

CELL C LTD
ORAL HEARINGS: INQUIRY INTO PAY TV
9 MAY 2018



RESPONSE TO INQUIRY INTO SUBSCRIPTION BROADCASTING

Agenda

1. Introduction to the team
2. The Discussion Document
3. The pay tv market in South Africa
4. The submissions
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Introduction to the team

Cell C is today represented by the following team:

- Graham Mackinnon Chief Legal Officer
- Themba Phiri Executive Head: Regulatory
- Harrish Kasseepursad Executive: Regulatory
- Kerron Edmunson Legal and regulatory consultant
- Surie Ramasary Chief Executive: Content
- Patrick Conroy Managing Executive: Commercial Content

THE DISCUSSION DOCUMENT

Why is this investigation into competition important?

- There are 4 TV broadcasters to choose from in South Africa – SABC, etv, StarTimes (TVSA) and Multichoice/DStv/MNet
 - 5 subscription broadcasting licences were awarded in 2008, only 3 of which are on air today with vastly different subscriber numbers and profiles, a further licence was awarded with the same result (para 44)
- ICASA is required:
 - to promote competition as required in section 2(f) of the ECA
 - to promote the interests of consumers with regards to quality electronic communications services at reasonable prices as required in section 2(n) of the ECA
- There are serious concerns that the pay tv market is not competitive
- There are serious concerns that the market for electronic audio-visual content is not competitive

Cell C is concerned

- For convenience we use “Multichoice” to include MNet, Supersport, and DStv
- Multichoice is dominant (in the relevant markets identified by ICASA)
 - Multichoice’s position in these markets is not in the public interest in the short or longer term
 - Multichoice has effectively prevented the successful entry and operation of new entrants using (at least) its scale benefits for over 3 decades, leveraging this and its vertical integration in different layers of the value chain
 - Multichoice has been entirely unregulated for over 12 years, and its market dominance has been unregulated for a further 10 years
- **Competition is “not effective”**
- Multichoice makes the ridiculous statement that there is no such thing as premium content when it is clear that its focus for decades has been acquiring and solidifying its position in this regard (para 350-365)
- Multichoice argues that ex ante regulation will act on Multichoice’s ability to operate (para 460)
 - It confuses the roles of ex post and ex ante regulation



black

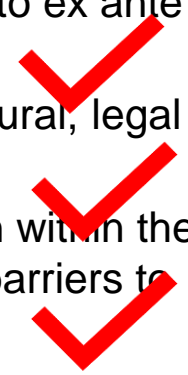
- Cell C has launched **black**, an entertainment streaming platform
- **black** streams movies, series, some sports, video clips, gaming, bookings, and other types of entertainment selling from as little as R5 (with different payment routes)
 - In this way it is able to reach a broad cross-section of the population, with the intention of mass market inclusion
 - This platform can be used to further enable access to other types of content including content that may assist in bridging the information gap
- Difficulties Cell C has experienced in accessing content for this platform are indicative of the difficulties in the market for content in general, and premium content specifically
 - This hampers the distribution of content in a way that is not only accessible but affordable and convenient
 - This restricts the range of offerings that a consumer has to choose from
- Diversity of voices is of the essence of broadcasting in South Africa – these problems prevent this diversity

What does the law say about competition investigations?

- ICASA may undertake any inquiry it deems necessary, in terms of section 4B of the ICASA Act
- The process for a market review is set out in section 67(4) of the ECA –
 - define the relevant wholesale and retail markets
 - determine if there is effective competition in those markets
 - determine which, if any, licensees have SMP in those markets where there is ineffective competition
 - impose appropriate pro-competitive licence conditions on those licensees having SMP to remedy the market failure
 - set out a schedule for review
- Section 67(4A) of the ECA states that in considering whether there is ineffective competition in markets, consider, among other things –
 - The non-transitory entry barriers to the market (structural, legal and regulatory)
 - The dynamic character and functioning of the market including an assessment of the relative market share of licensees ... and a forward-looking assessment of the relative market power of the licensees in the market

What does international best practise say about competition investigations?

- Define the markets – demand-side and supply-side substitutability, and apply the hypothetical monopolist test (with SSNIP)
- Apply the 3CT (three criteria test) in determining the susceptibility of the market to ex ante regulation –
 - (1) consider the presence of high and non-transitory barriers to entry (structural, legal or regulatory)
 - (2) consider if the market structure would tend towards effective competition within the relevant time horizon, having regard to the state of competition behind the barriers to entry
 - (3) consider whether competition law alone is sufficient to adequately address the market failure identified
- Assess market share (>45% = dominance under the Competition Act in South Africa)
- Consider other factors that might suggest dominance
 - Economies of scale, countervailing buying power, technological superiority, access to capital, vertical integration, diversification of products/services, number of competitors in the market, ability to earn above-normal profits...



Does the Discussion Document meet the criteria?

- Multichoice makes many arguments about the deficiencies of the Discussion Document, and the ICASA “process”
 - At para 230 it states that the process is “far-removed” from international precedent
 - It refers to many international precedents and articles, quotes from newspapers, and case law – but it does not want ICASA to rely on international precedent when defining the local market or addressing the local market
 - It suggests at para 238 that because ICASA does not reflect “all” potential constraints on competitors, it has considered the market too narrowly i.e. there must be constraints
 - At para 259 it implies that the “failure” by ICASA to draw a link between activities and constraints (e.g. production) indicates that there is no such link
 - It maintains that there are no barriers to entry for competitors, and at para 695 it puts forward as its reasons for this that “*when a licensee consciously decides to contest for rights then it is capable of winning them*” – thus dismissing ICASA’s analysis of the difficulties potential competitors face – and the reality on the ground
 - It concludes that “the Discussion Document is based on a fair amount of speculation which is expressed as fact”...

THE MARKETS IN BROAD TERMS

The “broadcasting market” in South Africa

- The history and current status of the market are relevant:
 - Section 192 of the Constitution is specifically directed at the regulation of broadcasting in the public interest, and *to ensure fairness and a diversity of views broadly representing South African society*
 - MNet was launched 3 decades ago with an ‘open window’ that endured for 18 years
 - Multichoice/DStv was launched in 1995 and operated without a licence for 13 years
 - As at today’s date, there are still only 2 other pay tv broadcasters neither of which have managed to acquire even a quarter of the subscribers in the market
- There can be no question that Multichoice has invested a significant amount of money in both its platform and its content
 - But it has had a head start of over 20 years – this is not even comparable to the mobile communications market, and certainly not to the OTT market
 - It has been unregulated for almost all of those years
 - It derives revenue from both subscriptions and advertising
 - It has scale that enables it to leverage its position in various ways



The electronic audio-visual content market simplified

Content rights

- Content production (wholesale)
- Content acquisition (wholesale)
- Content aggregation/packaging/commissioning (wholesale)
- Content distribution (retail)
- Content transmission

Content types

- Premium content (wholesale and retail)
- Non-premium content (retail)

The “pay tv” market

- There is no question that it is dominated by Multichoice
 - It is vertically integrated:
 - buying rights to premium audio-visual content from rights owners
 - reselling to its competitors and itself
 - commissioning, packaging and aggregating of audio-visual content
 - selling packages directly to subscribers
 - distributing its signals to subscribers
 - providing set top boxes to subscribers
 - It can leverage its dominance in audio-visual content in the pay tv market into other wholesale and retail markets, ensuring economies of scale and scope, access to capital markets, and denying access to upstream audio-visual content
 - Multichoice comments that competition “takes place over time” – but it has been in the market since 1986 as MNet and since 1995 as DStv.... (para 468)

Summary of relevant factors

- The history of Multichoice
 - Time in the market
 - Absence of regulation
 - Vertical integration
 - Status as (effectively) the sole pay tv licensee for decades
 - Focus for so many years on high LSMs
 - Sources of revenue include advertising and subscriptions
 - Recycling content which frequently saves money (and limits innovation)
- Future market prospects
 - Digital terrestrial television is still some way off
 - Accessibility to and affordability of set top boxes for most people is unlikely
 - OTT players are not a substitute at this time and are unlikely to constitute a substantial competitive threat to pay tv for the majority of viewers in the near term
 - Free to air licensees and **black** will take years to influence Multichoice's market share and growth because they cannot achieve Multichoice's scale or match its bids for content: *they do not operate in the same market*
 - The competitive forces Multichoice refers to all launched in the last 3 years



What is “effective competition”?

- Multichoice claims to be facing an increase in the number of providers of content in the various markets in which it has a presence – but it is Cell C’s view that the level of competition is “not effective”
- Multichoice attempts to define **ineffective competition** by using a subjective and peculiar metric which will be difficult to prove, and assumes there is competition at all
 - “a state of *competition* which results in *significant harm* to consumers” (para 465)
- It is more appropriate to define what **effective competition** is, or what factors are likely to give rise to effective competition:
 1. There are no dominant firms/price takers in the relevant market
 2. There are homogeneous or substitutable products even if there are possible differences in quality or cost
 3. There are no barriers to entry/exit or sunk costs
 4. Consumers can switch suppliers
- Competition is “**not effective**” when one of these conditions is not met



No effective competition in premium content

- ICASA itself observes that *“...the vicious cycle[,] begins with the acquisition of premium content on an exclusive basis for a stipulated time frame. Exclusive premium content attracts more viewers thereby increasing the broadcaster’s chances of acquiring even more premium content as rights holders would prefer to sell to an established broadcaster with an established and growing subscriber base. More viewers also mean an (sic) increase in advertising and subscription revenue that enables the broadcaster not only to outbid its rivals but also acquire even more exclusive content. Consequently, new entrants are forced from the market.”*
- Cell C agrees with this statement
 - This vicious cycle theory was also upheld as correct by OFCOM in its early pay TV market investigations in the UK between 2007 and 2010
- Competition in the pay tv market is not effective
- Competition in the market for premium and non-premium content (at the identified levels) is **not effective**



THE SUBMISSIONS

The Cell C submission

- What follows is a critique of some of the Multichoice arguments
- This is necessary because the Cell C submission addresses the Discussion Document and the Multichoice submission addresses the Discussion Document, but it is important to address the arguments raised by Multichoice in its own submission in order to properly address the Discussion Document



Market definition: pay tv and FTA

- FTA has, on Multichoice's own version, historically always been defined separately from pay tv
 - Multichoice acknowledges that the switching costs are too high for most consumers (para 681)
- Then it offers an example involving the business models of newspapers to support the argument that pay tv and FTA are in the *same* market (para 250)
- And it offers an example using luxury and relatively inexpensive cars to support the fact that pay tv and FTA are in the same market (para 253)
 - This ignores the more detailed analysis of service offerings and supply and demand that demonstrate that they are in separate markets
 - We accept that all the theoretical arguments regarding substitution are relevant, but none of them add up to FTA and pay tv being in the same market – otherwise a house would be in the same market as Buckingham Palace because they are both places to live, but only 1 person can afford to live in the Palace...
 - We agree that price differences should not be an obstacle to including all paid-for products in the same relevant market, but Multichoice has failed to prove that just because all paid-for products with extreme pricing differences could be in the same market, doesn't mean that they are in the same market

328 The constraint on Pay TV services of FTA TV is strengthened by the extent of OOH viewing in SA (of sports content in particular). Viewing of audio-visual content is very much a social event, and many potential subscribers will consider a combination of FTA TV, together with OOH viewing, as providing a complete alternative. As presented in Part B, [REDACTED]

[REDACTED]

[REDACTED]

329 These three features work together, with the effect that a hypothetical monopolist of Pay TV services would be constrained from profitably implementing a SSNIP by the strong alternative that FTA TV in combination with OOH viewing represent for marginal subscribers.

Market definition: SSNIP test

- Contrary to the Multichoice prediction, it is entirely likely that less than 10% of Multichoice's Premium subscribers will leave Multichoice if the price of their package increases
 - It does increase prices year on year
 - Multichoice itself argues that within the Multichoice stable, consumers “frequently switch” between different DStv bouquets at different price points (para 307)
 - But they don't leave
 - And Multichoice has failed to advance any evidence of this “frequent” switching
 - Multichoice's “evidence” of subscriber numbers increasing for FTA broadcasters (para 376) does not prove that FTA/OTT is materially increasing as a constraint on Multichoice
 - If they were to raise prices as they claim, there is no evidence that subscribers would be lost to FTA
 - Multichoice *has* created new packages and argues that customers *do* switch
- We find no evidence that the SSNIP test does not apply



Market definition: substitutability (i)

- Defining content as a package containing different content genres does not as a matter of fact support the argument that packages containing different content are therefore substitutable (para 300)
 - Aggregating the preferences of 2 different people that each like a different non-substitutable product (sport v reality show) does not make those products substitutable
- Multichoice states that FTA is the “primary constraint” on pay tv (para 313)
 - Pay tv and FTA have both developed from linear SD offerings to higher capacity, HD-capable, non-linear capable offerings
 - It is not clear why FTA would now be more constraining (or more capable of substitution for pay tv) than it used to be (para 314)
- The question is whether a significant number of subscribers really see certain types of content as a substitute for other types of content. This needs to be determined through a thorough market definition exercise
- While Netflix may affect Multichoice’s pricing, movies will not replace sport



Market definition: substitutability (ii)

- It is argued by Multichoice that premium content is capable of substitution, but then a consumer could split its own bouquet, taking only sport for example, or only soapies, or viewing House of Cards on etv as well as Multichoice
- If premium sport was capable of substitution then viewers would be satisfied with only local sport coverage and express no interest in taking the Premium bouquet to access all the (13) Supersport channels

SuperSport was recently involved in a public tender process and confirmed a three-year partnership with the rights holders. The renewal starts from the 2018/19 season. “This is a momentous day for SuperSport,” said chief executive Gideon Khobane. “The Uefa Champions League features many of the world’s top players and enthralls soccer fans like little else. We are privileged to be able to tell this great story year after year via high-quality broadcasts.” SuperSport’s rights include television, mobile and internet platforms, extend across sub-Saharan Africa (including South Africa) and supplement a world-class soccer offering that includes the Fifa 2018 World Cup in Russia and many other top soccer properties. (https://www.supersport.com/football/uefa-champions-league/news/171208/SuperSport_secures_Champions_League)



Market definition: substitutability (iii)

- Multichoice refers frequently to the UK as a source of its arguments, specifically “the UKCC referred to FTA as an “out of market constraint to be taken into account in an assessment [of a market]” (para 323)
 - However the point is that imposing some kind of constraint on pricing is not the same thing as FTA being in the same market as pay tv
 - The UK is renowned for its exceptionally strong FTA market on any measure. It is an entirely different thing in South Africa where it is arguably *not* competition or innovation or investment that has resulted in the SABC gaining viewers, but availability and affordability of the signal (largely because of the unique benefits given Sentech as the state-owned signal distributor, to carry the national broadcaster’s signal) (para 325)

Market definition: substitutability (iii)

- Multichoice admit that not everything can be substituted because of viewing preferences
 - Therefore a challenger must also be able to acquire all premium content for fully effective competition to take place
 - The barriers to accessing premium content (preferred by customers, but more expensive and less substitutable for distribution), is therefore a bottleneck
- There are inherent logical flaws in Multichoice's criticism of the ICASA definition of markets on the basis of substitutability

Market definition: retail, wholesale, upstream, downstream (i)

- In Cell C's submission we explain why in this – the first such inquiry – too many subdivisions are unhelpful, or too complex, but that certain subdivisions are critical
 - The complex approach proposed by ICASA may well obscure the fact that Multichoice is, as a matter of fact, dominant in the pay tv market and for premium content acquisition and distribution
 - Cell C agrees that the relevant upstream market for the acquisition of electronic audio-visual content (as Multichoice describes it (para 389)) includes rights for distribution using all technologies, and linear and non-linear rights as well, but we do not agree that one entity should acquire all of these rights and “squat” on them i.e. buy the rights to offer content across various platforms and then only use one subset of them via satellite distribution
 - When other platforms try to acquire content, it is sterilised, often for long periods of time – and Cell C has asked for content and been refused
 - If every contract concluded by Multichoice could be examined, this would assist in supporting its claim that it is not controlling content in these markets



Market definition: retail, wholesale, upstream, downstream (ii)

- We say (i) if upstream content is not substitutable and (ii) it is only sold to downstream entities in the vertical relationship, then there can be no effective retail competition
 - Cell C does not agree that “there is today a single relevant upstream market for content acquisition without distinction in terms of price, quality or genre of the content” as alleged by Multichoice (para 228) not only but also because Multichoice itself has different bouquets
 - Cell C does not agree that competition in the retail market “is far from ineffective” (para 735) and Multichoice has advanced no evidence in support of this statement
 - Cell C believes that vertical integration is a real feature which impacts on the effectiveness of competition in the retail market and of course it raises concerns, despite allegations by Multichoice to the contrary (para 620)

Market definition: types of content (i)

- Cell C has indicated in its submission that it is necessary to define content (whether sports, series, movies and so on) as premium or not premium (which we deal with later), and therefore that some sports events could be characterised as premium content even if all sport is not characterised as premium content
- Multichoice claims that “it is not the case, that a broadcaster would be unlikely to substitute between sports viewed by different demographics in response to a 5-10% price increase” (para 415)
 - It offers no examples of where it has done so i.e. where it has taken a soccer event where cricket programme prices had increased, for example (para 391)
 - It is not conceivable that a viewer who likes live sport would be satisfied with watching the match 2 days later
 - It is an inherently problematic argument by Multichoice that international sports rights are capable of substitution by local derbies when Multichoice itself recognises that it is taking rights to local soccer leagues to satisfy local demand (albeit in other countries, which is not relevant to SA anyway)
 - It is effectively suggesting that potential competitors should be happy to take what they can get as long as its sport and that the so-called sports content market should not be distinguished from other types of content markets



Market definition: types of content (ii)

- It also claims that new sports content is being developed “out of nowhere” so that there are so many types of sport that it cannot be categorised as “premium” (para 222, 297)
 - There are limits to the number of sports formats that are possible, and these have likely been reached, without greatly changing the overall pool of “premium” sporting content
 - An IPL tournament is not the same as a 5-day test match between South Africa and England, for example, and even though both are cricket, this would not satisfy every viewer
 - The new formats are not of great scale, are generally offered in a bundle with other event coverage, and are usually offered by the *same* rights holders
 - This is still problematic for new entrants

Market definition: types of content (ii)

- Multichoice argues that “Hollywood studios are less important” (para 222)
 - The pool of “premium” pay tv offerings has increased with Game of Thrones and House of Cards as series, also becoming popular – but these are not the same as Hollywood movies or live sport, and there is no evidence that these series are now the drivers of growth in FTA or have replaced movies or live sport, and it is our understanding that Multichoice has acquired the rights to many series for a lengthy period of time
 - In the Sky decision, the UK regulators (compound decisions by Ofcom, then UKCC, now CMA) failed to find that Sky was dominant in premium movies because of the presence and effect of Netflix and Amazon, but it did find that it was dominant in sport – in other words, there were two separate markets for content (sport and movies)
 - Multichoice states that local content is more popular than international content, but we are aware that Multichoice pays significantly more for access to international content than it does for access to local content
- The Multichoice conclusion that “there is no relevant distinction between content traditionally considered to be “premium” and other content” is not underpinned by any evidence

Market definition: premium content (i)

- Multichoice dismisses the relevance of definitions of “premium” content
 - Multichoice says that if “narrow types of content” e.g. premium or must-have content, were “once” the basis of building a subscriber base, they no longer are (para 292)
 - In fact, more premium content has been developed, such as Game of Thrones, but this doesn’t mean that it and existing premium content are no longer drivers of subscriber take-up simply because there are more forms of premium content or that they are equally popular
 - Sport, because of its nature and the fact that live sport cannot be substituted, is clearly distinguishable from delayed broadcasts and highlight packages

Market definition: premium content (ii)

- Multichoice argue that the price of content has increased to such an extent that it now exceeds revenue from subscription prices
 - Is it likely that prices for non-premium content, of which there is supposed to be such a lot and it is all substitutable, can have increased to this extent?
 - Multichoice omits the fact that it also gains revenue from advertising...
- Multichoice do seem to accept that premium and non-premium content are 2 markets in their pricing, offering a mass market product @ R99, and another for >LSMs @R250-R850 (para 554)
- Cell C considers this to be one of the most important definitions in this review. In our submission we offer up a definition

Market definition: premium content (iii)

- Cell C suggests that premium content be defined as:

“Content determined to be valuable [either by a financial or public interest standard]; and/or that is made available on bouquets that are priced above the price of the majority of content, or subject to a retail buy-through, or both”

Market power: market share arguments

- Multichoice indicates that their delivery mechanism may be threatened by technology change i.e. they argue that the market is broader than pay tv over satellite because of all the platforms available
 - However, in the case of sound broadcasting there have been changes in technology (e.g. CDs to MP3 to streaming) but the music content itself is not affected
 - Sony has had to accept digital music and has changed its business model – so what?
 - Pirated digital music is less interesting now, because all music is digital even if it must be paid for
 - Multichoice’s argument that piracy is eroding its market share is not relevant to this investigation – piracy should be addressed by different regulation
 - The Vumatel/Netflix article contains a similarly flawed reason to extend the market
 - Multichoice has been providing services on other platforms for years
- Multichoice argues that OTTs have a “huge” advantage over it in that they do not have to pay licence fees or contribute to USAF (para 498)
 - Multichoice has not indicated where and how an OTT has dislodged an incumbent. The argument that Netflix has experienced “exponential growth” from Jan 2016 to 200,000 subscribers ignores the economic fact that everyone other than a failing firm will have “exponential growth” coming off a zero base
 - OTTs are good for consumers, SA must move with the times



Market power: barriers to entry

- Cell C agrees with ICASA's assessment of the numerous barriers to entry for potential competitors seeking to enter the market for electronic audio-visual content
- Multichoice does not agree
 - It would have us believe that anyone who decides to buy any type of content can simply buy it – it argues that all content is contestable (para 454) – but on what terms is Kyknet being made available to third parties, for example?
 - It argues that OTT players and others are already eating into the market, but in the time horizon that ICASA should apply (3 years), there is no certainty at all that Multichoice will face any substantial competition, without regulatory intervention
 - The barriers to entry to become, say a Netflix, are enormous
 - The likelihood of creating an effective constraint on Multichoice is slight
 - The market inquiry needs to assess the past and the present position in order to determine what a forward-looking assessment may say about the market
 - Multichoice's list of current players does not prove that there is effective competition nor does it guarantee more competition in future



In summary...

- It is clear that Multichoice holds the vast majority of the “rights” identified by ICASA
- There are no substitutes for Multichoice despite its argument that going to the pub to watch a movie and watching other programmes on etv at home provides “a complete alternative” to the majority of television viewers (para 328)
- There are no substitutes for its content that can be considered to be *equivalent*
 - Multichoice can and does combine channels into bouquets of its own choosing, for which it charges one price i.e. consumers can only choose among existing bouquets and must take all channels in the bouquet
 - Premium content is made available alongside non-premium content in the bouquet
 - Multichoice itself agrees that “marginal subscribers” must opt for FTA because they cannot afford pay tv (para 329)
- Therefore:
 - Multichoice is dominant in premium content at the wholesale and retail level
 - Multichoice is dominant in non-premium content at the retail level
 - High barriers to entry subsist in *both* content markets

THE NEXT STEPS

How should ICASA proceed?

- The Discussion Document is just that – it invites participation by the public
 - ICASA posits a number of suppositions and invites response to questions
 - This is a section 4B inquiry by ICASA, and it is not over yet
- Multichoice has, along with 17 other parties, made a submission – although Multichoice’s submission is 589 pages long
- ICASA has the power to continue the inquiry or revisit the inquiry, based on the input it receives
- In this inquiry, it is appropriate to take account of whether or not there is or can be, **effective competition** in the current market
- It is Cell C’s view that competition in the relevant markets will not become effective in the near future (relevant time horizon)
- ICASA could now allow written comments to be submitted by interested parties in response to the submissions because it is not possible to address all the arguments raised by Multichoice in a hearing
 - ICASA could then proceed under section 67



Possible remedies

- Obligations on Multichoice:
 - to publish information concerning long term and/or exclusive contracts concluded by Multichoice for premium content (as defined) with a view to **shortening exclusive rights periods**
 - disclosing the terms on which such content is available for **acquisition by third parties**
 - to maintain **separate accounts** for each of its various offerings by platform, premium and non-premium type of content, and wholesale and retail content
 - to make programmes and channels available separately on terms regarding distribution, reselling and access imposed to be by ICASA (**rights splitting**)
 - to be subject to **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
 - relating to **accounts, records and other documents to be disclosed** to ICASA and published
 - regarding the amount and type of premium, sports and South African programming for broadcasting over a period of time, in the aggregate and **unbundling sports rights**
 - to **carry the channels and advertising of third party products** that are *not* in the same market as Multichoice

