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## **DISCUSSION DOCUMENT: INQUIRY INTO THE SUBSCRIPTION TELEVISION BROADCASTING SERVICES**

### **COMMENTS BY E.TV**

#### **WHO ARE WE**

1. e.tv is South Africa's first commercial free-to-air television licensee and since its inception has made a significant contribution to the country's broadcasting landscape:
  - 1.1. e.tv is a Level 2 BBBEE contributor;
  - 1.2. e.tv's holding company, eMedia Investments, is majority-owned and controlled by HCI;
  - 1.3. HCI's major shareholder is the SACTWU Investment Group, the investment vehicle for the South African Clothing and Textile Workers Union;
  - 1.4. e.tv's ultimate shareholder beneficiaries are:
    - members of the South African Clothing and Textile Workers Union (SACTWU) and their families;
    - Annual dividend payments are made;
  - 1.5. Eighteen (18) million South Africans watch e.tv daily;
  - 1.6. The channel broadcasts more than 45% South African content;
  - 1.7. The channel makes significant investment in South African independent production, staff development and training – 5.5% of payroll; and



## **INTRODUCTION**

2. e.tv wishes to thank the Independent Communications Authority (“the Authority”) for the opportunity to make inputs into the discussion document as published on 25 August 2017 in Government Gazette No. 41070.
3. e.tv notes that the Authority has acknowledged the processes it has undertaken in the past years to address the question of competition in the subscription broadcasting services in South Africa have yielded little results. e.tv is disappointed though that although a considerable amount of resources were utilised in these processes nothing concrete came out of it. We remain sceptical that this process will lead into some tangible and implementable recommendation in the end.
4. e.tv was given an opportunity to make contribution to this process by responding to a questionnaire from the Authority. Following the submission of our responses, e.tv also met with the Authority to clarify some of the responses it had given. As a result further written inputs were submitted to the Authority.
5. e.tv agrees with the Authority that there is a need to address market failures in the subscription television space. However, e.tv believes that the Authority is taking long to reach the outcome and are concerned that the broadcasting landscape keeps changing drastically. Instead the Authority should have looked at the immediate regulatory failures to be addressed in the short to medium term and leave other matters for the Inquiry process.
6. The Authority acknowledges that it has licensed operators in the past and out of the ten (10), licensees only three (3) launched their subscription television services. However, the Authority does not indicate the factors that made it impossible for the licensees to launch their subscription television services. It would have been very good if the Authority spelt out those factors that are making it difficult for the licensees to launch their services. This may be a sign that market studies are not conducted by the Authority before issuing the invitation to apply in order to license for particular markets. We thus recommend that the final position document to be published by the Authority



must clearly indicate the factors that are a hindrance to the ability of licensees to launch services upon being duly licensed.

## **CHALLENGES FACING THE FREE-TO-AIR (FTA) TELEVISION MARKET**

7. As a FTA commercial television broadcaster, e.tv strongly advocates for a strong FTA television platform in South Africa, which can compete in a multichannel digital environment.
8. The current South African broadcasting policy and regulatory framework is predicated on the notion of a three-tier broadcasting system namely public, commercial and community. Each tier has its own unique business model. The policy and regulatory framework requires each sector to perform public interest obligations to the extent that the obligations for each tier differs. In particular, it is the FTA broadcasters that bear the bulk of the public interest obligations.
9. e.tv submits that there is an urgent need to develop and implement regulatory measures aimed at preserving the viability of the FTA segment of the television broadcasting industry, which is under threat as a result of the increasing dominance of pay-television in the country. This is evidenced by the fact that in total FTA households decreased by 2, 5% from 8, 4 million in 2012 to 8, 1 million in 2016, whilst pay TV households increased by 48, 4% from 3, 9 million in 2012 to 6, 2 million in 2016.
10. If no measures are taken to guarantee the health of the FTA broadcasting services in the country, the vision of ensuring “access to information via print, broadcasting and the Internet, which are vital for building an informed citizenry will be undermined. It also contributes to education and economic development”, as contained in the National Development Plan, 2030, will also seriously be undermined.
11. The weakening of the FTA broadcasters will result in a situation where the majority of South Africans will have to rely on subscription television to access broadcasting services. This will also lead into a situation where the digital divide between the technological have and have-nots will widen further.

### Advertising Revenue



12. The ability of the broadcasting licensees to attract advertising revenue has a direct impact on the health of the South African broadcasting industry as a whole. In particular, the vigorous participation of pay-television players in the advertising market is part of their license conditions and if left unchecked may erode the revenue base of FTA broadcasters, which rely largely, or in the case of commercial FTA broadcasters such as e.tv, solely, on advertising for revenue. Another issue to be considered seriously is the participation of Over-the-Top (OTT) players in the advertising market which is unregulated and is beginning to erode the revenue base for the FTA and subscription-television.
13. e.tv submits that it is known that the growth of subscription TV is directly linked with subscription TV's participation in the advertising market and thus directly undermines the very foundation upon which South African broadcasting policy and regulation is built. The long term consequence amongst others is that the viability of FTA broadcasting, already under threat, will cease and that the public interest obligations imposed on FTA broadcasters may no longer be achieved thus undermining section 192 of the Constitution of the Republic of South Africa.
14. The Broadcasting White Paper of 1998 realised the inherent dangers of allowing pay-television broadcasters to have access to advertising revenue.

*“Since free-to-air services provide the greatest social contribution to the largest number of South Africans, they should have priority to the advertising cake”.<sup>1</sup>*

15. The White Paper further instructed the Authority to take the necessary steps to limit the amount of advertising carried by pay TV operators:

*“The Regulator will review the hourly limits on advertising for free-to-air stations to determine whether they are set at an appropriate level every two years.*

*The Regulator will further review whether the share of advertising revenue by subscription services is appropriate and not detrimental to the survival and viability*

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<sup>1</sup> Chapter 3.3.2: private television (in chapter 3 dealing with commercial broadcasting)



*of the free-to-air services. It will consider whether a lower hourly limit should be imposed upon subscription services.”*

16. To date, ICASA has also taken no action in this regard. e.tv is of the view that such an action is long overdue and is now urgently required.
17. It is against this background that the principles outlined in the White Paper on Broadcasting Policy were carried into the Electronic Communications Act (ECA) No. 36 of 2005, in particular section 60, which makes provision for restrictions on subscription television. To be specific section 60 (4) of the ECA states that subscription broadcasting services may draw their revenue from subscriptions, advertising and sponsorships. Advertising and sponsorship or a combination thereof, may not be the largest source of annual revenue. e.tv is not sure if the Authority has done assessments of the subscription television broadcaster's finances to ascertain if there is compliance with this provision of the ECA.
18. From 2012 to 2016 e.tv has noted that the advertising revenue gap between FTA and pay television has been reduced. In 2012 FTA and subscription television attracted 59% and 41% respectively compared to 52% and 48% in 2016. From these figures it can be concluded that advertising revenue for FTA has declined by 14% whilst the advertising revenue for subscription television has increased by 7%. This should be a cause for concern since the majority of the advertising revenue would have gone to the dominant subscription television operator.
19. e.tv is of the view that section 60 (4) does not in any way limit the ability of the subscription television provider to take revenue from the advertising market and does not protect free-to-air broadcasters in any way.
20. e.tv respectfully submits that the limitations on subscription services' access to the advertising markets (e.g. section 60 (4) of the ECA) must be implemented without delay.
21. e.tv is of the view that the Authority could consider that FTA broadcasters can be given an opportunity to share proportionately in the substantial revenue which the subscription provider collects by introducing the following measures:



- 21.1. *Meaningful Caps on Subscription Service Advertising Revenue.* e.tv believes that stringent caps on advertising revenue share by subscription broadcasters could go a long way towards addressing imbalances in the market. If the subscription provider did not compete with FTA broadcasters for available advertising revenue then it would pose less of a threat to FTA television. But, as mentioned above, the advertising cap placed on the subscription television broadcaster is meaningless and vague. It is common knowledge that the dominant subscription television provider controls almost 100% of subscription revenue in the country and 48% of total television advertising revenue. Under the present cap, the subscription provider could control essentially 100% of annual television advertising nationwide before it reached the cap. Yet if that occurred, FTA broadcasting would have long since ceased to be financially and economically viable. Even at today's levels the financial viability of FTA broadcasting is in question, and the subscription operator's advertising share has been growing steadily as indicated above.
- 21.2. *Proportionate Carriage Fees.* Secondly, e.tv believes that to address the market imbalance would be to ensure the Individual FTA television licensees receive reasonable carriage or integration fees approximating the value they contribute to the pay TV platform. In terms of this approach, the must-carry status as envisaged in section 60 (3) of the ECA would be extended to include all Individual FTA television broadcasting licensees and pay TV broadcasters would be required to compensate those broadcasters for the value of their channels as measured by objective factors such as the audience and revenue performance of the pay TV platform, the content costs of the FTA channel and the contribution each FTA channel makes to the pay TV platform's viewership.
22. In the US, where carriage fees are allowed for, the US Congress<sup>2</sup> acknowledged when adopting these laws in 1992 that<sup>3</sup>:
- 22.1. "a very substantial portion of the fees, which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals."

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<sup>2</sup> Background to the US Carriage laws is provided in Appendix 1

<sup>3</sup> Note that "cable" here refers to pay TV and "broadcast", "broadcaster" or "over the air" refers to FTA TV.



- 22.2. “using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services [and now] sell advertising on these channels in competition with broadcasters.”
- 22.3. this condition “has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting.”
- 22.4. “public policy [does not support] a system under which broadcasters in effect subsidize the establishment of their chief competitors.”
- 22.5. once a home receives cable service “that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on a cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate over which the local system has control.”
- 22.6. “television broadcasting plays a vital role in serving the public interest. [This] role is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favourable terms as consideration for carriage of these signals.”
23. In summary, the U.S. Congress found that subscription broadcasting services undermine the foundation of FTA broadcasting when they use free access to broadcast signals to grow their platforms and then use those platforms to compete with FTA broadcasters in the sale of advertising and the purchase of programming. FTA television can remain free to those who choose not to take subscription services only if FTA broadcasters can receive the fair value of their signals from those who would retransmit them or otherwise use them to enhance the value of their own platforms.
24. e.tv’s firmly believe that the domestic market bears many similarities to the market in the United States in 1992. A dominant subscription television broadcaster has built a large and very profitable business, in substantial part by re-selling FTA broadcast signals while avoiding the considerable costs of public interest obligations. The subscription television broadcaster now acts as a gatekeeper to its subscribers,



making FTA broadcasters dependent on that distribution. Yet the subscription service also takes an extremely large and rapidly growing share of the country's advertising revenue, undermining the viability of FTA broadcasters, even as those FTA broadcasters continue to subsidize growth of the pay television platform.

25. Unlike in the US though, where there is a strong market for regional and local advertising which FTA broadcasters are in the best position to capture, all television advertising in South Africa is national in scope, so the direct-to-home subscription satellite operators are able to compete with the FTA broadcasters for essentially all advertising revenues. That means the erosion in advertising revenue supporting free broadcasting has been especially acute in South.

#### Must Carry Rules

26. Whereas the carriage of the SABC channels is currently subject to the ICASA Must Carry Regulations, 2008,<sup>4</sup> as contemplated by section 60(3) of the ECA, there is no regulation governing carriage of any other FTA channels by pay TV operators.
27. e.tv submits that there is a need to regulate the manner in and the extent to which all major FTA channels are used by pay- television operators. At present e.tv is the second most viewed channel on the DStv Premium and DStv Compact bouquets therefore making a significant contribution to the growth of the platform. Also, over 18% of e.tv's audience watches the channel through DStv, as the default system of convenience and choice meaning e.tv would be in a precarious position if DStv declined to carry it in future.

#### Market dominance

28. The Authority has in paragraph 4.3.5 (pg. 40) correctly indicated that "Multichoice has 98% share of subscription television broadcasting homes". The document further indicates in paragraph 4.3.6 that "..... various means of accessing subscription

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<sup>4</sup> General Notice No. 1271, Government Gazette No. 31500 (31 October 2008)





television broadcasting services, satellite remains the dominant platform with 99.1% share of the subscription .....”.

29. These statements above must be of great concern to the Authority.
30. Since the Authority has entered into a Memorandum of Understanding with the Competition Commission, it should have used this mechanism and report this matter to the Commission for investigation as the Commission is the most appropriate body to deal with ex post competition matters.

#### Access to premium content

31. In South Africa, access to premium content remain the exclusive area for the subscription television.
32. From an economic theory point of view rights holders and subscription broadcasters have incentives to contract with each other on an exclusive basis with respect to premium content. Given the fact that content is a highly differentiated product, subscription operators seek to acquire premium content as a means to differentiate their offerings from that of their rivals in order to compete effectively for a wider audience. In essence subscription broadcasters would want to acquire premium content on exclusive basis because they want to strengthen their position in the market. Equally rights holder would at any given time want to extract maximum value for their content.
33. It is a known fact that exclusivity together with the scarcity of premium content accompanied by intense competition among pay television broadcasters lead to high prices for broadcasting rights which in many instances are unaffordable to FTA broadcasters.
34. e.tv submits that it will be necessary in the future to break the broadcast rights e.g. for sports into FTA and subscription rather than giving all the sports rights to one company.



## **SPECIFIC QUESTIONS**

35. *Q1. Do you agree with the theoretical approach to defining relevant markets and market segments?*
- 35.1. Having looked at the various literature around the theoretical approach to defining relevant markets, e.tv agrees with the proposed approach which looks at the supply-side, demand side and the geographic market (including how various products are priced in a particular market)..
36. *Q2. Are there aspects of this market definition theoretical framework that would not apply to subscription television broadcasting services?*
- None.
37. *Q3. Do you agree with the approach of using the value chain to identify functional markets?*
- 37.1. We note that the Authority used the subscription television value chain as the basis of framing market definition. The value chain identifies five (5) segments of the value chain, namely content production/acquisition/commissioning, content aggregation/channel packaging, retail distribution, transmission networks and consumer interface.
- 37.2. In our submission to the Authority in September 2016, e.tv indicated that it is active on each level of the value chain with its local content production, which is limited to few hours of programming per week and signal distribution is outsourced to Sentech.
- 37.3. So e.tv wishes to submit that the approach of using the value chain to identify functional markets is correct. However, it would have been good if the discussion document went into the details as to what are the regulatory measures the Authority will prescribe in order to address failures in each segment of the value chain.



37.4. Lastly it is e.tv's submission that given the multichannel environment we operate in we propose that technical services be added in the value chain to address access restrictions imposed by the need to encrypt signals for access by paying customers only.

38. *Q4. If not how would you go about defining the relevant market in subscription broadcasting?*

38.1. See the response above.

39. *Q5. Do you agree with the Authority's definition of what constitutes premium content?*

39.1. See section 31 - 34 above for a response.

40. *Q6. What other content would you classify as premium in the South African context and why?*

40.1. No further comment

41. *Q8. Do you agree with the Authority's characterisation of the retail market and the market definition as outlined above? If not how would you define the relevant market/s in this regard?*

41.1. Yes, except to say that both the wholesale and retail markets includes FTA channels as part of the bouquet.

42. *Q9. Do you agree with the authority's characterisation of the wholesale market and the market definition as outlined above? If not how would you define the relevant market/s in this regard?*

42.1. Yes, except to say that both the wholesale and retail markets includes FTA channels as part of the bouquet.

43. *Q10. What is the nature of the bargaining power between independent wholesale channel suppliers and broadcasters? How has the nature of this power changed over time?*



43.1. The independent wholesale channel suppliers has a very strong bargaining power since they can sell their channels, which already include niche advertisers and promotional material on their platforms. Because most of their content is geared towards servicing the niche markets, they are more likely to have more bargaining power when selling their content to broadcasters.

44. *Q11. Do you agree with the Authority's characterisation of the market and market definition as outlined above? If not how would you define the relevant market in this regard?*

44.1. e.tv agrees with the proposed definition.

45. *Q12. Do you agree with the Authority's characterisation of the market and market definition as outlined above? If not how would you define the relevant market in this regard?*

45.1. e.tv agrees with the proposed characterisation since the development of technical services has the potential to become a bottleneck as it may create a new level in the value chain whereby encrypted television signals could be restricted to paying customers through conditional access system and end user navigation assisted by Electronic Programme Guide (EPG).

45.2. It is our view that these systems can be configured in such a way to restrict access to certain networks.

46. *Q13. Is it necessary to define a market for technical services? What are the competition challenges in this market?*

46.1. Yes, see the response in Q12 above.

47. *Q14. Do you agree with the Authority's proposal to use the above factors in determining the effectiveness of competition? Please substantiate your answer.*

47.1. It is important to indicate that the broadcasting industry is one of the most difficult industry to enter by new entrants.



47.2. In preparing the final position paper the Authority is urged to consider the following issues if it is to promote effective competition in the subscription television in South Africa, namely:

- a) the presence of existing dominant broadcaster who may have long established relationship with viewers and advertisers;
- b) Availability of suitable programming at reasonable prices;
- c) consumer costs to be incurred by them when deciding to switch between different broadcasters; and
- d) capital investment required in setting up a subscription broadcasting service.

48. *Q15. In your view, are there any competition concerns and is there a need for regulatory intervention in the market for the acquisition of non-premium content?*

48.1. None at this stage.

49. *Q16. Kindly comment on the nature of barriers to entry in the upstream market.*

49.1. See our comment in section 29 of the document above.

50. *Q17. What in your opinion are the premium rights in the South African television sector? Who currently holds them?*

50.1. The discussion document identified Hollywood movies, South African Rugby Union, Cricket South Africa, SA Premier Soccer League, UEFA Champions League, Spanish La Liga, English Premier League, UEFA Europa League, German Bundesliga and SAFA – Bafana Bafana.

50.2. e.tv agrees with the identified premium content rights and wishes to submit that WWE (Multichoice), Italian Premier Soccer League, American Basketball League, must also be categorised as premium content.

51. *Q18. Kindly comment on the Authority's proposal to use the number of rights as a unit of measure for market share calculation purposes. What other factors should be analysed to determine the dynamic character and functioning of the market?*



51.1. The Authority identified the Herfindhal-Hirschman Index (HHI) as the most commonly used method to measure the concentration levels in a particular market.

51.2. e.tv wishes to indicate that it agrees with the use of HHI to measure concentration ratio in a market in particular in the ownership rights as far as premium content is concerned. The fact that one company has an HHI of 6400 is a clear indication that the premium content market is extremely concentrated and should be of a great concern to the Authority. This figure alone should then serve as clear indication to the Authority that interventions are required to address the market deficiencies.

51.3. e.tv is of the view that the other factor than can be considered in determining the concentration ratio in the market is the advertising revenue as a percentage of the total broadcasting market. This would then in our view provide a clearer picture regarding the market concentration ratio.

52. *Q19. Do you consider the nature and extent of vertical integration in subscription television likely to harm competition? Kindly elaborate your answer.*

52.1. Yes vertical integration in subscription television is likely to harm competition. This is due to the fact that the dominant player can enter into exclusive content agreement with certain production houses which can make it difficult for competitors to procure content from such content production houses.

52.2. Secondly, this may lead to collusion between the dominant subscription television operators to increase the cost of acquiring such content which again may prohibit competitors to access content at acceptable cost levels.

53. *Q20. Do you agree with the Authority's preliminary view that competition law alone is not sufficient to deal with possible market failures in the market for the acquisition of premium content?*

53.1. e.tv agrees with the Authority's preliminary view that competition law alone is not sufficient to deal with possible market failure. E.tv is of the view that there are certain measures that the Authority must consider before embarking on a



licensing process. It is e.tv's submission that the Authority must conduct Market Studies before embarking on a licensing process. The Market Studies in our view will begin to indicate what the kind of pro-competitive conditions that must be imposed on the dominant player and the ones to be licensed. The pro-competitive measures to be imposed will assist in levelling the playing field and ultimately reducing the barriers to entry by new entrants. In this way the ex-ante mode of operation for the Authority will be effective.

54. *Q21. Kindly comment on the above analysis of possible barriers to entry at the retail level of the market. What other barriers to entry are prevalent in this market?*

54.1. See response to Q20 above.

55. *Q22. Is the Authority correct to use subscriber numbers as a unit of measure for market share calculation purposes? How else would you calculate market share at this level? What other factors should be analysed to determine dynamic character of the market?*

55.1. e.tv agrees that the use of subscriber numbers as a unit measure for market share for calculation purposes. The higher the subscriber base the higher the possibility of the subscription television operator is able to get more advertising revenue, which in our view could mean the reduction of advertising revenue to other broadcast operators.

56. *Q23. Do you support the Authority's proposed approach in identifying players with significant market power? Kindly elaborate*

56.1. Yes, e.tv agrees with the proposed approach in identifying players with significant market power. This is so because the Competition Act clearly defines what constitutes market dominance in a particular market. In this connection Multichoice has 98, 1% of the market subscription market share. Multichoice is also an active player in the entire broadcasting value chain.

56.2. So e.tv submits that the Authority must consider declaring the set-top-box as an essential facility which must be opened up and accessed by other subscription television operators.



57. *Q24. Does the nature of any licensee's vertical integration in this market raise competition concerns?*

57.1. Yes, the nature of any licensee's vertical integration in a particular market must raise competition concerns to the Authority especially when the licensee is an active participant in each segments of the value chain.

58. *Q25. Kindly comment on each of the remedies discussed above and indicate their possible applicability in the South African context.*

58.1. The discussion document identified a number of pro-competitive license conditions that can be considered for implementation by the Authority. The identified pro-competitive conditions include namely;

- a) shorten exclusive contracts;
- b) input Foreclosure;
- c) introduce unbundling;
- d) impose rights splitting; and
- e) impose wholesale must offer.

58.2. e.tv agrees with the pro-competitive license conditions identified by the Authority. In this regard, nothing prevents the Authority to commence the process to force the dominant player to allow access to the premium content. Broadband penetration in South Africa is still at infancy stage and it will take time to reach all citizens. Hence the approach adopted by Ofcom is still relevant in the South African context.

59. *Q26. Is the above proposal feasible in the South African market context?*

59.1. Yes e.tv agrees with the proposal contained in section 8.6.1.1 of the discussion document. In addition e.tv proposes that a consideration be made to the fact that such measures cannot be left open ended. Perhaps a consideration should be made to allow access to the dominant player's distribution infrastructure up to a point where if the competitor reaches a certain percentage of the market share its services must also be regulated by the Authority. This will assist all broadcasters to be at the level where they can compete on equal footing.





60. Q27. *Kindly comment on competition implications of set-top-box interoperability.*

60.1. A set-top-box (STB) is a critical element which enables a broadcaster to reach its audience and as such it becomes a competitive tool for any broadcaster that has invested in it. More so because in the subscription television space an encryption technology is included in the STB which becomes a barrier to any other broadcaster that may want to access the same audiences.

60.2. The lack of technical interoperability of STBs between different subscription service providers has adverse effect on competition and service quality in the Pay-TV distribution market. Whenever, a consumer changes its service provider, the STB of existing service provider becomes useless as the same STB cannot be used; resulting into electronic waste (e-waste). The availability of practical solution which can provide technical interoperability of STB is always desirable.

60.3. e.tv wishes to submit that a STB is an essential facility, which the Authority must consider declaring it as such. This would enable other broadcasters to access the technology and allow broadcasters to compete at content or services level.

61. Q28. *What other conditions could be imposed on any licensee having significant market power to remedy market failure in the relevant markets?*

61.1. None at this stage.

## **CONCLUSION**

1. e.tv thanks the Authority for the opportunity to comment on the Discussion Document: Inquiry into Subscription Television Broadcasting Services and looks forward to participating in the further stages to be undertaken by the Authority.