eMedia Investments (Pty) Ltd's Submission

on the Supplementary Discussion Document issued by ICASA on 6 January 2025

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1. INTRODUCTION

1.1 On 11 July 2016, the Independent Communications Authority of South Africa (**ICASA** or **the Authority**) published a notice of its intention to conduct an inquiry into the state of competition in subscription television broadcasting services in terms of section 4B of the ICASA Act.

1.2 Following a preliminary information gathering exercise and public hearings, ICASA published its Draft Findings Document in the Inquiry into Subscription Television Broadcasting Services in Government Gazette No. 42391 on 12 April 2019 (**the Draft Findings**).

1.3 In its Draft Findings, the Authority *inter alia* identified the following relevant markets at the retail level:

1.3.1 A market for the retail distribution of analogue-based free-to-air television services in South Africa.

1.3.2 A market for the retail distribution of basic-tier subscription services and satellite-based free-to-air television services in South Africa.

1.3.3 A market for the retail distribution of premium subscription television services in South Africa.

1.3.4 A market for the retail distribution of video-on-demand services in South Africa.

1.4 On 10 November 2023, the Authority published a further consultation notice and issued a new questionnaire with the ostensible aim of updating market insights. Stakeholders were required to respond by 22 January 2024, but this deadline was extended to 15 February 2024.

1.5 On 6 January 2025, ICASA published its Supplementary Discussion Document: Inquiry into Subscription Television Broadcasting Services, December 2024 in Government Gazette No. 51848 (**the Supplementary Discussion Document**).

1.6 The Supplementary Discussion Document significantly and materially revises the number and the definition of the markets that had been identified by the Authority in 2019. In particular, the Authority now proposes to find that *the market for the retail distribution of premium subscription satellite television services in South Africa*, and *the market for the retail distribution of video-on-demand services in South Africa* – identified as separate markets in 2019 – be combined into a single market; namely a retail market for **premium subscription TV and Over the Top (OTT) streaming services**.

1.7 The Authority has posed ten questions in respect of which stakeholders have been invited to submit written representations.

1.8 eMedia Investments (Pty) Ltd ("**eMedia**") has participated in the inquiry into subscription television broadcasting services since 2016 (as well as the various previous attempts to analyse and regulate the subscription broadcasting market). It made written and oral representations in respect of the Draft Findings Document.

1.9 eMedia wishes to thank the Authority for the opportunity to make further submissions in relation to this ongoing inquiry into subscription television broadcasting services, and for granting in the extension until 24 March 2025 to do so.

1.10 eMedia intends to make use of the opportunity, in terms of paragraph 1.18 of the Supplementary Discussion Document, to make oral representations at the public hearing(s) which may be held in due course.

1.11 In this regard, eMedia submits that, given the complete about-turn in the stance taken by the Authority in relation to how it views the subscription television broadcasting market, hearings must be held. At any such hearings, eMedia requests that, in view of this about-turn in relation to its various previous findings spanning almost ten years since the inquiry commenced in 2016, it be given 1 hour and fifteen minutes to make its presentation and that it be given the last slot within which to do so.

1.12 eMedia is the holding company of various interests in the broadcasting sector, each of which is impacted by the important questions posed by the Authority. Those interests include:

1.12.1 e.tv, a licensed free-to-air broadcaster;

1.12.2 e.Sat, the holder of a subscription television licence;

1.12.3 Platco, which operates Openview as a free-to-air satellite broadcasting service; and

1.12.4 eVOD, which is a video-on-demand service.

1.13 eMedia's written submission below are made in particular response to the following questions posed by the Authority:

1.13.1 Question 1 regarding the Authority's market definition approach;

1.13.2 Question 2 regarding the tools identified by the Authority for defining the relevant markets;

1.13.3 Question 4 regarding changes that the Authority can expect to occur in OTT services and subscription services which have an impact on competition between those services; and

1.13.4 Question 5 regarding the Authority's preliminary view that premium tier subscription television is in the same market as SVOD OTTs.

1.14 eMedia has elected not to answer, in these submissions, those questions in respect of which it does not take issue with the Authority's preliminary findings. In particular, eMedia does not take issue with:

1.14.1 The Authority's preliminary view that there is a market for the retail distribution of analogue-based free-to-air television services in South Africa

1.14.2 The Authority's views on the wholesale market definition (question 6).

1.14.3 The Authority's preliminary view that that market definition in upstream content markets should not be limited to establishing whether the notion of premium content exists and whether there are differences between premium content and non-premium content (question 7).

1.15 In relation to question 3, the Authority's preliminary view is that satellite-based free-to-air television services in South Africa are in the same market as basic tier subscription television. For the reasons set out in section 3 below, it is simply not possible at this stage, and given the available information, for eMedia to make submissions in relation to question 3.

1.16 eMedia does, however, disagree with the Authority's belated identification of a single market for the retail distribution of premium subscription television and OTT services in South Africa, rather than the two separate markets that it defined in 2019.

1.17 eMedia's detailed and substantiated submissions in respect of the remaining questions posed by the Authority below are structured as follows:

1.17.1 Executive summary.

1.17.2 Market definition principles (relevant to questions 1 and 2 posed by the Authority).

1.17.3 Various factors critical to questions 4 and 5 posed by the Authority, including:

1.17.3.1 Product and service characteristics;

1.17.3.2 Content (including viewing experiences);

1.17.3.3 Regulation;

1.17.3.4 Multi-homing and complementary use;

1.17.3.5 Pricing;

1.17.3.6 Advertising; and

1.17.3.7 Case precedent.

1.18 Finaly, eMedia sets out in a separate section how the Authority has acted in dereliction of its duties and promises, and acted in a manner which creates a perception of favouritism towards the existing dominant player in the subscription broadcasting market, MultiChoice. The Authority has failed other licenced broadcasters in this regard and the position it now adopts fortifies this conclusion. In 2019, eMedia made submissions to ICASA in which it made the point that any delay in concluding this inquiry favoured MultiChoice and highlighted why regulation was required. A further five years have elapsed, and the Authority is still no closer to a conclusion.

1.19 Indeed, for more than a decade the Authority has viewed DStv and MultiChoice as holding significant market power deserving of regulation yet shied away from implementing such regulation. The easy way out now is to belatedly, and without substantial justification, change its view of the relevant markets, which can only serve to ensure further delays. Of course, this "justification" is premised on an alleged change to certain market conditions – primarily identified as a growth in OTT streaming services. Yet this change is one that is only now observed following a delay of over nine years in dealing with the issue of dominance in the subscription broadcasting market. That delay, in turn, is one caused solely by the Authority. This is despite its statutory obligations, which set a time limit of six months for it to make findings pursuant to any process conducted by it. This conduct is unconscionable.

1.20 One further preliminary issue which must be addressed is the fact that certain conclusions reached by the Authority are based on apparently confidential information provided to it by Multichoice. There are no reasons provided as to why such confidentiality was granted, particularly in circumstances in which certain information may very well not be confidential. Any final decision taken, based on such information, is inherently unfair and contrary to the principles of fair administrative justice. In this regard, eMedia request the Authority to:

1.20.1 Place on record the nature of the information in respect of which confidentiality was sought by Multichoice;

1.20.2 Provide written reasons prior to any hearing as to why it granted such confidentiality; and

1.20.3 Grant eMedia access to this information (through its legal team if necessary), subject to the appropriate confidentiality undertakings being given as is the norm in the Competition Commission and Tribunal. Should this request not be acceded to, e Media requests written reasons for any such decision.

1.20.4 Finally, eMedia is concerned that the excessive delays have resulted in the Authority having no institutional memory and that this has impacted the changed position it has now adopted, exacerbated by the lack of broadcasting experience or knowledge within ICASA, with the bulk, if not all, the Councillors coming from a telco background.

2. EXECUTIVE SUMMARY OF eMEDIA's POSITION

2.1 eMedia submits that the boundaries between the markets that the Authority has defined are unclear. Far greater certainty is required. Accordingly, eMedia is unable to properly address question 3. The reasons for this are set out in the section that follows immediately below.

2.2 eMedia fundamentally disagrees that there is a single retail market for **premium subscription television and OTT streaming services**. While the significant growth of OTT streaming is obvious for all to see, that simply means that the *separate* market for OTT streaming services (which was correctly identified as a separate market in the Authority's 2019 Draft Findings) has grown. Growth of this distinct market does not indicate convergence between premium subscription television and OTT streaming services.

2.3 In these submissions, eMedia makes the point that there are notable differences between premium subscription satellite TV services and OTT streaming services. These differences were in fact fully appreciated by the Authority in the 2019 Draft Findings but now appear to have been swept under the proverbial carpet. These differences include product and service characteristics, content, viewing experiences, the technologies employed, and the fact that premium subscription satellite services are regulated, whereas OTT streaming services are not.

2.4 eMedia submits that there is no justification to ignore or downplay these differentiators.

2.5 Stripped to its essence, the Authority, in this Supplementary Discussion Document, appears to have uncritically accepted representations made by MultiChoice that it has lost "significant" numbers of subscribers to its so-called premium bouquets (Premium and Compact Plus) who, it says, have all switched to OTT services. On the basis of these *representations* by MultiChoice, which do not appear to have been critically scrutinised or backed up by objective *evidence* of actual *switching*, the Authority appears to have rejected various studies that have consistently and clearly shown that premium subscription TV services and OTT streaming services are *complements* and not substitutes in South Africa. Put differently, they are in different markets, but complementary to one another for many consumers. MultiChoice's strategy of *promoting* Netflix, Amazon Prime and other OTT services and then entering the OTT services market with DStv Stream and Showmax, is also clear evidence that it regards OTT streaming as a complementary service and not a competitor in the same market.

2.6 As regards pricing, the Supplementary Discussion Document proposes to find that because the cost of broadband internet connectivity has decreased in recent years, it is now easier for consumers to 'cut the cord' of satellite subscription and use OTT streaming services for their entertainment needs. That, in and of itself, does not indicate that they are in the same market. In any event, e-Media submits that the Authority is failing to compare apples with apples. The relevant inquiry must be the extent to which a typical consumer can, having regard to costs, *replicate* a DStv experience, not whether a few more consumers in South Africa can now watch one or two movies on Netflix a month. Having regard to publicly available information, eMedia submits that to *replicate* a DStv viewing experience, a typical subscriber would need no less than 125GB of internet data a month. This requires not only an *uncapped* internet connection, but one that does not throttle a user under a Fair Usage Policy. The Authority's analysis fails to take account of these requirements.

2.7 Equally problematically, the Authority has failed to heed the warning of the cellophane fallacy. While noting it in introductory remarks in the Supplementary Discussion Document, the Authority does not refer to it again. eMedia submits that the simple explanation for MultiChoice losing subscribers is that it has been pricing its premium satellite services at monopoly levels for more than a decade, coupled with the cost of living crisis in this country. If proper regard is had to the cellophane fallacy, apparently observed adoption of OTT streaming is not switching to a real substitute. It is an illustration of monopoly prices becoming unaffordable to consumers.

3. ICASA's INCLUSION OF SATELLITE-BASED FREE-TO-AIR TELEVISION SERVICES AND BASIC TIER SUBSCRIPTION SERVICES IN THE SAME MARKET (QUESTION 3)

3.1 The Authority's preliminary view is that satellite-based free-to-air television services in South Africa are in the same market as basic tier subscription television. In coming to this conclusion, the Authority apparently considered several factors including differences in product characteristics and price, case precedent that separated free-to-air services from subscription television services, and the potential of FTA broadcasting services to offer "many channels of a better quality".

3.2 The Authority has not provided any coherent definition for what it considers to be a "basic tier subscription television" service. It has also not set out any basis upon which to distinguish between *basic tier* subscription television and *premium* subscription television.

3.3 It is critical that the Authority considers and determines an identifiable metric (or set of metrics) by which to differentiate between basic tier subscription television and premium subscription television. Without such metrics, it is impossible to determine what "basic tier subscription television" is and, consequently, to consider whether it is in the same market as Free to Air (FTA) television.

3.4 To illustrate this, it is entirely unclear whether, and if so why, the Authority considers MultiChoice's Family bouquet (priced at R339.00 per month) or its Access bouquet (priced at R150.00 per month) to be in the same "basic tier" market as FTA services.

3.5 It bears emphasis that MultiChoice has complete control over both the pricing and the content of its various bouquets. The Authority may stipulate today that MultiChoice's Family bouquet, or its Access bouquet, are in the "basic tier" market and tomorrow MultiChoice may change the price and the content of these bouquets, leading to regulatory confusion and creating scope for manipulation on the part of MultiChoice. The Authority should not allow MultiChoice to determine what constitutes a basic tier subscription television service and, by extension, what constitutes premium subscription television. Such an approach is clearly prejudicial to eMedia and other stakeholders. An appropriate metric or set of metrics must be determined if this market definition is to be maintained.

3.6 Should the Authority be of the view that this is not feasible, then the only conclusion that can rationally be reached is that there is a *single* market for subscription television broadcasting (including all of MultiChoice's bouquets) and that FTA services fall into a separate market.

3.7 In this regard, it appears that the Authority has failed to consider the material differences between FTA and subscription television in relation to revenue (FTA broadcasters rely on advertising revenue while subscription television broadcasters rely on advertising revenue and subscription fees), regulation (FTA broadcasters are regulated far more stringently), and market dynamics.

3.8 In the absence of some greater certainty, eMedia does not at this stage make submissions in relation to the inclusion of satellite-based free-to-air television services and basic tier subscription television in the same market.

3.9 It reserves its right to do so in future and at the appropriate juncture.

4. MARKET DEFINITION PRINCIPLES

4.1 eMedia does not take issue with the market definition principles that the Authority has set out in the Supplementary Discussion Document, or for that matter in the 2019 Draft Findings. There are, however, a few points that bear emphasis.

4.2 In essence, antitrust law defines a *relevant market* as the arena of effective competition where firms compete for consumer demand. It has two dimensions: a relevant product market and a geographic market. The product market includes all goods or services that customers consider reasonably **interchangeable or substitutable** for each other, while the geographic market includes all products or services that are considered to be substitutes in a particular geographic area.

4.3 The classic test employed when attempting to define a market is the "**hypothetical monopolist**" or '**SSNIP' test** (Small but Significant Non-Transitory Increase in Price). Under the SSNIP test, one asks: if a hypothetical monopolist controlled a candidate product or set of products, could it profitably raise price by (typically) 5% to 10%[1]? If enough customers would, in response, switch to alternative products (outside that set) *such that the price increase is unprofitable*, the market definition is too narrow and must be expanded to include the alternatives. eMedia wishes to emphasise the requirement that it must be shown that the *price increase is unprofitable*. At times, the Authority appears to have reduced the inquiry to whether "*enough customers are likely to switch*".[2] It may very well be that some consumers will respond by choosing to spend their money elsewhere, but that is not enough. The proper inquiry is whether a sufficient number of consumers will switch s*o as to make the increase unprofitable for the hypothetical monopolist*.

4.4 This process continues until a price increase would indeed be profitable, indicating the set of products is a relevant market. The intuition is that a relevant market includes the closest **demand-side substitutes** that constrain each other's pricing. In practice, evidence of high cross-price elasticity (consumer switching) *between* products signals that they are in the same market. Conversely, products with low substitutability belong in separate markets. Courts and regulators often describe the relevant market as the "area of effective competition". What this means in practice is that

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[1] Given the rate of inflation in South Africa, it is more appropriate to use the higher 10% number, or at least postulate a 5–10% increase above inflation.

[2] See, for example, Findings Document, para 5.3.9.

switching in both directions should ideally be assessed.[3] Thus, the Authority must *also* consider whether, for example, a 5-10% increase in the price of Netflix or other OTT streaming services would cause a significant number of consumers to switch to a DStv premium bouquet.

4.5 As noted by the Authority in the 2019 Draft Findings, in addition to the SSNIP test, competition law considers qualitative indicators of substitutability (both demand and supply-side) such as product characteristics, consumer perceptions, distribution methods, price patterns, and entry barriers to more precisely delineate relevant antitrust markets. Regrettably, the comprehensive analysis of these factors in the 2019 Draft Findings has not been carried through into the Supplementary Discussion Document. Accordingly, eMedia will address them again below.

4.6 The prevailing jurisprudence requires a practical, evidence-based approach that takes economic reality and consumer behaviour into account.

4.7 **Demand- <u>and</u> supply-side substitution:** Market definition emphasises demand-side substitution – i.e. how consumers would switch in response to a price or quality change in the product or service being investigated. Supply-side substitutability should also be considered: if producers of other products could easily shift to offer the product in question (in response to a price increase) within a short time and without significant cost, this can broaden the market. For example, it would be relevant for

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[3] eMedia notes that in the 2019 Draft Findings Document, the fact that there was evidence of switching in both directions was a key basis for the preliminary finding that satellite-based free-to-air television services are in the same market as basic tier subscription television.

ICASA to consider whether an OTT supplier such as Netflix could easily shift to offer a satellite broadcasting service in South Africa in competition with MultiChoice.

4.8 **Quality and Non-Price Factors:** In digital markets, price is not the only competitive parameter. Features, convenience, and quality also matter. Competition authorities sometimes use a "SSNDQ" (small but significant non-transitory decrease in quality) test for zero-price or dynamic markets. In the present context, both satellite TV and streaming are paid services, but they differ vastly in terms of content variety, viewing experience (linear schedule versus on-demand), as well as the technology on which they operate and which are required by consumers. The market definition analysis must obviously account for these non-price aspects as part of substitutability. eMedia deals with some of these issues in greater detail below.

4.9 **SSNIP and the Cellophane Fallacy:** A critical caution in market definition is the "**Cellophane fallacy**". If a firm already has monopoly power and charges monopoly-level prices, consumers may have switched away all close substitutes, making remaining customers seem price-insensitive. A further SSNIP might then appear profitable even if the market is defined too narrowly. In other words, using current high prices can mislead one to define the market too broadly. This is relevant here because in many countries legacy pay-TV (especially dominant satellite providers) has historically enjoyed significant market power and high prices. A proper analysis must ask whether observed switching is because products or services are substitutes, or simply because prices are so high that a postulated increase (under the SSNIP test) has made it unaffordable such that a significant number of consumers have simply decided to stop buying. For example, Econex, in an economic note on South Africa's pay-

TV market,[4] warned that where a product's price is at monopoly levels, products that are not truly substitutes could *appear* to be interchangeable under a SSNIP test.

5. PRODUCT AND SERVICE CHARACTERISTICS

5.1 Satellite Pay-TV Services and On-Demand Streaming (or OTT) Services have very different product and service characteristics.

5.2 **Satellite Pay-TV Services:** Subscription satellite TV offers a **bundle of linear channels** delivered via satellite broadcast to a dish receiver. Consumers typically purchase tiered packages (bouquets) of channels that include live content – TV shows, news, sports, movies – airing on a fixed schedule. Key features include linear "appointment" viewing (content is consumed at scheduled times, exclusive live sports or events, and a broad range of 'genres' available in distinct channels. The pricing model involves a monthly subscription with multi-tier options (basic to premium). Notably, subscription satellite TV is geographically constrained (services are offered country-by-country or at most regionally due to regulatory restrictions as well as the licensing of content rights). Installation of a dish and decoder is required, which also creates upfront switching friction.

5.3 **On-Demand Streaming Services:** OTT streaming platforms like Netflix, Amazon Prime Video, Disney+, etc., provide a **catalogue of on-demand content** (movies, series, documentaries, etc.) delivered over the internet. Users can select any title at any time (non-linear consumption) and

[4] Econex, "Are pay-tv and OTT in the same relevant market in South Africa?", available at https://www.readkong.com/page/are-pay-tv-and-ott-in-the-same-relevant-market-in-south-7901629.

typically have access on multiple viewing devices (smart TV, laptop, smartphone, etc.). These services usually do not carry live broadcast channels (and certainly in South Africa, this is extremely limited). The business model is a flat monthly fee with no long-term commitment. No set top box or decoder is required. Streaming relies on broadband internet access, so the total cost to consumers includes the internet service itself (which might be a substantial expense where data is metered or broadband is pricey). Unlike a satellite service, once a consumer has subscribed to an OTT service, it is globally accessible[5] and can be consumed anywhere, not just at home. This is distinct flexibility advantage.

5.4 There are other distinguishing characteristics.

5.4.1 **Technological Differences:** Satellite broadcast and internet streaming are distinct distribution technologies. Satellite TV requires dedicated spectrum and infrastructure (satellites, dishes) and offers reliable high-quality video including for remote areas (where internet may be poor). Streaming, by contrast, requires a stable broadband connection; quality can be affected by bandwidth (HD/4K streaming needs high speeds). These differences mean that in regions with limited broadband internet penetration (or high data costs), streaming can simply not effectively reach the mass of consumers. Indeed, the Authority's initial finding that OTT streaming services fell into a different market (i.e. outside the pay-TV market) due to these infrastructural barriers, remains extremely cogent.

5.4.2 **Viewing Experience and Consumer Behavior:** Satellite TV's linear nature means viewers have a more passive, scheduled

[5] Although libraries can vary by region.

experience, whereas streaming offers active choice and binge-watching at one's own pace. These formats appeal differently across demographics. For example, younger generations have gravitated toward the flexibility of streaming and often eschew traditional cable/satellite entirely. This is not *switching*. By contrast, older or less tech-savvy viewers generally prefer the familiarity of linear channels or might not want to manage multiple apps to replicate the channel-surfing experience.

5.4.3 **OTT streaming services offer content at 4K UHD** in South Africa: Save for two channels, DStv is only available at 1080p (HD). The Authority has not considered that this may be one explanation for the adoption of OTT streaming services, as the owners of 4K TV sets look for high(er) quality content. This distinguishing feature would place OTT streaming services in a different market in South Africa on the basis of *quality*.

6. CONTENT

6.1 A relevant factor in a substitutability inquiry is content. Satellite TV typically offers **live sports, live news, and first-run TV episodes** via linear channels. This is content that streaming services historically did not provide at all. Satellite TV also has substantially greater local content. For many consumers, live sports or timely news are a unique value of pay-TV. Streaming services excel in library content and originals for on-demand 'binging'. E-media submits that it is this difference which makes the services *complements* rather than substitutes, and this is especially so for content-hungry consumers: e.g. a household might keep satellite TV for live events and use Netflix and/or other OTT streaming services for movies/series on-demand.

6.2 This is explored in greater detail below in these submissions.

DIFFERENCES ARE MATERIAL

6.3 The Authority has stated [at paragraph 2.4.5.1 of the Supplementary Discussion Document] that it considered that there may be "some differences" in content between providers of video entertainment services, including between subscription services and OTT services. It highlights, quite correctly that "*MultiChoice sees sports and local content as key ways to differentiate its services*", but then concludes that the mere observation of differences in content is not sufficient to conclude that OTT services and subscription television services are in separate markets. With respect, eMedia fundamentally disagrees with this assessment. Observations of differences in content is key. Indeed, this was one of the bases on which the Authority defined the OTT streaming services as being in a separate market in 2019.[6]

6.4 The Authority also says:

6.4.1 Differences in offerings are "less observable", including because Netflix has "started investing in sports-related content" and "appears to be gradually moving towards live sports content" [paragraph 2.4.5.2].

6.4.2 In the South African market, the most significant distinction in terms of offering between linear subscription television and OTTs has been the limited availability of live sport content on OTT services. However, live sports broadcasting on OTT services is "possible" in

[6] Draft Findings, para 5.12.9 – 5.12.15

South Africa [paragraph 2.4.5.8].

6.5 Critically, however, the Authority readily acknowledges that most of the larger OTT service providers **do not** provide live premium sports content [paragraph 2.4.5.9].

6.6 In coming to the conclusion that Netflix is gradually moving towards live sports and other content, the Authority listed (and presumably considered) the following examples:[7]

6.6.1 The “Netflix Cup”, in which athletes from the Netflix series “Formula 1: Drive to Survive” and “Full Swing” teamed up in a match-play golf tournament in Las Vegas on 14 November 2023.[8] It is unclear whether the event was available to be watched live by South African subscribers of Netflix. If it was, it was streamed at midnight on 14 November 2023 (15:00 Pacific Time).[9]

6.6.2 A boxing match between Mike Tyson and social-media personality Jake Paul.[10] The boxing match was streamed live in South Africa and was #1 in South Africa and 78 countries in total.[11] However, the event experienced major technical difficulties.[12]

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[7] Paragraph 2.4.5.2.

[8] https://www.netflix.com/tudum/articles/netflix-cup-live-event-date-news

[9] https://about.netflix.com/en/news/netflix-to-host-first-ever-live-sports-event-drive-to-survive-full-swing

[10] https://about.netflix.com/en/news/60-million-households-tuned-in-live-for-jake-paul-vs-mike-tyson

[11] https://about.netflix.com/en/news/jake-paul-vs-mike-tyson-over-108-million-live-global-viewers

[12] https://www.nbcnews.com/sports/boxing/netflix-streaming-problems-tyson-paul-event-frustration-jokes-rcna180443

6.6.3 Live NFL games – which have little or no following in South Africa. On 25 December 2024 Netflix streamed two live NFL games. The partnership between Netflix and the NFL is to broadcast NFL games on Christmas day for three seasons.[13] It appears that the games were available to Netflix subscribers worldwide.[14]

6.6.4 Although not sporting events, "Live comedy and other events" (not specified by the Authority).

6.7 This is really not a significant offering. Netflix has only streamed a handful of sports and entertainment events live. More importantly, the sports content available on Netflix does not fall within the Authority's proposed definition of premium sports content.

6.8 Amazon's Prime Video offers the following live sports content for its subscribers in 2025, none of which is aimed at the South African market:

6.8.1 The American National Women's Soccer League (NWSL), including the NWSL Challenge Cup, 25 regular-season games and one quarterfinal playoff.

6.8.2 Premier Boxing Champions fights.

6.8.3 ONE Championship fight nights.

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[13] https://about.netflix.com/en/news/netflix-nfl-christmas-gameday-reaches-65-million-us-viewers

[14] https://www.iol.co.za/entertainment/streaming/netflix-to-stream-nfl-christmas-day-games-globally-for-chiefs-vs-steelers-and-ravens-vs-texans-16a5a17b-c456-4874-9b0b-1856cce9dda3

6.8.4 Major League Baseball (MLB), including 21 games during the 2025 season.

6.8.5 Five consecutive NASCAR Cup Series races.

6.8.6 Womens National Basketball Association (WNBA).

6.8.7 Thursday Night Football, a program concerning the NFL.

6.8.8 National Basketball Association (NBA), including 66 regular-season games and live NBA pregame, postgame, and halftime shows.

6.8.9 National Hockey League (NHL).

6.8.10 Certain Overtime Elite basketball games.[15]

6.9 To the extent that those events are available to subscribers in South Africa, the sports content available on Amazon's Prime Video does not fall within the Authority's proposed definition of premium sports content.

6.10 Disney+ does not appear to offer any live sports or other content in South Africa.[16] Nor does Apple TV+.

6.11 By contrast, DSTV's premium offering includes more than 135 television

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[15] https://www.aboutamazon.com/news/entertainment/live-sports-streaming-prime-video

[16] https://www.disney.co.za/introducing-disney-plus and https://www.apps.disneyplus.com/za/onboarding?utm_campaign=Backlink&utm_content=Homepage_Navigation&utm_medium=Disney_WebsiteZA&utm_source=Referral

channels, many of which provide not only live sport, but also live entertainment and news.

6.12 DSTV's premium offering includes at least the following live sporting content:

6.12.1 More than 20 SuperSport channels.[17]

6.12.2 A 24-hour dedicated WWE channel (channel 128).

6.12.3 A fully-dedicated motoring channel called Ignition (channel 189).

6.12.4 Two channels dedicated to ESPN (which includes broadcasts of EFL, MLS, Dutch Eredivisie, NBA, NFL, MLB etc on channels 218 and 219).[18]

6.13 In the financial year ending March 2024 Supersport alone broadcast 34 490 live events. The Supersport Schools channel (channel 216) displayed more than 49 000 hours of live programming across 43 different sports codes.[19]

6.14 The Authority also does not appear to have considered the dedicated news channels available on DSTV as relevant – including, importantly, local news channels.

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[17] https://www.dstv.com/en-za/buy/dstv-packages/dstv-premium/

[18] https://www.dstv.com/en-za/explore/dstv-channels/

[19] https://investors.multichoice.com/pdf/annual-results/FY24/fy24-results-press-release.pdf

6.15 DSTV's premium bouquet includes more than 20 live and dedicated news channels as follows:

6.15.1 BBC World News (Channel 400)

6.15.2 CNN International (Channel 401)

6.15.3 Sky News (Channel 402)

6.15.4 eNCA (Channel 403)

6.15.5 SABC News (Channel 404)

6.15.6 Newzroom Afrika (Channel 405)

6.15.7 Al Jazeera (Channel 406)

6.15.8 Russia Today (Channel 407)

6.15.9 Parliamentary Service (Channel 408)

6.15.10 CGTN (Channel 409)

6.15.11 CNBC Africa (Channel 410)

6.15.12 Bloomberg TV (Channel 411)

6.15.13 Business Day TV (412)

6.15.14 NDTV 24x7 (Channel 413)

6.15.15 EuroNews Africa (Channel 414)

6.15.16 Arise News (Channel 416)

6.15.17 Africa News (Channel 417)

6.15.18 RAI International (Channel 430)

6.15.19 NHK World (Channel 431)

6.15.20 RTPI (Channel 435)

6.15.21 TV5 Monde Afrique (Channel 437).[20]

6.16 None of this is available on the large OTT suppliers' streaming platforms.

6.17 There is thus no real comparison between Multichoice's premium satellite television subscription service and the major OTTs as far as content is concerned.

6.18 It would be no answer to suggest that DStv Stream (an OTT service) has live sports and news channels and therefore that live content is a feature of OTT services as well. There can be no doubt that DStv Stream is in a completely different market from other OTT providers in South Africa. This is clear if regard is had to the price at which it is sold to South African

[20] https://www.dstv.com/en-za/news/116485/a-single-platform-to-access-diverse-news-sources/

consumers.

6.19 A Mybroadband article of 13 August 2024[21] contains the following table of comparative pricing for access to various streaming services:

	Concurrent streams	Maximum streaming quality	Price	Effective price per stream
DStv Stream Premium	**1 for all devices 1 additional for smartphone, tablet, or laptop**	**Full HD (1080p)**	**R799**	**R799.00***
Netflix Premium	4 for all devices	4K (2160p)	R199	R49.75
Showmax Entertainment (MultiChoice owned)	2 for all devices	Full HD (1080p)	R99	R49.50
Amazon Prime Video	3 for all devices	4K (2160p)	R79	R26.33
Disney+ Premium	4 for all devices	4K (2160p)	R139	R34.75
Apple TV+	6 for all devices	4K (2160p)	R125	R20.83
YouTube Premium	4 for most videos 2 for rented or bought movies	4K (2160p)	R72	R18.00

* This is a month-to-month price. The price drops to R699.00 if a 12 month commitment is made. This price also includes Showmax as a bundled service. Compact Plus is also available on Stream for R549.00 pm

6.20 In March 2025, MultiChoice announced that it is doubling the number of streams available for the price of R799.00 per month (the month-to-month price). The "effective price per stream" for "Premium" would thus be

[21] https://mybroadband.co.za/news/broadcasting/554806-dstvs-big-streaming-problem.html

R399.50 per month.

6.21 On an "effective price per stream" basis, DStv Stream Premium is still a startling 8 times more expensive than the next most expensive OTT offering (Netflix Premium), and that for poorer quality (Full HD (1080p)) as opposed to Netflix's 4K (21060p). It is important to note that none of the prices reflected in the table above include the cost of the internet service that is required.

6.22 Regulators would be extremely hard pressed to conclude that DStv Stream is in the same market as the other OTT services referred to in the table.

6.23 This analysis also reveals something else significant. The simple fact is that the price of *DStv Stream* (either Premium or Compact Plus) does not appear to be constrained by the other OTT providers like Netflix, Amazon Prime or Disney+. Put differently, the price of *DStv Stream* has not been, and is not being, set with reference to the price of Netflix or Amazon Prime, for example. If that is so, it is difficult to imagine that MultiChoice considers the price of its premium *satellite broadcasting services* to be constrained by OTT streaming *prices*. Rather, it is only constrained by the affordability of its premium offerings. eMedia refers to further evidence, from MultiChoice itself, for this below.

6.24 Thus, MultiChoice is clearly independently setting its prices for satellite broadcasting services, and then simply applying the same (or very similar) price to the comparable DStv Stream package.

6.25 All of this indicates that MultiChoice's premium satellite broadcasting services are in a separate market to OTT streaming services.

VIEWING EXPERIENCES – CATCH UP AND BOX OFFICE

6.26 The Authority also suggests that there are currently no major differences in viewing experiences between watching traditional tv and streaming or watching video on demand services [paragraph 2.4.6.1]. It says:

> "Traditional broadcast television viewers historically could watch only the content, which was being broadcast, with no control in terms of fast forwarding or changing the program. However, technology has advanced to offer catch up features which are now common with most subscription television services, giving greater viewing control and convenience to consumers. A video-on-demand user chooses to watch any video, movie or clip anywhere, anytime at his or her convenience. As with catch-up services on traditional subscription services, a video-on-demand user can find any type of programme of his or her interest. *[paragraph 2.4.6.2]*

6.27 That is not correct.

6.28 DSTV's traditional premium subscription television offering requires a decoder and installation.[22] DSTV offers three different decoders – HD Single View, DSTV Explora (Model 3B), and DSTV Explora Ultra.[23] The DSTV Explora Ultra has capability to include Showmax and third-party streaming apps.[24] Both Explora and Explora Ultra decoders include the following features:

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[22] https://www.dstv.com/en-za/buy/dstv-packages/dstv-premium/premium-decoder-package-deals/?_gl=1*b100fo*_up*MQ..*_gs*MQ..&gclid=CjwKCAjwvr--BhB5EiwAd5YbXmYus1rmiO5AIOefkDBK9iWlIuJ5dXucy18Aftq1o61JQtR0RDlT0BoCbesQAvD_BwE&gclsrc=aw.ds

[23] https://getdstv.dstv.co.za/compare-dstv-decoders

[24] https://getdstv.dstv.co.za/compare-dstv-decoders

6.28.1 Watching Catch Up;

6.28.2 Renting movies on Boxoffice;

6.28.3 Pausing live tv;

6.28.4 Recording;

6.28.5 Recommendations.[25]

6.29 But those features are limited for even DSTV premium subscribers. The DSTV Explora Ultra only allows a user to pause live tv for up to two hours and only permits recording of up to 110 hours.[26] Even DSTV Stream ostensibly only permits users to go back in time up to 24 hours on selected channels.[27] Users have struggled to use this feature.

6.30 Catch Up does not include all content that is available to DSTV Premium subscribers. It includes a selection of shows from channels on the package that can be watched on demand. Content includes episodes of some of the latest series, box sets, movies, sporting highlights, kids' stuff and more, with content being added after it has been broadcast on the live TV channels.[28]

6.31 The Catch Up feature is limited in the following ways:

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[25] https://getdstv.dstv.co.za/compare-dstv-decoders

[26] https://getdstv.dstv.co.za/dstv_explora_ultra_without_installation

[27] https://www.dstv.com/en-za/news/117255/dstv-stream-new-features/

[28] https://www.dstv.com/en-za/help/faqs/services/catch-up/what-is-catch-up/

6.31.1 The content that can be watched on Catch Up is linked to the channels on the package that the subscriber has subscribed to.[29]

6.31.2 Users can only download 25 Catch Up shows to their decoder at any one time.[30]

6.31.3 Live or near live broadcasts can take between 12-24 hours to be added to Catch Up. DSTV aims to add other shows to Catch Up within a few hours.[31]

6.32 Over 175 hours of content is available on the DSTV Exploras.[32] That is far less than all but 2 of the OTTs compared by the Authority in paragraph 2.4.5.25.

6.33 Not all content is included on Catch Up because Multichoice does not have the rights to include all content on Catch Up. Content that is not on Catch Up can be recorded and stored on a user's Playlist on certain decoders (subject to the limitation of 110 hours mentioned above).[33]

6.34 Content that is available on Catch Up is only available for a limited time. How long content is available on Catch Up will depend on the agreements between Multichoice and its content providers and can be anything from

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[29] https://www.dstv.com/en-za/help/faqs/services/catch-up/what-is-catch-up/

[30] https://www.dstv.com/en-za/help/faqs/services/catch-up/how-many-catch-up-shows-can-i-download-to-my-dstv-explora/

[31] https://www.dstv.com/en-za/help/faqs/services/catch-up/how-long-does-it-take-for-a-show-to-get-to-catch-up/

[32] https://www.dstv.com/en-za/help/faqs/services/catch-up/what-decoders-have-catch-up/

[33] https://www.dstv.com/en-za/help/faqs/services/catch-up/why-can-t-i-select-which-shows-get-included-on-catch-up/

a few days to a few months after first broadcast,[34] although local content may be longer.

6.35 The BoxOffice feature is limited in the following ways:

6.35.1 In order to rent a movie from DSTV Box Office a user must pay to rent that movie. It is an additional charge on top of the monthly subscription for DSTV (even for DSTV Premium subscribers).[35]

6.35.2 Once rented, BoxOffice movies are only available for 48 hours.[36]

6.36 There are thus notable differences between the linear content offering and functionality available to Multichoice's Premium package subscribers and subscribers of OTTs (including Multichoice's Showmax), such that it is doubtful whether OTTs compete with Multichoice's premium satellite subscription television offering.

7. <u>REGULATION</u>

7.1 The Authority fails to consider that the regulation of MultiChoice's premium satellite service is, in and of itself, a basis to conclude that it is in a separate market from unregulated OTT streamers.

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34 https://www.dstv.com/en-za/help/faqs/services/catch-up/how-long-are-programmes-available-for-on-catch-up/

35 https://www.dstv.com/en-za/buy/boxoffice/#:~:text=Anytime%20is%20Movie%20Time%20with,all%20available%20at%20your%20fingertips.

36 https://www.dstv.com/en-za/buy/boxoffice/#:~:text=Anytime%20is%20Movie%20Time%20with,all%20available%20at%20your%20fingertips.

7.2 Supply substitutability considers whether producers of one product could easily retool to produce another, such that they would constrain a price increase. Competition authorities include supply-side substitutes in the same market only if suppliers can switch to the other product **rapidly and without significant cost or risk**. Regulatory requirements directly impact this analysis. If a business must obtain a license or meet regulatory conditions to supply a product, it **cannot immediately enter** that market. The EU Commission's Notice on Market Definition explicitly notes that **legal or regulatory obstacles (e.g. "the necessity of holding a particular licence") are barriers that may prevent supply-side switching.**[37]

7.3 In other words, even if a firm has the technical capability to offer a service, the absence of a required license will **preclude entry**. Often this means that the regulated service remains insulated from competition by unlicensed suppliers,[38] but the converse is also true. **Regulation imposes costs on the supplier of the regulated service that places it in a different anti-trust market**.

7.4 Licensing constraints thereby set **boundaries on offerings** and segment the market.

7.5 Barriers to entry are closely tied to market definition because if entry is difficult, incumbent products face less competitive constraint from potential substitutes. Regulation often raises entry barriers: licensing

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37 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:C(2023)6789

38 For example, the Competition Tribunal observed, in a radio merger context, in the Primedia decision, that **"to broadcast, a station needs a licence… and must comply with prescribed format obligations"**, which limits a rival station's ability to simply switch format or expand coverage. Primedia Ltd and Others v Competition Commission and Another (39/AM/MAY06) [2008] ZACT 30 (9 May 2008)

requirements, spectrum allocation limits and the hoarding of satellite transponder space by incumbents, and local content quotas can all deter or slow competition. Academic commentary on regulatory economics notes that **sector-specific rules can create "legal barriers to entry"** that reinforce market power of incumbents.[39]

REGULATED VS UNREGULATED PRODUCTS

7.6 South African precedents highlight that regulation can delineate markets. In the **Primedia/Kaya FM** decision (Tribunal reconsideration, 2008), the Tribunal grappled with whether different radio stations competed in the same market for advertising. It noted that ICASA's licensing regime imposed **format and geographic limitations**: one station was licensed for "adult contemporary music" in Gauteng and another for "adult African contemporary music," each with specified broadcast areas.[40] These licence conditions "set boundaries on the possible offerings and listeners stations competed for". The Commission's expert accordingly defined a narrow market (Gauteng-based English adult contemporary radio advertising). The merging parties argued that each station was so constrained by its license that it did not effectively compete with others – implying nearly each was its own market. While the Tribunal did not go so far as to treat every station as a separate market (to avoid "each station being a monopoly of its own"), it acknowledged that **licensing constraints reduce substitutability**. Stations targeting different mandated genres or regions were not considered close substitutes by advertisers. The outcome was a segmented market analysis, much narrower than a hypothetical unregulated scenario where all radio stations (or even all advertising

39 Laffont & Tirole, *Competition in Telecommunications*, 2000.
40 saflii.org

media) might be in one market.

7.7 In telecommunications, market definitions have evolved with regulatory change. In **Telkom/Business Connexion (BCX)**, a 2007 merger which the Tribunal prohibited, Telkom was the "de facto monopoly" provider of fixed-line telecom infrastructure, while BCX operated in competitive IT services.[41]

7.8 The Tribunal identified distinct relevant markets: (1) telecommunication infrastructure (entirely dominated by Telkom under its license), and (2) managed network services (where BCX and others competed). It explicitly noted that Telkom's core network was a monopoly until a second network operator (Neotel) entered under a license in the mid-2000s. This regulatory monopoly insulated Telkom's infrastructure market – it was **not disciplined by unlicensed entrants** because none could legally build national networks at the time. Meanwhile, downstream IT services were unregulated, open to entry. The Tribunal observed Telkom's incentive to **leverage its regulated monopoly into unregulated markets** (vertical integration)

7.9 This case underscores that where one segment is highly regulated (or even a legal monopoly), it will be treated as a separate relevant market from adjacent unregulated segments, since the competitive conditions differ starkly. Indeed, only years later, after regulatory liberalization under the Electronic Communications Act 2005 (introducing a technology-neutral licensing regime), was Telkom's repeat merger attempt with BCX cleared – by then the market landscape had shifted, with more entrants and

[41] https://ryan-hawthorne.squarespace.com/s/BCXTelkom-merger-CCRED-Review6.pdf#:~:text=following%20a%20recommendation%20for%20prohibition,conditions%20by%20the%20COMESA%20Competition

converged services blurring the old boundaries.[42]

7.10 Another recent Tribunal matter in broadcasting is **eMedia Investments v MultiChoice (2022)**, concerning MultiChoice's decision to drop certain licensed free-to-air channels from its DStv satellite platform. Although an interim relief case (not a final market definition ruling), the record is informative. MultiChoice had argued that its business faces "*a significant and escalating threat from unregulated global OTT operators*" (like Netflix, Amazon Prime, etc.), which "*have significant competitive advantage over traditional operators, particularly because they face none of the costs associated with providing traditional services*."[43] This statement highlights a crucial point, and in fact the opposite of what MultiChoice was contending: streaming services are unregulated in South Africa (at least historically, no ICASA license or local content quotas have applied to Netflix), whereas MultiChoice's DStv is subject to extensive regulation (licenses, must-carry obligations for public channels, local content requirements, etc.). The **regulatory costs and obligations** are part of the product offering. MultiChoice's must invest in local content to meet quotas, whereas Netflix's content spending is entirely at its discretion. These differences make the services *less* substitutable.

7.11 All these factors support treating licensed broadcast services as a separate market from unlicensed streaming.

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42 https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/55c31148e4b0bb1423fd8a16/1438847304011/BCXTelkom+merger+CCRED+Review6.pdf

43 https://www.saflii.org/za/cases/ZACT/2022/67.pdf#:~:text=to%20do%20so%20arises%20because,they%20face%20none%20of%20the

INTERNATIONAL EXAMPLES

7.12 International competition cases likewise recognize that regulation can carve out separate markets. In the United States, courts have on occasion distinguished regulated products in market definition – for example, courts separated **regulated taxi services from unregulated ride-sharing** in some local competition disputes, reasoning that licensing, insurance, and safety rules differentiate the services. In the EU, telecom merger reviews historically separated **fixed-line telephony markets (often former state monopolies)** from emerging internet-based voice services, given the latter were not subject to the same telephony regulations and initially catered to a different consumer base. The European Commission's Notice on Market Definition notes that **sector-specific rules (like needing permits or licenses) can segment geographic or product markets by limiting outside competition.**[44]

7.13 A concrete example is the European Commission's **Deutsche Telekom** case, where the incumbent's regulated local access network was considered its own market, distinct from other platforms, because competitors could only enter by meeting regulatory conditions (i.e. leasing the incumbent's network under mandated terms) – an acknowledgment that the regulation-created monopoly of the local loop made it a separate market (and enabled an abuse of dominance via margin squeeze).

7.14 Scholarly literature supports treating regulated and unregulated products as separate markets when regulation limits substitution. Professor Bishop

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[44] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:C(2023)6789#:~:text=human%20capital%2C%20establishment%20of%20brand,3%20of%20the%20Technical%20Annex

and Walker observe that **high entry barriers – whether structural or legal – mean that potential competition remains "out-of-market" for the timeframe of analysis**, so the incumbent's market power is unchecked.[45] Legal barriers like licensing are cited as classic entry barriers in both economics and law. In regulated industries, products may have inelastic demand due to lack of alternatives (often the rationale for regulation in the first place), reinforcing their market isolation.

7.15 Regulatory economics also teaches that when a firm's prices or outputs are constrained by a regulator, traditional market analysis must be adjusted: one cannot assume that an unregulated entrant would immediately discipline a regulated firm's conduct, especially if the entrant does not offer a perfect substitute or faces its own limitations.

7.16 In summary, the consensus is that regulation can create "competition on the merits" only within a circumscribed field, and antitrust market definitions should respect those boundaries rather than pretend a level playing field that does not exist.

7.17 In broadcasting, South Africa's regulatory regime (through ICASA) requires that anyone transmitting a TV or radio channel over the air or satellite obtain a broadcasting licence, adhere to content standards, and often fulfil public interest mandates. Unregulated content services – such as global streaming or social media platforms – historically had no such requirements. The result is that domestic broadcasters operate under different cost structures and limitations.

7.18 eMedia thus submits that unless and until regulatory parity is achieved,

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[45] Bishop & Walker, *The Economics of EC Competition Law*, 3rd ed., 2010.

traditional satellite broadcasting should be viewed as a separate market/s for competition analysis, with OTT services in a different market and at the most a fringe competitive constraint. eMedia notes that ICASA has no statutory authority to regulate OTT streaming services.

8. MULTI-HOMING AND COMPLEMENTARITY

8.1 A key finding by the Authority in the 2019 Draft Findings Document was that OTT streaming services are complements to traditional satellite broadcast services. That analysis remains just as cogent today.

8.2 The degree of multi-homing (subscribing to more than one of the services) versus switching entirely is a key factor in market definition – high multi-homing suggests the services fulfil different needs (pointing to separate markets), whereas widespread one-for-one switching would indicate a single market.

8.3 For many years, a very significant portion of consumers have regarded the services as complementary.[46] In 2019, the Authority had regard to the fact that MultiChoice itself acknowledges that the OTT market is expected to develop in parallel with, and to complement pay-TV in the future, both in terms of subscribers and revenue.[47]

8.4 Even Multichoice *still* believes that viewers lean into streaming video content as a "*complementary or supplementary use of traditional linear*

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[46] See CC201604-Darji-R-Mkwanazi-S-and-Njisane-Y-2016-Disruptive-technologies-in-Telecommunications-Broadcasting-and-Transport-sectors.pdf at page 15.

[47] Draft Findings, para 5.12.7 citing MultiChoice Group Limited, pre-listing statement, 21 January 2019, page 27.

broadcast tv".[48]

8.5 In other words, the general trend is that consumers have added Netflix and other OTT streaming services but have *not* cancel DStv – implying that Netflix is not a full substitute but rather a different product fulfilling additional entertainment needs. Moreover, some content categories are clearly not substitutable: a live sports fan (especially in South Africa) would consider switching from satellite to a streaming service impossible, simply because streaming services lack the sports channels that they need particularly in relation to sports of national interests including those involving national teams and events such as World Cups and the Olympics. A consumer might consider Netflix, for example, a complement to a movie channel package on DStv, but certainly not a substitute for live TV generally.

8.6 As noted, this was effectively the Authority's finding in 2019. There is simply no reason to expect that anything has changed. OTT services have grown, but that simply means that this (separate) market has grown.

8.7 In its discussion of the issue of whether the products are complements or substitutes (at para 2.4.10 of the Supplementary Discussion Document), the Authority cites a quantitative study by Nyarenda into the variability in consumers' behavioural intent to use OTT platforms. The study found that about 89% of the respondents interviewed indicated that they use OTT services in conjunction with their subscription television platform (DStv). This is an enormous proportion.

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48 https://www.dstv.com/mediasales/southern/our-platforms/#:~:text=DStv%20Media%20Sales%20(DMS)%20provide,and%20migrating%20audiences%20at%20scale

8.8 The Authority also cites a study by PwC in paragraph 2.4.10.3, which comes to the same conclusion.

8.9 Startlingly, in the very next paragraph, the Authority appears to reject this quantitative information (and indeed all of its conclusions and 2019) on the basis that "*none of these studies conduct detailed analysis of the impact of the nature of cord-stacking behaviour on the revenue and profitability of MultiChoice*". With respect, this leaves a lot to be desired. Quite apart from the fact that it is totally unclear what the Authority is referring to, there is simply no justification to disregard clear survey evidence in this fashion. Such survey evidence is direct evidence from consumers of how they view the markets. It was precisely the basis on which the Competition Commission concluded that OTT services are complements rather than substitutes .

8.10 The fundamental difficulty with the Authority's approach is that no one, other than the Authority, has access to the data required to assess the impact on the revenue and profitability of MultiChoice. Put differently, MultiChoice is in a private dialogue with the Authority, and, with respect, the latter must be exceptionally cautious in making this the key bases for its conclusion. Reference is made to what is set out above in this regard and the request for access to certain such information subject to appropriate confidentiality undertakings being given.

8.11 In paragraph 2.4.10.6, the Authority says that it has been "*informed*" by MultiChoice that it "*has been losing a significant number of subscribers, with a significant number of those lost subscribers switching to OTT services*". And that "*between 2016 and 2023, the DStv Premium bouquet has lost [Redacted] of its subscribers to alternative services*".

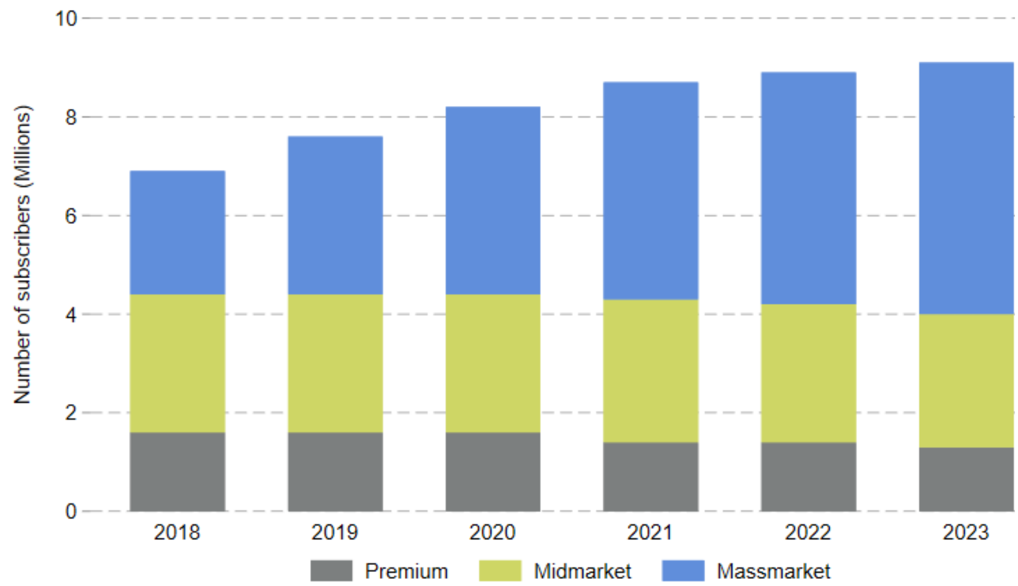
8.12 This is an unacceptable basis to reach a conclusion. What the Authority is effectively saying is that it is prepared to accept the untested "say so" of MultiChoice.

8.13 First, it is by no means clear how MultiChoice <u>knows</u> that a subscriber that has terminated its DStv Premium subscription has switched to an OTT service. Where is the data that confirms this? There is certainly no data referred to in the Supplementary Discussion Document.

8.14 Second, the statement that MultiChoice has been losing "*a significant number of subscribers*" is simply *untrue*. eMedia notes that the Authority states in various paragraphs of the Supplementary Discussion Document that MultiChoice has lost subscribers since 2019.[49] On the basis of information that is available to eMedia, MultiChoice has not lost subscribers at all during the period between 2016 and 2023, although there may have been a very marginal decline in 2024, relative to 2023. The figure below shows the total number of subscribers on the DStv platform, broken down into different types of bouquets (as defined by MultiChoice itself).

[49] See, for example, para 2.4.5.13

Figure 1: Total number of DStv subscribers in South Africa, 2018 to 2023



Source: MultiChoice Public Documents
Note: "Premium" includes Premium and Compact Plus bouquets, "Mid Market" includes Compact and Commercial[50] and "Mass Market" includes EasyView, Access and Family bouquets.
MultiChoice measures subscribers based on all subscribers that have an active primary/principal subscription with MultiChoice within the 90-day period on or before reporting date.

8.15 MultiChoice has clearly not "lost subscribers" since 2019.[51]

8.16 The largest share of DStv subscribers, and the overwhelming source of its ongoing growth in subscriber numbers are in regard to the lower-priced mass market packages. Lower-cost packages – including DStv Family, Access, and the ultra-budget EasyView – have been the primary growth engine for MultiChoice in South Africa. This mass-market segment consistently expanded from 2016 through 2023. MultiChoice reported

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[50] DStv's Commercial bouquet, also known as DStv Business packages, offers tailored entertainment solutions for businesses like hotels, lodges, restaurants, and offices

[51] As of March 31, 2023, DStv reported approximately **9.3 million 90-day active subscribers** in South Africa; https://multichoice-reports.co.za/group-iar-2023/south-africa-operations.php?utm_source=chatgpt.com.

"sustained growth in the mass market" throughout these years.[52] The mass segment has added subscribers at a very healthy rate annually. For example, in FY2022 the low-end base grew about *7%*, from 4.6 million to 4.9 million 90-day active subscribers, an addition of 300 000 subscribers in a single year.[53]

8.17 In FY2023, despite tough conditions, the mass market tier still **grew by 10%** year-on-year[54] – a remarkable gain – even after a mid-year price increase on those packages. **DStv Access** (one of the cheapest bouquets) has been highlighted as a "springboard" for future growth, as many first-time pay-TV households start there. MultiChoice has noted customers upgrading from Access to the slightly pricier Family package when they can,[55] indicating an aspirational ladder within the mass segment. Thus, converting a large base of budget subscribers was a deliberate strategy: capture the broader market and then attempt to upsell or retain them long-term as incomes improve.

8.18 By 2023, the vast majority of South Africa's DStv subscribers were on these lower-tier plans, which cost a fraction of Premium.

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[52] https://multichoice-reports.co.za/group-iar-2019/our-operations.php#:~:text=Currently%2C%20our%20customer%20base%20is,strong%20returns%20for%20our%20shareholders

[53] https://mybroadband.co.za/news/broadcasting/448162-dstv-exodus-premium-subscribers-not-the-only-ones-leaving.html#:~:text=It%20was%20only%20in%20the,recorded%20growth%20in%20South%20Africa

[54] https://multichoice-reports.co.za/group-iar-2023/south-africa-operations.php#:~:text=Our%20mass%20market%20tier%20sustained,targeted%20campaigns%20and%20upgrade%20strategies

[55] https://multichoice-reports.co.za/group-iar-2023/south-africa-operations.php#:~:text=Our%20mass%20market%20tier%20sustained,targeted%20campaigns%20and%20upgrade%20strategies

8.19 In short, entry-level DStv options (Family, Access, EasyView) steadily climbed from 2016–2023, underpinning the *overall* subscriber growth in South Africa.

8.20 While it *may* be correct that MultiChoice has lost some subscribers in the premium segment, it has certainly not lost "*a significant number of subscribers*" overall, as suggested by the Authority.

PROPERLY IDENTIFYING THE BOUQUETS IN 'PREMIUM MARKET'

8.21 The submissions below do not detract general point made in section 3 concerning the lack of clarity regarding the boundaries of the relevant markets.

8.22 eMedia hardly has to point out to the Authority that MultiChoice has a number of different bouquets aimed at various LSM groupings. For the purposes of understanding movements of subscribers, however, it is necessary to clearly identify in which market these different services are alleged to compete.

8.23 Regrettably, the Supplementary Discussion Document does not deal with this at all. Two paragraphs of the 2019 Draft Findings Document reveal that ICASA, at the time, considered the 3 cheapest DStv bouquets (EasyView, Access and Family) to fall into the "Basic Tier" market,[56] and the DStv Compact bouquet to fall into the Premium Market (along with the Premium bouquet, Compact Plus and (presumably) its Commercial offering.[57] The Supplementary Discussion Document is completely silent

[56] Draft Findings, para 7.3.8.

[57] See Draft Findings, para 5.12.41.

in relation to which bouquets are in “basic tier” and which are considered to be in “premium” market. As no other market between “basic tier” and “premium” is defined by the Authority, eMedia has had to assume that the Authority has and will continue to allocate the bouquets as follows:

8.23.1 **ICASA’s “basic tier” market:** EasyView, Access and Family (competing inter alia with eMedia);

8.23.2 **ICASA’s “premium” market**: MultiChoice's Premium Bouquet, Compact Plus, Compact *as well as* its Commercial offering.

8.24 eMedia again highlights that the understanding of which bouquets are in which market is critical. It is very important to note that the Authority’s market definition would *not* correspond with MultiChoice's definition of ‘premium’. ICASA would include Compact in the Premium Market, whereas MultiChoice would consider this to be part of a “midmarket” segment. Premium, according to MultiChoice, is merely the Premium Bouquet and Compact Plus Bouquet.

8.25 But if this is correct, then the 2025 Supplementary Discussion Document is confusing in relation to the movement of subscribers. The Authority appears to have taken MultiChoice's subscriber losses to the *Premium Bouquet* as a proxy for subscriber switching in its *Premium Market* as a whole. This cannot be logically sustained. The Authority needs to analyse alleged subscriber losses in the *Premium Market* as a whole. This is what the SSNIP test would require. The simple reality is that if the Premium Bouquet, Compact Plus, Compact and Commercial bouquets are all in the *Premium Market* (because they cannot be in the “basic tier” market), then MultiChoice’s actual subscriber *losses* in the *Premium Market* are really minimal.

8.26 The Figure 1 above suggests that between 2018 and 2023, MultiChoice has actually only 'lost' approximately 150 000 subscribers in the Premium Market (as defined by the Authority). Given that this market has over 4 million subscribers, that translates into percentage loss of approximately **3.61%**.

8.27 That is really not "significant".

8.28 Accordingly, eMedia urges the Authority to reconsider its findings that:

8.28.1 MultiChoice has lost a significant number of subscribers overall; and

8.28.2 MultiChoice has lost a significant number of subscribers in the Premium Market as defined by the Authority.

NO EVIDENCE OF SIGNIFICANT *SWITCHING* TO OTT SERVICES

8.29 Even if losses to the *premium bouquets as defined by MultiChoice* could be an appropriate measure, the data available to eMedia does not support the conclusions that the Authority has reached.

8.30 The narrative that MultiChoice has cultivated, and which appears to have been uncritically accepted by the Authority, is that the entry and expansion of global streaming platforms in South Africa has been the sole cause of a significant decline in DStv (premium) subscriber numbers, and indeed that it poses an "existential threat" to the entire DStv business model.

8.31 None of this is correct, as the information below shows.

8.32 The table below shows how DStv's premium bouquet customers declined between 2018 and 2024.

DStv premium segment subscribers South Africa		
Financial year-end	Change from previous year	Subscribers
March 2018	n/a	1.6 million
March 2019	-7%	1.6 million
March 2020	-4%	1.5 million
March 2021	-8%	1.4 million
March 2022	-4%	1.4 million
March 2023	-6%	1.3 million
March 2024	-8%	1.2 million

8.33 This means that from March 2018 to March 2024, DStv premium segment subscribers (as defined by MutliChoice, not the Authority) have declined by 400 000.

8.34 It is important to note, however, that MultiChoice has repeatedly revised the way it reports its subscriber figures, making it difficult to track the decline in premium subscriptions over several years. Initially, it was possible to calculate the number of Premium subscriptions on their own by using Naspers's subscriber mix statistics. After Naspers spun off MultiChoice, the company started reporting Premium and Compact Plus subscribers in a single group in 2019. Very importantly, from 2020, MultiChoice switched from reporting the number of "*paying subscribers*" it had at the end of its financial year to "*subscribers that have been active in the past 90 days*". This change in the method of reporting may have a tendency to exaggerate the numbers of subscribers that are alleged to have stopped using the service, seen over a period from 2018 to 2024.

8.35 Moreover, this data does not differentiate between subscribers that have simply *downgraded* their subscriptions from the premium packages (as defined by MultiChoice) to the mid-market bouquets and those that have *cancelled* their subscriptions altogether. This is critical information. If, for example, even half of the 400 000 subscribers that have allegedly been lost to the premium bouquets, have in fact simply downgraded to a mid-market bouquet (Compact), this fundamentally changes an assessment of whether a significant number of subscribers have *switched* (substituted) to OTT services.

8.36 But even if we do make an assumption that *all 400 000 cancelled* their DStv premium subscription, this information must then be compared with the data in Figure 3 at paragraph 2.4.11.5 of the Authority's Supplementary discussion document. This shows that over the same period, 2018 to 2023, there was a *massive* growth in the number of active subscribers to OTT services, from 4.2 million (in 2018) to 8.3 million (in 2023). This is an increase in *over 4 million OTT consumers*, which is significantly in excess of the number of premium DSTV subscribers that have allegedly been *lost*.

8.37 eMedia submits that the following is patently clear:

8.37.1 there has been significant growth in the (separate) market for OTT services;

8.37.2 there has not been a *corresponding* decline in the number of active DTtv subscribers, either to MultiChoice as a whole, or even to the premium segment;

8.37.3 given this growth in the OTT market (i.e. given the number of <u>new</u>

consumers of OTT services), the Authority cannot uncritically conclude that consumers are *substituting* DStv for OTT services, i.e. *switching* from DStv premium to OTT (there is no casual connection between the two);

8.37.4 put differently, the data is not evidence of *substitution*.

8.37.5 rather, it appears to be clear evidence of substantial growth in the relatively new, but *separate* market for OTT services.

8.38 This is not particularly surprising if one takes a step back and considers the reality of the world we live in. What is in fact happening is that a largely younger, and more tech savvy, set of consumers is sampling a new form of entertainment (OTT services), which:

8.38.1 does not require them to be tied to a particular device (a TV set at home);

8.38.2 offers very significant mobility (they can watch Netflix anywhere they like); and

8.38.3 is not temporally limited (requiring them to be at a particular place at a predetermined time to watch a linear stream).

8.39 Regulators worldwide are examining this issue. Ofcom in the UK, for instance, found in 2018 that while streaming may compete with linear TV at the margins, a significant segment of viewers (especially older and rural viewers) choose to remain with regulated broadcast services, indicating distinct markets.[58] Its latest report for 2023 does not paint a different picture.[59]

MultiChoice itself does not identify OTT streaming as a cause of DSTV premium's decline

8.40 Importantly, MultiChoice itself has attributed the pressure on its satellite subscription services to other factors, not OTT streaming services.

8.41 Thus, MultiChoice's 2024 Annual Report records the following:

> "Rising inflation and unemployment across our markets are hindering our customer's ability to afford their preferred DStv and GOtv subscriptions.
>
> Subscriber growth is typically more muted in a year that follows the FIFA World Cup, but FY24 came in below trend as the subscriber base declined YoY in the face of a deteriorating macro and consumer environment. Despite the typical resilience of pay-TV in a downturn, many of our would-be customers cannot afford to consistently pay for our product or choose not to subscribe when power availability is unreliable.
>
> South Africa Pay-TV (MultiChoice South Africa)
>
> The South African economy continues to endure severe economic pressure, with consumers under financial distress due to the cost-of living squeeze from high inflation and interest rates. Consistent loadshedding through FY24 created an environment where customers without backup power were reluctant to subscribe to our service due to the uncertainty of whether they would be able to watch. The net effect was increased pressure on subscriber numbers, activity and viewership, with active subscribers down 5% to 7.6m at year-end.
>
> In terms of subscriber mix, the premium customer tier (which includes

[58] Ofcom, *Media Nations Report* for 2018 referred to by the Authority in the Draft Findings, at para 5.13.1.

[59] https://www.ofcom.org.uk/siteassets/resources/documents/research-and-data/multi-sector/media-nations/2023/media-nations-2023-uk/?v=330012, page 8.

the Premium and Compact Plus bouquets) declined by 8%, with the Premium bouquet remaining far more stable than Compact Plus given focused retention efforts and the progression in the Premium base towards a more stable core cohort of subscribers. The Compact base, much like the Compact Plus base, is most exposed to the challenges in the macro-economic environment with the mid-market customer tier down 9% as a result. Having delivered consistent growth in recent years, the mass market tier declined by 2%, due to pressure in the Family base, as well as the impact of loadshedding and reduced decoder subsidies.

We are in the fortunate position that we don't have to choose between linear and streaming – in some markets, where broadband and data is more readily available, streaming will continue to grow fast … and in others, our linear offer remains the cheapest option to watch video for the average household. As the Home of Entertainment and the ultimate aggregator, DStv provides a lean-back entertainment experience with the option to stream - one place for customers to browse, subscribe for and consume all of their content across all their devices."[60]

8.42 None of this suggests that MultiChoice considers itself to be *losing* subscribers to OTT streaming services.

MULTICHOICE'S RESPONSE TO THE OTT MARKET GROWTH

8.43 It is also important to consider what MultiChoice has done in response to very obvious, rapid growth in the OTT market. Put simply, it has seen this as a *new market opportunity* and employed various strategies that have only served to *promote* such services in South Africa.

8.44 First, we have seen Multichoice employing a hybrid strategy of partnering with or bundling its existing service with streaming services. MultiChoice has reached deals to integrate Netflix and Amazon Prime Video into its

[60] https://investors.multichoice.com/pdf/integrated-annual-reports/FY24/mcg-iar-2024-hr.pdf

decoder and offer unified bundles.[61]

8.45 The idea is a one-stop subscription where a customer pays one bill for both DStv and Netflix, etc. A Mybroadband article of 12 August 2020[62] quotes the MultiChoice CEO as follows:

> "**MultiChoice CEO Calvo Mawela said** it makes sense for DStv to become a one-stop-shop where you pay one bill and get access to all streaming content, including Netflix, Amazon, Hulu, and YouTube.
>
> Mawela said pay-TV operators like MultiChoice have always operated in a multi-channel environment where they purchase content from third-party providers.
>
> This third-party content is then aggregated into the DStv platform and sold to subscribers in the form of DStv bouquets.
>
> Mawela said adding streaming players to the DStv platform is a natural progression of pay-TV into the online space.
>
> "We have always seen ourselves as a one-stop-shop where you can get content from all content producers in Africa and around the world," said Mawela.
>
> He added that Netflix is essentially a <u>content provider</u>, as are Amazon, Hulu, YouTube, and many others.
>
> He said MultiChoice is reaching out to all the streaming platforms around the world with the aim of providing their content to DStv subscribers."

8.46 It is not economically rational for one competitor to actively promote a direct competitor in this fashion. If DStv premium and Netflix were competitors, this bundling strategy would be akin to an iStore devoting an entire section of a shop floor to Samsung phones. Needless to say, this

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[61] https://mybroadband.co.za/news/broadcasting/363570-dstv-bundling-plans-with-netflix-investigated-by-competition-commission.html#:~:text=Image

[62] https://mybroadband.co.za/news/broadcasting/363570-dstv-bundling-plans-with-netflix-investigated-by-competition-commission.html#:~:text=Image

would never happen, and appreciating this means that there is considerable doubt that MultiChoice really considers Netflix to be *competitor* to its premium satellite service.

8.47 The existence of these bundles in fact underscores that MultiChoice itself sees OTT streaming and DStv as **complementary services**, rather than pure substitutes.

8.48 If they were perfect substitutes targeting the same customer need, one would also expect a legacy firm such as MultiChoice to make significant investments to improve its *existing* offering at the risk of losing customers to OTT service providers. This is not what MultiChoice has done. Rather, and this is the second strategy, it has made substantial investments in new OTT services, DStv Stream, and more particularly, Showmax.

8.49 The first step was the development of the **DStv Now** app (recently rebranded to DStv Stream), which allows DStv subscribers to watch live channels and catch-up content on smartphones, tablets, and smart TVs. By FY2019, DStv Now had become a core part of the offering (included free for all DStv subscribers). In subsequent years, MultiChoice went further by enabling a "DStv Streaming"-only option – customers can subscribe to DStv packages *without a satellite dish* or decoder, using just the app and an internet connection.

8.50 A cornerstone of MultiChoice's response to the growth of the streaming market has been **Showmax**, its subscription video-on-demand (SVOD) platform. Launched in 2015, Showmax is the group's answer to Netflix – offering a catalogue of movies, series, and originals via internet streaming. Between 2016 and 2023, MultiChoice poured enormous resources into strengthening Showmax and integrating it with its pay-TV ecosystem. For instance, DStv Premium subscribers have been given free access to Showmax as a value-add, and other DStv subscribers could add Showmax to their bill at a discount.[63]

8.51 Showmax has differentiated itself by focusing on **local African content** and sports. It carries many of MultiChoice's own productions. By FY2023 MultiChoice reported Showmax subscriber growth of 26% year-on-year, and a 51% jump in Showmax revenue.[64] MultiChoice's latest financial statements, being its Consolidated Interim Financial Statements For The Period Ending September 2024, report a continuation of this trend as follows:

> "The group's subscription video on demand business, Showmax, delivered a strong 30% YoY increase in paying subscribers, or 50% YoY excluding discontinued services (namely the Showmax Pro and the Showmax diaspora offerings)."[65]

8.52 In 2022–2023, MultiChoice entered a partnership with U.S. media giant Comcast's NBCUniversal and Sky. Announced in March 2023, the deal saw Showmax re-launched on Peacock's streaming platform technology, with NBCUniversal/Sky taking a 30% stake.[66]

8.53 The strategic partnership gives Showmax access to a vast library of

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[63] https://multichoice-reports.co.za/group-iar-2019/our-operations.php#:~:text=alternatives%20in%20our%20territories,subscription%20to%20their%20DStv%20bills

[64] https://investors.multichoice.com/pdf/annual-results/FY23/fy23-results-fact-sheet.pdf

[65] https://investors.multichoice.com/pdf/interim-results/1h-fy25/1h-fy25-results-booklet.pdf

[66] https://investors.multichoice.com/article.php?articleid=13684#:~:text=MultiChoice%27s%2050,leading%20streaming%20service%20in%20Africa

premium international content (from NBCUniversal, Sky, HBO, Warner Bros, etc.) *in addition* to MultiChoice's local content and sports. The aim is to create **"the leading streaming service in Africa,"** combining the best of local and global entertainment, including live EPL football, under one revamped Showmax platform. This joint venture effectively injects cutting-edge tech and content depth into Showmax, enabling it to better compete with Netflix and Disney+ *on their own turf*. MultiChoice's CEO Calvo Mawela called it an opportunity for Showmax to scale new heights by "working with a leading global player".

8.54 Notably, Dana Strong, Group Chief Executive Officer, Sky, commented, "*This new collaboration in streaming and content with MultiChoice, NBCUniversal, and Sky takes our partnership to the next level in one of the world's most vibrant, fastest growing markets*."[67] She was, of course, referring to the *OTT services market*.

8.55 The company has committed significant investment to this venture. For example, in FY2024 MultiChoice and NBCU planned to spend ~$177 million on Showmax's development.[68]

8.56 MultiChoice has also actively promoted Showmax. It has, for example, entered into a partnership with Capitec giving the bank's 12 million app users in South Africa access to the streaming service at a *50% discount*.[69]

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67 https://investors.multichoice.com/article.php?articleid=13684#:~:text=,a%20winning%20platform%20going%20forward

68 https://www.reuters.com/business/media-telecom/safricas-multichoice-tv-nbcuniversal-invest-177-mln-showmax-2024-02-01/#:~:text=%28MCGJ,year%2C%20they%20said%20on%20Thursday

69 https://mybroadband.co.za/news/broadcasting/557912-real-reasons-dstv-and-showmax-dont-support-4k.html

This is utterly extraordinary and not the conduct of a firm that truly considers OTT streaming services to be a competitor of its traditional satellite offering. It is, rather, the conduct of a firm that regards these OTT services as complements.

8.57 All of this is clear evidence of MultiChoice developing a new OTT service to compete with Netflix and other OTT streaming services, given the substantial growth in this separate market.

8.58 For the avoidance of doubt, the fact that MultiChoice offers both premium satellite services under the DStv brand, as well as Showmax, does not lead to a conclusion that these services are in the same market. On the contrary, it is indicative of the economic reality that there are *separate* markets and MultiChoice has appreciated that it can compete it both. Put simply, Showmax (and *not* DStv premium) is MultiChoice's offering in competition with Netflix.

8.59 Finally, in paragraph 2.4.7.5 of the Supplementary Discussion Document, the Authority suggests that a study by Udoakpan, Nokuphiwa & Tengeh, Robertson. (2020),[70] supports the conclusion that "*the Consumer is in a position to pay for an additional OTT service and still come in cheaper than the DStv Premium package*" and that "*This could be the reason MultiChoice has been losing subscribers to OTT services in its mid to high-end bouquets*". The study in fact concludes as follows:

> "Thus, based on the findings, <u>the researchers conclude</u> that OTT TV services are a complementary service to pay-TV services instead of a substitute, and both services have their unique advantages.

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[70] The Impact of Over-the-Top Television Services on Pay- Television Subscription Services in South Africa. Journal of Open Innovation Technology Market and Complexity. 6. 139.

> Furthermore, in South Africa, pay-TV subscription services will continue dominating OTT TV, and this is mainly due to sporting rights, live content, breaking news, and availability of fast, affordable broadband data."[71]

8.60 It is surprising that the Authority has not reflected this *conclusion*.

8.61 eMedia therefore submits that OTT streaming services are indeed complements and *not substitutes* to DStv's premium satellite service.

9. PRICING

9.1 An important consideration in the assessment of substitutability is the pricing of the products or services being compared.

COMPARING APPLES WITH APPLES

9.2 With respect, on the basis of the information that is provided in the Supplementary Discussion Document eMedia believes that the Authority is not comparing apples with apples.

9.3 In particular, the critical comparison is not between (1) what it would cost a consumer who may have an active OTT subscription to watch a few two hour movies in a month, and (2) the cost of a subscription to DStv. eMedia submits that the comparison must take into account what it would cost to *replicate* the DStv experience. The latter involves a once off monthly fee, with the subscriber then forgetting about the cost and being free to watch

[71] https://www.mdpi.com/2199-8531/6/4/139, paragraph 5.

as much TV as they like.

9.4 In essence, what the Authority needs to be considering is the total cost to *replicate* that *experience* on an OTT streaming platform. At the very least, this in turn requires some consideration of the average number of hours that a family watches DStv in a month.

9.5 To illustrate the point, eMedia uses the very conservative assumption that an average family (not a marginal customer) will watch 10 hours of DStv a week, which translates into 43 hours a month.

9.6 Streaming on an OTT service such as Netflix in South Africa consumes a considerable amount of data, approximately:

9.6.1 **High Definition (HD) 1080p**: up to 3 GB per hour;

9.6.2 **Ultra High Definition (UHD) 4K**: up to 7 GB per hour.[72]

9.7 Therefore, a household that is streaming (and using internet access for no other purpose) for a mere 10 hours a week would require approximately **30 GB** in HD and **70 GB** in UHD 4K.

9.8 On a monthly basis (43 hours), a consumer would utilise at least **125 GB** of date viewing Netflix in HD and **301 GB** in UHD 4K.

9.9 eMedia submits that this is the appropriate calculation given that DStv is available 24/7 for a monthly fee. Again, the Authority is required to

[72] https://help.netflix.com/en/node/87 and https://www.androidauthority.com/how-much-data-does-netflix-use-976146/

analyse the extent to which a typical consumer could replicate the *DStv experience*, and that in turn involves appreciating that DStv viewers are entirely agnostic as to how much time they spend on the platform (they are not watching their data) and that it is not implausible to assume that a typical household will watch DStv for ten hours a week.

9.10 The Authority's own information reveals that this can be incredibly expensive. For example, on the basis of the table in para 2.4.9.2 of the Supplementary Discussion Document, a consumer would need to spend a minimum of R2000 on data to replicate DSTv (assuming viewing at 10 hours a week).

9.11 Indeed, eMedia submits that this replication is really only feasible on an uncapped internet connection, which does not throttle a consumer for using more than 125GB of data a momth, which in turn is only feasible on a fibre to the home connection or perhaps some fixed LTE services.

9.12 There is simply no analysis of the extent of penetration of such services in South Africa.

9.13 Moreover, in paragraph 2.4.7.3, the Authority seeks to compute the breakdown of the cost of accessing a typical OTT combination, consisting of a Netflix Basic subscription at R99 plus an average fixed LTE or FTTH broadband service at approximately R349. The problem with this analysis is that the broadband service package chosen (Axxess MTN for R349.00) would throttle a subscriber if they used over 100 GB of data a month under an Acceptable Use Policy (UAP).[73] The effect of this throttling is that the

[73] https://www.axxess.co.za/lte/mtn-lte?gad_source=1&gclid=Cj0KCQjw4v6-BhDuARIsALprm30xi8rclBnpG7a3ich-8WLT0RzxNe2nm9as9JAT4ckEMNF9zBHRDnYaAnLVEALw_wcB

line speed would be reduced to 2 MB/s, which the Authority recognises is too slow for OTT streaming.

9.14 It is important to emphasise that the above analysis assumes that the internet subscription is being used for no other purpose, i.e. that it is dedicated to watching OTT streaming services. The moment it is accepted (as eMedia submits it must) that an internet connection may also be used for multiple other purposes in a month (including video calls, gaming, etc), the cost of the amount of data required increases exponentially. If there is only sufficient data left over to watch OTT streaming services for a few hours a month, it is not a true substitute for a DStv premium package.

9.15 It follows that there are a number of variables that the Authority has not considered.

THE CELLOPHANE FALLACY

9.16 The Authority has mentioned the cellophane fallacy but, with respect has failed to consider its implications.

9.17 It is uncontroversial that when defining a relevant market, what matters is substitutability at the competitive price, not at the current price. The "cellophane fallacy" warns that prices may already be supra-competitive. Richard Whish *Competition Law* (5th edition, pages 30-31) explains the 'cellophane fallacy' as follows: '*A monopolist may already be charging a monopoly price: if it were to raise its price further, its customers may cease to buy from it at all. In this situation, the monopolist's "own price elasticity" — the extent to which customers switch from its products in response to a price rise — is high. If an SSNIP test is applied in these* *circumstances between the monopolised product and another one, this might suggest a high degree of substitutability, since consumers are already at the point where they will cease to buy from the monopolist; the test therefore would exaggerate the breadth of the market. This error was committed by the US Supreme Court in United States v EI du Pont de Nemour and Co [351 U.S. 377 (1956)] in a case concerning packaging materials, including cellophane, since when it has been known as the "Cellophane Fallacy".*'.

9.18 The critical point for present purposes is that the Authority has failed to consider that MultiChoice's price for its premium services is at the monopoly level, and has been for some time. If this is so, the simple explanation for the loss of subscribers is not "*competition from OTT services*" but rather that the current cost of living crises in South Africa has made it unaffordable.

9.19 Put simply, consumers that were historically able to afford MultiChoice's monopoly prices now have less disposable income and are electing to cancel their DStv premium subscription. MultiChoice's premium subscriber numbers may be declining as a consequence, but it would be a mistake to assume that this is because they are *substituting* to OTT services. This is a clear example of the cellophane fallacy.

9.20 There are in fact very clear indications that this is what is going on. Economic pressure and affordability have significantly impacted the mix of DStv subscribers. South Africa's economic climate has put many consumers under financial strain. Low GDP growth, high unemployment, and rising living costs (fuel, electricity, food prices) have meant fewer households can afford premium pay-TV. MultiChoice itself has cited **intense macro-economic pressure on consumers**, especially in recent years[74]. Middle-income customers were hit by inflation and interest rate hikes, causing downgrades from Compact or Compact Plus to cheaper tiers.[75]

9.21 Persistent high unemployment and the cost of living crisis has also limited the pool of new customers.

9.22 Additionally, South Africa has, for many of the past few years, faced an **unprecedented energy crisis** which has had an impact on MultiChoice. South Africa's rolling blackouts became more frequent and severe by 2022–2023. As power outages reached Stage 4+ regularly, TV viewership and subscriber activity dropped because people literally could not watch TV for hours. The company also noted that worse loadshedding correlated with lower subscription recharges and renewals in the period.

9.23 All these economic factors drove a **value-conscious shift**: subscribers gravitated to DStv's affordable bouquets (or left entirely) to save money. This dynamic eroded the upper segments but fuelled mass-tier growth.

9.24 Another factor is the perceived value of DStv's content relative to its price. MultiChoice's DStv Premium package has long been anchored by exclusive sports (e.g. English Premier League, local soccer, rugby, cricket) and a wide array of channels. However, outside of sports, customers have questioned the value of paying for large channel bouquets when they primarily watch a few of them. Indeed, MultiChoice's own survey data

74 https://multichoice-reports.co.za/group-iar-2023/south-africa-operations.php#:~:text=challenging%20period,We

75 https://multichoice-reports.co.za/group-iar-2023/south-africa-operations.php#:~:text=challenging%20period,We

has showed declining satisfaction with pay-TV pricing.

10. ADVERTISING

10.1 In respect of advertising, MultiChoice (through DSTV Media Sales) offers advertising opportunities to reach people through its decoder and streaming platforms.[76] The Authority says that global OTT services can be expected to introduce advertising on some of their lower-tier services in South Africa in the near future [paragraph 2.4.6.4].

10.2 However, PwC believes it will likely be some time before OTT streaming platforms will introduce more affordable subscriptions with ads in South Africa.[77] Moreover, even MultiChoice does not have immediate plans to introduce advertising on its Showmax streaming service.[78]

10.3 There are two points to make in relation to the Authority's observation.

10.4 First, premium Satellite TV services in South Africa are an example of a so-called two-sided market: they earn subscriber fees but also carry advertising on many channels. OTT services are not a significant platform for advertisers, and certainly not in South Africa. While eMedia accepts that this *may* change some time in the future, the second point becomes

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[76] https://www.dstv.com/mediasales/southern/our-platforms/#:~:text=DStv%20Media%20Sales%20(DMS)%20provide,and%20migrating%20audiences%20at%20scale

[77] https://mybroadband.co.za/news/broadcasting/580695-bad-news-for-cheaper-netflix-in-south-africa.html#:~:text=By%20Daniel%20Puchert,by%20the%20Covid%2D19%20pandemic.

[78] https://mybroadband.co.za/news/broadcasting/574946-good-news-about-dstv-prices.html

relevant.

10.5 The second point is that antitrust market definition is typically based on current market conditions and short-term responses, not on speculative future trends. Generally, antitrust law is cautious about speculating about nascent competition.

10.6 At present, therefore, premium subscription satellite TV services are in a separate two-sided market from OTT services in South Africa.

11. CASE PRECEDENT

11.1 In paragraph 2.4.12 of the Supplementary Discussion document, the Authority refers to a number of foreign cases. They are primarily merger cases in various local jurisdictions in the European Union.

11.2 eMedia submits that great care must be taken in referring to such case law. The Authority cannot simply assume that such foreign case precedent is applicable to South Africa. South Africa's particular circumstances must be considered.

12. THE AUTHORITY'S DELAY

12.1 To assess the fact that the Authority has acted in a matter creating an image of perceived favouritism, in a manner which has unjustifiably favoured certain broadcasters over others and justifies a conclusion that the Authority has acted in dereliction of its duties, it is necessary to set out a brief history of the Authority's approach and previous positions and statements in relation to the subscription broadcasting market. This history pre-dates the commencement of this inquiry in 2016 – more than 9 years ago.

12.2 The fact that this inquiry has still not been finalised, having commenced more than 9 years ago, on its own justifies the conclusion that the Authority has acted failed certain of its licensees. By no stretch of the imagination could or should an inquiry take a decade to conclude (and this response is not even the final phase of the inquiry).

12.3 Preceding the commencement of the current process in 2016, the following developments bear relevance.

12.3.1 In May 1998, the Department of Communications published its "White Paper on Broadcasting Policy". In this White Paper, the Department recognised that – "*Fair competition between broadcasting services should prevail*".[79] This has since been included as one of the objects in the Electronic Communications Act.

12.3.2 Accordingly, the need to ensure level playing fields and fair competition in the broadcasting industry dates back more than 25 years. The White Paper specifically dealt with the issues which existed at the time, inter alia by prohibiting any subscription broadcaster from earning more advertising income than subscription income. However, the Department of Communications could not have known what it now knows concerning the growth of subscription broadcasting. It also recommended that limits be placed on subscription broadcasters' ability to purchase exclusive broadcasting rights for national sporting events, an issue which has

[79] At paragraph 3.3.2, page 23 of the White Paper.

shown its face in recent times.

12.3.3 It bears mentioning that MultiChoice was, in essence, gifted a licence and was able to operate until 2007 without any licence terms and conditions imposed on it. Moreover, when it had to apply for a subscription television broadcasting licence in what was, in effect, a beauty contest, it was merely "regifted" a licence and then, on terms which were more favourable than other licensees operating within the private sphere.

12.3.4 On 1 June 2005, the Authority published its Position Paper on "Subscription Broadcasting Services". This followed on from the Authority having published its Discussion Paper into the inquiry into subscription broadcasting on 23 April 2004.

12.3.5 Pursuant to the White Paper, the Authority already began considering issues pertaining to satellite broadcasting when it published its Discussion Paper on satellite broadcasting in April 1999. However, this inquiry was not finalised

12.3.6 Importantly, at the time, one of the reasons this process was not finalised was that one of the Councillors who presided on the original satellite inquiry was unavailable, and this lack of continuity made it difficult to conclude the process. This is a crucial aspect which needs to be considered for current purposes. The numerous delays, over a period of decades and years rather than months, means that with each step of the way, there is no lack of continuity. It is no doubt for this very reason that section 4C of the ICASA Act makes it peremptory for the Authority to make a finding on the subject matter of any inquiry and publish its findings in the Government Gazettes "*within*

<u>180 days</u> from the date of conclusion of the inquiry ...".

12.3.7 It was already then, when the Discussion Paper was published in 2004, some 20 years ago, that the Authority was considering introducing a regulatory framework for subscription broadcasting in South Africa. Yet, 20 years hence, the process that commenced in 2004 has still not been completed and the regulations which the Authority contemplated introducing at the time are still just that – regulations in the ether which may (or may never) be introduced to regulate subscription broadcasting in South Africa.

12.3.8 In the Discussion Paper published by the Authority in 2004, the Authority already recognised that MultiChoice had an unfair market advantage creating barriers of entry into the market, and accepted that there was a need to regulate competition amongst subscription broadcasting services to "*<u>ensure effective and sustainable competition</u>*". Yet, 20 years later, it has taken no steps in this regard. As stated, by failing in its duties, the Authority has aided and abetted the entrenchment by MultiChoice of its unfair market advantage thereby preventing new entrants into the marketplace from being able to survive, and impacting the viability of free-to-air broadcasters as well. In this regard, for many years, including in the 2004/2005 processes, the need to limit the advertising available to subscription broadcasters has been raised. Time and time again since then, this has been ignored by the Authority.

12.3.9 Importantly, in response to the 2005 position paper, MultiChoice submitted to the Authority that the impact of subscription television broadcasting services on the advertising revenue on free-to-air terrestrial television broadcasting services had been minimal and that, notwithstanding the fact that advertising would increase commensurate with growth of subscribers, "*it is unlikely that it will ever account for a similar percentage of revenue received by terrestrial subscription television broadcasting services*". Self-evidently, this has not been the case and hence the Authority's failure to decide, since 2005, to place a limit on advertising has had an adverse effect on the ability of free-to-air broadcasters to compete against the MultiChoice monolith. MultiChoice has eaten into the advertising of free-to-air broadcasters while receiving substantial subscription revenue, which has meant that MultiChoice has been able to entrench itself by entering into exclusive content deals, not only in respect of movies, but also sports.

12.3.10 In 2007, during the process of licensing new entrants into the subscription television market, the Authority was again given the opportunity to somehow regulate the market to license new entrants to compete with MultiChoice. The Authority simply glossed over the suggestions made in this regard and failed to regulate any of the anti-competitive practices engaged in by MultiChoice including, for example, tiering subscription plans for consumers, and the ability to do so after obtaining direct information of the plans of all potential new entrants into the market.

12.4 This notwithstanding, it took the Authority a further nine years before it commenced with the current process. During this period, MultiChoice was able to further entrench its position in the market and to increasingly encroach on the total television advertising spend.

12.5 It appears that the Authority did not deem the five year period between 2016 when the Inquiry was initially contemplated and 2021 when the hearings concluded (and which constituted the *conclusion of the inquiry*) as being long enough and detailed enough for it to make its findings. As forewarned by eMedia Investments at the 2021 hearing, those hearings would not put an end to the matter. In this regard eMedia stated: "*Further submissions and hearings will need to be held concerning any proposed regulations. This will take a further several years*".

12.6 Further, in 2021, eMedia also pointed out that MultiChoice had already alluded to the possibility of reviewing any decisions by the Authority during which further period it would not be restrained in any way and could further entrench its position.

12.7 For the sake of completeness, eMedia attaches the presentation it made at the 2021 hearings. The reason for doing so is the very real fear that the Authority will simply 'forget' the points made, which remain just as important today.

12.8 Regarding the current Inquiry, this process commenced almost 9 years ago when, on 11 July 2016, ICASA published a notice in GG40 GNR40256 communicating its intention to conduct an inquiry in order to establish, *inter alia*, why no other subscription broadcasting service licensees had been able to succeed.

12.9 The history relating to the current Inquiry is as follows:

12.9.1 On 11 July 2016, the Authority gave notice of its intention to conduct an Inquiry into subscription broadcasting services as provided for in section 4B of the ICASA Act. In doing so, it referenced the inability of the seven licensees who had been licensed to provide subscription broadcasting services in 2007 and 2015 to get off the ground.

12.9.2 In the aforesaid notice, the Authority recognised its "*commitment and mandate to ensure that markets are effectively competitive*". Indeed, it is for this reason that it commenced the Inquiry.

12.9.3 The Inquiry was divided into the following stages –

12.9.3.1 An information gathering stage in accordance with section 4C of the ICASA Act consisting of requesting stakeholders to respond to questionnaires;

12.9.3.2 The publication of a discussion document for public comment;

12.9.3.3 The publication of a findings document; and

12.9.3.4 Depending on the findings set out in the findings document, the Authority would possibly engage in the process of prescribing regulations in terms of section 67(4) of the ECA which requires the Authority to prescribe regulations in terms of which pro-competitive conditions can be imposed upon licensees having significant market power where the Authority determines that this is so.

12.10 The Authority completed phase 1, being the information gathering and, on 25 August 2017, it published a discussion document for public comment. This was, in effect, the beginning of stage 2 as outlined above.

12.11 Pursuant to its publication of the discussion document of 25 August 2017, interested parties made submissions. The Authority extended the closing date of submissions to 4 December 2017 when it received 18 submissions.

12.12 Pursuant to receiving the aforesaid submissions, public hearings were held from 7 to 11 May 2018. Following these hearings, the Authority requested additional information from various stakeholders. It took from May 2018 until December 2018 for this information to be gathered.

12.13 Phase 3 of the process envisaged the publication of a Findings Document. Only a "draft Findings Document" was published on 12 April 2019 for comment. The written deadline for submitting representations in relation to the findings document was 21 June 2019, being three years after the 2016 notice was published.

12.14 Seventeen stakeholders commented on the findings document.

12.15 The next hearings were scheduled for six months later, 9 May 2020, but were postponed due to the prohibition of gatherings as contained in the relevant Covid-19 Disaster Management Regulations. However, it is by no means clear why these hearings could not be convened remotely, on, or at least relatively soon after 9 May 2020, as ICASA has subsequently done. The hearings were postponed and took place between 12 and 15 January 2021. These hearings concluded the inquiry.

12.16 In terms of section 4C of the (6) of the ICASA Act, the Authority is <u>obliged</u> to make a finding on the subject matter of an inquiry and publish a summary of its findings in the Government Gazette "*within 180 days from the date of [the] conclusion of the inquiry ...*".

12.17 Despite this legislative obligation, the Authority breached the provision of the Act and failed to make a finding as prescribed in the ICASA Act. eMedia points out in this regard that section 8 of the ICASA Act provides that a Councillor (or Councillors) can be removed from office because of their inability to perform their duties efficiently.

12.18 The Authority did not act efficiently. Rather, on 9 May 2022, no doubt because it had sat on its laurels and belatedly realised that it had done so, ICASA issued a media statement in which it stated that, rather than publishing its findings document, it had resolved that, "*based on ongoing developments and what is a rapidly changing market, the consultation process in respect of the Inquiry into the Subscription Broadcasting Services Market must be extended into the current financial year.*"

12.19 Eighteen months passed. On 10 November 2023, ICASA published a further consultation notice, issuing new questionnaires to update market insights. Stakeholders were required to respond by 22 January 2024, which was extended to 15 February 2024.

12.20 No doubt exhausted by the endless process, very few interested parties chose to respond. The Supplementary Discussion Document reveals that only five responded. This alone should be cause for alarm. It is simply not in the interests of proper regulation to delay an outcome for so long there is no longer any public participation. Further, the Authority delayed almost one year before it issued its Supplementary Discussion Document for comment on 6 January 2025.

12.21 Given the objects of the Electronic Communications Act 36 of 2005 (**ECA**), one of which is to promote competition within the ICT sector (which notably does not include OTT streaming services), and the obligations of the Authority as a regulator to promote the objects of the ECA and related legislation, as well as to make decisions in relation to matters which have come before it, its failure to do so (as set out above) in relation to the subject matter of the Inquiry, constitutes a gross dereliction of duties.

12.22 It smacks of the Authority, for reasons unbeknown to eMedia, favouring the existing monopoly subscription broadcaster over all other players in the industry. It is trite that justice must not only be done but must be seen to be done.

12.23 Rather, the Authority has, for decades, simply shirked its responsibilities in dealing with the Inquiry and making any final findings and accompanying regulations.

12.24 eMedia once again submits that this has been to the advantage of the dominant subscription broadcaster, Mutichoice/DStv.

12.25 The endless and excessive delays in finalising the Inquiry, has allowed MultiChoice to continue acting in a dominant manner in the subscription broadcasting market, as it has done for years. eMedia has issued numerous warnings of the consequences of MultiChoice's dominance not only insofar as free-to-air television is concerned, but also in relation to the ability for new licenced entrants into the subscription broadcasting market to succeed. Despite eMedia warning the Authority that this would happen in 2007 when new entrants were being licenced, and arguing that the Authority should deal with certain predatory practices during the licensing processes, these warnings and suggestions went unheeded.

12.26 Similar regulatory processes as the one now being undertaken in the Inquiry, have also not resulted in any definitive decisions and regulation within the subscription broadcasting market.

12.27 The Authority is, therefore, solely to blame for what has happened in the market; it is the Authority which has created the circumstances allowing MultiChoice's dominance to thrive; and it is the Authority which has created an uncompetitive market environment which has doomed any new entrants to failure.

12.28 The Authority had, in April 2019, already published its draft findings into the Inquiry. In these findings, it found that:

> "In all the identified markets where there is ineffective competition the Authority found that <u>MultiChoice possesses significant market power</u> on the basis of high market shares and the nature of its vertical integration which the Authority [deems] to harm competition."

12.29 At that stage, given that finding, it was the Authority's duty to move to the next phase as per its own plan, culminating in the issue of regulations. Yet, and embarrassingly so for the Authority, it did not do so. Rather, some six years later it has, through its own conduct (or perhaps misconduct is the preferred word) deemed that its previous conclusions were wrong.

12.30 Further, in its draft findings, the Authority considered what appropriate licence terms and conditions should be imposed to deal with ineffective competition in the relevant markets. These were as follows –

12.30.1 Reducing contract duration and prohibiting automatic renewal contracts with a duration of five or more years;

12.30.2 Preventing renewal of contracts without the rights owners going back to the market;

12.30.3 Limiting the number of studios a licensee with significant market power should have access to for entering into agreements at any one time so that other studios are freed up for other competitors.

12.31 These were urgently needed in 2019. Today, they appear to be as far off as ever. This is inexplicable and unconscionable.

12.32 In the circumstances, all of eMedia's rights are reserved, including the right to approach a competent court for appropriate relief.

13. <u>CONCLUSION</u>

13.1 Based on the legal and economic submissions above, eMedia submits that premium subscription satellite TV services and on-demand streaming services should not be found to lie in the same relevant market. They exhibit meaningful differences in format, content offerings, and usage that have led many competition authorities to treat them as distinct markets.

13.2 In antitrust terms, the demand-side substitutability between the two is imperfect and incomplete. A small but significant price increase by MultiChoice may push some margin of cost-sensitive consumers to cut the cord in favour of Netflix or another OTT streaming services, but many others would stay because streaming cannot fully replicate the live and linear content experience. Likewise, a price hike by an OTT streaming service might cause subscribers to cancel, but they are far more likely to switch to another streaming service than to revert to DStv (illustrating that the closest substitutes for OTT services like Netflix are other OTT services, not MultiChoice).

13.3 eMedia submits that the Authority should retain the market definition in its 2019 Draft Findings Document. The Authority got it right 5 years ago and there is no justification for change.