

EMEDIA'S COMMENTS AND SUBMISSIONS ON THE DISCUSSION DOCUMENT ON THE MARKET INQUIRY INTO SIGNAL DISTRIBUTION SERVICES IN SOUTH AFRICA

Introduction

- 1 eMedia Investments (Pty) Ltd ("eMedia") thanks the Independent Communications Authority of South Africa ("ICASA" or "the Authority") for the opportunity to comment on the Discussion Document on the Market Inquiry into Signal Distribution Services in South Africa ("the Discussion Document") which was published on 22 April 2022 in Government Gazette No. 46255.
- 2 eMedia appreciates that there is a need for an inquiry to assess the state of competition in the broadcast signal distribution market. An inquiry is necessary to determine whether or not there are markets or market segments within the broadcast signal distribution service value chain which may warrant regulation in the context of a market review in accordance with section 67(4) of the Electronic Communications Act 2005 (Act No. 36 of 2005) ("ECA"). The Discussion Document is phase 2 of the four phases the Authority has determined it will follow in conducting the inquiry.
- 3 Pursuant to receiving comments on the Discussion Document and hearings, it is the Authority's intention to produce a "Findings Document". While eMedia appreciates the Authority is now undertaking an inquiry and is taking steps to issue a Discussion Document before it makes findings, and, hopefully, regulations, it is deeply concerned at the fact that the issues relating to significant market power in relation to signal distribution services have been ignored for decades. This is despite pleas by the broadcasters that the market needed

urgent regulation. Indeed, the Authority recognised as far back as 2010 that there was an urgent need to regulate the market due to Sentech's undisputed dominance. Yet, the Authority has taken no steps in this regard other than those set out below. All this has been to the detriment of broadcasters and caused them financial harm.

- 4 eMedia holds the view that, as a result of what is set out herein, the Authority has not fulfilled its own mandate and has failed broadcasters while enabling Sentech, the dominant player in the signal distribution services, to further entrench its position. It has allowed Sentech to engage in anti-competitive pricing and exploit this given the uneven bargaining positions between Sentech (as the only option to provide broadcast signal distribution services) and its customers, being television and radio broadcasters.
- 5 The Authority's intervention is required urgently, and it should act with haste in fulfilling its own mandate.
- 6 These submissions focus only on the television broadcasting market.
- 7 The approach taken by eMedia in dealing with the Discussion Document is to provide a historical analysis of broadcast signal distribution services in South Africa since its subsidiary, e.tv, commenced broadcasting in 1998; the role of the Authority to date in trying to regulate providers of broadcast signal distribution services; the impact of Sentech holding Significant Market Power ("SMP"); barriers to entry; concluding with suggestions as to how these practices could be limited and broadcasters protected from such anti-competitive practices. These

submissions will, in effect, answer the questions posed by the Authority in the Discussion Document albeit not ad-seriatim.

- 8 eMedia requires an opportunity to make oral representations relating to the comments contained herein and reserves the right to make additional submissions when such oral presentations take place.

Who we are

- 9 eMedia Investments (Pty) Ltd is a South African media group with holdings in a variety of broadcasting content and production businesses. These include e.tv (South Africa's only commercial free-to-air television broadcasting licence licensee), Openview (a free-to-air satellite multi-television broadcaster) and eNCA (South Africa's most watched 24-hour news channel which is broadcast on DSTV).
- 10 While Openview is a satellite free-to-air platform, e.tv is a free to air terrestrial broadcasting licensee currently transitioning from analogue to digital. In this capacity, it is obviously reliant on signal distribution services by the holder of an Electronic Communications Network Service Licence ("ECNS").

e.tv's historical relationship with Sentech

- 11 Since it was licensed and commenced operating, e.tv (then trading as Midi TV (Pty) Ltd) has used Sentech as its broadcast signal distributor. When e.tv began broadcasting, it had no option but to use the services of Sentech as its broadcast signal distributor. The reason for this was that Sentech was, and in effect

remains, the only licensed entity which was able to provide these services as it had (and still has) no other competitors. This situation remains unchanged and the Authority has recognised that this is the case.

- 12 Accordingly, in August 1999, e.tv (then Midi TV) concluded a transmission agreement with Sentech.
- 13 Despite attempts to renegotiate the agreement, and in particular negotiate the rates being charged by Sentech, Sentech continued charging at rates which e.tv believed were excessive. e.tv maintained that Sentech could overreach them by reason of e.tv having no other options but to use their transmission services and due to their monopoly creating unequal bargaining power.
- 14 e.tv was granted an Electronic Communications Network Service Licence ("ECNS licence") at more or less the same time as being awarded its broadcasting licence so that it could potentially self-provide. However, by reason of the barriers to entry and the costs of establishing the necessary infrastructure to self-provide, it was unable to do so. Sentech, when it was formed as a new public company in 1996 and took over all the existing infrastructure, was given all existing signal distribution equipment and granted exclusivity over transmitter high sites critical for effective transmission. When the Independent Broadcasting Act was repealed by the Electronic Communications Act 36 of 2005 ("ECA"), Sentech lost its status as a "common carrier" and accordingly no longer had exclusivity over transmission high sites. Accordingly, until 2005, e.tv could simply not use anyone other than Sentech but could also not self-provide. The cost of self-providing would have amounted to billions of rands and this, of itself,

rendered self-providing impossible. This has been recognised by the Authority as a barrier to entry. It was only after 2005 that e.tv could have entered into a facilities leasing agreement with Sentech in terms of the ECA. The difficulties associated with this are dealt with further below.

The Authority's failure to regulate the provision of signal distribution services in South Africa

15 For some years after the agreement was signed between e.tv and Sentech, e.tv made numerous approaches and held discussions with representatives of the Authority. These discussions related to e.tv's concerns about Sentech's dominance in the marketplace and Sentech's anti-competitive prices which were difficult, if not impossible, to negotiate.

16 Pursuant to this, in Notice 928 of 2010 (Government Gazette 33599 of 30 September 2010), the Authority gave notice of its intention to embark on a section 4B inquiry into wholesale transmission services. In this notice, the Authority recognised the following:

"Should a monopoly situation exist, it would mean that there is an opportunity for transmission services providers to engage in a number of anti-competitive practices such as denial of access and excessive pricing which can take excessively long to resolve if left solely to ex post regulation. Such potential monopoly behaviour can represent a risk to broadcasters which want their content to be distributed, and new operators who want to establish their own transmission services."

17 In 2010 the Authority stated that the objective of the inquiry was to deal with concerns raised by broadcasting services licensees and to understand the

markets facilitating the ultimate end-to-end process of delivering broadcasting content to end users.

18 Thereafter, the Authority conducted interviews, circulated a questionnaire to interested parties, published a Discussion Document and held public hearings.

19 The Authority envisioned that the next phase of the inquiry would be the development of regulations in terms of section 67(4) of the ECA should this be necessary.

20 Pursuant to this, on 15 June 2011 in Notice 346 of 2011 (Government Gazette No. 34371 of 15 June 2011), the Authority issued a Discussion Paper for comment ("the 2011 Discussion Paper").

21 The 2011 Discussion Paper recognised, *inter alia*, the following:

21.1 There is ineffective competition in the signal distribution market given that Sentech is, and has been, the only option for the provision of MTS;

21.2 There is unlikely to be effective competition with the introduction of new competitors into the market by reason of –

21.2.1 the high sunk costs and investments required for a new entrant;

21.2.2 the costs of Sentech providing MTS have already been substantially incurred and accordingly represent a sunk cost given that it has been in existence for many decades;

- 21.2.3 the difficulty any new entrant will have to entice existing customers of MTS away from Sentech; and
 - 21.2.4 technological barriers which would make it difficult for a new entrant to provide an equivalent radio service to existing suppliers.
- 21.3 Broadcasters have little, if any, countervailing bargaining power in dealing with Sentech given that broadcasters have no other choice. This is exacerbated by broadcasters who broadcast nationally having to meet coverage obligations to provide services to a set percentage of the total population;
- 21.4 Sentech is in a privileged situation given its access to capital markets or financial resources as, given that it is a government-owned entity, it has access to government funding or other funding at the privileged rates that government may attract;
- 21.5 Sentech is likely to remain dominant given its infrastructure including sites for transmission, access roads, buildings, masts and associated services needed to make up a MTS;
- 21.6 Broadcasters, other than Mnet, had no choice but to purchase MTS from Sentech given not only that Orbicom has fewer sites which would not enable broadcasters to comply with their licence obligation relating to population reach, but Orbicom only provided services to Mnet and Multichoice;

- 21.7 Sentech also benefitted significantly in terms of the switch over from analogue TV to digital TV and the move to DTT as its heavy investment was totally funded by government. This fact was not taken into account when Sentech finalised its DTT broadcast signal distribution tariffs.

The Authority's findings in relation to the consequences of Sentech having market power in the 2011 Discussion Paper

- 22 Having identified different national markets of Managed Transmission Services for the purposes of providing analogue (and digital, when available) terrestrial television broadcasting services within South Africa (the other national markets are not relevant for purposes of this submission), the Authority concluded that:

- 22.1 Further competition in the market for MTS on a terrestrial network was unlikely and there were limited prospects for new entrants – a situation which would persist for some years;

- 22.2 In the absence of regulation, licensees such as Sentech who have SMP can adversely impact the market through exploiting their market power and bargaining position resulting in excessive pricing. Regulation would ensure that broadcasters could secure transmission services on reasonable terms (which they currently cannot). There were a range of pro-competitive remedies which could address the impact of SMP in the marketplace which included the non-exhaustive list of remedies and pro-competitive terms and conditions which the Authority could impose in terms of the ECA. These included –

- 22.2.1 timely compliance with licence terms and pro-competitive conditions;
 - 22.2.2 to act fairly and reasonably in relation to the provision of services, facilities leasing and access;
 - 22.2.3 transparency through obligations to publish terms and conditions;
 - 22.2.4 non-discrimination; and
 - 22.2.5 price controls, such as cost-orientation and an obligation to publish tariffs annually.
- 22.3 The fact that Sentech, as a government-owned entity, could further entrench its position (thereby increasing the barriers for entry) given that it has access to government funding (such as provided to Sentech for purposes of DTT) or other funding at the privileged rates that governments may attract. This would likely give it a privileged position compared to privately funded entities.
- 22.4 Further barriers to entry included the fact that a significant part of the costs that Sentech incurs in providing MTS have already been incurred and represent “sunk costs” given that Sentech’s transmission network has been built up over a number of years and the assets were transferred from the SABC. New entrants would have to incur significant upfront investments in order to provide the equivalent MTS to existing customers.

- 23 Pursuant to the 2011 Discussion Paper, much the same as the Authority has now done in the Discussion Document, the Authority raised numerous questions which interested parties could answer dealing with, *inter alia*, characterisation of the various markets in South Africa (including the broadcast market), assessment of market power and identification of licensees with SMP and other related matters. Numerous parties made submissions in response to the 2011 Discussion Paper.
- 24 Unfortunately, without any reasons being given by the Authority, this initial process was never concluded. Inexplicably, and without known reason, the Authority elected not to take the matter further, and failed to publish any regulations. The result of this, and in the absence of such regulations, Sentech, as the only player in the broadcasting transmission services market and hence having SMP, has continued with its anti-competitive practices unabated. This is particularly so in relation to pricing and other contractual arrangements. The situation remains as it is and the need to regulate Sentech as having SMP is even more urgent and important with the looming ASO and the need for Sentech to enter into new contractual arrangements with broadcasters, including e.tv.
- 25 In effect, 12 years after indicating that it would be conducting an inquiry into broadcasting transmission services, nothing has changed. Rather, the Authority has elected to publish the discussion document to look at the very same issues which it grappled with in 2010 and 2011. Many of the conclusions set out by the Authority in the discussion document are those which it already had and which were reflected in the 2011 Discussion Paper. Not only is this wasteful of the Authority's resources together with those of the broadcasters, but the delay has

severely prejudiced broadcasters who have been required to continue paying excessive prices imposed on them by Sentech. Over the years, this has merely gotten worse. So, whereas in 2011, signal distribution costs accounted for approximately 14.6% of e.tv's total costs, today, it is the second biggest cost item and accounts for approximately 22% of e.tv's total cost. The impact of Sentech's SMP and the financial prejudice caused to e.tv is self-evident. By failing in its duties, the Authority has allowed Sentech to overcharge broadcasters including e.tv. In this regard, e.tv submits that in addition to the current inquiry, an inquiry should take place on the impact that Sentech's SMP and dominance has had on broadcasters, including the financial impact, and assess means to redress this imbalance.

- 26 In response to the 2011 Discussion Paper, e.tv made submissions on the regulatory framework for broadcasting transmission services. In summary, e.tv pointed to the following:

26.1 It had commissioned an independent analysis of the signal distribution costs charged by Sentech which concluded that the costs were inflated and carried a large profit margin. The analysis found that despite most of Sentech's infrastructure (such as masts, roads and buildings) having been depreciated, this was not reflected in the price structure used by Sentech in relation to signal distribution for e.tv (nothing has changed).

26.2 Not only were Sentech's analogue tariffs inflated, but the DTT tariffs which it wished to impose were significantly higher than the terrestrial tariffs and were completely unreasonable and without any rationale.

- 26.3 Digital transmission costs should be less than analogue transmission costs and this should be reflected accordingly in the charges (particularly now that the costs associated with the transmission of DTT have been funded by the government).
- 26.4 There were no suitable alternative suppliers who could be used instead of Sentech.
- 26.5 It was difficult for any new players to enter into the market.
- 26.6 Based on the proposals from Sentech made at the time in relation to the costs of DTT, unless there was tariff regulation, broadcast signal distribution costs would rise significantly with severe impact on broadcasters.
- 26.7 Until there was tariff regulation, it would be virtually impossible for e.tv to engage in meaningful negotiations with Sentech on these tariffs due to the uneven bargaining power. Sentech would merely adopt a “take it or leave it” approach. e.tv would have no option but to “take it” given that there were no other alternatives. e.tv would accordingly be forced to accept Sentech’s prices as unreasonable and unjustifiable as they were.

Nothing has changed

- 27 Eleven years since the 2011 Discussion Paper, the Authority has, inexplicably, again elected to conduct an inquiry into broadcasting transmission services. In publishing the Discussion Document, the Authority simply ignores the history

preceding the Discussion Document, including the 2011 Discussion Paper and the matters more fully set out above. Rather, it engages in a process in which the inquiry commences afresh. This, despite the fact that many of the positions adopted in the 2011 Discussion Paper and questions arising in relation thereto, are precisely the same as those contained in the 2011 Discussion Paper. So, for example, in the Discussion Document, the Authority records the following:

27.1 Apart from Orbicom, *“there is no alternative terrestrial supplier to Sentech in South Africa”* (see para 6.1.2 at p 32).

27.2 Due to a range of factors such as high entry barriers, large sunk costs and long-term contracts with existing broadcasters, it is unlikely and probably impossible for another firm to enter the terrestrial broadcasting market to compete with Sentech.

28 Insofar as DTT is concerned, with the rollout it is likely that the same sites will be used as were used for analogue terrestrial broadcasting and therefore there will be economies of scope which an AMTS (in this instance Sentech), could exploit to offer a more competitive service (which is unlikely given Sentech’s dominance in the marketplace and the lack of any other competitor). It is unlikely that there will be potential new competitors entering into the market by reason of:

28.1 The high sunk costs of investment required for a new entrant;

28.2 The existence of long-term contracts;

28.3 Technological barriers making it difficult for a new entrant to provide an equivalent service to existing suppliers given the cost of building a new

network of transmission sites and the need to readjust antennas for existing end-users;

28.4 Broadcasters are unlikely to exert any significant countervailing bargaining power on Sentech;

28.5 Sentech is a government-owned entity and has access to government funding or other funding at privileged rates that government may attract;

28.6 There are numerous significant barriers that make new entry unlikely so that it is likely that Sentech will continue to be the significant market provider of MTS to the majority of broadcasters.

29 In other words, the position currently adopted by the Authority is precisely the same as it adopted in 2011 and nothing has changed. The submissions made by e.tv in 2011 are as apposite today. The only thing that has changed is that although it appears to want to hide the fact that it reached the same conclusions in the 2011 Discussion Paper as it does in the Discussion Document despite which it has done nothing for 11 years, the Authority's inactivity has caused broadcasters, including e.tv, substantial financial prejudice while allowing Sentech to remain uncontrolled and engage in anti-competitive pricing.

30 This is in circumstances where Sentech is itself enjoying huge profits. Sentech's Integrated Report for the period ending 31 March 2021 shows that the company made a profit of over R300 million in the last financial year and holds a cash balance of R2 billion.

- 31 The Authority has, accordingly, failed in its duty in terms of section 67(4)(a) of the ECA which obliges it to, following an inquiry, prescribe regulations imposing *“appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and **if any licensee has significant market power in such market ...**”*.

Where to next?

- 32 The Authority cannot rest on its laurels as it has done since 2011 and needs to urgently proceed with the current inquiry and regulate the transmission services market. While the Authority has shown alacrity of speed in dealing with certain issues, such as analogue switch-off and the spectrum auction, when it comes to dealing with competition issues, it fails to act with alacrity or at all. This is seen not only in respect of the current Discussion Document and inquiry, but also its inexplicable delay in dealing with dominance in and competitive issues arising from the subscription broadcasting market.
- 33 As stated by the Authority in paragraph 2.1.3 of the Discussion Document, the current process is not an end in itself. Rather it is a means to consider imposing effective competition as well as whether there is a need to impose *ex ante* regulation which, in the prevailing circumstances, eMedia submits there is.
- 34 Insofar as facilities leasing is concerned, while the ECA clearly provides that this is possible and obligations exist on an ECNS licensee to lease electronic communications facilities to any other person licensed in terms of the Act (section 43), this needs to be in terms of a leasing agreement to be entered into between

the parties. However, there is no legislation or regulation which defines what such an agreement should include. Most importantly, nothing is said about pricing in the ECA and it is therefore left open to the parties to agree on pricing. However, by reason of what is set out above and the fact that Sentech is an SMP, should e.tv or any other broadcaster wish to enter into a leasing facilities arrangement, Sentech would be able to determine the price. Tariffs need to be introduced on an urgent basis regulating such prices as well as the terms and conditions to be included in any facilities leasing agreement.

- 35 Sentech should be compelled in negotiating new agreements for the provision of DTT terrestrial services not to over inflate its prices by, for example, basing it on costs which have already depreciated or been amortized.
- 36 Regulations need to be imposed for an open and transparent pricing structure and to regulate the tariffs charged by Sentech on a non-discriminatory basis. This will enable broadcasters such as e.tv to engage in meaningful negotiations with Sentech concerning not only the tariffs to be charged but also in relation to the provision of its services. There is no reason why charges proposed by Sentech cannot be subject to a public process before the Authority in much the same way as Eskom's proposed tariff hikes are.
- 37 The Authority is therefore encouraged not to delay this process any further. This will only function to worsen the situation by allowing Sentech to entrench its position and continue engaging in its anti-competitive practices, particularly insofar as pricing is concerned.

- 38 The Authority is, no doubt, well aware of its obligations in terms of the ICASA Act, 13 of 2000, and that in terms of this Act, it **must** make a finding on the subject matter of an inquiry within 180 days from the date of conclusion of the inquiry and publish a summary of its findings in the Government Gazette.
- 39 We thank the Authority for this opportunity to comment on this matter and requests an opportunity to make oral representations relating to the comments contained herein and reserves the right to make additional submissions when such oral presentations take place.

28 June 2022