

**DISCUSSION DOCUMENT:**

**INQUIRY**

**INTO**

**SUBSCRIPTION TELEVISION**

**BROADCASTING SERVICES**

**GOVERNMENT GAZETTE**

**NO. 41070**

**OF 25 AUGUST 2017**

## INTRODUCTORY REMARKS

- 1 Vodacom (Pty) Limited (“**Vodacom**”) welcomes the opportunity to submit our written representations in response to the Discussion Document in respect of an Inquiry into Subscription Television Broadcasting Services (“**Discussion Document**”) gazetted in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 (“**ICASA Act**”) (“**the Inquiry**”).<sup>1</sup>

### Section 4B of the ICASA Act

- 2 Vodacom is particularly heartened that the Authority has elected to undertake a thorough inquiry as contemplated in section 4B of the ICASA Act. A section 4B inquiry affords the Authority with the necessary flexibility to thoroughly interrogate matters at hand, albeit within the parameters of a well-structured and robust inquisitorial framework. An inquiry of this nature also affords interested parties the requisite degree of regulatory certainty regarding the operative scope of the inquiry, and the timeframe within which the expected outcomes therefrom are to materialise.<sup>2</sup> Lastly, section 4C of the ICASA Act sets-out the operative procedure for undertaking a section 4B inquiry, and this guidance reinforces the robustness of the inquisitorial nature of a section 4B inquiry. So, overall, Vodacom welcomes and supports the Authority’s endeavours in initiating the section 4B inquiry.

### Scope and purpose of the Inquiry

- 3 The Authority has set-out the legal basis pursuant to which the Inquiry is being undertaken. In this regard, Vodacom broadly supports the Authority’s reliance on section 4B of the ICASA Act read with section 67(4) of the Electronic Communications Act, 2005 (“**the Act**”) as the empowering provisions for the initiation of the Inquiry.
- 4 Notwithstanding, these provisions do not *per se* provide the Authority with the basis, or *trigger* to elect to initiate an Inquiry, particularly in terms of section 67(4) of the Act. That is, neither section 4B of the ICASA Act nor section 67(4) of the Act sets-out the pre-conditions pursuant to which the Authority is required to be satisfied of their existence prior to lawfully invoking the empowering provisions for undertaking an inquiry in terms of Chapter 10 of the Act. Further, these provisions do

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<sup>1</sup> Government Gazette No. 41070 of 25 August 2017 (General Notice 642 of 2017).

<sup>2</sup> Section 4C(6) of the ICASA Act imposes an obligation on the Authority to gazette the findings of the inquiry within 90 days of having undertaken same. This provision reads as follows:

*“The Authority must, within 90 days from the date of conclusion of the inquiry—*  
*(a) make a finding on the subject matter of the inquiry; and*  
*(b) publish in the Gazette—*  
*(i) a summary of its finding; and*  
*(ii) the details of the place where and the time when the finding*  
*and the reasons for the finding can be obtained by the public.”*

not set-out any *precipitating factors* which the Authority is lawfully required to have regard to in order for its reliance on Chapter 10 of the Act to be reasonably and lawfully justified.

- 5 In the absence of such *precipitating factors*, the Authority has, at several junctures, set-out its motivation for initiating the Inquiry. For instance, at paragraphs 2.1.1 and 2.1.2, the Authority states that the public consultative process amounts to an inquiry into the state of competition in relation to subscription television broadcasting services. At paragraph 2.2.2 when referencing the Notice *gazetted* on 11 July 2016 which served to signal the Authority's intention to initiate the Inquiry, the Authority further states the following:

*"In the Notice, the Authority noted that despite having issued five subscription broadcasting service licences in 2007 and a further two subscription broadcasting services licences in 2015, only three licensees have commenced operations... [A]s such, the Authority noted in the Notice that, due to its commitment and mandate to ensure that markets are effectively competitive, it was commencing an inquiry into subscription television broadcasting services."*(Own emphasis)

- 6 Further, with reference to the Notice, which was subsequently amended with the *gazetting* of an erratum intended to clarify certain procedural aspects for the Inquiry, the Authority substituted paragraph 1.3 of the Notice with the following text which was intended to both clarify and expand on the scope and purpose of the Inquiry"<sup>3</sup>:

*"The purpose of this inquiry is to establish factors that have contributed to new subscription broadcasting service licensees not being able to successfully launch their services and/or attract a fair number of subscribers.*

*It is important for the Authority to understand the challenges faced by these licensees so that it can address the regulatory impediments, and create an enabling environment for the introduction of competition, if any."*<sup>4</sup>(Own emphasis)

- 7 In addition, at paragraph 3.1.1 the Authority states another reason for the initiation of the Inquiry, namely that *"...it has reason to believe that there are features of this sector that may result in ineffective competition."* The Authority proceeds to amplify its observations and beliefs as follows:

*"The Authority has accordingly identified a need for an inquiry into whether there are any competition concerns in the subscription television broadcasting sector which have contributed to new subscription television broadcasting service licensees not being able*

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<sup>3</sup> At para 2.2.9.1.

<sup>4</sup> At paras 2.2.9.2 and 2.2.9.3.

*to successfully launch their services and/or attract a fair number of new subscribers or which impact more generally on competition in the broadcasting sector, including the ability of other broadcasters to compete.”(Own emphasis)*

8 The Authority also makes reference to others aims of the Inquiry and details these as follows:

*“Through this analysis, the inquiry aims to identify all factors that prevent, distort or restrict effective competition, including any evidence of market failure, regulatory failure or competition concerns. This will provide a factual basis upon which the Authority can make evidence-based recommendations that serve to address any regulatory impediments and promote competition in respect of subscription television broadcasting services in South Africa.”<sup>5</sup> (Own emphasis)*

9 Lastly, the Authority consistently references the financial sustainability challenges faced by subscription broadcasting service licensees,<sup>6</sup> with one licensee having been subject to business rescue proceedings<sup>7</sup> while other licensees have experienced challenges in commencing with their commercial operations, and even those that had been able to do so, experiencing challenges in attracting “a fair number of subscribers.”<sup>8</sup>

10 All in all, the Authority has posited at least three (3) different rationale for initiating the Inquiry, and these may be summarised as follows:

10.1 The financial and commercial viability of newly-licensed subscription television broadcasting service licensees;

10.2 The broad regulatory mandate of ensuring that markets operate effectively and competitively; and

10.3 The exploration of specific competition law theorem of harm.

11 While the first two factors constitute sound rationale for undertaking an inquiry, such an exercise ought to be general in nature and aimed at exploring specific issues, including operational and commercial issues. In other words, the Authority possess broad powers which permit it to initiate *inquisitorial inquiries* in instances where it wishes to explore factors which may specifically affect the operations of a licensee, or a particular category of licensees.

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<sup>5</sup> See further the discussion on the 2010 IPTV and VOD Position Paper.

<sup>6</sup> At para 3.2.3.

<sup>7</sup> At para 2.2.2.

<sup>8</sup> At paras 3.2.3 and 3.2.4.

12 However, it is the third factor which, in our view, constitutes the more compelling rationale for initiating the Inquiry. Further, although the third factor does not in of itself amount to a precipitating factor – it has seemingly been alluded to by the Authority as an additional rationale for the expanded scope of the Inquiry – we shall demonstrate its consistency and congruency with what ought to be the precipitating factors for initiating the Inquiry. In doing so, we wish to emphasise the importance of the Authority's inquiry and the rationale for initiating same as being rationally connected to a legitimate and reasonable policy and/or statutory objective. In this regard, we believe that the broader policy rationale for *ex ante* regulation and the imposition of pro-competitive measure and remedies suffices as a compelling basis for the Authority initiating the Inquiry and we expand on our views below.

### Relevant markets susceptible to *ex ante* regulation

13 While the Authority may, on balance be able to competently demonstrate that the three (3) factors referenced as constituting the rationale for the Inquiry are rationally connected to the pursuit of some statutory and/or policy objective being sought to be attained, a stronger policy basis exists which is premised on the justification of the circumstances upon which *ex ante* regulatory intervention may be warranted. This policy justification does not necessary exist as part of our laws. However, it is a well-established regulatory practice amongst regulatory authorities which are empowered to, amongst others regulate for competition through proportionate and reasonable intervention where same is warranted.

14 In this regard, it is commonly accepted that there exists relevant markets within the broader electronic communications industry which are susceptible to *ex anteregulation* due, in part, to their structural disposition. The structure of these relevant markets, in turn, present certain incentives for the market participants that are inherently inconsistent with market outcomes reflective of effective or workable competition. It is often not sufficient for these incentives to exist. The relative positioning of market participants in respect of each other and consumers, and the opportunity and ability to act upon the perverse incentives are important determinants in whether market conduct materialises in sub-optimal market outcomes that are detrimental to consumer and total welfare.

15 So, an important function for *ex ante* regulation of these relevant markets is the identification of the structural factors which give rise to the prevalence of these perverse incentives. The European Commission, in its regulation of electronic communications markets, has developed a three-stage test for the identification of relevant markets which ought to be subjected to *ex ante* regulation for purposes of alleviating the market failure which inhibits such markets to be effectively competitive.

16 This three-stage test operates cumulatively and is premised on competition law principles. It has consistently been articulated by the European Commission as follows:

*"In identifying markets in accordance with competition law principles, recourse should be had to the following three criteria. The first criterion is the presence of high and non-transitory entry barriers whether of structural, legal or regulatory nature. However, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers within a relevant time horizon have also to be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible ex ante regulation.*

*Therefore the second criterion admits only those markets the structure of which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers of entry. The third criterion is that application of competition law alone would not adequately address the market failure(s) concerned."<sup>9</sup>(Own emphasis)*

17 When these relevant markets are identified, recourse is had to the European Commission Guidelines of market analysis and the assessment of significant market power for purposes of understanding the competitive and dynamic characteristics of these relevant markets.<sup>10</sup> The 2002 Commission Guidelines also forms the basis upon which licensees who are designated to possess significant market power have regulatory obligations imposed upon them so as to constrain their ability to conduct themselves to an appreciable extent independent of its customers, competitors and the market. It suffices, for present purposes, to state that the three-stage test operates to identify those relevant markets to which the 2002 Commission Guidelines are subsequently applied in determining whether regulatory obligations in the form of pro-competitive measures are warranted given the prevailing competitive dynamics in these relevant markets.

18 So, while the Authority has not had recourse to the three-stage test as the primary basis for initiating the Inquiry, Vodacom believes that it nonetheless provides a stronger basis for initiating the Inquiry. The three-stage test further provides the Authority with a more compelling rationale for initiating the Inquiry into the subscription television broadcasting market for the following three (3) reasons:

18.1 First, in the application of the three-stage test, in particular the first criterion, it is clear that the subscription television broadcasting services market is characterised by high barriers to entry that are legal and regulatory in nature. These barriers to entry effectively operate

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<sup>9</sup> European Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (2003/311/EC) ("**2003 Commission Recommendation**"), at para 9.

<sup>10</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03) ("**2002 Commission Guidelines**").

to determine the structural disposition of the relevant market. Here, without the requisite regulatory authorisations which are granted and issued by the Authority, firms are effectively constrained from rendering services that are interchangeable with those offered by incumbent licensees;

18.2 Second, the nature of competition in the broader subscription television broadcasting market is a function of the number of firms in possession of the requisite regulatory authorisations granted by the Authority. Where there exists a limited or few number of licensed firms, the extent to which these firms constrain each other is an important consideration, as well as the time horizon within which market entry ensues and new entrants are able to compete effectively with incumbent licensees. Here, where recently licensed firms face operational challenges in launching their commercial offerings in direct competition with incumbent licensees, this in of itself ought not to be understood as a function of anti-competitive market conduct. However, it may be an indicative proxy of the existence of insurmountable barriers to entry which operate to insulate incumbent licensees from effective competition. Where these barriers to entry are inherently structural, it is unlikely that, within a reasonable time horizon, new entrants would be able to surmount them so as to compete effectively with incumbent licensees; and

18.3 Third, and closely related to the second criteria, is the persistence of structural barriers to entry over a prolonged period. This is ordinarily understood to be reflective of durable market failure which the general operation of *ex post* competition law enforcement is ill-suited to address, at least as effectively as *ex ante* regulation. Indicative of the inability of *ex post* competition law to effectively address the durable market failure in the broader subscription television broadcasting market is the prolonged investigation undertaken by the Competition Commission that is discussed at paragraph 2.4.7 of the Discussion Document.

19 When all three criterion are applied cumulatively, as the European Commission had done, Market No. 18 was identified as a relevant market that ought to be subjected to an assessment under the 2002 Commission Guidelines so as to determine whether regulatory remedies were reasonably justified. Market No. 18 constitutes the wholesale relevant market for broadcasting transmissions services to deliver broadcast content to end users. In designating Market No. 18 for assessment, the European Commission also stated the following in respect of other related relevant markets:

*“National regulatory authorities have discretion with respect to the analysis of the market for ‘Conditional access systems to digital television and radio services broadcast’ in accordance with Article 6(3) of the Access Directive. Article 6(3) of the Access Directive provides that Member States may permit their NRAs to review the market for conditional*

*access system to digital television and radio services broadcast, irrespective of the means of transmission.*”(Own emphasis)

- 20 We shall discuss the Authority’s position in respect of this relevant market when considering supply-side substitutability throughout the signal distribution transmission value chain. This discussion shall also set-out Vodacom’s position in relation to *platform neutrality* and its importance for attaining symmetric regulatory treatment for the transmission and delivery of digital content to subscribers and end-users.

## Summary

- 21 Our introductory remarks have sought to contextualise Vodacom’s understanding of the scope and purpose of the Inquiry. We have also sought to provide an alternative basis and rationale which supports the Authority’s endeavours in initiating the Inquiry. In the remainder of our written representations, we have identified specific themes which we believe are intricately related to matters which are set-out in the Discussion Document. As the backdrop to these themes, we have set-out our appreciation of the broader regulatory dispensation as it pertains to broadcasting matters. We also discuss three (3) regulatory processes which the Authority has undertaken and which we believe ought to have been discussed in more detail in the Discussion Document given their interrelatedness to the Inquiry. We then proceed to expand upon our initial views set-out above regarding Market No. 18 with specific reference to the European Commission’s regulatory practice. This is for purposes of emphasising the importance of recognising the existence of this relevant market. Finally, we set-out our broad views in respect of the Authority’s proposed possible pro-competitive measures. All in all, our written representation seeks to posit some principles which we believe are important for the Authority to consider, and is accordingly organised as follows:

## General comments

- I **Statutory dispensation for the regulation of electronic communications and broadcasting services categories**
- II **The 2010 IPTV and VOD Position Paper**
- III **Review of the broadcasting regulatory framework**
- IV **Broadcast transmission services market inquiry**



- V Market No. 18: Relevant market for broadcasting transmission services to deliver broadcast content to end-users**
  
- VI Proposed possible pro-competitive licence conditions**
  
- VII Conclusion**

## GENERAL COMMENTS

### I Statutory dispensation for the regulation of electronic communications and broadcasting services categories

22 The Act, read together with the Broadcasting Act, 1999 (“**Broadcasting Act**”) regulate the provision of broadcasting services. Further, the legislative mandate for the regulation of Electronic Communications Services (“**ECS**”) and Electronic Communications Network Services (“**ECNS**”) is set-out in the Act.

23 The Broadcasting Act details three (3) broad categories of broadcasting services, namely public broadcasting services, commercial broadcasting services and community broadcasting services. Broadcasting services licences are further categorised in the Broadcasting Act into the following services categories:

23.1 Free-to-air broadcasting services;

23.2 Terrestrial subscription broadcasting services;

23.3 Satellite subscription broadcasting services;

23.4 Cable subscription broadcasting services;

23.5 Low-power sound broadcasting services; and

23.6 Any other class of licence prescribed by the Authority from time to time.

24 In addition and dependent on the nature and scope of the service to be rendered, an individual or class licence is required under the Act so as provide a broadcasting service. This requirement equally applies in respect of ECS and ECNS services. Further, applications for broadcasting services licences, ECS licences and ECNS licences must be made in terms of the applicable provisions of the Act and the regulations prescribed thereunder. Lastly, section 7 of the Act provides that unless a service is specifically exempted from licensing in terms of section 6 of the Act, no person may provide a broadcasting service, an ECS or ECNS without the requisite and relevant licence category.

25 The definitions of broadcasting service, an ECS and an ECNS service in the Act are of importance as they delineate the nature and type of services requiring to be licensed in terms of a broadcasting service, and ECS licence and an ECNS licence. Each of these definitions, together with important associated definitions in the Act are set-out below:

*“Broadcasting”* is defined in section 1 of the Act as:

*“**broadcasting**’ means any form of unidirectional electronic communications intended for reception by-*

*(a) the public;*

*(b) sections of the public; or*

*(c) subscribers to any broadcasting service,*

*whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and ‘broadcast’ is construed accordingly.”*

26 A *“broadcasting service”* is defined as follows:

*“**broadcasting service**’ means any service which consists of broadcasting and which service is conveyed by means of an electronic communications network, but does not include-*

*(a) a service which provides no more than data or text, whether with or without associated still images;*

*(b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or*

*(c) a service or a class of service, which the Authority may prescribe as not falling within this definition.”*

27 Further, an *“electronic communications network service”* is defined as follows:

*‘**electronic communications network service**’ means a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise-*

*(a) for that person's own use for the provision of an electronic communications service or broadcasting service;*

*(b) to another person for that other person's use in the provision of an electronic communications service or broadcasting service; or*

*(c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act, and*

*'network services' is construed accordingly."*

28 An "electronic communications service" is defined as "...any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services (Own emphasis).

29 An "electronic communications network" which is referred to in the definitions of ECS, ECNS and broadcasting service, is defined as:

*"**electronic communications network**' means any system of electronic communications facilities (excluding subscriber equipment), including without limitation-*

*(a) satellite systems;*

*(b) fixed systems (circuit- and packet-switched);*

*(c) mobile systems;*

*(d) fibre optic cables (undersea and land-based);*

*(e) electricity cable systems (to the extent used for electronic communications services);*

*and*

*(f) other transmission systems, used for conveyance of electronic communications."*

30 The term "electronic communications", which is referenced in the definition of "broadcasting" and in the definition of an ECS, ECNS is defined as follows:

*"**electronic communications**' means the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service."*

- 31 In addition to the Act, the Broadcasting Act defines the concepts of “*broadcaster*”, “*broadcasting*” and a “*broadcasting service licence*” as follows:

*“broadcaster” means any legal or natural person who composes or packages television or radio programme services for reception by the public or sections of the public or subscribers to such a service irrespective of technology used”;*

*“broadcasting” means any form of unidirectional electronic communications intended for the public, sections of the public or subscribers to any broadcasting service having appropriate receiving facilities, whether carried by means of radio frequency spectrum or any other electronic communications network or any combination of the aforementioned, and “broadcast” is construed accordingly;*

*“broadcasting licence” means a licence granted and issued by the Authority in terms of this Act or the Electronic Communications Act, to a person for the purpose of providing a defined category of broadcasting service, or deemed by this Act or the Electronic Communications Act to have been so granted and issued.”*

- 32 Lastly, a *television broadcasting service* is defined in the Broadcasting Act as follows:

*“television broadcasting service” means a broadcasting service consisting in the sending of visual images or other visible signals whether with or without accompanying sounds, where the visual images are such that sequences of them are seen as moving pictures.”*

- 33 When regard is had to the relevant definitions set-out in the Act and the Broadcasting Act, broadcasting services and ECS are both services which consist of the conveyance of electronic communications over an electronic communications network to the public, sections of the public or to subscribers of the service. An ECS, however, is specifically defined as a service which excludes broadcasting services and a broadcasting service is defined as a service which does not include a service which provides data and text (including still images), and as a service where the provision of audio visual or audio material is incidental to that service. The effect of the aforesaid is that services which provide only data and text (including still images) and services where the provision of audio visual or audio material is incidental to that service are to be categorised as ECS services.

- 34 As an ECS service is specifically defined not to be inclusive of a broadcasting service, one is required to have regard to the definitions of “*broadcasting*” and “*broadcasting service*” to determine the features which operate to distinguish a broadcasting service from an ECS. Whilst the definition of a

broadcasting service is of assistance in setting out which services would not constitute a broadcasting service, the definition of broadcasting contains the one defining element which effectively distinguishes a broadcasting service from an ECS and that is the description of a broadcasting service as being “*a form of unidirectional communications.*” As such, all forms of unidirectional communications which consist of the conveyance of something more than text and data, and where the provision of audio visual and audio material is a primary feature (as opposed to an incidental feature) will constitute a broadcasting service. Similarly, if a service is bi-directional in nature, such a service will constitute an ECS even if such service consists in the provision of audio visual and audio material.

## II The 2010 IPTV and VOD Position Paper

35 At the culmination of an inquiry undertaken by the Authority in terms of section 4B of the ICASA Act, a Position Paper was *gazetted* which *inter alia* set-out several positions and determinations in respect of the provision of IPTV and VOD services in the Republic of South Africa. In the IPTV and VOD Position Paper, the Authority set-out seven (7) main positions as follows:

35.1 First, the Authority endorsed the International Telecommunication Union (“ITU”) definition of IPTV, which is defined as follows:

*“IPTV is defined as multimedia services such as television, video, audio, text, graphics or data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability.”*

35.2 Second, a distinction was made between IPTV services, Internet video and web-based services on the basis that IPTV services were managed services offered over a secure and closed network in contrast to Internet video and web-based services, which were offered over the public internet over a peer-to-peer network;

35.3 Third, the Authority confirmed that it does not wish to regulate video provided or accessed via the public Internet (including YouTube, user-generated content and programming provided on a subscription basis). In this regard, the Authority acknowledged that although it was not empowered to regulate such content, were programming provided over the Internet to become a substitute for traditional television broadcasting, it may be appropriate for it to regulate such activities. However, before the Authority could regulate programming provided over the internet, a legislative amendment to existing statutes would be necessary;

- 35.4 Fourth, the Authority also confirmed that on-demand programming services rendered over the Internet were content services and as such not subject to regulation. The conveyance of such services over the Internet was, however, subject to regulation as an ECS licence would be required in respect of such conveyance;
- 35.5 Fifth, the Authority concluded that broadcasting services as defined in the Act are unidirectional electronic communications and any electronic communications which are not unidirectional would be categorised as ECS services under the Act. However, the Authority proceeded to emphasise that there was a “*distinct blurring*” between the extremes of unidirectional and bi-directional services.
- 35.6 In this regard, the Authority described an extreme form of unidirectional transmission as constituting scheduled analogue, digital terrestrial and satellite television services which are transmitted from a single point to the public who passively receive such services and have no direct control over the content forming part of such services. Further, that voice telephony services which involve the sending and receiving of messages by at least two parties who have complete control over the information sent and received, is a clear manifestation of bi-directional transmission. Between these two extremes, according to the Authority’s assessment, fall a number of services which are capable of being categorised as either unidirectional, bi-directional or multidirectional, thereby rendering the determination of what constitutes a broadcasting service and what constitutes an ECS service a matter of policy;
- 35.7 Sixth, the Authority made a determination that VOD services which provide scheduled television programming amount to broadcasting services under the Act. In arriving at this determination, the Authority found that IPTV services are primarily provided on a unidirectional basis and although such services contain bi-directional features, these are merely incidental to the rendering of a services that is essentially a broadcasting service; and
- 35.8 Lastly, the Authority made a determination that VOD services (including pay-per-view and TVOD, but excluding on-demand services provided over the public internet and which are content services not subject to regulation) are ECS services under the Act. The Authority’s determination includes both “push” and “pull” VOD even though, according to the Authority, “push” VOD is more unidirectional than “pull” VOD. The determination in respect of VOD was premised on *inter alia* the level of viewer choice which permits interaction between the viewer and the programming service which is not available with a traditional television broadcasting service.

- 36 As part of its determination that IPTV services constitute broadcasting services, the Authority also stated the following:
- 36.1 A broadcasting licence is required for purposes of rendering IPTV services;
- 36.2 An IPTV service provided on a commercial basis (i.e. free-to-air or subscription) would require an individual commercial television broadcasting service licence; and
- 36.3 An IPTV service provided by a community broadcasting service would require a class community television broadcasting service licence.
- 37 The provisions of Chapter 9 of the Act as well as all broadcasting regulations and the standard terms and conditions of licences applicable to broadcasting services would be applicable in respect of IPTV services. The Authority also made the determination that all existing holders of broadcasting service licences are authorised to render IPTV services under those regulatory authorisations.
- 38 With regards to VOD services, the Authority found that given that these services are to be categorised as ECS services under the Act, an ECS licence would be required to render these services. Further, given that VOD services are not voice telephony services requiring the use of numbers allocated from the national numbering plan, a class licence would be required to provide these services, whether on a provincial or national basis.

## Summary

- 39 Vodacom believes that the positions set-out in the 2010 IPTV and VOD Position Paper ought to be reconsidered within the context of the Inquiry given that the services in question are being considered within a market definition exercise, and not purely from a legislative definitional perspective. We also believe that the Authority's position on the "*distinct blurring*" between the extreme forms of unidirectional, bidirectional and multidirectional transmission ought to be reconsidered for purposes of ensuring regulatory certainty.

## III Review of the broadcasting regulatory framework

- 40 On 8 December 2011, the Authority *gazetted* an issue paper in respect of its review of the broadcasting regulatory framework within the context of a digitally converged environment. On 31 October 2012, the Authority *gazetted* its preliminary report on the public consultative process. As part of this process, interested parties were requested to comment on the 2010 IPTV and VOD Position Paper. Apart from Sentech SOC Limited ("**Sentech**") and Kagiso Media who called for the review of the determinations set-out in the 2010 IPTV and VOD Position Paper, the Authority held



the view that there was general consensus and support for the 2010 IPTV and VOD Position Paper. Further, the Authority was of the view that to the extent that there were small differences in respect of the regulation of IPTV and VOD services, these would be taken into account when revisiting the IPTV and VOD Position Paper as part of a broader broadcasting services legislative review process. This regulatory process did not venture to interrogate and reconsider the positions set-out in the IPTV and VOD Position Paper, and Vodacom is of the view that this amounted to a missed opportunity.

#### IV Broadcast transmission services market inquiry

41 On 30 September 2010, the Authority initiated an inquiry in terms of section 4B of the ICASA Act in respect of the rendering of wholesale broadcast transmissions services (“**Broadcast Transmission Market Inquiry**”). This inquiry included the *gazetting* of a discussion document which, similar to the Discussion Document, set-out several questions while also positing preliminary positions reached by the Authority in respect of the definition of relevant markets for the rendering of wholesale broadcast transmission services for television and radio, the designation of SMP and proposed pro-competitive measures on licensees designated to have SMP in those relevant markets.

42 Having solicited responses from interested parties, the Authority *gazetted* a Findings Document on 7 June 2013 in terms of section 4C(6) of the ICASA Act.<sup>11</sup> The Findings Document set-out several conclusions which may be summarised as follows:

42.1 There exists relevant markets in respect of:

42.1.1 Managed transmission services for television broadcasting services; and

42.1.2 Managed transmission services for radio broadcasting services;

42.2 Sentech is designated to be in possession of SMP in both relevant markets given that the Authority had determined both relevant markets to be ineffectively competitive; and

42.3 The Authority had determined that the following pro-competitive measures were to be imposed upon Sentech through a subsequent regulation-making process:

42.3.1 Transparency obligation to publish a Reference Access offer;

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<sup>11</sup> Government Gazette No. 36537 of 7 June 2013 (General Notice 577 of 2013).

42.3.2 Non-discrimination obligation, including same in respect of pricing;

42.3.3 Price control obligation for network access; and

42.3.4 Separation of accounts obligation.

43 Curiously, on 3 October 2014 the Authority *gazetted* a General Notice entitled **Withdrawal of the Findings Document Regarding the Wholesale Broadcasting Transmission Services Discussion Document Published in Government Gazette No. 36537 of 2013**.<sup>12</sup> In the Notice, no rationale or further elaboration is provided by the Authority in respect of the withdrawal of the Findings Document. Further, the Discussion Document is not sufficiently elaborative on the existence of the upstream wholesale transmission relevant markets which are critical for the distribution of content and broadcasting services to end-users and subscribers. Instead, Paragraphs 5.6.1 to 5.6.3, in particular Figure 4 makes reference to the existence of “*transmission networks*” and lists analogue transmission, digital transmission, internet, cable and satellite as part of the television broadcasting value chain.

44 Vodacom believes that, in the absence of an explanatory note what elaborates on the reasons for the withdrawal of the 2014 Findings Document, it is not clear what the Authority’s position is in respect of the relevant wholesale broadcasting transmission services markets. In particular, the absence of a detailed discussion on the competitive dynamics of these relevant markets within the Discussion Document represent a missed opportunity for the Authority to articulate its position on the linkages that exist, from a derived-demand perspective, between these relevant upstream market with those that are positioned further downstream. It is in this regard that our reference to the European Commission’s regulatory practice for market No. 18 is particularly relevant.

## **V Market No. 18: Relevant market for broadcasting transmission services to deliver broadcast content to end-users**

45 In our discussion at Part IV above concerning the Authority’s positions on Broadcast Transmission Market Inquiry, we alluded to our surprise at the absence of any explanation for the Authority’s abrupt withdrawal of the findings made in terms of section 4C(6) of the ICASA Act in respect of that market inquiry. Notwithstanding, our primary concern in respect of those findings is the misalignment that exists between the manner in which the Authority defined the relevant wholesale transmission markets and the international regulatory best practice.

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<sup>12</sup> Government Gazette No. 38064 of 3 October 2014 (General Notice 851 of 2014).

46 In this regard, at Part IV above, we referred to the European Commission's definition of Market No. 18 in terms of the three-stage test and further subjecting the relevant market to an assessment under the 2003 Commission Recommendation. We shall briefly discuss three (3) European Commission notifications from European Union Member States in respect of Market No. 18 for purposes of demonstrating the existence of this relevant market and the importance for the Authority to acknowledge same in the Discussion Document. Our vociferousness in wishing the Authority to explicitly recognise the existence of this relevant market in the Discussion Document shall become apparent when we discuss the *derived demand* nature for which this relevant upstream market is required in the conveyance of digital content to end-users.

*Commission Decision concerning Case SE/2016/1871: Wholesale market for national broadcasting transmission of free-to-air TV via the terrestrial network in Sweden*<sup>13</sup>

47 The Post- och telestyrelsen ("PTS") defined Market No. 18 as constituting the wholesale market for national broadcasting transmission of free-to-air TV via the terrestrial network and differentiated this relevant market from the subscription broadcasting relevant market, both from a supply-side and demand-side perspective. On the supply-side substitutability for transmission platforms capable of rendering broadcasting content to end-users and subscribers, the Commission made the following remarks:

*"The Commission commented on the need to monitor market developments, in particular with regard to the level of competition between transmission platforms and the development of bundle offer at retail level."*<sup>14</sup>(Own emphasis)

48 This comment had been informed by the observable trend in respect of the number of subscription broadcasting subscriber declining by 10% while there had been an exponential growth in the number of television subscribers wherein the transmission platform had been Fibre-to-the-Home ("FTTH") local access networks. Further, subscriber numbers for IPTV content had also increased on account of, amongst others, the increased availability of FTTH networks and adoption being driven by competitors offering broadcast content in conjunction with broadband services. The trend of increased penetration of alternative transmission platforms capable of rendering the same or competing broadcasting content may have an effect on the manner in which transmission platform competitive constraints are considered. Here, the Commission stated that:

*"...the Commission notes that since June 2012 the number of TV subscriptions via fibre and fibre LAN has increased by almost 50% to a total of 14% of households...[T]hese developments might put into question the current (narrow) retail market definition, and*

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<sup>13</sup> C(2016) 4064 final, Brussels, 24.6.2016.

<sup>14</sup> *Supra*, at para 1.1, page 2.

the second criteria of the three criteria test (absence of tendency towards effective competition).<sup>15</sup>(Own emphasis)

- 49 The cumulative effect of the Commission's observations are that 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 that 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.
- 50 Lastly, platform availability is clearly an important consideration for purposes of assessing supply-side substitutability, and the omission to consider this factor is potentially fatal in the determination of the appropriate contours of both the upstream wholesale relevant markets, and the downstream retail relevant markets. This is on account of the role that an appreciation of derived-demand dynamics plays in that it necessitates that the relevant market be defined at the downstream level first so as to determine the contours of the upstream wholesale relevant market. All in all, the European Commission's observations in respect of regulatory authorities having an appreciation of the evolving market dynamics in respect of transmission platform technological capabilities is crucial and particularly instructive for the Discussion Document.

*Commission Decision concerning Case UK/2016/1913: Broadcasting transmission services to deliver broadcast content to end users in the United Kingdom*<sup>16</sup>

- 51 The Office of Communications ("Ofcom") had undertaken a re-assessment of its 2005 Statement which made several determination in respect of the definition of the relevant market. For our present purposes, the relevant markets were defined then as follows:
- *the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle UK Limited ("Crown Castle") for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the UK, to deliver broadcast content to end-users on a national, regional or metropolitan basis;*
  - *the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by National Transcommunications Limited*

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<sup>15</sup> *Supra*, at para 2, page 7.

<sup>16</sup> C(2016) 6910 final, Brussels, 21.10.2016.

*(“ntl:broadcast”) for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the UK, to deliver broadcast content to end-users on a national, regional or metropolitan basis; and*

- *the market for the provision of access to other masts, sites and shared or shareable antenna systems used for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the UK, to deliver broadcast content to end-users.”<sup>17</sup>*

52 These relevant markets were the furthest upstream markets located at the infrastructure and network level and entailed mast sites and antennas used for the transmission of analogue and (predominantly) digital transmission services for the conveyance of broadcast content to end-users. In effect, these markets amounted to the *Network Access* part of the broadcasting transmission supply chain. The other elements of this supply chain are as follows:

- *“content (broadcast channels) – the provision of programmes and other content for each channel;*
- *contribution (also known as playout) and multiplexing – the transfer of the content channels to a multiplexing centre and blending them into a single digital signal;*
- *distribution – sending the multiplexed DTT signal to each of the main transmission sites;*
- *managed transmission services (“MTS”) – services including network design, procurement and installation of transmitters, network monitoring, quality assurance of the signal and maintenance of the transmission equipment; and*
- *network access (“NA”), which covers access to sites and associated facilities to enable broadcast transmission.”<sup>18</sup> (Own emphasis)*

53 The above is particularly instructive as a representation of the broader supply chain of broadcast transmission platform. Though it reflects the main elements of the broader supply chain of broadcasting transmission, it also represents the DTT transmission platform throughout the United Kingdom. The more important focus of the above is the broader architecture which exists for both analogues and digital transmission platforms. This, in our view, constitutes the more approximate representation of the entirety of the broadcast transmission platform value chain which the Authority ought to have reflected Figure 4 in the Discussion Document.

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<sup>17</sup> Ofcom, *Broadcasting Transmission Services: a review of the market*, 10 November 2016.

<sup>18</sup> *Supra*, at para 2.15.

*Commission Decision concerning Case FI/2015/1723: Markets for television and radio broadcasting transmission services, to deliver broadcast content to end user in Finland*<sup>19</sup>

54 The Viestintävirasto's ("FICORA") assessment of both the wholesale and retail markets had been substantively aligned with the PTS in relation to the identification of the relevant upstream wholesale transmission market. This market definition had also been informed by the extent to which there existed alternative transmission platforms. In respect of the relevant retail markets, the European Commission noted the following:

*"FICORA assesses the demand- and supply-side substitutability of the retail market for television broadcasting and radio programme services with alternative platforms. In the case of the retail market for television broadcasting it concludes that services provided over the VHF network, cable, satellite, IPTV or OTT services are not substitutes for digital terrestrial services."<sup>20</sup> (Own emphasis)*

55 These relevant retail markets exists on account of the upstream transmission platforms that are capable of making these services available to subscribers. The European Commission proceeded to make the following important statement in respect of the emergence of LTE as a significant competitive constraint to other upstream wholesale transmission platforms:

*"The market for TV and radio transmission services in Finland can be expected to undergo significant changes in the near future. On the one hand it results from changing consumer behaviour, such as transition towards non-linear access to content, and on mobile devices. On the other hand it results from the potential competition of alternative transmission platforms such as cable, IPTV or OTT services. Moreover, the completion of mobile LTE networks can be expected to add another method of delivery of (high quality) content to the end users, throughout the entire territory of Finland."<sup>21</sup> (Own emphasis)*

56 The 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. In this regard, regulatory authorities have traditionally categorised certain services on the basis of the technology and transmission platform upon which the service is rendered. As technology has evolved towards multiple services capable of being rendered on digitised and packet-switched IP transmission platforms, colloquially referred to as "*everything over IP*", regulation has had to embrace *technology neutrality*. Technology neutrality has become a key regulatory principle upon which horizontal licence authorisation

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<sup>19</sup> C(2015) 2361 final, Brussels, 1.4.2015.

<sup>20</sup> *Supra*, at para 2.2, page 2.

<sup>21</sup> *Supra*, at para 3, page 7.

regimes have been premised. In turn, licensing authorisation regimes have gradually eliminated the constraints that vertical licensing structures impose on licensees' ability to offer multiple services on the same transmission platform. As transmission platform 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.

### Proposed possible pro-competitive licence conditions

57 At Paragraph 8 of the Discussion Document, the Authority proposes to impose four (4) mutually reinforcing pro-competitive measures that are intended to alleviate the perceived market failure. While Vodacom broadly supports the imposition of the four (4) proposed pro-competitive measures where market failure is found to exist, we believe that two (2) of the four (4) proposed pro-competitive measures are intended to induce the same regulatory outcomes in as far as giving effect to sections 67(7)(h) and (i) of the Act.<sup>22</sup>

58 In this regard, Vodacom has understood *rights unbundling* and *rights splitting*, at least in the manner in which the Discussion Document has briefly set-out the salient aspects of same, as proposed pro-competitive measures intended to render the same regulatory outcome in addressing the same perceived market failure. In this regard, both proposed pro-competitive measures as briefly described in the Discussion Document have three (3) common themes, which are as follows:

58.1 First, both proposed pro-competitive measures are directed at the proprietor of the broadcast rights to make same available in a disaggregated manner;

58.2 Second, both proposed pro-competitive measures entail that the rights proprietor make same available on a *stand-alone* basis and to more than a single potential purchaser; and

58.3 Third, both proposed pro-competitive measures are intended to address the anti-competitive effect of a single broadcaster *hoarding* the broadcast rights that are made available as a consolidated rights package.

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<sup>22</sup> The provision reads as follows:

*"Pro-competitive licence terms and conditions may include but are not limited to-*

*(i) distribution, access and reselling obligations for broadcasters."*

59 The Authority has solicited views regarding the appropriate formulation of the proposed pro-competitive measures; we shall discuss *rights unbundling* and *rights splitting* hereunder broadly as constituting one proposed pro-competitive measure. We subsequently discuss input foreclosure and express our views regarding the Authority having to be mindful of the delicate balance that's required to be sustained in the design of the regulatory intervention.

### ***Rights unbundling and rights splitting***

60 The manner in which premium content rights are packaged and offered for sale has an effect on the potential number of prospective purchaser of these rights. A common feature of rights packaging is the aggregation/consolidation of all content rights, and the means by which these rights are exercisable in a single consolidated offering and as part of the same contractual agreement. That is, no single and distinguishable content right is disaggregated from other similarly distinguishable content rights and subsequently made available on a *stand-alone* basis. This 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.

61 In this regard, contractual negotiations for a consolidated rights package may be undertaken more efficiently and transactions concluded expeditiously. Further, it may be more desirable for a rights proprietor to enforce its contractual rights with a single purchaser instead of multiple purchasers and accordingly reduce the transactions costs associated with contractual rights enforcement. The efficacy of this practice may also be partially based on the historic presence of a single broadcaster that would have been in possession of certain categories of regulatory authorisations which permitted it to lawfully offer the broadcast content to its subscribers. Here, broadcasting markets are ordinarily characterised by high regulatory and legal barriers to entry, and this factor alone renders these markets to be highly concentrated with a single or limited number of firms that are in possession of regulatory authorisations that permit these firms to make certain broadcast content available.

62 However, there has been a steady liberalisation of these markets with the introduction of new entrants possessing the same regulatory authorisations as incumbent broadcast licensees. Similarly, and as alluded to above, on account of the emergence of alternative transmission platforms, their presence has resulted in the increased availability of licensees that are technologically capable of making the same broadcast content available which would ordinarily have been restricted to being received through traditional broadcasting end-user devices. These developments have rendered the presumed efficacy and rationale of rights consolidation and aggregation more difficult to sustain.



- 63 Accordingly, Vodacom supports the disaggregation of broadcast rights on the basis of the transmission modality used to make content available to subscribers and end-users. This would practically entail that, as part of the regulatory intervention, the Authority imposes an obligation on broadcast rights proprietors intending to make available these rights available within the Republic of South Africa to disaggregate same. The Authority would further prescribe a prohibition of general application in respect of any licensee making broadcast content available to subscribers and end-users that would have been acquired as a consolidated rights package.
- 64 There would, of course be information asymmetry concerns with regards to whether the Authority and any other licensee would be in possession of actual knowledge in respect of the availability of broadcast rights on a disaggregated manner. In other words, concomitant with the obligation to disaggregate the broadcasting rights, the Authority would necessarily require that broadcast rights proprietors intending to make same available within the Republic duly disclose to all licensees the availability of these disaggregated rights within a reasonable period.

### ***Input foreclosure***

- 65 The Authority has also identified input foreclosure as a concern which arises from long-term exclusivity agreements for the acquisition of broadcasting content. In this regard, the Authority's concern relates to the unascertainability of broadcast content once a licensee has acquired the territorial rights of same on an exclusive basis and pursuant to a long-term contractual commitment. As a means of alleviating the anti-competitive concerns, the Authority has proposed that the duration of these contractual commitments be subject to regulation.
- 66 There would, of course be difficulties with the regulation of parties' ability to renegotiate the terms and conditions of an agreement and their willingness to be bound by those terms. The Authority would also have to be mindful of the *pacta sunt servanda* principle that is enshrined in our law, and balance parties' freedom to contract with any regulatory intervention that would operate to circumscribe this principle. Added to the need to strike this balance is the broader object that the Authority is statutorily required to foster that is set-out at section 2(y) of the Act.
- 67 This object reads as follows:

#### ***"Object of Act***

*The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to-*

[the Authority to] *refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public.*"

68 The regulatory intervention would, of course also have to be mindful that at the time of its effectiveness, there would be existing contractual commitments that would be required to be amended to give effect to the shortening of the duration. In turn, the price and other related terms of the agreement would inherently be based on the duration of the term of the agreement. At the very least, any regulatory intervention would result in pre-existing agreements being subject to renegotiations, and the extent to which these renegotiations are capable of being undertaken promptly would be dependent upon the framework which the Authority would set-out and the timeframe within which renegotiations are to be concluded. All in all, the regulatory intervention would have to:

68.1 Be consistent with the tests for proportionality, reasonableness and rationality,

68.2 Strike the necessary balance between the regulatory objectives being pursued by the Authority, and the broader freedom of parties to bind themselves to contractual commitments;

68.3 Be fashioned in a manner that is consistent with the *pacta sunt servanda* principle; and

68.4 Not be susceptible to the violation of section 2(y) of the Act.

69 Lastly, there would need to be a transitional period which would operate as a managed migration to the new regulatory framework. The means by which the transitional period would operate, including its duration, would be entirely dependent upon the Authority's evaluation of all broadcast rights contractual commitments that all broadcasters have entered into for premium content and consequently determining a reasonable migration period. In the circumstances, Vodacom believes that apart from the regulatory intervention being inherently contentious and controversial, its endeavour to strike a balance in respect of the four (4) considerations above represents a very delicate exercise that must be approached with care and caution.

## VII Conclusion

70 We have set-out our broad views on the principles which the Authority ought to have regard to as part of the Inquiry, as well as matters which we believe are intricately related to the issues set-out in the Discussion Document. We trust that our contribution is of some value to the Authority's deliberations and we look forward to participating in further consultative engagements with the Authority in due course.

**END**