submissions by third parties also fail to provide adequate evidence that each of the three criteria is met. Regarding the first criterion (i.e. high and non-transitory barriers to entry, whether of a structural, legal or regulatory nature), as explained in MultiChoice's submission there are no significant barriers to entry, let alone "high and non-transitory" barriers. In fact, entry to the audio-visual content market is becoming easier.¹⁰⁸

¹⁰⁷ EC, *Explanatory Note Accompanying the Commission Recommendation on Relevant Product and Service Markets*, Commission Staff Working Document, SWD(2014) 298, 9 October 2014, p12

¹⁰⁸ MultiChoice submission, pgs267-259, paras 540-566

- 78 Regarding the second criteria (i.e. the requirement that the market structure not tend towards effective competition within the relevant time horizon), in its Explanatory Note accompanying its most recent Recommendation on Relevant Markets, the EC made the following observations which are particularly relevant in the context of the dynamic developments in the South African electronic audio-visual market set out in MultiChoice's submission¹⁰⁹ (including the rise of OTT services):

"In view of the character of electronic communications markets, for regulatory intervention to be justified, market characteristics should be analysed not only in a static but also in a dynamic and forward-looking manner. Does the market, in the absence of regulation, tend towards effective competition? Market dynamics in the absence of sector-specific ex ante regulation may make barriers to entry disappear over time, for example as a result of technological developments"

[...]

Market dynamics may [...] be changed by technological developments or by the convergence of products and markets. The presence of infrastructures that are based on different technologies but that offer products that are substitutable for end customers can also alter competitive dynamics across the supply chain, including competition on price, choice and quality. Indeed, competitive pressures on operators need not necessarily derive from other comparable operators, but may be exercised by undertakings (such as those that are currently referred to as over-the-top players) that, while adopting different business models, are able to supply products that can be regarded as an alternative by end users. Indeed, in innovation-driven markets competitive constraints often come from innovative threats from potential competitors that are not currently in the market, and dynamic or longer-term

¹⁰⁹ MultiChoice submission, part B

*competition can take place among firms that are, from a static perspective, not necessarily competitors in an existing market."*¹¹⁰ (emphasis in original)

79 The EC also clarified:

*"A tendency towards effective competition does not necessarily imply that the market will reach the status of effective competition within the period of review. It simply means that there is clear evidence of dynamics in the market within the period of review which indicates that the status of effective competition will be reached in the foreseeable future without ex ante regulation in the market concerned."*¹¹¹

80 It is important for ICASA to be aware that the EC has only ever considered one electronic audio-visual services market to be susceptible to ex ante regulation under the three-criteria test. This was the wholesale market for broadcasting transmission services ("market 18") and it was removed from the list of markets considered susceptible to ex ante regulation in 2007. In removing this market from the list, the EC observed that it tended towards effective competition:

"There are a number of reasons why it is considered appropriate to remove the existing wholesale market from the recommended list. Many of the comments received during the consultation indicated that significant market changes are underway. There is evidence of greater platform competition as the transition from analogue to digital delivery platforms occurs. One implication is that there are likely to be fewer capacity constraints on any given platform. A second is that many Member States are likely to have 3-4 competing platforms (terrestrial, satellite, cable and telecom-based) in contrast to 2-3 analogue platforms, one of which, satellite, developed much later. The transition from analogue to digital provides an impetus for platforms to compete and attract end-users, which in a two-sided market context, also means obtaining content. These changes

¹¹⁰ EC, *Explanatory Note Accompanying the Commission Recommendation on Relevant Product and Service Markets*, Commission Staff Working Document, SWD(2014) 298, 9 October 2014, pgs9-10

¹¹¹ EC, *Explanatory Note Accompanying the Commission Recommendation on Relevant Product and Service Markets*, Commission Staff Working Document, SWD(2014) 298, 9 October 2014, p10

*indicate that despite the market entry barriers that may exist, the market dynamics are such that the second criterion is not satisfied."*¹¹²

History of entry and licensing

Issue

- 81 It has been argued by Cell C and a number of other third parties that ICASA should have regard to the history of how MultiChoice entered the market and the impact this has had on competition.¹¹³

MultiChoice response

- 82 MultiChoice disagrees that the historical context is relevant for a market review that should be forward-looking and must have regard to the dynamic nature of the market. This is particularly relevant in respect of the electronic audio visual services market, which has seen significant technological disruption. MultiChoice's submission has provided a full account of the massive disruption experienced by traditional Pay TV from OTT services.¹¹⁴
- 83 Factually, the arguments that call for a consideration of the history of entry fail to recognise that others could have entered, but chose not to do so, and that competitors and potential competitors to MultiChoice have been active in the market for a long period of time.

¹¹² EC, *Explanatory Note Accompanying the Commission Recommendation on Relevant Product and Service Markets*, Commission Staff Working Document, SEC(2007) 1483/2, C(2007) 5406, pgs48-49

¹¹³ Cell C submission, p16

¹¹⁴ MultiChoice submission, pgs85-94, paras 155-171

Q15: Are there competition concerns and a need for regulation of non-premium content?

Dominance in non-premium content at retail level and the bundling with premium

Issue

- 84 Cell C and Kwesé argue that MultiChoice is dominant in the retail provision of non-premium content and that MultiChoice has tied up most of this content.¹¹⁵ Kwesé also argues that the bundle of non-premium with premium extends the reach of non-premium making it attractive to advertisers and difficult for entrants to compete.¹¹⁶

MultiChoice response

- 85 As already explained, the terms "premium" and "non-premium" content do not define any relevant market. In any event, given the sheer volume of content that is available, MultiChoice could not be dominant in the retail provision of non-premium content (whatever this may mean). It would be impossible for MultiChoice to "tie up" all of the content Cell C and Kwesé regard as non-premium.
- 86 Given the massive amount of content that is available, a key aspect of MultiChoice's business is to choose, from amongst the vast amount and variety of content and channels available locally and internationally, those that are likely to have appeal, and to represent sufficient variety to potential subscribers to each bouquet it wishes to offer. MultiChoice then invests in developing and marketing this content to its subscribers. These activities are continuous, as (i) MultiChoice continually assesses the performance of its various offerings, re-evaluates them and invests in new content, and (ii) new independent content becomes available for acquisition regularly.

¹¹⁵ Cell C submission, pgs21 and 23; Kwesé submission, p39, para 6.5.3

¹¹⁶ Kwesé submission, p38, para 6.5.1

- 87 The availability of content to existing and potential competitors (including OTT, other Pay TV licensees, and FTA TV competitors) is also reflected in the fact that Cell C and Kwesé have been able to acquire content for distribution on their platforms in a short space of time.
- 88 MultiChoice is of the view that the submissions of these parties to the contrary are merely regulatory gaming in an attempt to improve their position and to free-ride off MultiChoice's efforts to identify, develop and market content to its subscribers. These parties would clearly rather not put in the effort to identify, develop and market content themselves, and prefer to wait for MultiChoice to do so successfully and then demand access to that content. This was evident in their submissions on local content in the public hearings, where both parties indicated a preference for licensing other operators' local content to investing in their own local content productions, despite there being no barriers to doing so. As MultiChoice made clear in its submissions, consumers mainly gain from competition to provide attractive content, not in 'me-too' platforms showing the same content as incumbents.

Q16: Barriers in the upstream market

Barriers to entry in content acquisition

Issue

- 89 Telkom argues that scarcity, cost, exclusivity and special relationships in premium content constitute barriers to entry since premium content is necessary for success.¹¹⁷ Kwesé similarly argues that premium content is essential to the success of entrants and their ability to grow a subscriber base.¹¹⁸ Telkom also argues that the same is true of non-premium content, but that this is less of an impediment to success.

¹¹⁷ Telkom submission, p17, paras 44-45.

¹¹⁸ Kwesé submission, pgs45-46.

MultiChoice response

- 90 These submissions conflate the notion of "premium" content (however this might be defined) with "must have"/essential content (i.e. content that is essential for the entry and expansion of rivals). MultiChoice's submission has dealt extensively with the claim that any content is essential.¹¹⁹ The submission explained that labelling content as "premium" does not imply that the content is "must-have"/essential. The submission also demonstrated that there is no single piece of content with unique appeal to the majority of households, or "must-have"/essential content. Refer to MultiChoice's expanded response on this issue a few paragraphs below under a similar heading.

Barriers to entry in content acquisitionIssue

- 91 A number of submissions have suggested that the high price of rights to certain content itself constitutes a barrier to acquiring such content by new entrants or smaller operators who may lack the capital required.

MultiChoice response

- 92 As the MultiChoice submission has already outlined, leading antitrust scholars globally have clearly stated that large capital investments on their own are not considered a true entry barrier.¹²⁰ This view is also expressed in the ICN Merger Guidelines Workbook where it is stated that "[t]he mere need to invest in order to enter is not itself a barrier to entry."¹²¹
- 93 The reason for this is simply that whilst a particular capital investment sum may be large for some individuals or firms, there will be firms for whom such amounts are well within their capacity to raise or invest if the opportunity is profitable. Therefore, whilst a larger sum may reduce the number of potential entrants, it

¹¹⁹ MultiChoice submission, pgs313-340

¹²⁰ Hovenkamp, s126b2 and footnote 20, p535

¹²¹ ICN Merger Guidelines Workbook, ICN Merger Working Group: Investigation and Analysis Subgroup, April 2006, p55, para E8

would not eliminate all potential entrants. This line of reasoning is captured in the following quote from McAfee, Mialon and Williams:

*"...many firms are capable of paying large capital costs, if the entry is worthwhile. Raising money for large projects is not necessarily more difficult than raising money for small projects. If capital markets work properly, raising capital should be no more difficult for a profitable large-scale project than for a profitable small-scale project. Profitable projects should attract many investors."*¹²² (emphasis added)

- 94 This is true for entry into audio-visual services more generally, and for content acquisition more narrowly. For instance, there are a number of actual and potential entrants who are capable of paying the large sums involved in acquiring certain content rights in SA if they believe it has value in building an audience. This would include all the domestic telcos as well as global OTT providers and local FTA broadcasters. That this is the case is reflected in the fact that in November 2017, Vodacom, Telkom, SABC and Kwesé all bid to acquire the PSL's electronic audio-visual rights for the next five seasons. MultiChoice's submission also provided extensive examples of expensive rights being acquired by entrants.
- 95 Whilst it may be the case that certain entrants are incapable of purchasing those rights, this clearly does not limit competition for those rights, given that other entrants are capable of paying for them. Furthermore, the inability to put up the capital for these rights does not preclude these other entrants from building a successful audio-visual service and competing in the market. As outlined above and in the MultiChoice submission, it is possible to build an audience with a wide range of content other than the most expensive rights, including quite cheap content. As the MultiChoice submission shows, this has been demonstrated across Africa by operators in competition to MultiChoice.

¹²² R P McAfee, H M Mialon, and M A Williams, 2003, "Economic and Antitrust Barriers to Entry", pgs17-18: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594601

Driving up content costs of rivals

Issue

- 96 Cell C argues that MultiChoice can simply pay over the odds for content in order to drive up the costs for rivals.¹²³ Kwesé argues that MultiChoice has on occasion paid substantial, unrelated market prices for sports rights where it was the sole bidder in order to ensure that no new entrant could afford that content when it came up again for tender.¹²⁴ The SABC makes a similar allegation.¹²⁵

MultiChoice response

- 97 MultiChoice denies that it overpays for content to drive up costs for rivals or to exclude rivals. Rights inflation is a feature of the market, globally as well as in SA. Rights holders are simply not willing to sell rights at a low price, even if MultiChoice were to be the sole bidder.
- 98 Further, it would not make commercial sense for MultiChoice to overpay for content in an effort to raise costs for rivals. If MultiChoice faced no competition today (which is denied), but a prospect of competition in a future rights auction, it would not be rational to spend more today than the content owner's reserve price. If MultiChoice wished, and was able, to bid more than rivals in the future auction, it could do this in the future auction. Over-paying in the current auction would only increase MultiChoice's costs unnecessarily and erode its profitability without assuring any incremental gain in future.
- 99 Rather, the coherent explanation for the prices MultiChoice has paid for sports rights (which have indeed been escalating) is a combination of (a) competition intensifying for the rights and MultiChoice seeking to outbid rivals and (b) MultiChoice investing in some sports as a way to increase the future value of those sports and the services that MultiChoice provides, resulting in higher prices

¹²³ Cell C submission, p18

¹²⁴ Kwesé submission, p22, para 5.8.4

¹²⁵ SABC submission, p22, para 2.2.6.5

that reflect the higher value of the rights to viewers resulting from MultiChoice's investments.

Incumbency advantage and ability to acquire content

Issue

100 Submissions made by Cell C and Kwesé argue that, due to exclusive arrangements and MultiChoice's market power, there are barriers to acquiring content and third party channels.¹²⁶ It is also claimed that MultiChoice leverages its market power into local content production.¹²⁷ Kwesé specifically raises access to local content producers as a barrier to producing own content due to the existence of retainer agreements with MultiChoice.¹²⁸ Kwesé further alleges that MultiChoice has agreements with community TV broadcasters which require them to give MultiChoice the first option on any content or channel which they produce, which prevents any other Pay TV broadcaster from accessing that content on equal terms, and that this acts as a further barrier to entry into the market for the acquisition of non-premium content.¹²⁹

MultiChoice response

101 The claims made in the submissions are incorrect and misleading.

101.1 The submissions by Cell C and Kwesé concerning MultiChoice's acquisition of content and channels on an exclusive basis have no merit. The acquisition of content and channels on an exclusive basis by subscription audio-visual service providers is a standard practice internationally, since consumers will only pay to acquire content which they cannot otherwise obtain for free. Econet Media itself spends significant amounts of money acquiring content and channels on an exclusive basis for inclusion on Kwesé TV and Kwesé Play – often at the expense of, amongst others, MultiChoice, with whom Econet was

¹²⁶ Cell C submission, p23, Kwesé submission, pgs36-37, paras 6.4.4-6.4.7

¹²⁷ Cell C submission, p23

¹²⁸ Kwesé submission, p37, para 6.4.6

¹²⁹ Kwesé submission, p38, para 6.5.2

competing for those rights. During its oral presentation, Kwesé made clear that it is not opposed to exclusivity.

101.2 As regards movies, the following ought to be noted:

101.2.1 The TVOD window becomes available before the first-run window, and anyone can bid for those rights.

101.2.2 First-run Hollywood movies are not essential for competing. The market has changed and it is no longer about growing market share with "premium" movies that are expensive to acquire. Attractive packages can be built on cleverly packaged second run movies which are readily available for acquisition. Shrinking windows also means that the first run/second run distinction is becoming less important.

101.2.3 Factually, it is not true that competitors are blocked from bidding for the second-run window as OTT rights (second run rights) are not usually acquired exclusively.

101.2.4 In any event, the rights to content coming from the major Hollywood studios are contestable and there is no reason why rivals cannot acquire rights to the first-run and second-run windows individually. Content providers sell their rights to maximise their own revenues and there is no particular advantage to selling both types of rights to a single buyer; if an independent OTT provider makes an attractive offer for the second-run window, there is no reason why the OTT rights cannot be sold separately.

101.2.5 There is no scarcity with respect to movies and series and supply extends beyond that which is produced by the major Hollywood studios.

- 101.2.5.1. The MultiChoice submission showed that there has been an explosion in the number of international series available from different production companies in the market. In respect of movies, there is a growing source of quality content outside of the confines of the big Hollywood studio deals.
- 101.2.5.2. There is also a huge volume of popular inexpensive movie content available on the African continent, which comes from a wide range of small independent producers.
- 101.2.6 The availability of content to entrants and existing competitors is also reflected in the fact that both Cell C and Kwesé have been able to acquire content for distribution on their platforms in a short space of time.
- 101.3 Please refer to paragraphs 87 to 94 of Appendix B for further details which have been provided in response to ICASA's question to MultiChoice regarding windowing.
- 101.4 Kwesé's allegation that a large portion of local content is either owned by MultiChoice or licensed exclusively to MultiChoice¹³⁰ is also incorrect. There is nothing stopping Kwesé or any other audio-visual service provider from seeking to acquire or to sub-license the vast archive of local content programming of the SABC (going back to 1976) or of e.tv (going back to 1998), or from requesting either of these entities to package that programming into channels for inclusion in Kwesé's offering. Indeed, this is what MultiChoice has done itself to boost its local content offering.
- 101.5 Possibilities for broadcasting local content are not limited to content which has already been developed, whether by MultiChoice or others.

¹³⁰ Kwesé submission, p37, para 6.4.6

As stated in the MultiChoice submission,¹³¹ local content can be developed relatively inexpensively, and broadcasters such as the SABC, e.tv and MultiChoice have done so.

101.6 MultiChoice denies that it has any advantage with respect to local content production.

101.6.1 MultiChoice does not have retainer agreements with local producers. M-Net's contracts with local producers include restraints which limit only the extent to which that producer can produce content in the same genre for another broadcaster, for a period limited to the duration of the agreement with that producer and for a short duration (usually three months) thereafter. This protects the investment which M-Net has made. Absent this restraint, it would not be commercially viable for M-Net to invest the amounts which it does for such productions. This would result in less income flowing to local producers, and lower quality productions. This would not be to the advantage of the local production industry, nor consumers as regards the quality of programming which is available.

101.6.2 There are no barriers to electronic audio-visual service entrants and competitors building in-house capabilities or commissioning their own local content from independent producers. Competitors like the SABC and e.tv have strong local content offerings which demonstrates that there is no scarcity of local independent producers which can develop local content under commission. MultiChoice's rivals must simply take commercial risk and invest, as their competitors (e.tv, SABC and MultiChoice) have done. In the last month, the SABC, in its presentation to the Parliamentary Portfolio Committee on Communications, emphasised the importance

¹³¹ MultiChoice submission, p318 to 319, para 638. See also para p 321, para 640.3

of quality local content, without any suggestion that there were any barriers to entry in this regard. It identified, as a content strategy, the following:

"Distinctive and quality local content accessible on multiple platforms in order to attract and retain maximum audiences

While audiences will connect with and consume SABC content in increasingly different ways over the next couple of years, what will remain unchanged is the demand for high-quality, diverse, distinctive South African local content.

[The SABC has] adopted a new approach to the acquisition of content so as to ensure that not only is there an increase in local content on all platforms, but that the content reflects an increased diversity, in terms of language, provincial representation and a greater range of production companies."

101.6.3 It would be completely inappropriate for ICASA to intervene in this regard, and such intervention would have hugely negative consequences.

101.7 Rights to a large number of third party channels distributed by MultiChoice are not held exclusively. This includes channels cited by Cell C (such as BBC, where BBC World News is also shown by StarSat) and channels distributed by KweSé in the rest of Africa where it has actively sought to acquire third party channels which are available on a non-exclusive basis (including, for example, CNN, Sky News, CNBC Africa, Cartoon Network and Boomerang).

101.8 It is also misleading to selectively cite only channels that are available on MultiChoice's bouquets. There are a large number of third party channels which are not included which would be available for

acquisition by other parties. No attempt has been made to assess the universe of available content and channels, which casts doubt on the reliability and veracity of the claims made by MultiChoice's rivals. The availability of third party channels is evidenced by the fact that entrants, like Kwesé, have been able to acquire rights to a large number of third party channels in a short space of time.

- 101.9 Whilst historically MultiChoice included exclusivity provisions in the channel distribution agreements with community channels, these provisions are being phased out at the point when any such agreement is renewed.

Staggering of rights

Issue

- 102 The Competition Commission has suggested that the staggered nature of contracts makes it difficult for competitors to build a critical mass of rights.¹³²

MultiChoice response

- 103 The staggering of rights is not a barrier to entry. On the contrary, it facilitates entry. Given the large volume of content that is available and is capable of attracting an audience, rights to a vast range of popular content frequently become available for acquisition in a short period of time. Because no individual content right (or small selection of content rights) is important in attracting subscribers and a wide range of alternatives is available, a competitor does not need to wait for particular rights to become available and can readily obtain an attractive portfolio of content. This is evident by the fact that entrants, like Kwesé, have been able to rapidly build up a portfolio of rights. This also dispels the notion that MultiChoice has long-term contracts for content.

¹³² Competition Commission submission, p5

Barriers to entry in content acquisition

Issue

- 104 The Competition Commission argues that various factors limit the number of suitable buyers of sports rights: capacity to broadcast live matches; expertise and production quality standards; and subscriber base and ability to pay the required amounts.¹³³
- 105 Kwesé claims that the sports rights acquired by SuperSport "*encompass the most sought after*" local and international sports events, and thereafter purports to set out what those rights are. Kwesé goes on to state that the "*ability to broadcast key sports content for new entrants is essential if they are to have any chance of competing with MultiChoice*" for both high value and other subscribers.¹³⁴
- 106 Cricket SA also claims that it "*faces the challenge of only being able to offer its broadcasting rights to a limited field of broadcasters*".¹³⁵
- 107 Cell C claimed in its oral presentation that, at the time it launched Cell C Black, there were no opportunities for it to bid for sport content which it considers to be premium, because these were all tied up by MultiChoice.
- 108 SABC makes numerous allegations regarding access to sports rights and sporting codes. These statements – contained in its written and its oral submissions – were largely made in the context of proposing amendments to the Sports Broadcasting Services Regulations, 2010, and are therefore dealt with in detail in paragraph 237 of this document.

¹³³ Competition Commission submission, p9, para 8.4

¹³⁴ Kwesé submission, pgs39-45, para 6.7.1-6.7.8

¹³⁵ Cricket SA submission, para 3.10

MultiChoice response

109 MultiChoice disagrees with the claim that there are a limited number of suitable buyers of sports rights in SA, and that sports rights are "essential". As regards the latter allegation, MultiChoice has explained in detail in its written submissions and earlier on in this document that consumers have a preference for a range of varied content, and that no single type of content is "essential" for a subscription audio-visual service provider to succeed.

110 Sports rights are fiercely contested and have become even more expensive – this demonstrates that other operators are capable of contesting these rights, and their willingness to do so has driven up the price of these rights.¹³⁶ The contenders for rights is not limited to SuperSport, ODM (as it then was, now StarTimes trading as StarSat), SABC and e.tv, as suggested by the Competition Commission. For example, MultiChoice is aware from media reports that in November 2017, Vodacom, Telkom, SABC and Kwesé all participated in the tender to acquire the PSL's electronic audio-visual rights for the next five seasons. Kwesé and StarTimes, in particular, have already acquired a wide range of sports rights for SA. For example, Kwesé has the following sports rights for SA:

110.1 English Premier League Football Exclusive FTA

110.2 Brazilian Football League Exclusive Pay

110.3 National Basketball Association (NBA) Exclusive Pay and FTA (including NBA TV Channel)

110.4 Formula E Motor Racing Exclusive Pay and FTA

110.5 International Association of Athletics Federation (IAAF) World Athletics Championships Exclusive Pay and FTA

¹³⁶ MultiChoice submission, p356

- 110.6 Extreme Fighting Championship Mixed Martial Arts (EFC MMA) Exclusive Pay
 - 110.7 World Title Boxing - Various - Promoters Exclusive Pay and FTA
 - 110.8 French Ligue 1 Football Exclusive Pay and FTA
 - 110.9 Africa Netball Championship Exclusive Pay and FTA
 - 110.10 Electronic Sports Leagues (ESL) - E sports Exclusive Pay and FTA
 - 110.11 COSAFA Football - Various - Exclusive Pay and FTA
- 111 The list of sports rights held by Kwesé is reflected in Figure 122 at p528 of MultiChoice's submission. It is noteworthy that Kwesé has not indicated to ICASA the sports rights which it has very recently acquired for SA (listed above), competing, amongst others, against MultiChoice.
- 112 What is also noteworthy about Kwesé is the strategic decision it took to launch a Pay TV service in the rest of sub-Saharan Africa, but to hold back the launch of that service in SA. During Kwesé's presentation at the oral hearings, it became clear that Kwesé's failure to launch in SA has nothing to do with MultiChoice or a lack of access to content. Rather, its absence in SA is because it does not have a licence. Kwesé also indicated that it would launch in SA if licenced and has already applied for a FTA DTT licence in SA.¹³⁷ Kwesé would be able to easily enter on DTH in SA if licenced as it already is on DTH in other countries and the satellite that it is using (Eutelsat 7B) would cover SA. MultiChoice and content are not barriers to Kwesé's entry.
- 113 Kwesé also stated during the oral hearing that there is a range of content not held by MultiChoice around which a broadcaster can successfully build an audience (e.g. ATP Tennis, NBA). Kwesé has in fact been very successful in doing so in the rest of sub-Saharan Africa, where it has entered and has actively sought to acquire a wide range of sports rights, competing with MultiChoice and

¹³⁷ The application was made in the name of Kwesé Free TV (Pty) Ltd which is an entity whose shareholding is made up as follows: Royal Bafokeng Metix (45%), Mosong Equities (35%) and Kwesé Media Econet South Africa (20%)

others, and Kwesé was successful in acquiring many of those rights. Kwesé for example, has been marketing the fact that it is the "Official FIFA World Cup Broadcaster", with exclusive rights to this content:

*"Russia 2018 is approaching rapidly and now's a good time to discover how you can catch 32 games free on Kwesé Free Sports and all 64 games on our paid-for platform, Kwesé TV. Kwesé has exclusive rights to broadcast the FIFA World Cup free in Africa. These rights include all games involving African teams, the opening ceremony and opening match, two quarterfinals, both semifinals, as well as the final and closing ceremony."*¹³⁸

- 114 The only reason Kwesé does not hold these rights for SA is because it is not licenced in SA, not because it has been unable to acquire these rights from the rights holders . Kwesé has been successful in developing local content elsewhere in Africa, investing in local sports leagues, magazine shows, etc. Yet, in SA, it is seeking to licence this content, instead of developing and marketing its own content as a means of competing. There is no reason why Kwesé does not develop, and invest in developing, its own content for distribution. It has an equal opportunity to do so.
- 115 As regards the sports rights held by StarTimes, refer to Figure 116 at page 516 of MultiChoice's submission.
- 116 As digital migration continues, it increases the number of channels that FTA broadcasters can provide. The additional channel space available on DTT opens up the opportunity for genre specific and specialist channels, including sports channels, which SABC, for example, has frequently said it will carry in the future – most recently when the SABC made a presentation in April 2018 to the Parliamentary Portfolio Committee on Communications.
- 117 MultiChoice's submission showed that competition for rights will be more intense in the future.¹³⁹ For example, Cell C has indicated that it is seeking to buy major

¹³⁸ <https://www.kwese.com/news/1549130/kwes%C3%A9-sports-your-official-fifa-world-cup-broadcaster>

¹³⁹ MultiChoice submission, pgs357-358

sports rights, including the Rugby World Cup. It also has acquired the rights to the matches of major football clubs. MultiChoice's submission also indicated that the global OTT services have acquired sports rights and this is likely to intensify in the future. Local and international OTT services thus have the capacity, the subscriber/user base and the financial resources to acquire these rights.

- 118 Cell C's claim that at the time of its launch in November 2017 all sports rights were tied up is incorrect. A number of notable rights became available in the two months preceding the announced date of its launch and within the following months.¹⁴⁰ In this regard, the table below contains a list of just a few notable sports rights:

Indian Premier League (cricket)	4 September 2017
PSL	16 November 2017
UEFA Club Football (Champions League and Europa League)	23 November 2017
EPCR European Club Rugby	6 December 2017
Serie A (Italian football)	2018
French Ligue 1	2018

- 119 Cell C also claimed that its access to five European football clubs' TV channels (Man U TV, Barca TV, Liverpool TV, Chelsea TV and Real Madrid) provides it with only near-live sports rights due to MultiChoice holding the live rights to sports content.

¹⁴⁰ Cell C announced the launch of Black on 8 November 2017.
<https://www.cellc.co.za/cellc/newsroom-detail/INTRODUCING-BLACK>

- 119.1 The lack of live rights sold directly by the clubs is as a result of a decision by the top European leagues to sell their live rights collectively to broadcasters around the world. As a result, residual rights sold by the clubs exclude the live rights.
- 119.2 However, near-live rights can still be packaged into a compelling offer to many consumers given that they are acquired at a substantially cheaper price than the live rights, which means the content can be offered at a low price. Furthermore, it is open to Cell C to bid for the live rights if it believes there is value in doing so.

Barriers to entry in content acquisition

Issue

- 120 The SABC, e.tv and Cell C allege that MultiChoice "hoards" rights, especially sports rights. The SABC describes "hoarding" as *"instances when the subscription broadcasting service does not intend to broadcast the event, or be a part of it"*.¹⁴¹ e.tv does not define what it means by "hoarded" rights. Cell C describes hoarding as occurring when one entity buys *"the rights to offer content across various platforms and then only use one subset of them via satellite distribution"*.¹⁴²

MultiChoice response

- 121 MultiChoice denies that it "hoards" sports rights. It does not seek to acquire rights to a platform which it does not intend to use.
- 122 It bears noting that rights holders may package their rights as they consider appropriate in order to gain maximum value from those rights. The PSL is an example of a rights holder which determines that the FTA rights be included in the comprehensive package of rights, but imposes a sub-licensing obligation on

¹⁴¹ SABC submission, p22, para. 2.2.6.4

¹⁴² Cell C presentation to ICASA, slide 27

the successful licensee to ensure that FTA rights are sub-licensed to an FTA broadcaster.

123 The EPL is an example of a rights holder which splits its rights into a Pay TV package and a FTA package for the continent of Africa. MultiChoice acquired the Pay TV rights (on all broadcast platforms) for sub-Saharan Africa, while the FTA package was acquired by Kwesé for the same territory (including SA).

124 In conclusion, the allegation about hoarding of rights is a broad generalisation which fails to acknowledge the many different ways in which rights holders determine the manner in which they package their rights. The only instances in which MultiChoice acquires, and does not use, FTA rights occurs where those rights are bundled across all platforms by rights holders for exclusivity purposes. This is exclusivity through differentiation of content, an essential element of competition in the electronic audio-visual services market,¹⁴³ and is not a "hoarding" of rights.

125 MultiChoice broadcasts all content that it acquires rights for.

Q19/Q24 Vertical integration in Pay TV

MultiChoice is the only player that is fully vertically integrated

Issue

126 Telkom states that MultiChoice is the only fully vertically integrated operator and that this should be investigated further to identify potential competition concerns.¹⁴⁴

¹⁴³ See MultiChoice submission, p359 (para 697) to p367 (para 710.2)

¹⁴⁴ Telkom submission, p24, para 67

MultiChoice response

- 127 Both the SABC and e.tv volunteer that they are vertically integrated – other than as regards broadcasting signal distribution, which they each outsource to Sentech.¹⁴⁵
- 128 Other DTH players also commission content, acquire content and package channels: thus, they too are vertically integrated operators. The only respect in which MultiChoice is more vertically integrated than other DTH players is with respect to signal distribution, since Orbicom is 100% owned by MultiChoice's holding company. This additional vertical integration on the DTH platform provides no basis for concern and no material advantage to MultiChoice, since other DTH players have been able to launch DTH without having a vertically integrated signal distributor. There are alternative independent suppliers who are able to provide DTH signal distribution to DTH entrants. For example, OpenView uses Sentech as a signal distributor. MultiChoice understands that StarSat self-provides its own signal distribution.
- 129 Turning to other transmission technologies, full vertical integration is not unique to MultiChoice, since other players are also fully vertically integrated. OTT providers such as Kwesé - which is active in the provision of audio-visual content over its network - also produces, commissions and acquires content, packages it and distributes it directly to consumers over its own broadband platform.
- 130 ACT-SA makes the point that vertical integration may only matter in respect of platform in the event the market is as narrow as DTH, which it is not.¹⁴⁶

¹⁴⁵ Confirmed in the SABC submission at p14, para 1.2.9 and the e.tv submission at p10, para 37.2 respectively

¹⁴⁶ ACT-SA submission, p20, para 8.12

MultiChoice will not supply its channels to others due to vertical integrationIssue

- 131 It is argued in a number of submissions that vertical integration results in an incentive not to provide rivals with adequate content.¹⁴⁷

MultiChoice response

- 132 Exclusivity and the differentiation it provides is fundamental to competition between audio-visual service providers. They all acquire, develop and package exclusive content for their service to differentiate themselves and compete for viewers. For example, global OTT services such as Netflix and Amazon, invest a huge amount of money in developing original productions for exclusive distribution on their OTT services. Similarly, M-Net and SuperSport were established to acquire or commission content, and package it into channels for MultiChoice's bouquets, and these brands are intimately linked to the DStv brand.
- 133 Exclusivity also provides large benefits to consumers by incentivizing providers to make large investments in innovative content and its promotion. MultiChoice's audio-visual service investments in the PSL reflect this incentive, building it from a poor league into a global top 10. The same applies to the large local content investments of MultiChoice and the FTA broadcasters in SA.

- 134 [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

¹⁴⁷ Cell C submission, p14; Competition Commission submission, p14, paras 15.2 and 15.3; Kwesé submission, p54, para 7.2.2; Telkom submission, pgs24-25

Literature cited to support vertical integration and foreclosure incentives

Issue

135 The Competition Commission argues that vertical integration in subscription broadcasting stifles competition by giving upstream (wholesale) firms an incentive to deny downstream (retail) firms adequate content, leading to foreclosure. The Competition Commission cites Snyder (1995)¹⁴⁸ and Chipty (2001)¹⁴⁹ to the effect that vertically integrated firms are on average likely to offer limited premium content and even more restricted basic content to rivals or impose onerous terms of access to premium content, which may lead to some degree of foreclosure.¹⁵⁰

MultiChoice response

136 The literature cited by the Competition Commission does not support its argument that vertical integration leads to input foreclosure. Moreover, the literature finds that vertical integration generates efficiency gains which must be weighed against any claims of foreclosure effects. Taking account of efficiencies, the literature finds that vertical integration does not harm consumers and may in fact benefit them.

137 The Chipty (2001) article has little relevance to the Competition Commission's argument as it is concerned with customer foreclosure (refusing to carry rival channels in a retail offering), whereas the Competition Commission's argument

¹⁴⁸ Christopher M. Snyder, *Empirical Studies of Vertical Foreclosure*, 1995 Industry Economics Conference Papers and Proceedings, University of Melbourne, November 1995

¹⁴⁹ Tasneem Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*, *The American Economic Review*, Volume 91, No. 3, June 2001 ("Chipty"), pgs428-453

¹⁵⁰ Competition Commission submission, pgs14-16.

concerns input foreclosure (refusing to supply content in the form of channels).¹⁵¹ The Chipty article is silent on the issue of input foreclosure.

- 138 The Snyder (1995) article is also not probative of the Competition Commission's argument. That article is not only more than 20 years old, but it is largely a survey of other papers on vertical integration from the late 1980s and early 1990s. Chipty's work (then an unpublished mimeo) is one of those surveyed: as noted above, Chipty's work is on customer foreclosure not input foreclosure. The same can be said about the other article on cable TV surveyed by Snyder: Waterman and Weiss (1994)¹⁵² also find that integrated cable operators were more likely than non-integrated cable operators to carry integrated channels and less likely to carry channels of rivals. The Snyder article does include a section titled "*New evidence on foreclosure*", which consists of two studies of his own. The first of these looks at the effects of a regulatory-imposed reduction in vertical integration in the British beer industry; however Snyder's findings can be critiqued and subsequent economic studies have generally found that the outcome of the reduction in vertical integration was poor for consumers, as retail prices subsequently went up.¹⁵³
- 139 Moreover, the literature cited by the Competition Commission finds that vertical integration confers efficiency gains, in particular the elimination of successive mark-ups (known as "double marginalisation") and internalisation of service and quality externalities between the industry stages. When efficiencies are taken into account, it cannot be presumed that vertical integration stifles competition and is harmful to consumers. Chipty (2001) writes "*vertical integration does not*

¹⁵¹ Chipty looks at the US cable TV industry and evidence of customer foreclosure there – i.e. refusing to carry rival channels in the integrated cable operator's offering. She finds some evidence of this ("*Operators who own premium services offer, on average, one fewer premium service and one to two fewer basic services than do other operators*" (p429)) and gives examples of particular instances (e.g. "*operators who own premium movie services are less likely to carry the rival basic movie service, American Movie Classics*" (p429))

¹⁵² David Waterman and Andrew Reiss, *The effects of vertical integration between cable television systems and pay cable networks*, Journal of Econometrics, Volume 72, Issue 1-2, 1996, pgs357-395

¹⁵³ Margaret Slade, *Beer and the Tie: Did Divestiture of Brewer-Owned Public Houses Lead to Higher Beer Prices?*, Economic Journal, Volume 108, No. 448, May 1998, pgs565-602. Using free (unintegrated) pubs as a control group, she concludes: "*I find that the recommendation by the MMC to force divestiture resulted in higher retail prices and unchanged or lower brewer profits*" (p566)

harm, and may actually benefit consumers because of the associated efficiency gains." Waterman and Weiss (1994) – cited by Snyder (1995) – also refer to efficiency motives for vertical integration and note that these may account for their results (i.e. if there are sufficiently lower costs of carrying one's own channels, it may be efficient to supply that channel and not competing channels).

Vertical integration and new platform development

Issue:

- 140 It is argued by some submissions that there may be foreclosure of new platforms. Kwesé argues that MultiChoice's access to content has made it easier for it to enter OTT and given it an advantage over other Pay TV broadcasters and OTT services. Specifically, Kwesé claims MultiChoice can leverage from its negotiations for Pay TV rights to gain access to content for its OTT platform, and that this has allowed it to block competitors from not only the first-run TV broadcasting window but also the second-run (OTT) window.¹⁵⁴
- 141 Referring to Ofcom's Pay TV market investigation consultation document (2007), Kwesé also raises the concern that a vertically-integrated operator may leverage from its presence in the retail market to create additional barriers to entry (e.g. by preventing a new wholesale provider which is building up its portfolio of rights from accessing the retail market and hence limiting its ability to monetise those rights).¹⁵⁵ Telkom argues on the basis of Ofcom's 2007 consultation document that vertical integration between retail and platform operations may foreclose the possible development of new platforms.¹⁵⁶

MultiChoice response

- 142 Prior to dealing with these submissions by third parties, we wish to point out that MultiChoice understands that Kwesé and StarTimes also seek to acquire content rights for transmission for FTA and Pay, and for DTT, DTH, and OTT.

¹⁵⁴ Kwesé submission, p54, para 7.2.3

¹⁵⁵ Kwesé submission, p47, para 6.9.2

¹⁵⁶ Telkom submission, p25, para 70, bullet point 4

- 143 Contrary to Kwesé's argument on access to content, providers of content rights are able to sell separate rights for DTH and OTT platforms and may sell these to different buyers. Content providers sell their rights to maximise their own revenues and there is no particular advantage to selling both types of rights to a single buyer: if an independent OTT provider makes an attractive offer for these rights, there is no reason why the OTT rights cannot be sold separately.
- 144 Regarding the leverage argument, there are several means by which a new wholesale content provider may access the retail market, including by supplying new OTT entrants – which include global OTT operators and local telcos – or by entering the retail market itself on OTT and/or DTH platforms. In addition, the development of new platforms has not been foreclosed as Telkom alleges: Pay TV broadcasters in SA face intense competition from the global OTT giants and have had to respond to changing consumer demand patterns. MultiChoice also faces competition from well-resourced local telcos.
- 145 Kwesé itself states that vertical integration per se is not the issue, but rather barriers to accessing premium content.¹⁵⁷ Kwesé also recognises that vertical integration makes MultiChoice more efficient.¹⁵⁸ It is generally undesirable to inhibit efficient operations and promote inefficient rivals by restricting vertical integration, since such an approach is liable to increase prices and worsen services to consumers.

Vertical integration and countervailing buyer power

Issue

- 146 The Competition Commission argues that the existence of countervailing power "*may present competition problems*" when a buyer is vertically integrated and possesses market power in both the upstream and downstream markets. The Competition Commission refers to articles by Roller (2004), Chen (2007) and Lars (2012), as well as an article by Crawford and Yurukoglu (2012).¹⁵⁹ The

¹⁵⁷ Kwesé submission, p48, para 6.9.4

¹⁵⁸ Kwesé submission, p54, para 7.2.4

¹⁵⁹ Competition Commission submission, p8, para 8.2 and p10, para 8.6

Competition Commission reports that Crawford and Yurukoglu find that, as retail market power increases, countervailing power benefits upstream do not compensate for the price hike driven by the increase in market power at the retail level (i.e. consumers become worse-off overall as the retail market becomes more concentrated).

MultiChoice response

- 147 It is unclear why the Competition Commission views the existence of countervailing power as capable of presenting competition problems. Crawford and Yurukoglu (2012) find that the beneficial effects for consumers of countervailing buyer power of a vertically integrated firm that gains market power both downstream and upstream do not fully offset the detrimental effects of the downstream market power. This is not a finding that the countervailing power is a competition problem. It is only a finding that the countervailing buyer power does not fully offset the competition problem that is associated with downstream market power.
- 148 To put this another way, even if MultiChoice has market power and countervailing buyer power (both of which are denied), the Crawford and Yurukoglu finding does *not* say that the countervailing buyer power makes things *worse* for consumers than not having it (as the Competition Commission appears to suggest). It only says that the extent to which the countervailing buyer power makes things better for consumers does not fully offset the detriment to consumers from the exercise of downstream market power.
- 149 In any event, the Crawford and Yurukoglu finding can have no bearing on ICASA's assessment because, for the reasons given in MultiChoice's submissions, MultiChoice does not have market power: MultiChoice and other traditional Pay TV broadcasters in SA currently face intense competition from global OTT giants, large local telcos and regional Pay TV services, as well as competitive pressures from FTA TV broadcasters.

Q21: Barriers to entry at the retail level**Access to platforms**Issue

150 Kwesé argues that without access to a broadcasting platform, new entrants are unable to supply their service. It further claims that MultiChoice has Pay TV exclusivity on Intelsat and Eutelsat.¹⁶⁰

MultiChoice response

151 In its response to Q26 of the Discussion Document Kwesé appears to be suggesting that inputs that broadcasters may need – in this case the need for a broadcasting platform – automatically become a barrier to entry warranting regulatory intervention.

152 At the outset it is important to state that the mere need to invest does not elevate something to an entry barrier, as even incumbents need to make such investments. As the MultiChoice submission indicated, abstract and subjective assessments of barriers are not useful. Instead, what is required is a practical assessment of the likelihood of entry and evidence of entrants being able to overcome such factors as identified theoretically as barriers. This practical and evidentiary approach is precisely what the OECD advocates.

"In recent years, several competition scholars have concluded that the debate about entry barriers should be considered irrelevant to competition policy. They argue that abstract, theoretical pondering on the definition of barriers to entry is unlikely to be very helpful in investigations and policy decisions. What matters in actual cases is not whether an impediment satisfies this or that definition of an entry barrier, but rather the more practical questions of whether, when, and to what extent entry is likely to occur given the facts in each case. Most

¹⁶⁰ Kwesé submission, p50, para 6.15.

*competition agencies in OECD countries agree with that pragmatic view."*¹⁶¹
(emphasis added)

153 Adopting this practical approach shows that there are several flaws to this line of reasoning by Kwesé.

153.1 First, new entrants can and do develop their own broadcasting platforms, an example being StarSat and another being Kwesé itself. Kwesé is on its own DTH platform outside of SA, and is only not on its own platform in SA due to licencing issues.

153.2 Second, there are third parties who provide the various components of broadcasting platform services and a new entrant need not make these investments on its own. For instance, Sentech, Globecast and Telemedia are local third party providers of platform services. There is therefore no merit to the claim that this represents a barrier to entry that cannot be overcome.

154 As regards Kwesé's claim that "*MultiChoice has pay television exclusivity on the Intelsat and Eutelsat platforms*", this is factually incorrect. Furthermore, there is spare transponder capacity on several satellites covering SA which is available to entrants. StarSat, for example, was able to launch its DTH platform by leasing capacity on SES-5. Through Sentech, OpenView uses Intelsat. A total of 16 satellites provide Ku-capacity over SA. These include several Intelsat satellites, several Eutelsat satellites, the SES 5 satellite, the Telstar 11N satellite, the NSS7 satellite, and a couple of HellaSat satellites. MultiChoice uses only two of these satellites. Indeed, Kwesé is operating its DTH service for southern Africa on one of these Eutelsat satellites which already has a footprint covering SA.

155 In any case, a new entrant can enter the market without access to a DTH platform, since there are other distribution platforms available, including OTT, on which Kwesé is already present. This is well recognised and reflected in

¹⁶¹ OECD Policy Brief, January 2007, Competition and Barriers to Entry:
<http://www.oecd.org/competition/mergers/37921908.pdf>

statements made by the Kwesé' chairman in his blog when announcing the launch of Kwesé Play, its partnership with Netflix and the Roku box.

"Custom-built and powered by our partner Roku®, the Kwesé Play "streaming box" has more entertainment content than any broadcaster in Africa and is the first set-top box in Africa to officially include Netflix service.

"This is a #Game Changer!

Here's how it works: Traditional subscription service (or Pay TV) relies on a decoder connected to a satellite dish. The challenge of satellite technology is that it's inflexible and rigid, limiting the things you can do. It's actually quite an old technology.

Kwesé Play uses the most advanced decoder in the world (an Internet "streaming box") connected by fibre optic cable. The high speed fibre (internet) connection allows us to provide the most intelligent TV service possible."¹⁶²

- 156 As the Chairman notes, all that is required for an OTT service is an Internet connection. The launch of Kwesé Play on a newer alternative platform highlights that access to technical platform services is not a significant, insurmountable barrier to entry. Kwesé's submission that ICASA should intervene by directing incumbents to give rivals (including Kwesé) access to 'old, inflexible and rigid' satellite technology is either self-serving or a contradiction, since Kwesé recognises that there is no need to use such a platform.

¹⁶² Econet Wireless, Strive Masiyiwa's Blog, 14 September 2017, Breaking News: Another amazing new service from Kwesé TV:
http://www.econetwireless.com/strive_masiyiwa_blog/index.php/breaking-news-another-amazing-new-service-from-kwese-tv/

MultiChoice's presence across all platforms raises barriers to entry

Issue

157 Telkom argues that offering access to content through multiple platforms raises the requirement for competitors to do the same, increasing barriers to entry.¹⁶³ Kwesé, similarly, argues that MultiChoice's ability to offer its services across all platforms (DTH and OTT in particular) raises barriers to entry for competitors in the "*market for subscription television broadcasting*".¹⁶⁴

MultiChoice response

158 It is not clear to MultiChoice why competitors need to offer services across all platforms. OTT providers constrain MultiChoice, yet do not need to operate on multiple platforms to be effective competitors and they have unique advantages of their own, which MultiChoice has described in its submission. Dynamics in the retail electronic audio-visual services market have presented a huge challenge to MultiChoice's business and this has meant that MultiChoice has had to respond competitively. It has done so in a number of ways set out in MultiChoice's submissions.¹⁶⁵ Other competitors, including the FTA TV broadcasters, for example, are also doing the same as a means of competing in the market.

159 However, even if this were the case, it is not clear to MultiChoice why competitors do not have a ready ability to offer services across multiple platforms and in particular why a DTH competitor could not readily offer services also over OTT. In fact, Kwesé and StarTimes both already do so. Given that the same content can be broadcast across different platforms (assuming distribution rights have been acquired for the relevant platforms), the only barrier to multi-platform distribution is the costs of establishing additional platforms. This is not insurmountable - as evidenced by the many DTH service offerings in SA alone

¹⁶³ Telkom submission, p20, para 57

¹⁶⁴ Kwesé submission, pgs12-13, para 5.1.2

¹⁶⁵ MultiChoice submission, pgs279-296

(DStv, StarSat, OpenView and Deukom) and the costs of establishing an OTT platform is even lower (as evidenced by the proliferation of OTT services).

Switching costs

Issue

160 Telkom suggests that DStv's "Price Lock" to subscribers to its Premium bouquet (this includes a fixed subscription fee for 24 months, DStv Explorer 2 and installation with DStv Smart LMB) means that consumers will be hesitant to switch to another Pay TV broadcaster.¹⁶⁶

MultiChoice response

161 As at 31 March 2017, only ■■■ of MultiChoice's subscribers had taken up the Price Lock offer. The remaining subscribers had monthly subscription contracts.

Brand loyalty

Issue

162 A number of submissions argue that brand loyalty may result in consumers preferring to remain with MultiChoice than subscribe to a rival provider.¹⁶⁷

MultiChoice response

163 MultiChoice's experience is that consumers are price-sensitive and will move for even small differences in price. It is for this reason that companies such as MultiChoice spend significant effort and resources trying to find innovative ways to manage and reduce churn.¹⁶⁸ Kwesé agrees that brand loyalty "*does not play a considerable role as a barrier to entry*" and if a competitor offered content at a lower price then consumers would likely switch.¹⁶⁹

¹⁶⁶ Telkom submission, p21, para 59

¹⁶⁷ See for instance Competition Commission submission, p13

¹⁶⁸ MultiChoice submission, p274

¹⁶⁹ Kwesé submission, p49, para 6.11.1

The costs and barriers to entry created by regulations for small broadcasters

164 A theme across a number of submissions is the additional costs and entry barriers for small broadcasters created by regulations.

164.1 e.tv indicates a lack of market studies prior to licensing may contribute to licensee failure.¹⁷⁰

164.2 Deukom indicates the impediment of certain regulations to entry by smaller broadcasters.¹⁷¹

164.3 Telkom notes the submissions by others on regulatory barriers.¹⁷²

164.4 Vodacom notes the legal and regulatory barriers to entry.¹⁷³

164.5 ACT-SA states that in their opinion the main barriers have been regulatory, which they list.¹⁷⁴

165 In addition, it emerged in the public hearings that the only reason Kwesé does not provide a DTH service in SA is because it requires a licence to do so, and ICASA has not recently called for an invitation to apply for such a licence.

166 MultiChoice submits that it would be inappropriate to compensate for regulatory shortcomings and delays by imposing conditions on market operators, which would be unwarranted.¹⁷⁵

¹⁷⁰ e.tv submission, p2, para 6

¹⁷¹ Deukom submission, p5, paras 2.5, 4.1 and 4.2

¹⁷² Telkom submission, p5, para 7

¹⁷³ Vodacom submission, p7

¹⁷⁴ ACT-SA submission, p21, paras 8.17-8.27

¹⁷⁵ MultiChoice submission, p277

Q18: Measure of market shares/Q23: Approach to SMP

167 MultiChoice stated in its submission that using the number of rights as a unit of measure for market share at the upstream level is incorrect and incapable of providing a meaningful analysis of the effectiveness of competition. Moreover, a range of factors other than market share must be assessed to form an accurate conclusion on the effectiveness of competition.¹⁷⁶

168 In the submissions by other parties there is also widespread criticism of ICASA's use of rights for determining market shares at the upstream level:

168.1 The Competition Commission makes the observation that these are bidding markets and hence one has to consider the strength of existing and potential competitors.¹⁷⁷

168.2 There is criticism that the market shares are not necessarily in respect of the markets defined by ICASA.¹⁷⁸

168.3 Others point out it is overly restrictive, since it excludes players such as OTT services which obviously compete for viewers, subscribers and advertisers.¹⁷⁹

168.4 Others such as ACT-SA express the view that (i) counting rights has numerous flaws, including limiting it to Pay TV DTH only and (ii) there is a need to look instead at whether the contracts are open to tender and whether a broadcaster even sought to acquire that content.¹⁸⁰

¹⁷⁶ MultiChoice submission, p371

¹⁷⁷ Competition Commission submission, p13, para 14.2

¹⁷⁸ Telkom submission, p18, para 48; Kwesé submission, p46, para 6.8.2

¹⁷⁹ ACT-SA submission, p25, para 8.30

¹⁸⁰ ACT-SA submission, p19, para 8.8-8.10 and p25, para 9.1

169 A number of submissions note that high market shares do not necessarily equate to SMP. Telkom notes that the two should not be equated.¹⁸¹ Kwesé indicates the same, namely that determining market power requires a more nuanced approach than simply considering market shares, as market shares may reflect efficiency and innovation too.¹⁸²

CONSIDERATION OF REMEDIES

170 It is premature to consider the appropriateness or otherwise of remedies at this stage.

171 Until ICASA makes final findings on the relevant market(s), whether competition is ineffective in those markets, and whether any service provider has SMP in any such markets, MultiChoice is unable to make meaningful submissions on remedies. MultiChoice will need to know of ICASA's final decisions on the merits in order to be able to meaningfully make representations on the appropriateness, rationality and reasonableness of any proposed remedies.

172 At this stage, MultiChoice's primary response is to refer to its submission on the relevant market and that competition in that market is far from inefficient in that market. On that basis, no remedies are required. MultiChoice makes this submission, at the outset, in relation to each remedy discussed below.

173 However, since a number of third party submissions discuss remedies, MultiChoice sets out below its responses to those submissions. These responses are subject to MultiChoice's submission above that a consideration of remedies is premature, and MultiChoice reserves all its rights in this regard.

¹⁸¹ Telkom submission, p16, para 40; p22, para 63 and p23, para 65.

¹⁸² Kwesé submission, p31, para 6.1.4

Q25: Remedies (shortening of exclusive contracts, unbundling by platform, splitting of rights and wholesale must offer)

Unbundling across platforms only of use if accompanied by "no single buyer" rule?

Issue

174 Cell C argues that "[u]nbundling across platforms is only of any use if it is accompanied by restrictions on MultiChoice's ability to buy rights across multiple platforms and/or 'warehouse' the rights".¹⁸³ Essentially this is an argument that a requirement to unbundle rights across platforms would need to be combined with a condition that no single buyer could acquire all of the rights, and that rights should be used, rather than acquired for the purpose of "warehousing" them.

MultiChoice response

175 As MultiChoice has previously submitted:

- 175.1 ICASA has not satisfactorily established that competition is ineffective, and so there is no basis for any remedy at all.
- 175.2 There has been a huge expansion of varied, quality content, both internationally and within SA and the rest of Africa and there is no content for which there is a need to share the rights in any way.
- 175.3 Rights owners have strong incentives to draw in more bidders and increase competition for the sale of their rights. With traditional broadcasters (Pay TV and FTA TV) now having to compete with OTT services, rights owners have even more options for selling their rights and are perfectly able to determine how best to do so.
- 175.4 Regulation that requires unbundling of rights by platform or the splitting of rights to a series into two or more packages will interfere with rights owners' ability to sell their rights exclusively, with the risk of reducing

¹⁸³ Cell C submission, p26

the amounts rights owners can earn with consequent risks for the amount and quality of content that will be produced and available for viewing by consumers.

- 175.5 Regulation requiring the splitting of rights and a no single buyer condition may have the further adverse consequence that consumers who want to watch all matches in a series may be forced to contract with more than one retailer. This would be inconvenient and likely to be more expensive for consumers.
- 175.6 Regulation requiring the unbundling of rights by platform will have the further adverse consequence that efficient bundling of the rights across platforms may be precluded.

Unbundling and rights splitting are only effective if used together?

Issue

- 176 Telkom argues that *"unbundling is only effective as a remedy to address unfair competition if used together [with rights splitting]"*.¹⁸⁴

MultiChoice response

- 177 It is likely that Telkom is merely arguing that an effective unbundling by platform or rights splitting remedy would require a "no single buyer" rule so that no single buyer could acquire all the rights.
- 178 If, however, Telkom is arguing that unbundling of rights by platform (undermining match exclusivity) is only effective if at the same time there is a requirement to split the rights within each platform into a number of packages (thereby also undermining series exclusivity), MultiChoice does not agree, and submits that it is unaware of any precedent internationally in which unbundling by platform and splitting of rights within each platform have both been required. MultiChoice further submits that to impose both remedies would be entirely disproportionate.

¹⁸⁴ Telkom submission, p26, para 76

No harm from unbundling by platform because there are now many alternative platforms and licensees?

Issue

179 Vodacom observes that "[a] common feature of rights packaging is the aggregation/consolidation of all content rights [...] in a single consolidated offering".¹⁸⁵ Vodacom also observes that:¹⁸⁶

"[t]his may, in part, be due to the presumed efficacy of consolidating all content rights and making same available as a single offering to a single broadcaster. Further there may very well be other efficiency considerations which reinforce the desirability of all content rights being consolidated as a single offering."

180 However, Vodacom then argues that the "steady liberalisation" of the electronic audio-visual services market, new entry and the emergence of alternative transmission platforms (resulting in there being many licensees that can broadcast content) "have rendered the presumed efficacy and rationale of rights consolidation and aggregation more difficult to sustain", and for that reason Vodacom "supports the disaggregation of broadcast rights on the basis of the transmission modality used to make content available to subscribers and end-users".¹⁸⁷

MultiChoice response

181 MultiChoice agrees with Vodacom that there are efficiency benefits for rights owners and consumers of the aggregate sale of rights without the splitting of rights or the unbundling of rights by platform.

¹⁸⁵ Vodacom submission, p24, para 60

¹⁸⁶ Vodacom submission, p24, para 60

¹⁸⁷ Vodacom submission, pgs24-25, paras 62-63

182 However, MultiChoice does not agree with Vodacom's submission that "steady liberalisation" undermines the efficiencies of rights aggregation, warranting regulation to disaggregate rights. On the contrary, the emergence of alternative distribution platforms and new entrants means that rights owners now have many options regarding how to sell their rights to maximise their revenues and investment in their content, for the ultimate benefit of consumers. This may or may not involve rights splitting or unbundling of rights by platform. Regulation of how rights are sold is therefore not needed and, indeed, is particularly dangerous when the conditions are already in place for entry, and effective competition, to occur. Instead, given the emergence of alternative transmission platforms and the new entrants that Vodacom observes, ICASA should allow rights owners to retain discretion regarding how optimally to sell their rights and refrain from interfering in healthy market processes.

Shortening durations of rights agreements

Issue

183 Cell C argues that shortening exclusive contracts is not a solution in itself because MultiChoice would still be in a position to win the contract each time and because suppliers may not be amenable to shortened time periods or may have minimum time periods in all their contracts.¹⁸⁸

MultiChoice response

184 The submission that MultiChoice will always win contracts is a mere assertion without foundation. It neither follows automatically from any proven facts nor is it likely given the dynamic characteristics of the market and the increasing constraints imposed by OTT players and large telcos. In any event, MultiChoice has historically not always won contracts when they come up for renewal. Indeed, there are a number of sports rights which MultiChoice previously held which it no longer holds, due to a number of considerations, including the overall increase in the costs of sports rights and MultiChoice having to contain its acquisition of rights budget. Examples of such sports rights include: German Bundesliga

¹⁸⁸ Cell C submission, p25

(football), Italian Serie A (football), UEFA Euro qualifiers (football), ICC football, English Football League, FA Cup (football), French Ligue One (football), USA Major League Soccer, Brazilian League (football), Portuguese League and Cup (football), NFL American (football), WTA (tennis), ATP 250 (tennis), EFC mixed martial arts, IAAF World Championships (athletics), RWC (Rally World Championship), NBA (basketball), Euro League (basketball), Caribbean Premier League (cricket), various World Title Boxing content, the ESPN sports channels, the SportTV Portuguese language sports channels.

185 Shortening contracts may in any event have negative consequences. As Cell C suggests, contract length has an impact on the suppliers of rights (e.g. sports leagues), who may not be amenable to shortened time periods. For example, shorter contract durations may make it more difficult for suppliers to raise finance, or prevent a sports league from signing long-term contracts with players. If shorter contract durations were to inhibit the ability of suppliers to invest in their rights, this would result in detriment to consumers who would receive a lower quality product. For example, as regards sports, incoming tours by certain countries may be more lucrative than others, and longer term contracts enable a sports federation to prepare business plans with greater certainty and spread their irregular income from these tours more evenly over the years of a longer contract. Furthermore, short contracts may place sports development programmes in jeopardy.

Rights splitting/unbundling and a simultaneous WMO remedy

Issue

186 Kwesé proposes that ICASA consider imposing not only limits on the number of Hollywood movie studio rights that a SMP operator may hold and the unbundling of sports rights for licensing across different platforms, but also a wholesale must offer remedy.¹⁸⁹ SOS/MMA similarly support the imposition of both types of remedy.¹⁹⁰

¹⁸⁹ Kwesé submission, p5, para 2.2.2

¹⁹⁰ SOS/MMA submission, p25, paras 8.7.2-8.7.4

MultiChoice response

- 187 It is not coherent to propose rights splitting/unbundling and a simultaneous WMO remedy. Each of rights splitting/unbundling and WMO would fully address any concern that might be raised (though neither is, in fact, necessary in SA). Imposing both would therefore be disproportionate and likely significantly to harm competition and innovation.
- 188 Indeed, a WMO remedy would undermine a rights splitting/unbundling remedy. It would weaken incentives of third party retailers to bid for content themselves.

SOS/MMA and Kwesé lists of international remedy precedentsIssue

- 189 SOS/MMA list a number of international cases that have resulted in remedies similar to the remedies that ICASA is contemplating. In particular, SOS/MMA refers to:¹⁹¹
- 189.1 EC in NewsCorp/Telepiu (2003).
 - 189.2 US FCC in Comcast/NBC Universal (2011).
 - 189.3 Ofcom in UK Pay TV Statement (2010).
 - 189.4 Singapore's Cross-Carriage Measures.
 - 189.5 EC decisions in FAPL, Bundesliga and UEFA.
- 190 Kwesé also details various international precedents which it states should guide ICASA's decisions when considering remedies.¹⁹²

¹⁹¹ SOS/MMA submission, pgs20-22, para 8.1.6

¹⁹² Kwesé submission, pgs56-62

MultiChoice response

191 It is not appropriate to seek to impose remedies simply on the basis that they have been imposed in other contexts in other countries where the characteristics of the investigations and the relevant markets at the time were different to those pertaining in SA at the present point in time and in the foreseeable future.

192 What is more, the first two cases that SOS/MMA list are merger cases and the last set of EC decisions are ex post anticompetitive agreement cases, and all of these are therefore distinguishable from ICASA's ex ante sector inquiry. SOS/MMA is also mistaken in its description of Ofcom's activity in the UK Pay TV sector. SOS/MMA assert without foundation that *"[a]t 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."* This is incorrect.

192.1 Sky continues to hold exclusive FSPTW rights from all six major Hollywood studios.

192.2 Moreover, it was the UK Competition Commission (not Ofcom) that investigated FSPTW rights (in its Movies on Pay TV market investigation): this investigation resulted in a finding of no adverse effect on competition and hence no need for any remedy.¹⁹³ Movie rights therefore remain unregulated in the UK.

192.3 Moreover, the UK Competition Commission observed that a WMO remedy would introduce a disincentive to other broadcasters bidding for rights themselves and would therefore hinder the long-term development of competition.¹⁹⁴

¹⁹³ UKCC, *Movies on pay TV market investigation: A report on the supply and acquisition of subscription pay-TV movie rights and services*, 2 August 2012

¹⁹⁴ UKCC, *Movies on pay TV market investigation: Notice of Possible Remedies*, 19 August 2011

192.4 Most of the international remedies cited by Kwesé arose out of merger contexts (i.e. as remedies to address a lessening of competition from the status quo). Only a minority arose from regulatory investigations finding ineffective competition existed and that the market was not tending towards effective competition. It is important that ICASA decides what is best for SA given the current and future state of competition and the dynamic changes occurring in the audio-visual sector in SA and does not simply apply remedies that have been imposed in other countries at other times from other contexts. The fact that there is regulation of the audio-visual sector elsewhere does not imply it is called for in the present context in SA.

Q26: Open up dominant firm's network

Issue

193 In its response to Q26, Kwesé calls for access to technical platform services, similar to Ofcom's TOS guidelines in the UK, covering conditional access services, EPGs and access control services.

MultiChoice response

194 First, such a remedy is unnecessary. As discussed above in relation to Q21 on barriers to entry, given the availability of capacity on other satellites, the availability of alternative providers of components of technical services, the ability of broadcasters to self-provide such services and the availability of alternative platforms (OTT), the remedy proposed by Kwesé on access to platform services is very intrusive, unwarranted and potentially damaging. Indeed, in SA there is a legislated common carrier (Sentech) that provides TPS, and OpenView HD has publicly stated its willingness to offer TPS to third party Pay TV operators. In that context, not only is there no need to require MultiChoice to open its own platform to third parties, but such a requirement would likely be financially harmful to those entities which are already offering third party access.

195 Furthermore, the limited availability of bandwidth on an incumbent's platform, constraints on STB memory and CAS capacity limit the ability of broadcasters to carry additional services. Carrying rivals' services on the MultiChoice platform would negatively impact on MultiChoice's ability to expand its own services.

Q27: STB interoperability

Issue:

196 Kwesé argues that lack of STB interoperability *"increases switching costs and 'hassle factor' for the consumer"*.¹⁹⁵ Kwesé then acknowledges that lack of STB interoperability has the benefit that broadcasters will be willing to invest in the development of STBs for competitive advantage. However, Kwesé concludes by asserting that the need to invest in STBs without interoperability *"increases the cost of entry, further limiting the opportunity for effective competition to take place"* and *"if potential entrants are unable to carry the costs of developing their own STBs and hence unable to become effective competitors, regulatory intervention may be necessary in this segment of the market"*.¹⁹⁶

MultiChoice response

197 First, barriers to establishing a new platform (whether DTH, DTT or OTT) and switching costs between platforms are low. Many such platforms exist in SA and the rest of Africa, and STB interoperability has not been needed for those platforms to develop. In SA, the present experience of OpenView alone provides the most direct evidence that Kwesé's claims are frivolous, opportunistic and should not be accepted.

198 Second, today, and increasingly in the future, STBs are not necessary in order for consumers to be able to access electronic audio-visual services. New innovations from OTT services are enabling consumers to download various Apps, and to thereby view electronic audio-visual content from multiple sources on multiple devices.

¹⁹⁵ Kwesé submission, p28, para 5.14.1

¹⁹⁶ Kwesé submission, p29, para 5.14.2

199 Finally, there are likely to be numerous and significant adverse consequences of a STB interoperability requirement, and STB interoperability in relation to only one platform or distribution technology would impose considerable costs and restrict the commercial agility of electronic audio-visual service providers that operate primarily on that platform or technology relative to competitors that use other platforms or technologies. This would be extremely undesirable, since regulation would then interfere with platform or technology competition. Furthermore, STB interoperability would raise costs for consumers and require technology which goes against some recent pro-consumer trends:

199.1 Broadcasters have been in many respects reducing the cost of STBs to consumers by minimising the required amount of internal memory to hold large channel lists, EPG information etc. Interoperability would increase the number of channels required to be carried on a STB, thereby raising costs of internal memory, one of the most costly components of modern STBs.

199.2 Further, because STBs are typically subsidised, interoperability will lead to a reduction in subsidies extended to consumers as firms would not wish to subsidise their rivals' services. For the same reason, this will also lead to a reduction in related infrastructure investments. This will ultimately increase the cost of STBs for consumers and leave them worse off on the innovation side of STBs, which is a fundamental component of the consumer experience.

200 It is precisely these sorts of unintended consequence of interference in competition between platforms/technologies that regulators should seek to avoid.

Q28: Other remedies?**Other remedy proposals by Cell C.**Issue

201 Cell C proposes a number of non-standard remedies, including:

- 201.1 Obligations to publish information concerning long term and/or exclusive contracts concluded by MultiChoice for premium content (however defined), and the terms on which such content is available for acquisition by third parties;
- 201.2 Obligations to maintain separate accounts for each of its various offerings by platform, premium and non-premium type of content, and wholesale and retail content;
- 201.3 Rate regulation on wholesale services, such that no content should be made available on terms that are less favourable than MultiChoice first acquired it, pro rata to the total price if content is sold by programme;
- 201.4 Obligations to carry the channels and advertising of products that are not in the same market as MultiChoice, for example, Cell C's Black.

202 Cell C also proposes that ICASA abolish *"exclusivity to content rights traditionally acquired by MultiChoice / SMP licensees (e.g. no exclusivity, no tiered pricing or other clauses that are likely to preclude smaller retailers)"* and suggests that Singapore has adopted such an approach.¹⁹⁷

¹⁹⁷ Cell C submission, pgs27-28.

MultiChoice response

203 MultiChoice first notes that many of these proposed remedies are unheard of internationally and entirely impractical and disproportionate to any possible concern. MultiChoice notes in particular the following:

- 203.1 Obligations to publish information concerning long term and/or exclusive contracts concluded by MultiChoice, and the terms on which such content is available for acquisition by third parties, would require MultiChoice to publish commercially sensitive information and would also be prejudicial to the content provider.
- 203.2 Obligations to maintain separate accounts would raise a wide range of complex issues, including how to identify retail prices for individual pieces of content that are sold together as a bundle and how to identify transfer prices between vertically integrated activities where currently there is no meaningful pricing.
- 203.3 Rate regulation on wholesale services, such that no content should be made available on terms that are less favourable than MultiChoice first acquired it, pro rata to the total price if content is sold by programme, would be an extreme and unprecedented remedy in the electronic audio-visual services market. It would run the risk of causing a variety of unintended effects, including significant reductions in incentives to bid for rights and in the amounts that rights holders (including local South African rights holders) can expect to receive for their rights.
- 203.4 Obligations to carry the channels and advertising of third party products, for example Cell C's Black, would not be justified or proportionate. Channels have several alternative means of distribution, including via the OTT platforms or by setting up their own OTT distribution service. Mandating carriage on MultiChoice's platform is unnecessary and would require intrusive regulation to determine the level of distribution fees.

203.5 Third party services can advertise on many outlets, and do not require regulated access to MultiChoice's airtime to market their offerings. Cell C, as a telecommunications network, has a large installed subscriber base to its other services (e.g. SMS, MMS and video-enabled devices) which it can use to directly market its OTT offerings. Further, rivals (e.g. OpenView) have grown exponentially on the back of advertising on alternative platforms which Cell C and any other competitor can also use. Advertising on MultiChoice's platform is therefore neither a necessary nor sufficient pre-condition for successful entry and competition.

204 MultiChoice also notes that the suggestion that Singapore has adopted an abolition on exclusivity is misleading. Singapore has adopted a "must retail" obligation for certain content, which retains the ability of retailers to acquire and broadcast content exclusively, but requires that they do so over rival platforms (which at the same time requires that those rival platforms provide access to rival retailers).

Other remedy proposals by Kwesé

Issue

205 Kwesé also proposes a number of non-standard remedies including:

- 205.1 A SMP broadcaster (including its affiliates) must be limited to only entering into output license agreements and volume licensing agreements with no more than two of the seven Hollywood studios; and
- 205.2 A SMP broadcaster (including its affiliates) must be prohibited from entering into output licensing agreements with independent content suppliers.

MultiChoice response

- 206 The first of these proposed remedies has no international precedent and would be extraordinarily interventionist and disproportionate, given that even if contracts were exclusive it would allow a non-SMP operator to hold five of the seven studio rights (three more than the SMP operator).
- 207 The proposed prohibition on licensing agreements with independent content suppliers is also extreme, unprecedented and disproportionate.

Telkom proposal for concessions to new licensees

Issue

- 208 Telkom has proposed that ICASA consider granting certain concessions to improve opportunities for new licensees (e.g. restrictions on number of licensees; marketing opportunities on competitors' services; relaxation of local content obligations).

MultiChoice response

- 209 What Telkom fails to appreciate is that most new entrants operate an OTT service that is in any event not subject to licensing regulations, and therefore already benefit from the types of concessions cited by Telkom. Furthermore, given that most of the new entrants are large domestic telcos and global giants, it is not apparent why they need further entry assistance as they are already capable of competing.

MISCELLANEOUS INPUT FROM THIRD PARTIES

Sports bodies acknowledge the importance of exclusivity and the lack of barriers to acquiring rights

- 210 The sports federations which responded to the Discussion Document recognise that exclusivity is important for competition and is also fundamental to the development of high quality content – ultimately for the benefit of consumers:

210.1 SARU states that the granting of exclusivity is a global practice which results in a wide range of benefits, including the maximization of revenue for sports federations and the resulting improvement and investment in the sport.¹⁹⁸

210.2 The PSL states that exclusivity is key to extracting value for its rights and that any intervention that removes exclusivity would be detrimental to the revenue that it earns.¹⁹⁹

210.3 According to CSA, since regulations preclude it from awarding rights to Pay TV broadcasters exclusively, this has arguably had a negative effect on the value of the rights derived by CSA.²⁰⁰

211 The PSL and SARU²⁰¹ also state that there are no barriers to acquiring rights. They confirm that the rights to broadcast the PSL and rugby events are sold on an open competitive tender or via bi-lateral negotiations on a regular basis and are open to any audio-visual service provider wishing to contest these rights.²⁰²

Other submissions believe the approach followed by ICASA is deficient

212 Several submissions by other parties note the deficiencies in ICASA's approach, which MultiChoice agrees with. This includes deficiencies in areas that are core to any market review, including the evaluation of competitive dynamics, a finding of SMP and the determination of remedies.

212.1 Telkom states that the Discussion Document does not properly evaluate the extent of competition between Pay TV and OTT²⁰³ and also that the Discussion Document does not properly evaluate the

¹⁹⁸ SARU submission, p9, para 7

¹⁹⁹ PSL submission, p17, para 37

²⁰⁰ CSA submission, p5, para 3.6

²⁰¹ SARU submission, p12, par 9.2.3.2

²⁰² PSL submission, p18, par 47

²⁰³ Telkom submission, p12, para 30

impact of digital migration. Telkom also notes that the vertical integration analysis is sparse and requires a more detailed analysis.²⁰⁴

212.2 In respect of remedies, the PSL states that ICASA has failed to properly consider the need for remedies²⁰⁵ and both the PSL and SARU state that ICASA has failed to consider the hugely adverse implications that the proposed remedies would have on the sports federations.²⁰⁶

212.3 ACT-SA's submission details the deficiencies in ICASA's approach in respect of market definition, assessment of competition, the determination of SMP and the consideration of licence conditions.

212.4 Cell C cautions against ICASA's reliance on a number of international cases and sources as exemplifying best practice *"in circumstances that are very different from those that subsisted when those international cases were decided. The decisions and the reasoning for those decisions can best be regarded as informative, rather than determinative of the South African context."*²⁰⁷

SUBMISSIONS MADE BY THIRD PARTIES WHICH GO BEYOND THE DISCUSSION DOCUMENT

213 Several third parties have made submissions which go beyond the questions raised by ICASA in its Discussion Document. In this last section of this document MultiChoice will respond to certain of those submissions, namely those dealing with —

213.1 the viability of the public broadcaster;

213.2 advertising revenue, and s60(4) of the ECA;

213.3 must carry obligations imposed on Pay TV licensees; and

²⁰⁴ Telkom submission, p19, para 51

²⁰⁵ PSL submission, p16

²⁰⁶ SARU submission, pgs11-13; PSL submission, p18

²⁰⁷ Cell C submission, p3, para 4

213.4 ICASA's Sports Broadcasting Services Regulations

The viability of the public broadcaster

Issue

214 Both the SABC and SOS/MMA argue that ICASA, in this Inquiry, must deal with the viability of the public broadcaster. SOS/MMA further suggested that MultiChoice should be responsible for the collection of the SABC's license fees.

MultiChoice response

215 Whilst MultiChoice agrees that the viability of the public broadcaster is an important issue which requires to be addressed, that issue is not the focus of this Inquiry, which is being conducted in terms of s67(4) of the ECA.

216 Nor is the collection of the SABC's license fees – whether by MultiChoice or the SABC itself – relevance to the assessment of competition in the electronic audio-visual services market, and is beyond the scope of this Inquiry. In any event, there is simply no basis to suggest that MultiChoice's infrastructure should be used for the collection of any part of a competitor's revenue stream.

Advertising revenue and s60(4) of the ECA

Issue

217 A number of third parties make allegations about MultiChoice's advertising revenue, and argue that the statutory cap imposed on advertising and sponsorship revenue which a Pay TV service may derive is inadequate, and that ICASA must address this issue.²⁰⁸

MultiChoice response

218 First, the figures provided by the SABC, e.tv and other third parties concerning MultiChoice's advertising revenue are exaggerated, since they rely on Adex data, which does not take into account discounts and which attributes all advertising

²⁰⁸ e.tv submission, pgs4-8; SABC submission, pgs4-5 and 25-26; and SOS/MMA submission, pg9, paras 6.3-6.4

revenue on the DStv bouquets to MultiChoice, whereas the revenue on many of the third party channels flows to those third parties. ICASA is in a position to verify MultiChoice's actual advertising revenue by referring to MultiChoice's annual financial statements which are in ICASA's possession.

- 219 Second, the legislature clearly intended that Pay TV services derive a portion of their revenue from advertising and sponsorships, subject to the proviso in s60(4) of the ECA, which states:

"Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, in no event may advertising or sponsorship, or a combination thereof, be the largest source of annual revenue."

- 220 ICASA is bound by this statutory provision, and there is therefore no point, in this Inquiry, in debating calls to alter this cap. That debate is for a separate policy process, which may or may not result in legislative amendments, both of which processes would be subject to public consultation.

Must carry obligations imposed on Pay TV licensees

Issue

- 221 Both e.tv and Cape Town TV submit that s60(3) of the ECA be amended so as to compel MultiChoice to carry all channels broadcast by FTA broadcasters and all community TV channels in SA.²⁰⁹ e.tv further submits that the Pay TV licensee must pay each FTA broadcaster for the carriage of its FTA channels an amount which approximates the value contributed to the Pay TV licensee's service calculated according to various factors.²¹⁰ Cape Town TV similarly argues, not only for "must carry", but also for "must pay" for that carriage.²¹¹
- 222 The SABC calls for a review and amendment of ICASA's Must Carry Regulations, and particularly Regulation 6 and 7 thereof.

²⁰⁹ e.tv submission, pgs6-8; Cape Town TV submission, pgs2-4.

²¹⁰ e.tv submission, p6

²¹¹ Cape Town TV submission, p3

MultiChoice response

223 s60(3) of the ECA provides:

"The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee."

224 The legislature clearly intended that such regulations were to be confined to the extent to which subscription broadcast services must carry the channels broadcast by the public broadcast service licensee, namely the SABC. Had the legislature intended that must carry obligations be imposed on subscription broadcast service licensees in relation to the channels of any entity other than the SABC, it would have said so. In accordance with the rules of statutory interpretation, this provision must be read narrowly.

225 There is therefore no point, in this Inquiry, in debating these calls by e.tv and Cape Town TV, and their motivation for those calls. This is, instead, a policy debate, which may or may not result in amendments to s60(3) of the ECA.

226 The SABC concedes that its request for a review of the Must Carry Regulations must be by way of a separate process,²¹² although later the SABC submits that this review could take place through this Inquiry.²¹³

227 MultiChoice submits that any review of ICASA's Must Carry Regulations would have to be in terms of a separate process from this Inquiry, and in this regard refers to s4B(1)(b) of the ICASA Act and s4 of the ECA. There is therefore little merit, in this Inquiry, in debating these calls by the SABC and their motivation for this review – this is a debate for a separate process.

228 There are, however, two factual allegations made by the SABC when dealing with the must carry issue.

²¹² SABC submission, p17, para 2.1.3

²¹³ SABC submission, p18, para 2.1.4

- 229 The first is that the SABC does not enjoy any commercial benefits from the must carry provisions. MultiChoice questions the correctness of this statement. First, the SABC channels are carried by MultiChoice without the SABC having to pay for any of the costs incurred by MultiChoice in carrying those channels. Furthermore, the SABC, by being included in the DStv bouquets, is broadcast to more than 6.6 million TV households throughout SA, thus enhancing the advertising opportunities and advertising revenue which the SABC may derive therefrom. It is important to note that all the advertising revenue on the SABC channels included in the DStv bouquets goes to the SABC – none of it goes to MultiChoice. This is a further significant commercial advantage which the SABC enjoys by virtue of the must carry provisions.
- 230 The second factual allegation is that MultiChoice, through Orbicom (a sister company to MultiChoice) will always prioritise the services of MultiChoice, and that in the past, MultiChoice *"intentionally facilitated bandwidth squeeze of 3 SABC Must Carry Channels and as a result the picture quality of the SABC channels was affected leading to audience complaints"*.
- 231 Whilst MultiChoice acknowledges that there was occasion in the past where there were technical issues concerning the broadcast quality of the SABC's three channels, those issues were investigated in a collaborative manner, with a view to improving the broadcast quality of those channels. MultiChoice has invested significant and dedicated resources to ensure that the SABC's channels, which are currently not provided by the SABC to it in HD format, are upgraded to the highest possible quality, so as to ensure that they meet the standard of all channels on the DStv bouquets. The broadcast quality of the SABC's channels is monitored on a 24/7 basis, and any service degradation is acted upon immediately. Furthermore, there are regular meetings between MultiChoice and the SABC's technical teams on at least a three monthly basis at which, amongst others, performance against the service level agreement is reviewed.
- 232 The suggestion that MultiChoice would intentionally or negligently contribute to the poor broadcast quality of any third party channels included on the DStv bouquet reflects an ignorance of the demands and expectations placed on a Pay TV broadcaster by its subscribers, who demand high broadcast quality of very

channel included in the Pay TV service. Delivering low broadcast quality would result in negative subscriber sentiment as regards the Pay TV service as a whole, and would result in churn.

ICASA's Sports Broadcasting Services Regulations

Issue

233 The SABC submitted to ICASA that it should begin a process to amend the Sports Broadcasting Services Regulations, 2010.²¹⁴

MultiChoice response

234 The first point MultiChoice wishes to make is that any review and amendment of the Sports Broadcasting Services Regulations would have to be in terms of a separate process from this Inquiry, and in this regard refers to s4B(1)(b) of the ICASA Act and s4 of the ECA.

235 Furthermore, the Sports Broadcasting Services Regulations are made in terms of s60(1) of the ECA, which indicates that their purpose is to ensure that subscription broadcasting services may not acquire exclusive rights in such a manner as to prevent or hinder FTA broadcasters from broadcasting national sporting events in the public interest. That objective is not related to addressing any competition concerns which may exist.

236 ICASA, in its presentation to the Parliamentary Portfolio Committee on Communications on 18 April 2018 indicated that in the course of this financial year it in fact will review the Sports Broadcasting Services Regulations, and it will be in that separate process where any issues concerning those Regulations and the possible amendment thereof ought to be raised. ICASA has already commenced this process – it has started to meet with stakeholders, including MultiChoice and e.tv.

²¹⁴ SABC submission, p4, para 1

237 Nevertheless, since the SABC, in motivating for the review of those Regulations, makes numerous statements, assertions and allegations against MultiChoice, MultiChoice would like to take this opportunity of responding thereto.

237.1 The SABC suggests that by virtue of the Regulations, the SABC is expected to broadcast all the events listed in the Regulations.²¹⁵ This interpretation is incorrect. The purpose of the Regulations is rather to ensure that subscription broadcasting services do not acquire the rights to listed events such that this would prevent or hinder the FTA broadcasting of those events.

237.2 Contrary to the complaint being that the list of events is inadequate, the SABC seems to suggest, first, that it does not have the financial resources to acquire the FTA rights to all the listed events, nor is it able to even broadcast all those events where it does have the FTA rights to those events – due to capacity constraints and the SABC's public service obligations.²¹⁶ Indeed, it is noteworthy that in its recent presentation to the Parliamentary Portfolio Committee on Communications, the SABC indicated that a priority for this financial year is to create a special sports channel so as to be able to properly exploit the sports broadcasting rights which it holds.²¹⁷

237.3 The SABC makes the bald assertion that *"events such as the PSL and Bafana Bafana games have yielded negative financial returns relative to the high cost of the rights investment made"*²¹⁸ Whilst MultiChoice has no detailed insight into the financial position of the SABC, we find these assertions strange, since the viewership for these matches, as well as for the other listed events broadcast by the SABC, is very high, and should yield excellent advertising opportunities, and thus potential advertising revenue for the SABC. (Note that the SABC's rights to

²¹⁵ SABC submission, p20, para 2.2.1

²¹⁶ SABC submission, pgs23-24, para 2.2.8 and p20, para 2.2.1

²¹⁷ SABC presentation to the Parliamentary Portfolio Committee on Communications, April 2018

²¹⁸ SABC submission, p20, para 2.2.1. See too a similar assertion made at p21, para 2.2.3

Bafana Bafana matches emanate from an agreement the SABC concluded with SAFA – not from any sub-licensing agreement with MultiChoice. Similarly, where the SABC referred in its oral presentation to the cost of acquiring CAF rights,²¹⁹ does not come from any sub-licensing agreement with MultiChoice, but a direct agreement with CAF and its agents.)

237.4 It can also be noted that the SABC does not make use of all the live sports rights available to it. In MultiChoice's submission, it was noted that this could be due to limited capacity. For example, in 2016/2017 the SABC failed to broadcast live 38 of the PSL matches for which it had acquired the live rights.²²⁰

237.5 The SABC asserts that when MultiChoice sub-licenses listed events to the SABC, it imposes uncompetitive sub-licensing conditions. More particularly the SABC alleges that –

237.5.1 MultiChoice demands a high price for the rights to be sub-licensed and that in certain instances the SABC is *"paying more than 50% towards the primary rights acquisition via sub-licensing ..., thereby becoming a significant funder of MCA primary sports rights";*²²⁰

237.5.2 as regards the "Super Rugby" games, the SABC is only permitted to broadcast delayed live broadcasts.²²¹ Similarly, in its oral presentation SABC alleged that all the "big games" are available only on a delayed live basis; and

237.5.3 often the sub-licensing agreements are concluded so late that the SABC has insufficient time to sell advertising space relating to the broadcast of the event.²²²

²¹⁹ SABC presentation to ICASA, slide 23

²²⁰ SABC submission, p21, para 2.2.4 and p22, para 2.2.6.2

²²¹ SABC submission, p21, para 2.2.5

²²² SABC submission, p20, para 2.2.2 and pgs22-23, para 2.2.6.6

237.6 MultiChoice denies each of these assertions.

237.6.1 As regards the pricing issue, the reality is that the prices of the broadcast rights to a number of the listed events are high. MultiChoice is entitled to seek a commercially based price for the sub-licensed rights, given the price it would have paid the rights holder.

237.6.2 As regards delayed rights, the first point MultiChoice wishes to make is that the Regulations themselves recognise that a listed event may be broadcast live, delayed live or delayed by a FTA broadcaster.²²³ Second, it is only in relation to certain rugby events that rights have been sub-licensed on a delayed basis (and because the rights were for delayed broadcast, a lower price was sought than would have been the case for live rights). In this regard, it is interesting to note that the SABC, in the question time following its recent presentation to the Parliamentary Portfolio Committee on Communications, indicated that audience numbers for the delayed broadcast of events were significant.

237.6.3 In any event, the SABC has significant live rights. For example, it has live rights to all cricket matches played by the Proteas in SA in all formats (including the matches format, which are not listed events), all matches played by Bafana Bafana in SA and the most important PSL matches – including all matches played by the top three teams (Kaizer Chiefs, Orlando Pirates and Mamelodi Sundowns), the semi-finals and finals of all the PSL knock-out tournaments and the promotion-relegation qualification matches. Accordingly, it is evident that SABC has significantly attractive sports rights,

²²³ Regulation 6(2)

237.6.4 As regards the alleged late conclusion of sub-licensing agreements, MultiChoice wishes to point out that Regulation 6(1) provides that where a subscription broadcaster has acquired the rights to a listed event, it must inform the FTA broadcasters within five days of acquiring such right, so as to afford those FTA broadcasters an opportunity to seek to acquire the sub-licensed FTA rights to that event. MultiChoice complies with this requirement and any delays which have occurred in the conclusion of the sub-licensing of those rights have been at the instance of the SABC – certainly not due to any conduct of MultiChoice. On the contrary, MultiChoice always seeks to enter into agreements with the SABC as early as possible to provide certainty. The delays which occur are solely as a result of the SABC taking a considerable period of time to obtain the necessary approvals to conclude agreements.

237.7 The SABC alleged that MultiChoice imposes host broadcasting obligations (i.e. production obligations) on the SABC for PSL matches in outlying areas outside of all Gauteng. This is incorrect. On the contrary, the PSL Invitation to Tender imposes all production obligations on SuperSport. Where SABC performs the production, this is by agreement between the SABC and MultiChoice, meaning that SABC agrees which matches it will host broadcast.

237.8 The SABC alleges that SuperSport/MultiChoice "*has locked-in all important sporting codes*".²²⁴ This allegation is denied. All the broadcast rights to all sporting events come up regularly for acquisition by way of tender and/or negotiations, and are thus contestable by any party, including the SABC.

²²⁴ SABC submission, p21, para 2.2.5.

237.9 SABC's allegation that SuperSport/MultiChoice hoard sports rights²²⁵ is denied and has been dealt with in paragraphs 121 to 124 above

237.10 The SABC suggests that "*SuperSport ... remains the biggest driver of subscribers because of premium sport content*".²²⁶ This too is denied. As MultiChoice indicated in its December 2017 submission, and again earlier on in this document, neither sport, nor any other single category of content is a driver of subscribers. Instead, there is a varied range of content which may appeal to different target audiences.

238 A final point which MultiChoice wishes to make, and which is dealt with in detail in its December 2017 submission, is that it sub-licences to the FTA broadcasters the right to broadcast sports events significantly in excess of the listed events.²²⁷

²²⁵ SABC submission, p21, para 2.2.5 and p22, para 2.2.6.4

²²⁶ SABC submission, p21, para 2.2.3

²²⁷ Appendix 4 to MultiChoice's submission