



MultiChoice and M-Net's Representations in ICASA's Subscription Television Inquiry

11 May 2018



Team

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Structure of Presentation

1. Introduction

2. Competitive landscape

3. Economic framework of analysis

4. Legal considerations and fair process

5. Ex ante regulation and remedies

6. Concluding remarks

Introduction

Introduction

- ❑ Welcome the opportunity to participate in Inquiry
- ❑ Have participated constructively since commencement of process in July 2016
- ❑ Have called for ICASA to ensure credibility of Inquiry through a robust, evidence-based process. Have submitted a wealth of evidence for ICASA to consider
- ❑ In presentation, will highlight concerns about process to date and the absence of evidence in ICASA's Discussion Document and other submissions
- ❑ Also handing up a document setting out recent developments in industry since end of November 2017 and will submit rebuttal to issues raised in third party representations relating to MultiChoice by 31 May

MultiChoice Group



- ❑ MultiChoice and M-Net are licensed subscription broadcasting services
- ❑ MultiChoice Group produces, acquires, packages and distributes content on various platforms
- ❑ Committed to nurturing South African creativity and building a thriving local content industry
- ❑ Various brands, including: M-Net, SuperSport, DStv, GOtv and Showmax



A Journey of Innovation



- ☐ First pay tv operator to launch outside of US
- ☐ First digital pay DTH to launch in Africa
- ☐ Took great entrepreneurial risk – not clear it would be a success
- ☐ Created market for pay tv in Africa when everyone said it wasn't viable
- ☐ Massive investment required
- ☐ Not an overnight success – took 10 years to reach 1m subscribers
- ☐ Constant innovation – in product, technology, service

MultiChoice Group





**55.75% Black owned
LEVEL 1**

Phuthuma Nathi BBBEE Share Scheme



90 000

black shareholders

R7,8bn

paid in dividends over time

20 times

investment growth

Contribution to SA



MultiChoice Staff



+8000

employees

87%

black employees

57%

women

51%

black women

R119m

on skills development
(FY 2017)

Annual Spend on BBBEE Suppliers



R10.4bn

spent with BBBEE
suppliers

R3.2bn

procured from SMMEs

R100m

on grants, and interest
free loans to SMMEs

100

entrepreneurs offered
skills development

Supporting Broadcasting Industry

- ☐ All DStv decoders and PVRs manufactured in SA
- ☐ Support installers and agencies – they jointly employ 4 700 people
- ☐ Provide equipment and technical support to community television services



Biggest Investor in Sport

- ☐ Invests R2bn a year
- ☐ Supports football leagues in Africa
- ☐ PSL in the top 10 leagues globally



Biggest Investor in Local Content

Invests R2,1bn a year. Investment creates jobs – actors, producers, directors



Competitive Landscape

Key Themes

- ❑ Launch and growth of OTT services
- ❑ Strong FTA TV in SA
- ❑ Strength of regional players
- ❑ Exponential growth and availability of content
- ❑ MultiChoice's competitive responses

OTT Services

"Before long, all video entertainment, sports and news will be consumed over IP streaming networks."

James Murdoch, CEO of 21st Century Fox and Chairperson of Sky plc, September 2017



Dramatic Changes

2005: 4 national broadcasters



Traditional TV



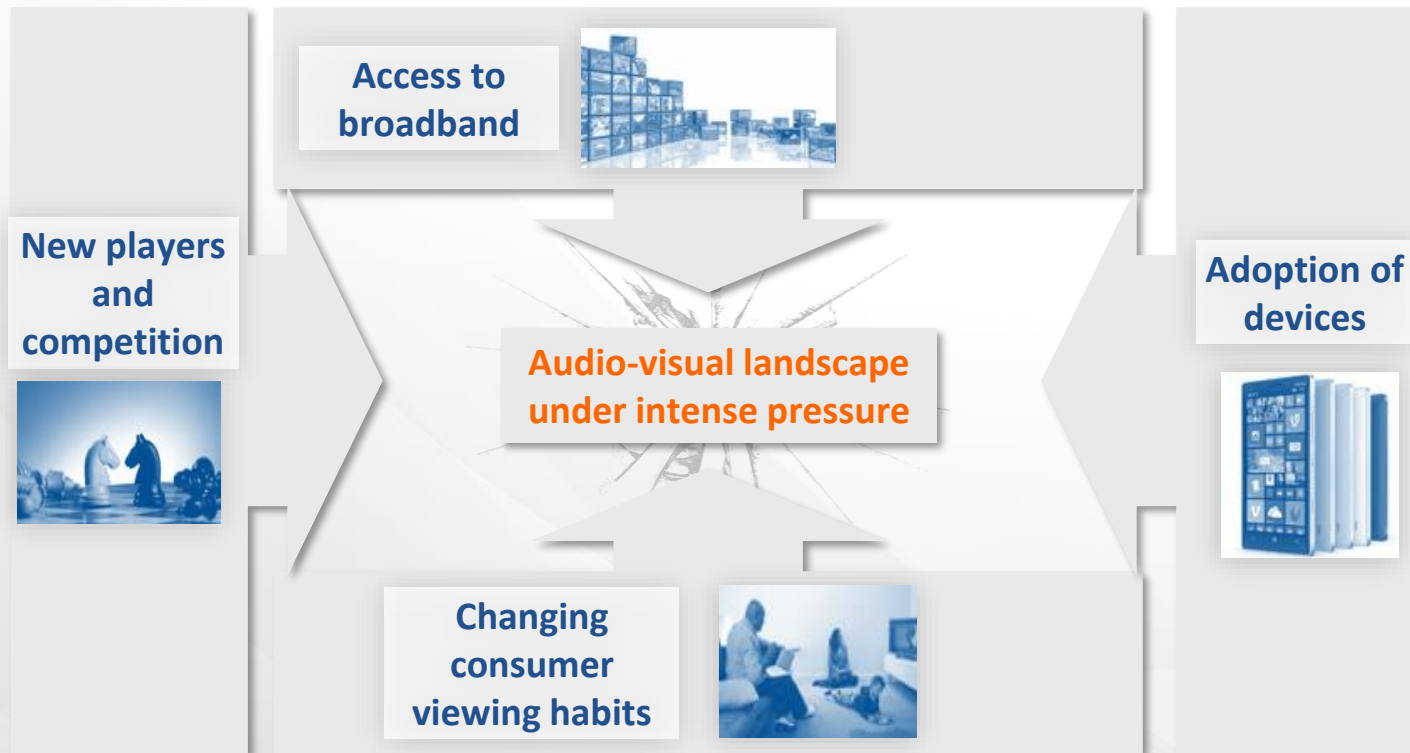
2018: Many audio-visual service providers



Multiple platforms, devices and services



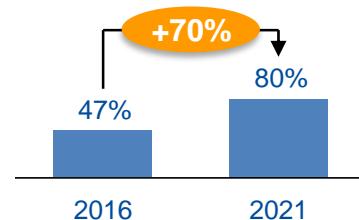
What Has Changed?



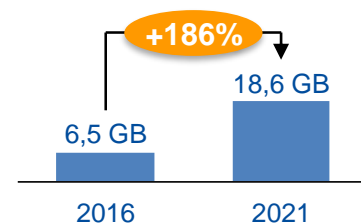
Broadband Uptake

- ❑ Rapid broadband roll-out, both mobile and fixed
- ❑ Exponential growth in consumer data usage
- ❑ Speeds sufficient for audio-visual services (video content already accounts for 57% of data in 2014, moving to 79% in 2021)
- ❑ Broadband prices continuously decreasing
- ❑ Telcos offering free data for video consumption

Internet penetration in SA

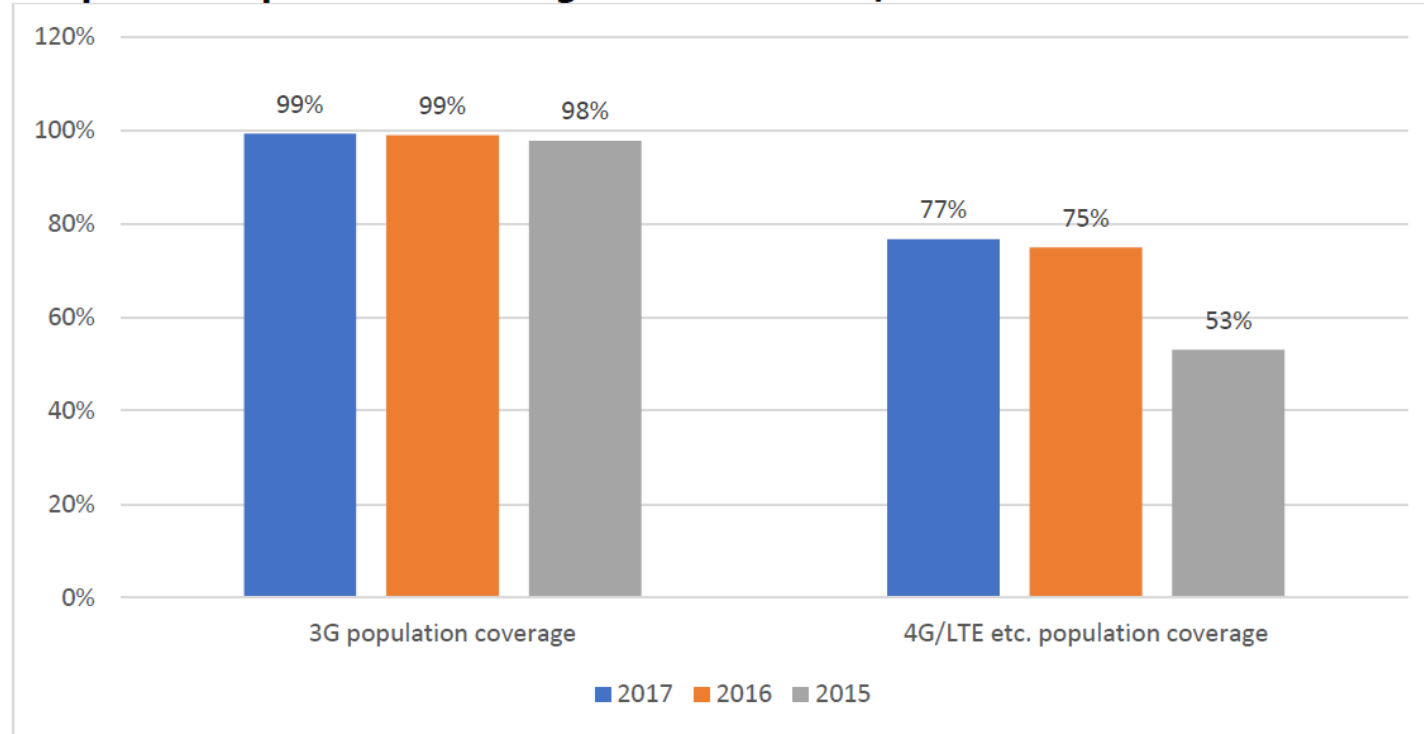


Average traffic per capita per month



Broadband Coverage

Graph 30: Population coverage for 3G and 4G/LTE

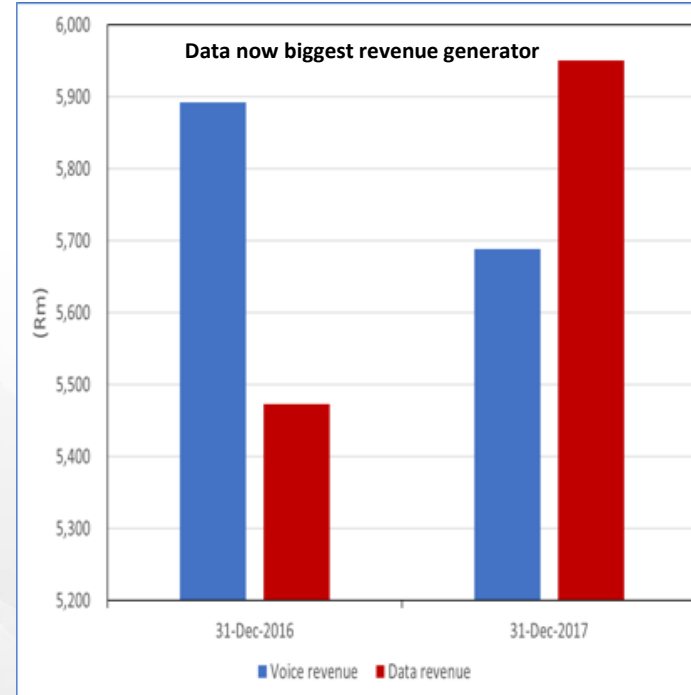
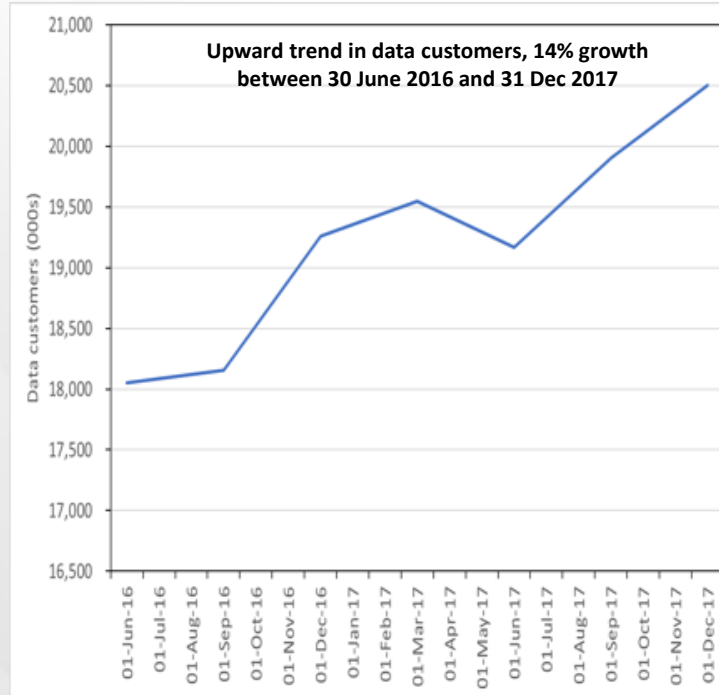


Source: ICASA Electronic Communications Questionnaire

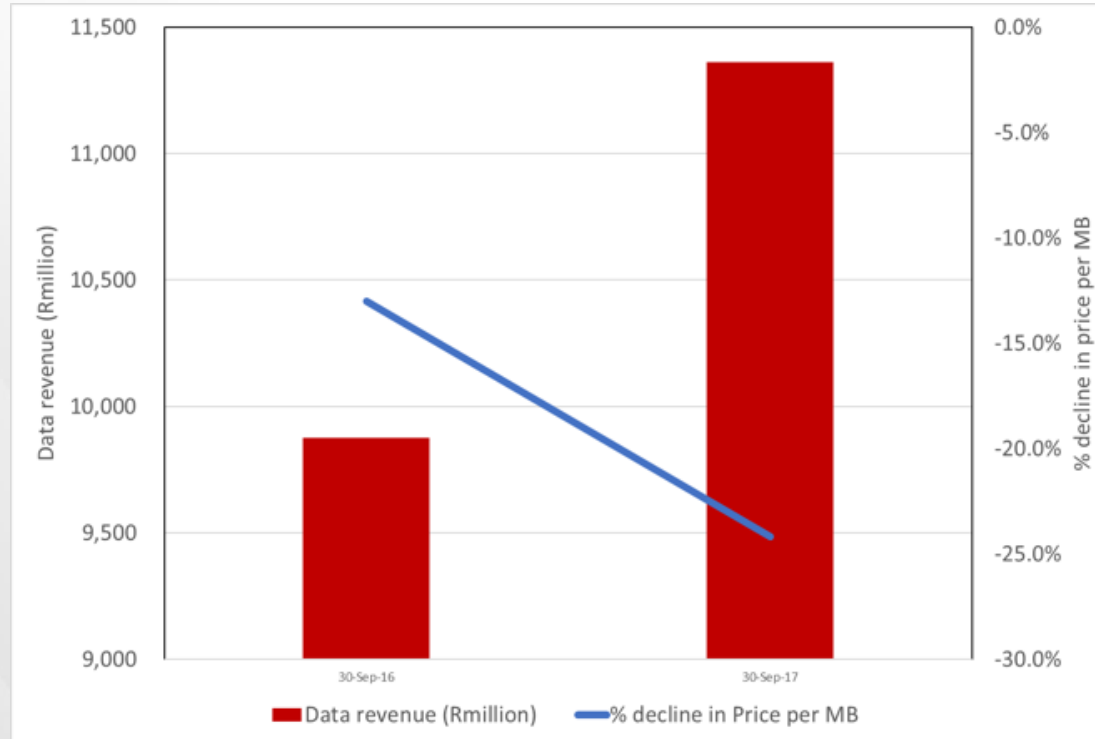
“Vodacom now provides 80.12% 4G coverage in South Africa, with 99.78% of the population covered by 3G and 99.97% covered by 2G,” it said.....Ulundi in KwaZulu-Natal now enjoys the same 4G signal as Vodacom subscribers who live in the heart of Johannesburg.”



More Customers Consuming Data



Data Revenue Rising While Prices Decline



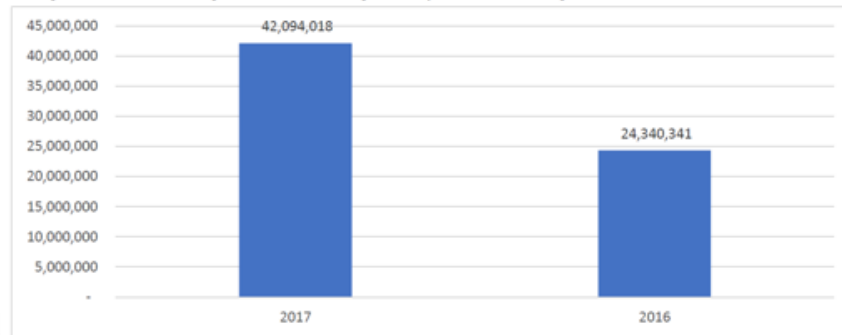
Trading update 31 Jan 2018

- 24.2% decline in effective data prices for the year
- Data traffic growth of 43.9%
- Supported by 53.8% growth in sale of bundles

Rapid Device Adoption

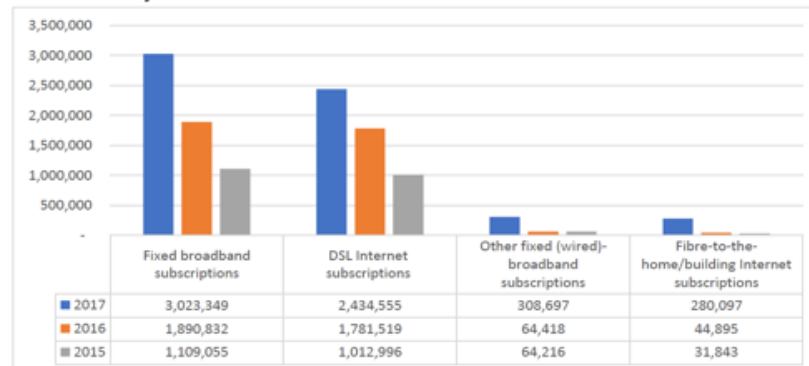
- ❑ Rapid adoption of connected devices, particularly smartphones
- ❑ Broadband subscriptions nearly doubling in 2017

Graph 23: Smart phone subscriptions, as at 30 September 2017



Source: ICASA Electronic Communications Questionnaire, 2017

Graph 21: Fixed broadband subscriptions, as at 30 September each year

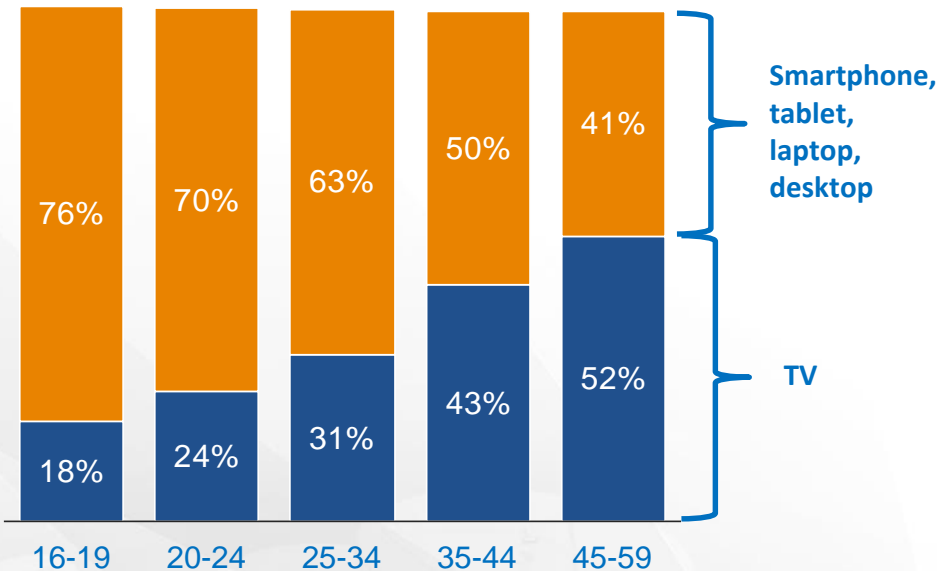


Source: ICASA Electronic Communications Questionnaire

Viewing Devices Changing

- ❑ Audio-visual services increasingly viewed on other devices, not TV sets
- ❑ Other device usage particularly prevalent amongst younger people
- ❑ 65% of South Africans are under 35

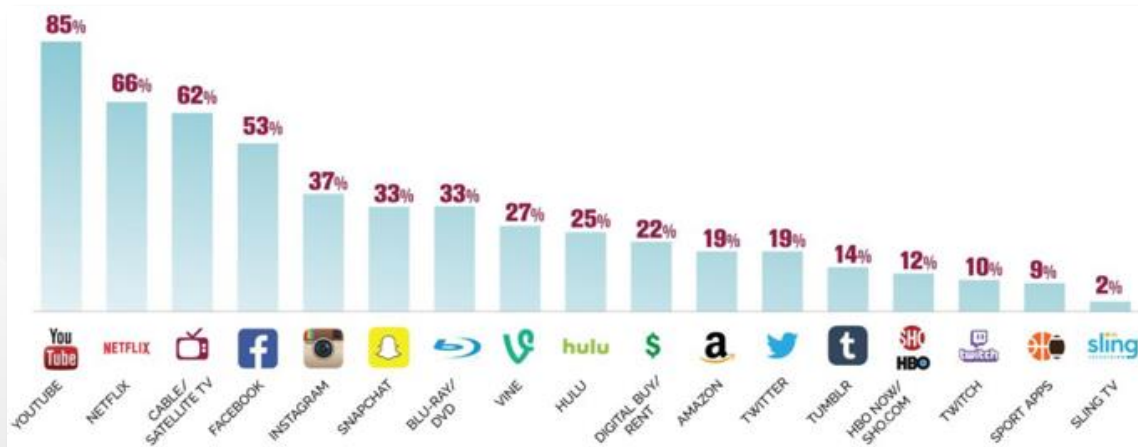
TV viewership by device and age group



Global Shift in Type of Content Watched

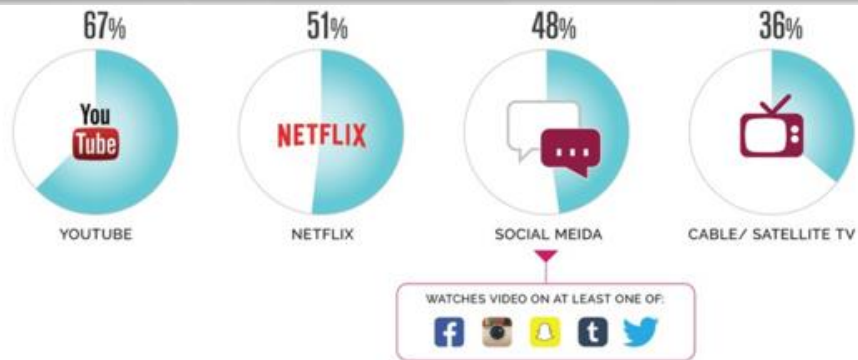
"Video sources watched"

(13-24 old, US)



"Can't live without"

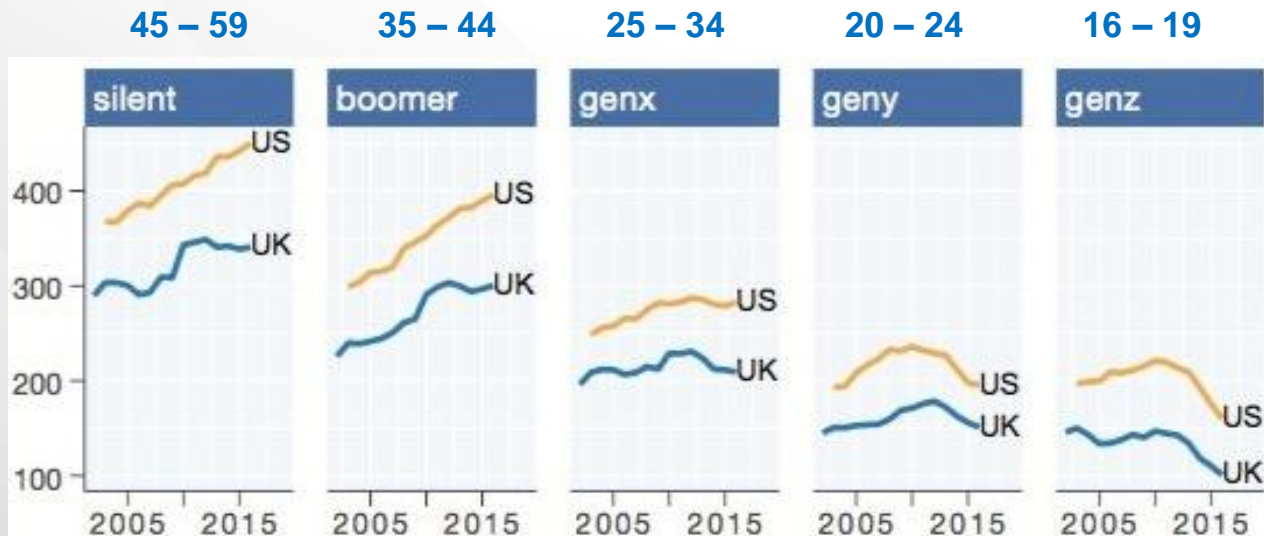
(13-24 old, US)



Global Decline of Traditional TV

- ❑ Global TV viewership is collapsing, in particular among younger people
- ❑ The rate of change will occur far more quickly in SA

Average TV viewership per day, by generation (example US and UK)



Impact on Pay TV

OTT services constrain Pay TV subscriptions through:

Cord-shaving

Consumers downgrade to lower-priced Pay TV services, and combine with other audio-visual services (OTT, FTA)

Cord-cutting

Consumers terminate traditional Pay TV services altogether, in favour of other electronic audio-visual services (OTT, FTA)

Cord-nevers

Individuals who've never subscribed to traditional Pay TV services, rather choosing OTT

OTT Ease of Entry

"Creating a TV network is now as easy as creating an app"

Reed Hastings, Netflix founder and CEO

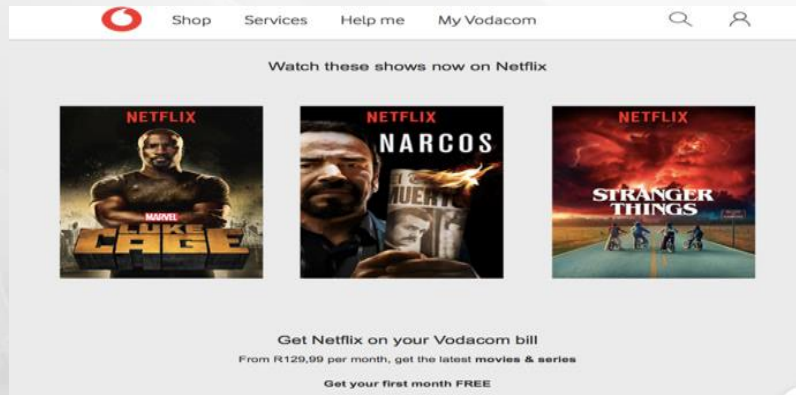
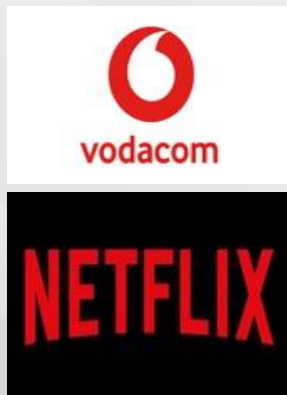


NETFLIX

OTT Ease of Entry

OTT services have several advantages


- ❑ Leverage existing broadband infrastructure and/or public Internet, thus infrastructural costs are low – cheap entry point
- ❑ Target subscribers who already have broadband and smart devices, thus no need to develop or subsidize devices
- ❑ Able to offer consumers triple and quadruple play (telco OTTs)
- ❑ Subject to little or no regulatory oversight



Global Scale of OTT Titans



125m users



100m users



1.5bn users



2bn users

- ❑ Acquire subscribers/users on a global scale
- ❑ Acquire third party content or produce their own content, to which they enjoy exclusive global rights
- ❑ Combined with massive revenues, they can make huge investments in content
 - ❑ Netflix content spend of R112bn, with 600 originals planned
 - ❑ Amazon content spend of >R50bn
 - ❑ Scale these investments globally

“I just want to be clear: We're going to continue to invest in video and increase that investment in 2018. And why are we going to do that? It's because the video business is having great results...”

Amazon CFO Brian Olsavsky, 2018

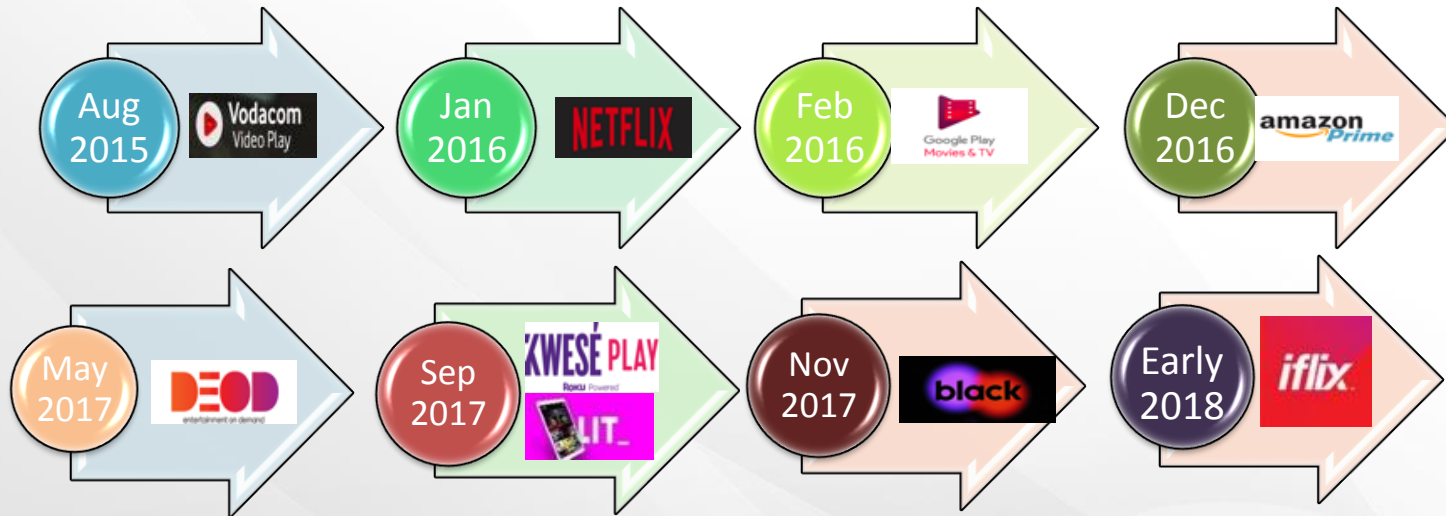


OTT Services Available in SA

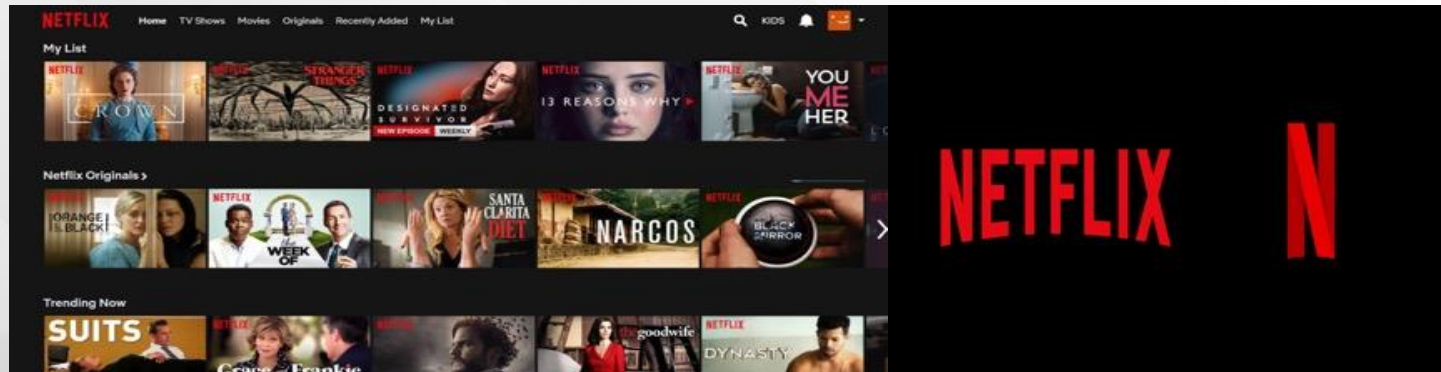
- All these developments have resulted in entry and growth of numerous OTT services, many of which are available in SA



Rapid Entry of OTT in SA



- ❑ Global giant already has a presence in SA, estimated over 400k subscribers
- ❑ Investing specifically in content for this market, in addition to its library of over 20 000 hours of series, kids, movies and documentaries
- ❑ Signing up subscribers directly and partnering with telcos and others audio-visual service providers (Vodacom; Kwesé)
- ❑ Excellent content curation, customer service and recommendation engine



- ❑ YouTube is the largest video app in South Africa, and significantly larger than any other OTT video player
- ❑ SABC and eNCA use YouTube as their online platform
- ❑ Content covers movies, series, sports, news, music and more
- ❑ Global plans to move into paid video services (e.g. YouTube Red, YouTube TV)



#1 video player app in SA

3.7m unique monthly website visitors in SA

20-25% of smartphone users are daily active users in SA

5x larger than DStv and Netflix on time spent in app

Econet / Kwesé



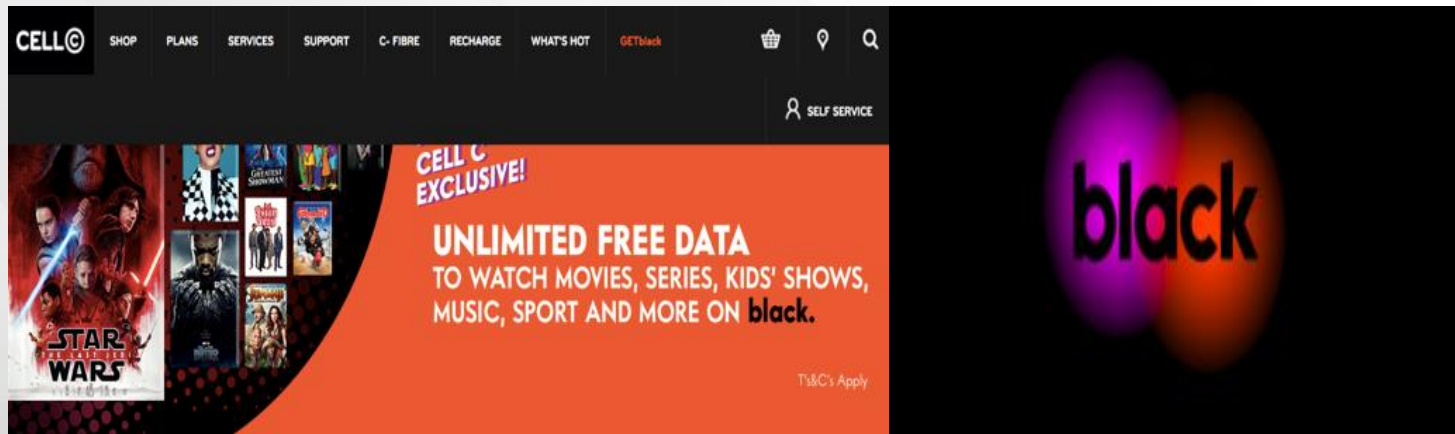
- ❑ Leading African telco with global operations and significant resources
- ❑ Operates in SA telco market as Liquid Telecom
- ❑ Offers Kwese Play in SA, and Kwese TV in rest of Africa
- ❑ Potential to expand in SA – have applied for FTA licence in SA
- ❑ Uses world's leading video streaming devices producer (Roku) as device partner
- ❑ Extensive live sports offering
- ❑ Secured Netflix as official partner for Africa
- ❑ Offers over 100 streaming channels alongside Netflix subscription, with content across all genres

"Traditional subscription service (or Pay TV) relies on a decoder connected to a satellite dish. The challenge of satellite technology is that it's inflexible and rigid, limiting the things you can do. It's actually quite an old technology. Kwesé Play uses the most advanced decoder in the world (an Internet "streaming box") connected by fibre optic cable. The high speed fibre (internet) connection allows us to provide the most intelligent TV service possible."

Strive Masiyiwa, Chairperson of Econet

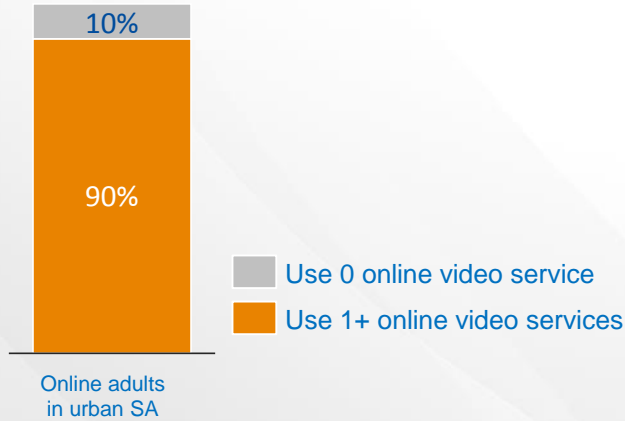
Cell C Black

- ❑ Targeting "27 million smartphones in South African market"
- ❑ Offers movies, series, sports, news and music
- ❑ Planning local content
- ❑ Innovative pricing and payment options; free data
- ❑ Partnered with Vubiquity and 21st Century Fox
- ❑ Claims impressive growth since launch and that it has "completely disrupted the market"

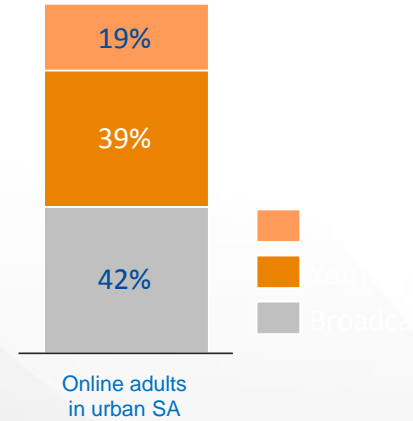


OTT Consumption in SA

>90% watch 1+ online video service



Broadcast TV is only 42% of screen time



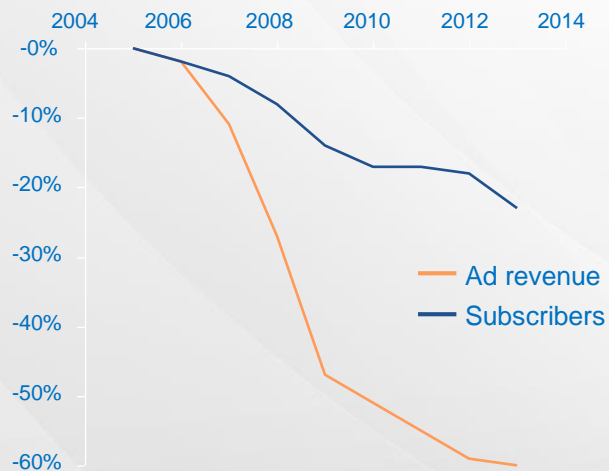
"Consumers in SA spend nearly as much of their daily viewing time watching free digital video sources such as YouTube and Facebook, as they do on linear television. Those aged 18-24 spend [...] more time with free digital video than people above their age"

Massive Impact

- Massive disruption of OTT services in the Pay TV market is similar to how OTT services altered the newspaper and music industry

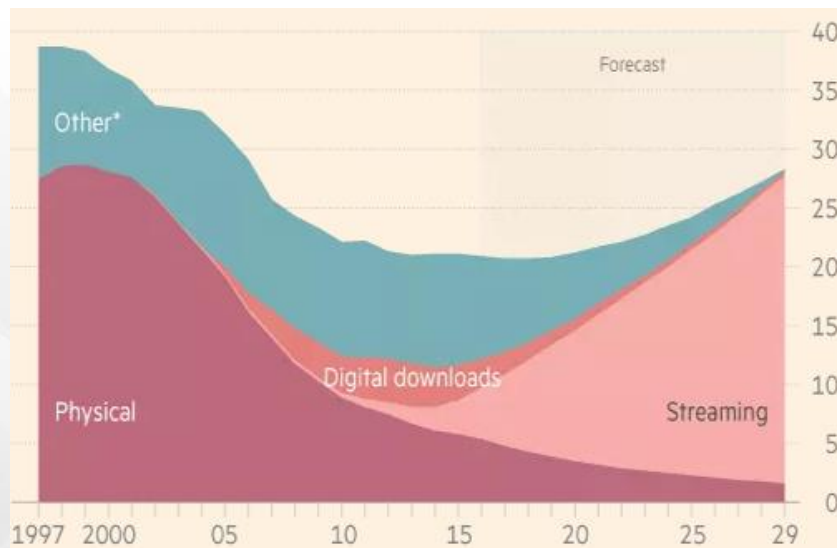
Newspapers

Cumulative revenue change (2005 = 100)



Music

Global recorded music revenue forecast (\$Bn)



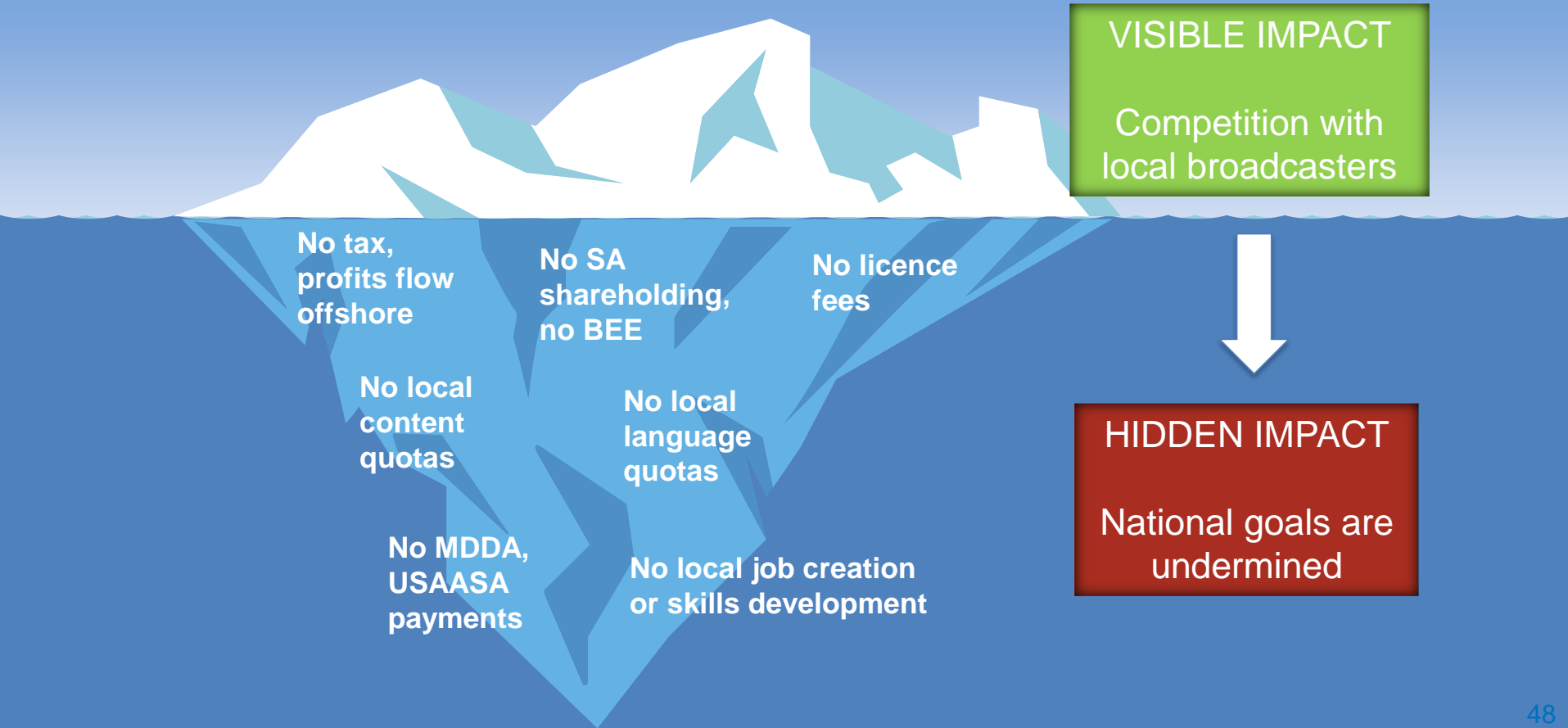
Global OTTs - The Hidden Impact



VISIBLE IMPACT

Competition with
local broadcasters

Global OTTs - The Hidden Impact



OTT Impact Ignored by ICASA

- ❑ Traditional Pay TV businesses' attention focused on impact of OTT
- ❑ Impact is real and happening at a fast pace, as reflected in developments in just the past five months
- ❑ Discussion Document does not pay sufficient attention to this impact
- ❑ Numerous parties indicated consideration should be given to these developments: Vodacom, Telkom, SABC, MultiChoice, e.tv, SOS/MMA, ACT-SA and KweSé not reflected in Discussion Document

OTT Impact Ignored by ICASA

- This cursory attention to the impact of OTT in audio-visual services is directly contrary to ICASA's position in the e.tv news license amendment application in which ICASA stated:

“plainly the context in which e.tv and other broadcasters operate has changed somewhat since the Position Paper was drafted and e.tv obtained its licence. As e.tv indicated, one of the most significant changes to the media landscape is the increase in online media and the way in which the public accesses information and content. While e.tv’s focus in its application was on the way in which news is consumed, there has been significant changes more generally to the platforms that people use to access content. These include online content, the availability of more subscription broadcasting services and channels, and on demand services. Further changes are imminent with the introduction of multi-channel DTT services to replace the current single channel analogue services”

(Emphasis added)

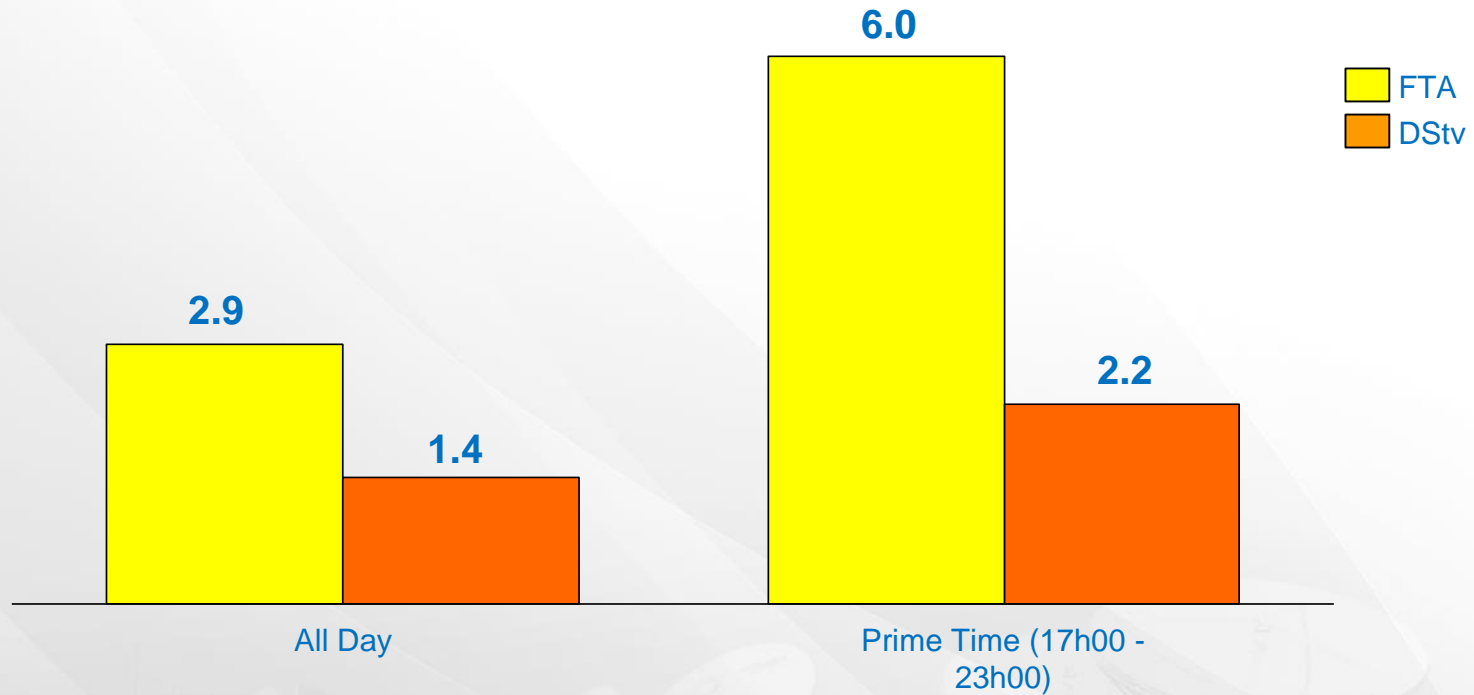
Strong FTA TV in SA

Strong FTA TV Offering in SA

- ❑ Strong FTA TV in SA constitutes competitive constraint on Pay TV
- ❑ Offers significant amount of quality local content and sports
- ❑ In written submissions numerous parties indicated the competitive interaction between FTA and Pay TV should be considered
- ❑ Strength of FTA disregarded by ICASA in Discussion Document

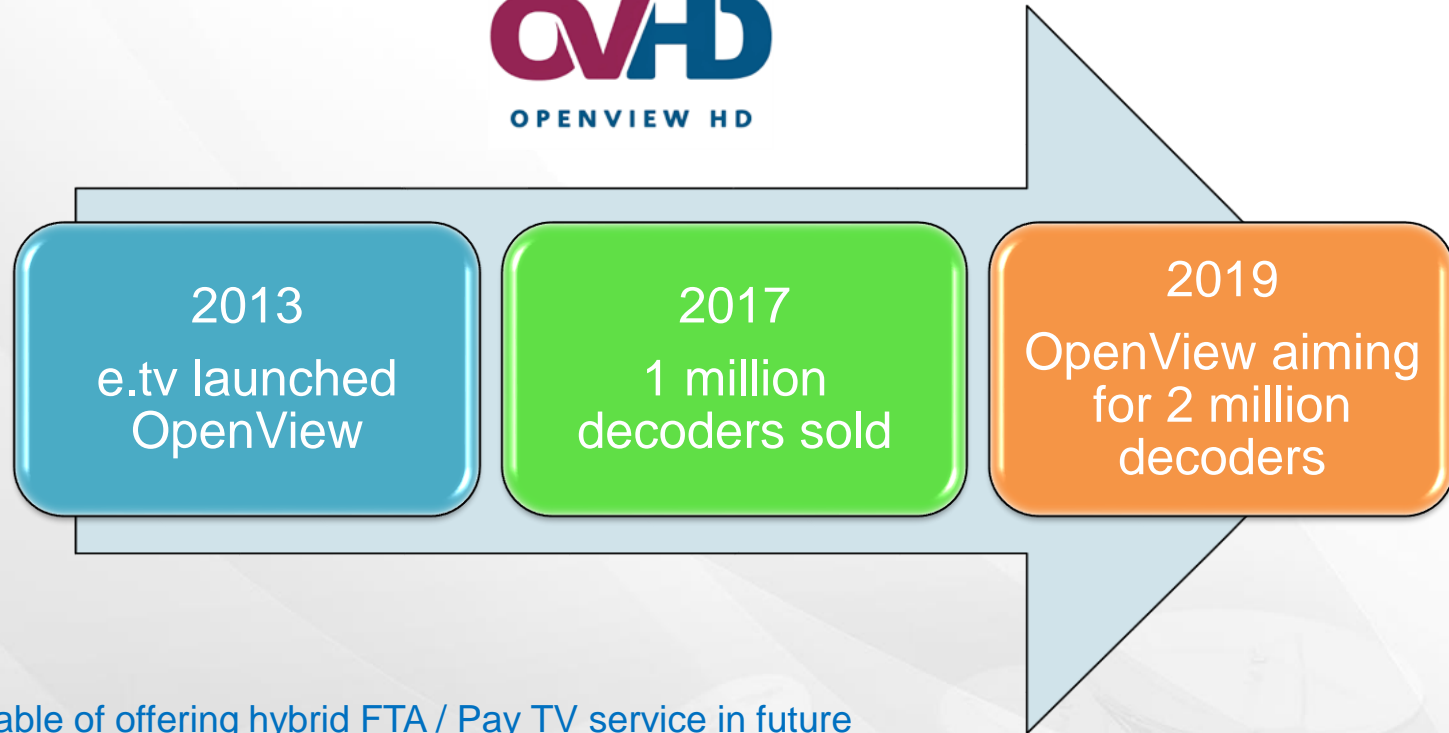
Wide Reach

Average Minute Ratings (Audience – Millions) – avg per month for 2017



FTA DTH Growing

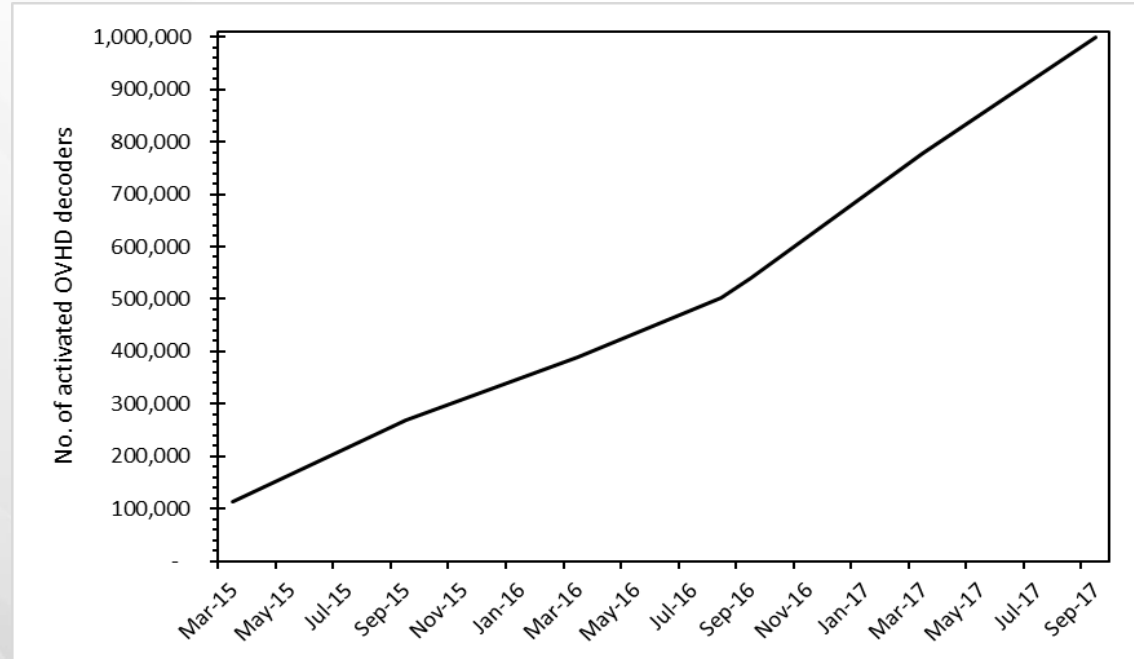
Success of OpenView evidence of power of FTA in SA



Capable of offering hybrid FTA / Pay TV service in future

FTA DTH Growing

- ❑ Success of OpenView evidence of power of FTA in SA
- ❑ Capable of offering hybrid FTA / Pay TV service in future
- ❑ Over 1m decoders now. Aiming for 2m by 2019



Great Potential for FTA DTT

- ❑ No reason success of DTT in rest of Africa can't be replicated in SA
- ❑ Potential for DTT has been recognised by ICASA: currently licensing new FTA players on DTT MUX 3
- ❑ Post migration there will be 7 national Muxes, with capacity for at least 140 SD channels – will further strengthen the FTA sector
- ❑ DTT offers potential for
 - ❑ More channels
 - ❑ Genre specific and specialist channels
 - ❑ HD channels

The background of the slide is a large, abstract geometric pattern on the left side, composed of many overlapping triangles in various shades of green, blue, and purple. The right side of the slide is plain white.

Rest of Africa: Successful Entry of Pay TV Competitors

Pay TV in Rest of Africa

- ❑ Multiple Pay TV operators in Sub-Saharan Africa
 - ❑ Consumer demand for lower- to middle-priced bouquets
 - ❑ Digital migration enabled multi-channel services
 - ❑ Entered quickly and acquired significant subscriber bases in short space of time
 - ❑ Acquired wide variety of content and packaged attractively
 - ❑ Significant investment in local content
- ❑ No reason why this can't occur in SA with suitable licensing of entrants

Pay TV Entrants in Rest of Africa

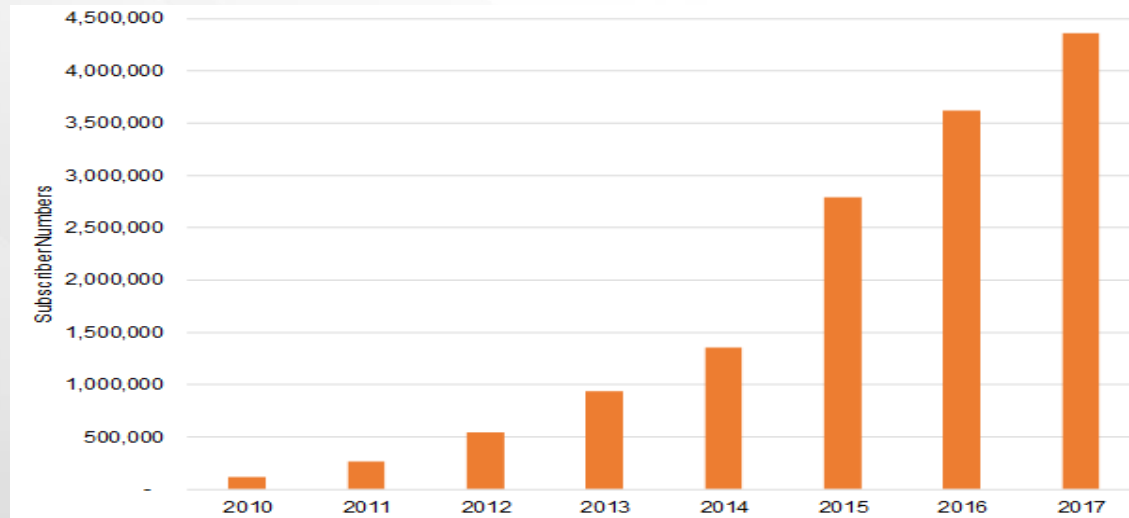


- ❑ Formidable competitor, backed by large Chinese company
- ❑ Successfully contesting entertainment and sports rights
- ❑ Understands the markets and has successful business model
- ❑ Operates on its own DTT, DTH and online platforms



StarTimes Growth


- ❑ Within a short space of time has become one of the largest Pay TV broadcasters in Africa
 - ❑ In Nigeria - biggest Pay TV broadcaster with almost 10 million subscribers in sub-Saharan Africa (Vice President StarTimes, 2018)
 - ❑ In East Africa - estimated market share of 39% on DTT platform



Relaunch of StarSat in SA




- ❑ Mid-2017 StarSat repositioned itself
- ❑ Embarked on major marketing campaign
- ❑ Repacked its bouquets which are competitively priced
- ❑ Now competing aggressively for content rights, including sports
- ❑ Has launched new HD PVR decoder



StarSat gives you top class entertainment with over 100+ channels to choose from.

Our channel offering is vast. We offer movies, news, series, kids programmes, music, gospel documentaries, sports, lifestyle, telenovelas, comedy and dramas.



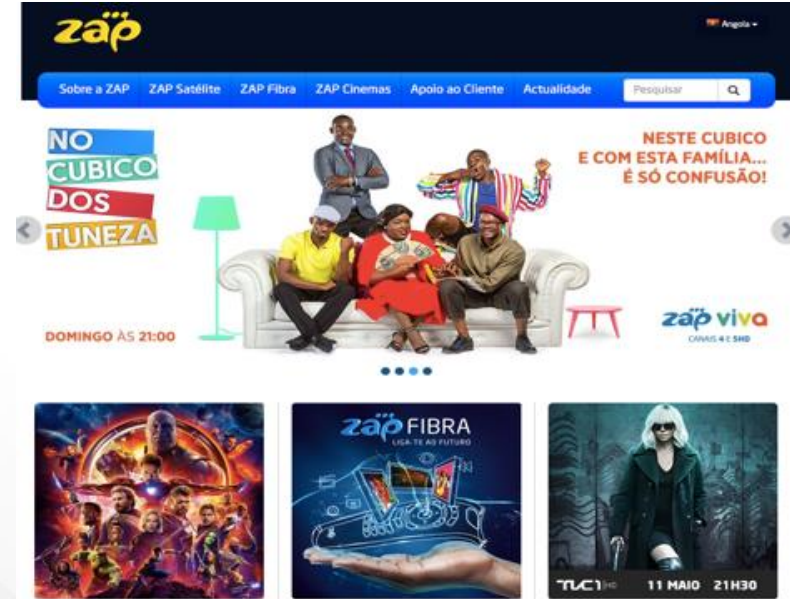
Get the All-New Combo 3 HD Decoder.

It's sleek and very smart. Comes packed with new features. You can now watch your favourite shows, Now in High Definition(HD).

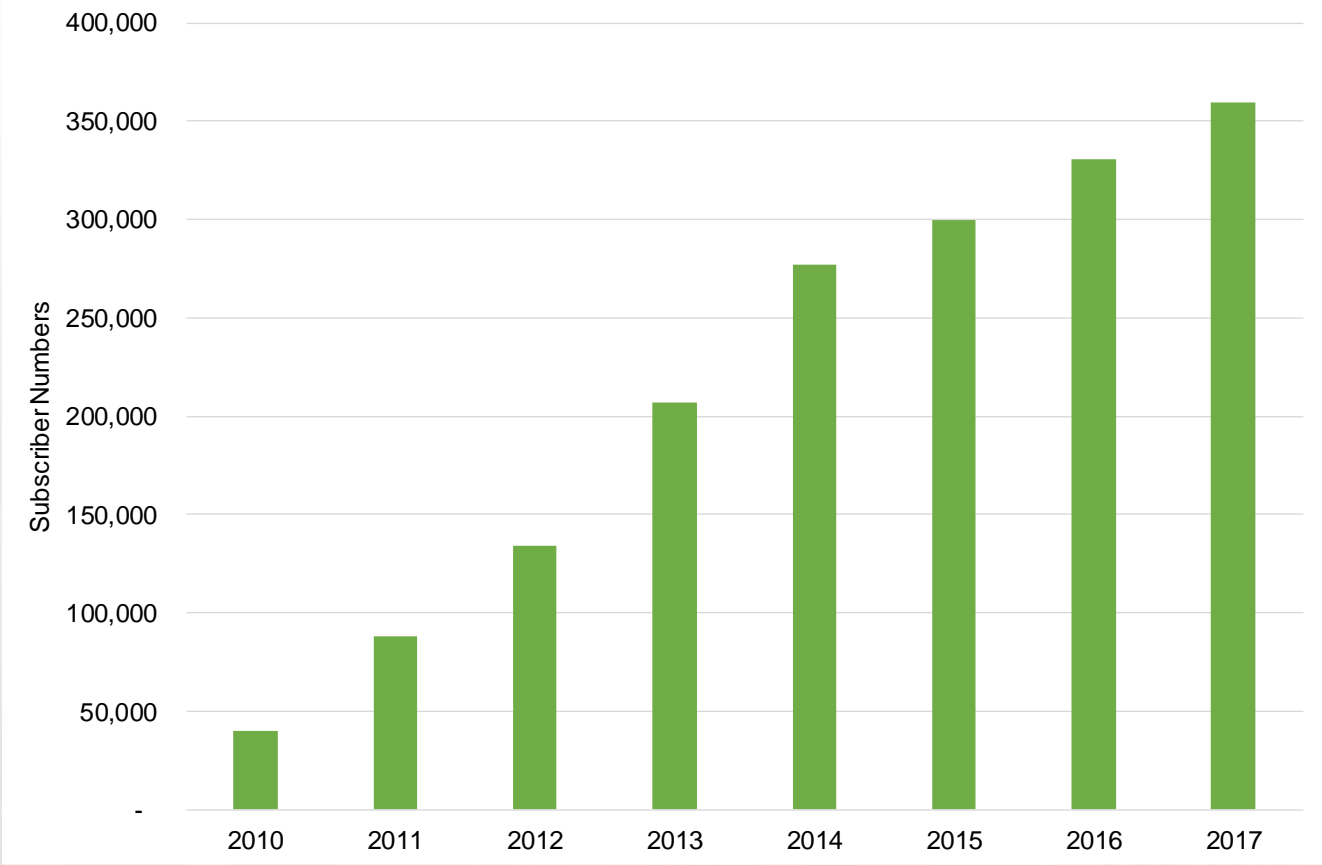
[GET OUR R399 OFFER NOW](#)

ZAP TV

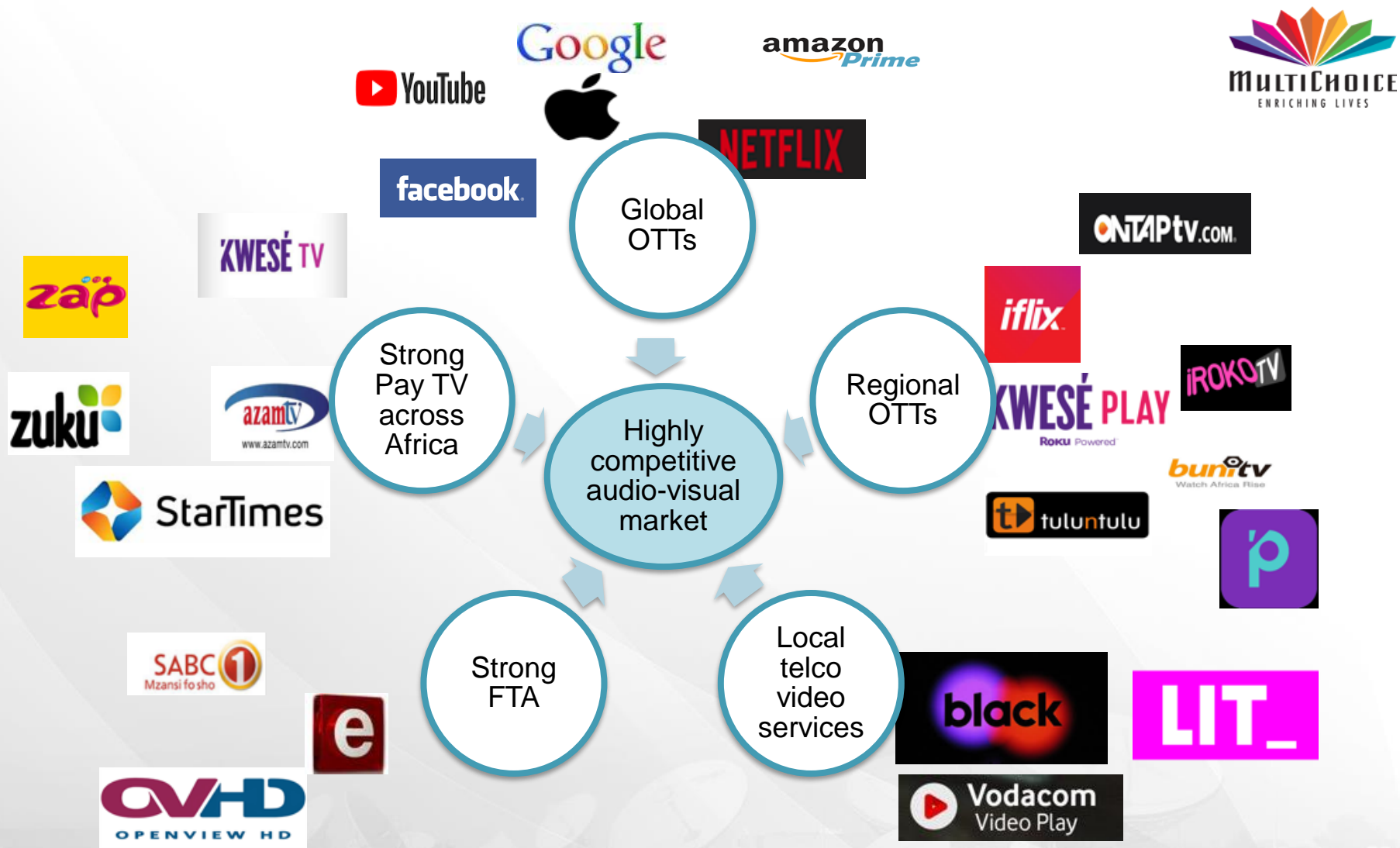
- ❑ Launched in Angola in 2010
 - ❑ Subsequently entered Mozambique
- ❑ Well curated content mix – variety of international and local content
 - ❑ Strong emphasis on local Portuguese content
 - ❑ No first Pay TV window movies or series
- ❑ Quickly built up a subscriber base and surpassed MultiChoice



ZAP TV's Growth



Source: Digital TV Research, 2017



Exponential Growth In Content

“We’re not seeing any slowdown in the appetite for new content”

Laura Kennedy, COO Lionsgate

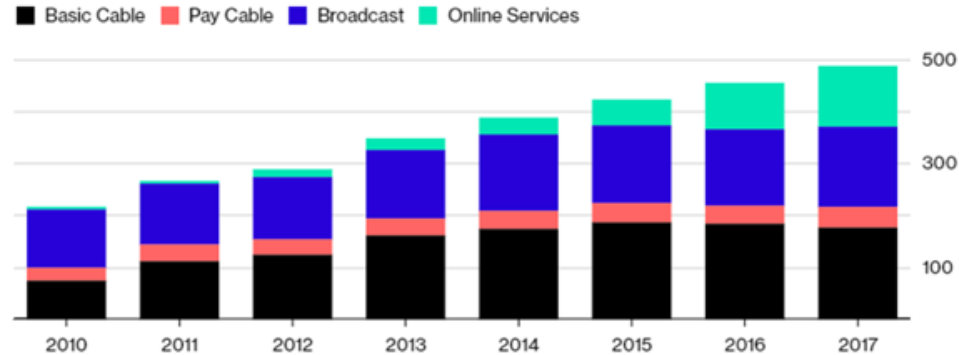


Content Game Has Changed

- ❑ Explosion of popular, quality audio-visual content
- ❑ There's so much, no one player can have it all
- ❑ Other trends
 - ❑ Growth in new types of content
 - ❑ Shrinking windows (due to digital piracy)
 - ❑ Growing variety of sports content
 - ❑ Local content increasingly important for building audience
- ❑ Value of different content types constantly shifting: local content and series now more popular than movies

So Much TV, So Little Time

Production of scripted shows has soared with the entry of online competitors like Netflix



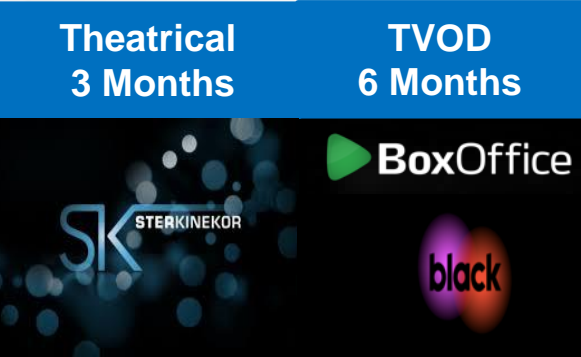
Source: FX Networks

- ❑ Hundreds of international series available
- ❑ Multitude of new titles being launched annually
- ❑ Growing popularity of series has seen a switch by many producers to this genre, further propelling investment and quality
- ❑ Acquisition of series rights is highly contestable

Movies

- ❑ Its no longer just about Hollywood
- ❑ Growing sources of quality content outside of Hollywood studios
 - ❑ Independents now producing more titles per year than the studios, and often out-perform them
 - ❑ Huge volume of popular inexpensive movies available across Africa (Nollywood)
- ❑ Shrinking windows means movie rights are not tied up for long duration
- ❑ Some new entrants have built successful strategy on second run rather than more expensive first run movies

Studio Movies: Windowing



Local content

- ❑ Local content is booming
- ❑ Has become important means of building audiences
- ❑ Since local content generally commissioned, there is no scarce supply
- ❑ SA production industry is thriving, with many established and emerging producers working across multiple genres including soaps, dramas and reality
- ❑ Producers able to work for multiple audio-visual service

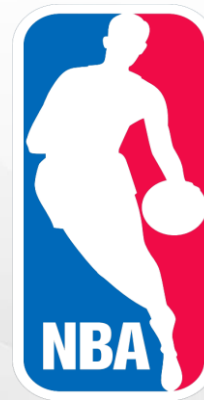


Sport

- ❑ Increasing variety and volume of sports content, all of which is regularly contestable
- ❑ Sports federations constantly and creatively determine how best to sell the rights to sports events, and are launching direct-to-consumer offerings
- ❑ Audio-visual providers also sometimes able to acquire inexpensive sports properties and enhance value through investments

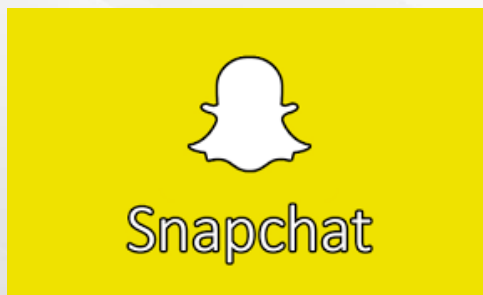


BUNDESLIGA



Short Form

- ❑ Plethora of short-form audio-visual content available
- ❑ Often viewed through social media platforms



Summary: Huge Amount of Content Available

- ❑ There's a wide range of content which is neither scarce nor costly
- ❑ Access to content is not a problem
- ❑ Audio-visual service providers need to be able to
 - ❑ Select content which will appeal to their target markets
 - ❑ Astutely package and promote their content
- ❑ Many new players showing they are able to do this effectively

MultiChoice's Competitive Responses

MultiChoice's Competitive Responses



- ❑ MultiChoice facing huge threats to its business and an existential threat going forward
- ❑ MultiChoice has had to respond competitively, lest it lose revenue
- ❑ Competitive response has had to occur across all dimensions
 - ❑ Content type and mix
 - ❑ Technology services (e.g. HD, PVR, STBs)
 - ❑ Launched additional services
 - ❑ Customer services and operational efficiency
 - ❑ Price

Improvements to Content

- ❑ Invested substantially in commissioning local content
- ❑ Increased number of bouquets
- ❑ Number of HD channels increased from 14 to 46 channels
- ❑ Dramatic increase in number of channels across all bouquets since 2014

Since 2014



27% more
Premium



44% more
Compact
Plus



50% more
Compact



61% more
Family



75% more
Access



100% more
Easyview

Introduced Additional Services

- ❑ Invested billions of rands in providing a range of additional services: DStv Catch Up, Catch Up Plus, BoxOffice, DStv Now and ShowMax
- ❑ Rolled out these additional services to all DStv subscribers



Additional Responses

- ❑ Improved functionality of decoders and user interface
 - ❑ Ability to record, pause, rewind and fast forward live TV
 - ❑ More HD channels
 - ❑ Recommendation engine
- ❑ Innovative subscriber management services
 - ❑ Introduced variety of customer payment options
 - ❑ Improved customer self-service interface



Price Increases vs Costs

- ❑ Costs are rapidly escalating, with billions of rands of investments
 - ❑ Content costs increased 25% in real terms in past 3 years alone, largely USD denominated
 - ❑ Huge technology and platform investments
- ❑ Yet subscription fees for most bouquets have either remained constant or declined in real terms
 - ❑ Price increases at or below inflation
- ❑ Huge benefits and value-add for consumers

Bouquet	Average annual nominal price change (April 2013 - Feb 2018)	Price adjusted for inflation Indexed to 2013 Rands
Premium	6.0%	0%
Compact +	6.5%	2%
Compact	7.3%	5%
Family	7.7%	6%
Access	0.0%	-21%
EasyView	0.0%	-21%

Summary: Competitive Constraints Facing MultiChoice

- ❑ Launch and growth of OTT services (pure OTTs and telcos)
- ❑ Strong FTA TV in SA
- ❑ Strong regional players expanding in (StarSat) or poised to enter SA (Kwesé)
- ❑ MultiChoice's competitive responses
 - ❑ Increasing investments – content, technology, customer services, DStv Now and ShowMax
 - ❑ Adding value to its offering – HD channels, CatchUp, BoxOffice
 - ❑ Containing subscription fees

Economic Framework Of Analysis

The Questions At Issue In This Inquiry Require Cogent Economic Analysis



But The discussion document relies on a STATIC approach and outdated international references

Defining markets

Identifying barriers to entry

Evaluating role of incumbency

Assessing vertical integration

Considering role of exclusivity

Interpreting entry failures

This can only be done correctly if the analysis takes proper account of **industry dynamics** and **firms' incentives**.

It is not correct to rely on old categorisations backed up by ancient international references

The document relies on very out-of-date European case law

European decisions mentioned in the Discussion Document are old and out of date

DECISION	YEAR
Deutsche Telekom/BetaResearch	1998
British Interactive Broadcasting/Open	1999
Sogecable/Via Digital	2002
Newscorp/Telepiu	2003
Viacom/Channel 5 Broadcasting	2004
CanalSat/TPS (Autorité de la concurrence)	2006
Market definition and market power in pay TV (Ofcom)	2007
Newscorp/BSkyB	2010

Only one European decision cited from the past 8 years, and this removed regulation

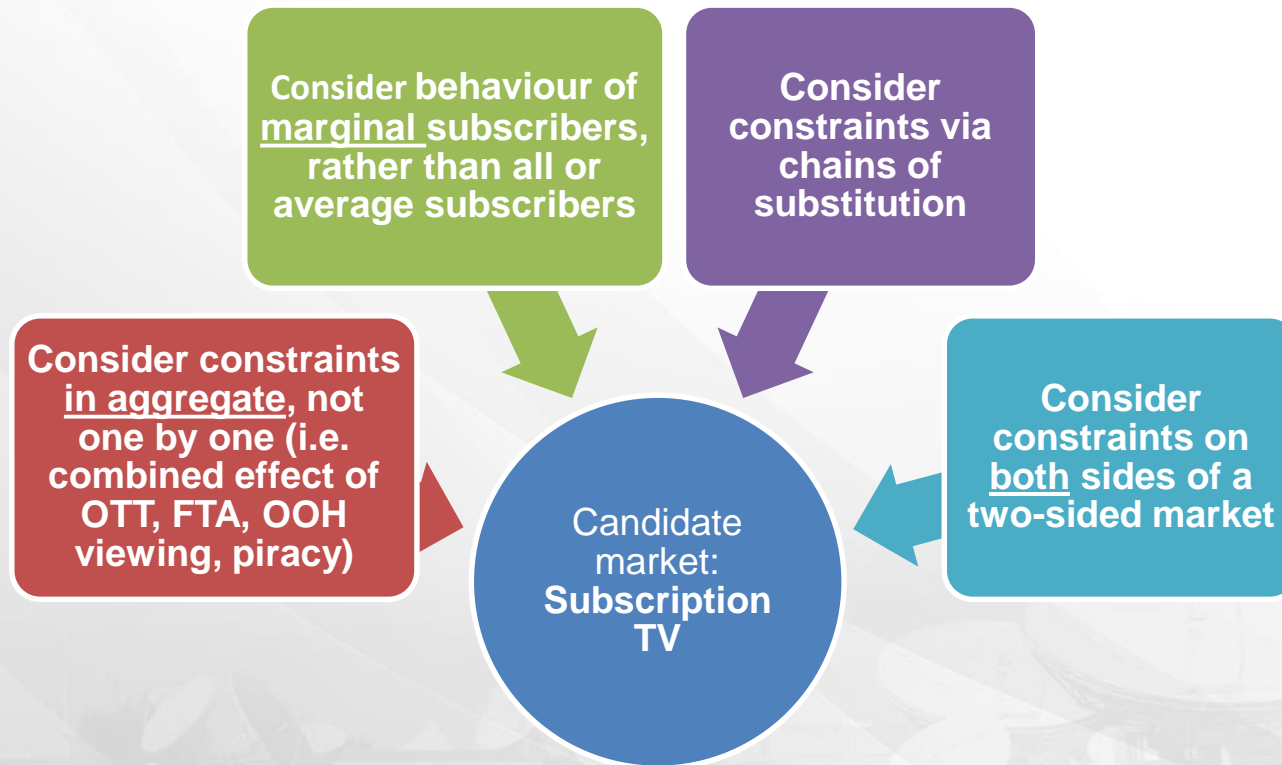
- ❑ `Review of the pay TV wholesale must-offer obligation (Ofcom, 2014)

ICASA cannot draw conclusions from historical decisions in other jurisdictions, particularly when

- ❑ Sector is experiencing huge disruption – especially from OTT
- ❑ There are different local industry and demand characteristics

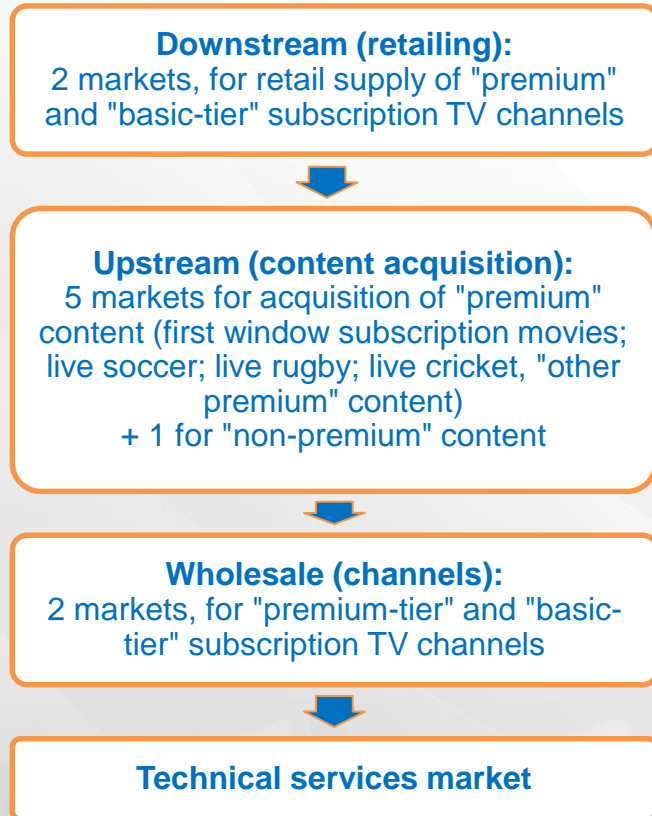
Market Analysis focuses on competitive constraints

If we start from "subscription TV" as a candidate market, we need to examine all competitive constraints on subscription TV *today*



The "Market Definition" Exercise in the Document Lacks Economic Substance

ICASA's "markets"



ICASA's approach

Discussion Document purports to rely on standard market definition methods (SSNIP; demand- and supply-side substitution)

But it doesn't. It falls back instead on impressionistic and subjective value judgments. e.g.

- ☐ Licence categories and practices
- ☐ Differences in product characteristics
- ☐ Business models (pay / FTA)
- ☐ Functions in the industry value chain
- ☐ So-called "premium" content
- ☐ Level of prices

Doing the analysis properly points to broader markets

Retail Markets Cannot be Defined Based on Viewing Mode or Business Models

- ❑ Discussion Document identifies **linear Subscription TV.... BUT**
 - ❑ **OTT services**
 - ❑ Linear vs non linear or content offering not a basis for separate market
 - ❑ OTT is simply another platform
 - ❑ Submissions (including from OTT players) acknowledge this
 - ❑ ICASA's international peers give OTT consideration
 - ❑ **FTA TV (both FTA TV and OTT)**
 - ❑ Different business model not a basis for separate market
 - ❑ Quality and range of free content affects consumer willingness to pay for content and hence a constraint
 - ❑ FTA players acknowledge this interaction
 - ❑ Increasingly the case with development of multi-channel FTA offerings (OpenView; DTT) and FTA availability on OTT (YouTube and websites)

Discussion Document does not give due weight to all of these important constraints

Notion Of "Premium" Content As "Must Have" Is Well Understood To Be Obsolete

- ❑ So-called "premium" content (FSPTW & Football) was deemed a driver for subscriptions (and a potential bottleneck to competition) in the past, elsewhere
- ❑ It's well understood today that **audiences are diverse and fragmented, and a broad array of content is capable of building a customer base**
 - ❑ International series - Netflix originals (Game of Thrones; House of Cards)
 - ❑ Local content (e.g. Generations; Uzalo; Isibaya; Idols)
 - ❑ Range of sports properties
- ❑ Scope to produce and invest in building content popularity (local originals, PSL)
- ❑ ICASA/submissions recognise the broad range of popular content in SA today, and its evolving nature
- ❑ Lack of scarcity and ability to invest in producing popular content means there is no longer any basis or utility in distinguishing "premium" and "basic"

No single piece of content is "must have" – there is a lot of content that can be used to build substantial audiences

Upstream Markets Cannot Be Based on Activities or Characteristics

- ❑ **Wholesale supply of linear channels should be assessed on constraints**
 - ❑ Direct and indirect constraints from non-linear content
 - ❑ Retailers can acquire content directly and use this either in non-linear retail offerings or in channels they package themselves
 - ❑ All broadcasters in SA package their own channels
- ❑ **Other upstream markets flow from retail (indirect constraints)**
 - ❑ Relevance of premium/basic distinction
 - ❑ Technical services – platforms compete for same end consumer

Relevant upstream markets cannot be defined on activities and narrow categorisations

The Assessment of Competition needs to capture industry dynamics

"When carrying out a market analysis (...) the assessment (...) should be done from a forward-looking perspective, starting from existing market conditions. The analysis should assess whether the market is prospectively competitive and whether any lack of competition is durable, by taking into account expected or foreseeable market developments." (emphasis added)

European Commission Recommendation on Relevant Markets, 2014




Approach in Discussion Document is inadequate

Static and structuralist

Not evidence based

Overly reliant on outdated findings from different market contexts



Forward looking analysis required (s67 and ICASA's Guidelines)

If current state of competition not durable due to foreseeable market developments in the review period, then ex ante regulation not warranted

EC "Three Criteria Test" is prospective, and only a threshold for further analysis

- ❑ EC's "three criteria" test (advocated by some third parties) is in fact only a threshold test of **whether a market analysis needs to be carried out** to establish whether an electronic communications market is effectively competitive
- ❑ 2nd criterion: **"whether the market tends to competition on a forward-looking basis"**
 - ❑ EC test actually stresses importance of a forward-looking assessment and whether a market **is on a trajectory towards competition**

"A tendency towards effective competition does not necessarily imply that the market will reach the status of effective competition within the period of review. It simply means that there is clear evidence of dynamics in the market within the period of review which indicates that the status of effective competition will be reached in the foreseeable future without ex ante regulation in the market concerned"

European Commission Staff Explanatory Note accompanying the Recommendation on Relevant Markets

The analysis of the three factors key to ICASA's assessment is flawed

1

Barriers to Entry

- Discussion of "barriers to entry" misunderstands their economic role
 - They are not simply "any cost" of successful entry
 - Need to be considered on a forward-looking, not historic, basis

2

Concentration indices and market power

- Discussion of market power and dynamics is wrong
- Concentration indices based on incorrect/static definitions are meaningless
- The "vicious cycle" is misunderstood and was never shown to operate

3

Vertical integration

- Vertical integration is not a form of market power, nor does it imply foreclosure
- Vertical efficiencies bring benefits, including to consumers
- Competitors (e.g. StarTimes) are also vertically integrated in distribution and content aggregation/channels

"Premium" Content Not a Barrier

- ❑ **Notion of “premium” obsolete**
- ❑ **Content to build audiences is not scarce, and readily accessible**
 - ❑ Wide range of "premium" content put forward by respondents
 - ❑ Cost of content is not a barrier to entry
- ❑ **Staggering of rights auctions is not a barrier to entry**
 - ❑ Vast number of rights frequently become available
 - ❑ Entrants elsewhere have been able rapidly to build up a portfolio of rights (e.g. BT in the UK)
- ❑ **Exclusivity over a period of years is standard**
 - ❑ Competition to acquire rights does not simply favour incumbents (c.f. "vicious cycle" – more later)
 - ❑ Exclusive content is common in Pay TV and has efficiency benefits (later)
- ❑ **Bundling is the global norm, and indeed telco entrants offer triple- and quadruple-play bundles**

Platform Costs Are Not a Barrier to Entry, and OTT Costs are Low

- ❑ **Capital costs (e.g. platform costs) are not an entry barrier**
 - ❑ Some forms of entry require large, well-resourced firms
 - ❑ But there are other forms of entry that are lower cost (OTT)
 - ❑ Capital markets will fund well-founded business plans
 - ❑ Successful entrants typically from existing broadcasting or adjacent industries (e.g. telcos) due to complementarities and their own advantages and scale

- ❑ **Wrong for Discussion Document to find entry barriers based on alleged difficulties faced by under-resourced and inefficient local licensees**
 - ❑ Access to DTH platform is not a barrier as entrants have proven their ability to launch own DTH platforms (OpenView and StarSat)
 - ❑ OTT platform has reduced entry costs and opened up new opportunities: future entry looks very different from past

Concentration Indices are Wrong and Uninformative

- ❑ **Concentration measures uninformative and misleading**

- ❑ Analysis is also completely backward-looking and not reflective of actual industry competitive dynamics

- ❑ **Content acquisition**

- ❑ No possible means of delineating "premium" content universe, even if were to exist
 - ❑ Shares of current rights holdings not just static but backward-looking:
 - ❑ Existing rights contracts were signed some time ago, thus reflect past conditions and not indicative of current competitive conditions or market power
 - ❑ Bidding markets where outcomes affected by whether others bid, and their success in bidding
 - ❑ Need to consider the strength of existing and potential bidders

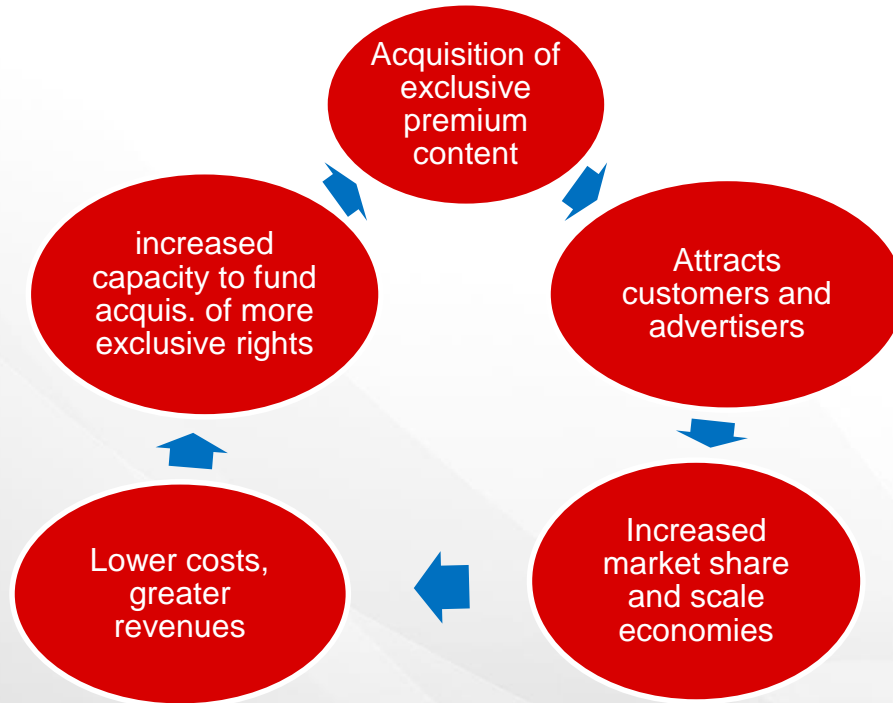
Concentration Indices are Wrong and Uninformative

- ❑ **Retail distribution**
- ❑ Drawing market definition based on licence categories and ignoring other platforms is assuming the conclusion
 - ❑ MultiChoice's market share as 98.1% absurd and not informative of competitive dynamics
- ❑ Static "snap-shot" of current shares uninformative of market dynamics
 - ❑ OTT growing very rapidly and market disruptor: competitive impact far outweighs current subscriber shares (even if these were included)
 - ❑ Pay TV incumbents already having to respond to this dynamic, launching their own OTT offerings and increasing content investments

Discussion Document puts forward a dynamic "Vicious Cycle" Theory

- ❑ Discussion Document floats a "vicious cycle" theory suggesting this is an established theory of harm, e.g. in Europe

Reproduced from
Discussion
Document D Fig. 6:
Exclusive
premium content
and market power
vicious cycle

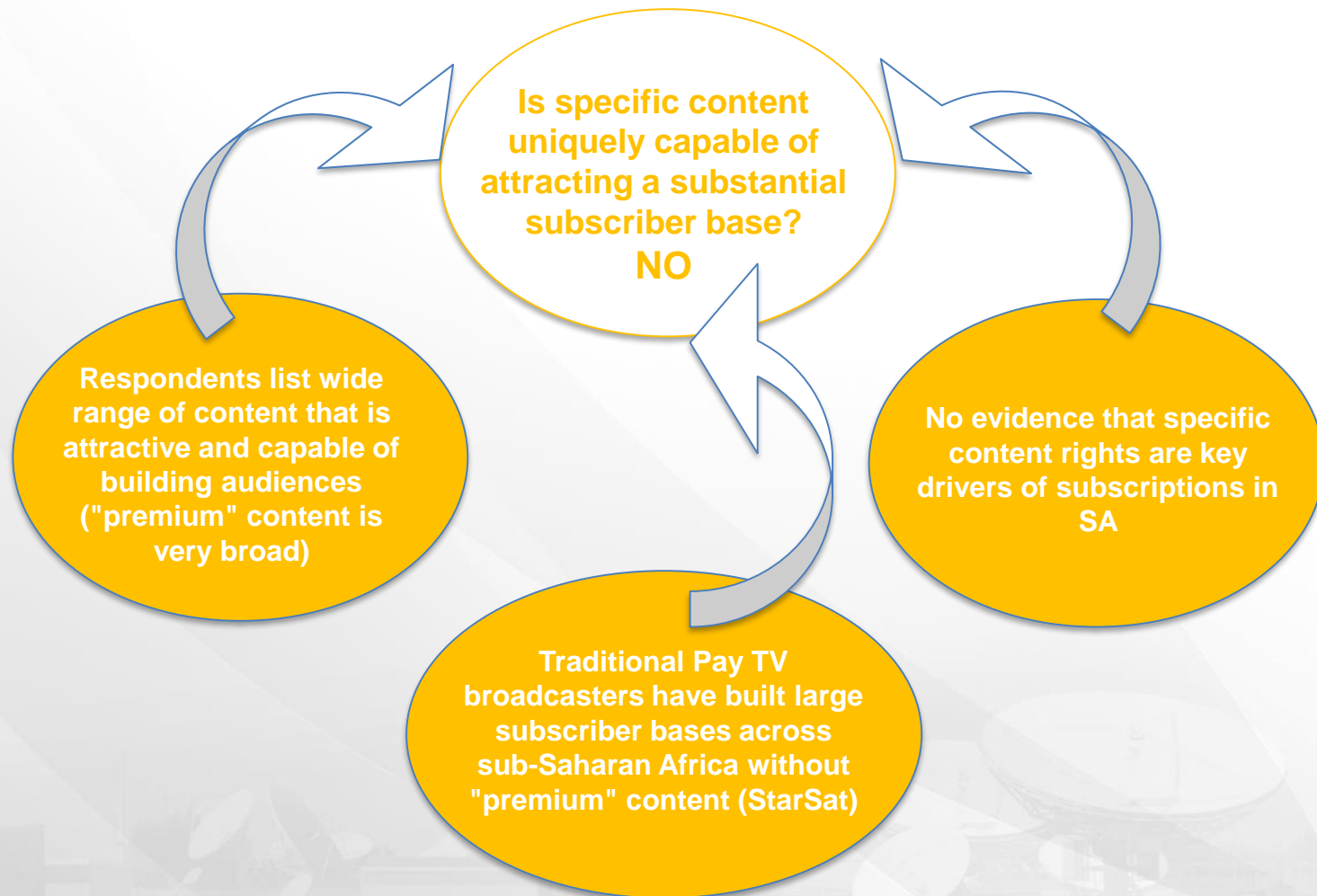


- ❑ While the theory was pursued vigorously for years by complainants in Ofcom's Pay TV investigation (2007-2010), it was not upheld on appeal

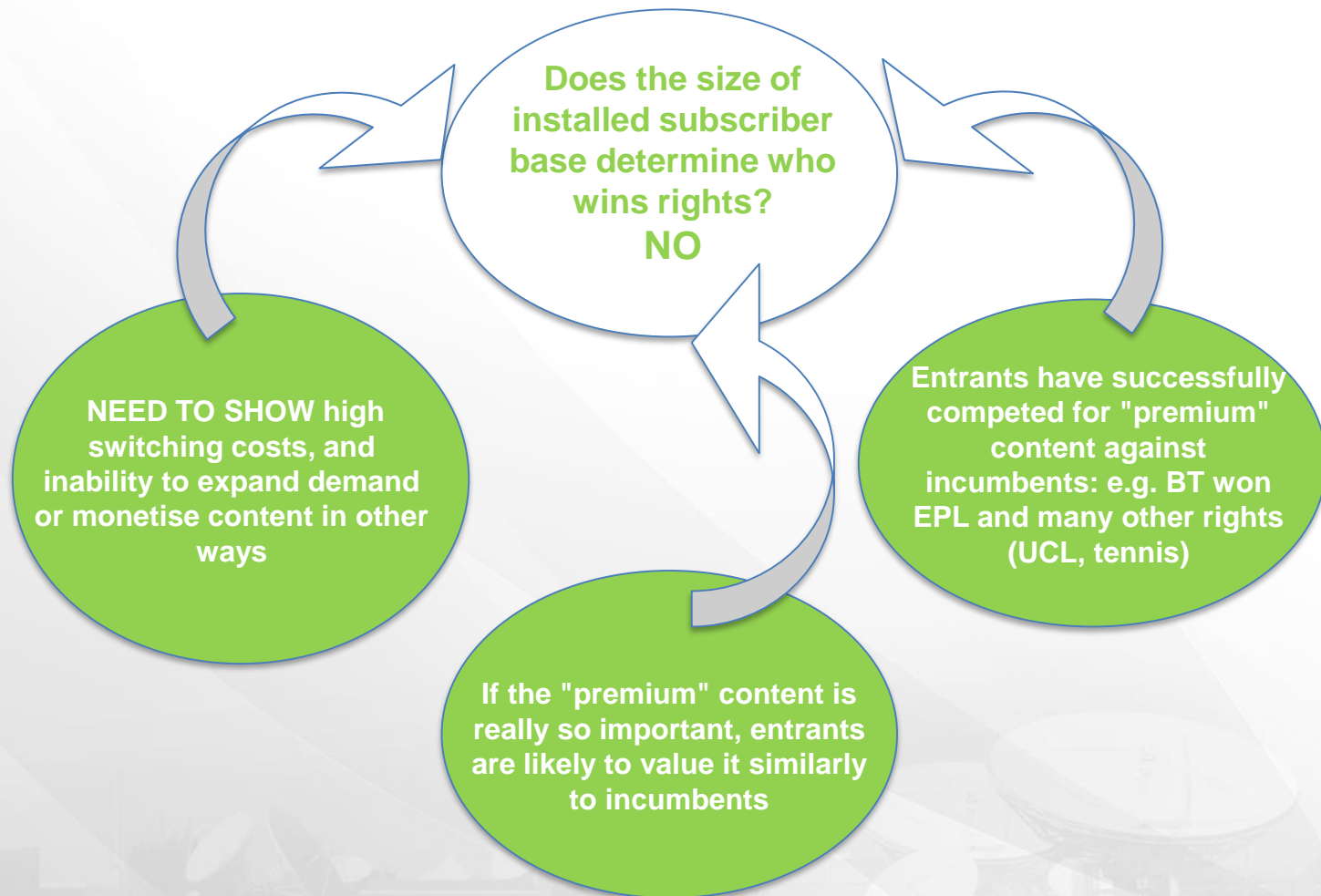
A "Vicious Cycle" Theory would require very specific conditions to hold

- ❑ A "vicious cycle" theory (as articulated properly in *Weeds*, *TV Wars*) **requires strict conditions to hold**
 - ❑ **Exclusivity over specific content must be capable of attracting a substantial subscriber base ("pulling power")**
 - ❑ **Larger installed subscriber base must substantially increase future profits**
- ❑ **Conditions are demanding and must be tested against evidence**

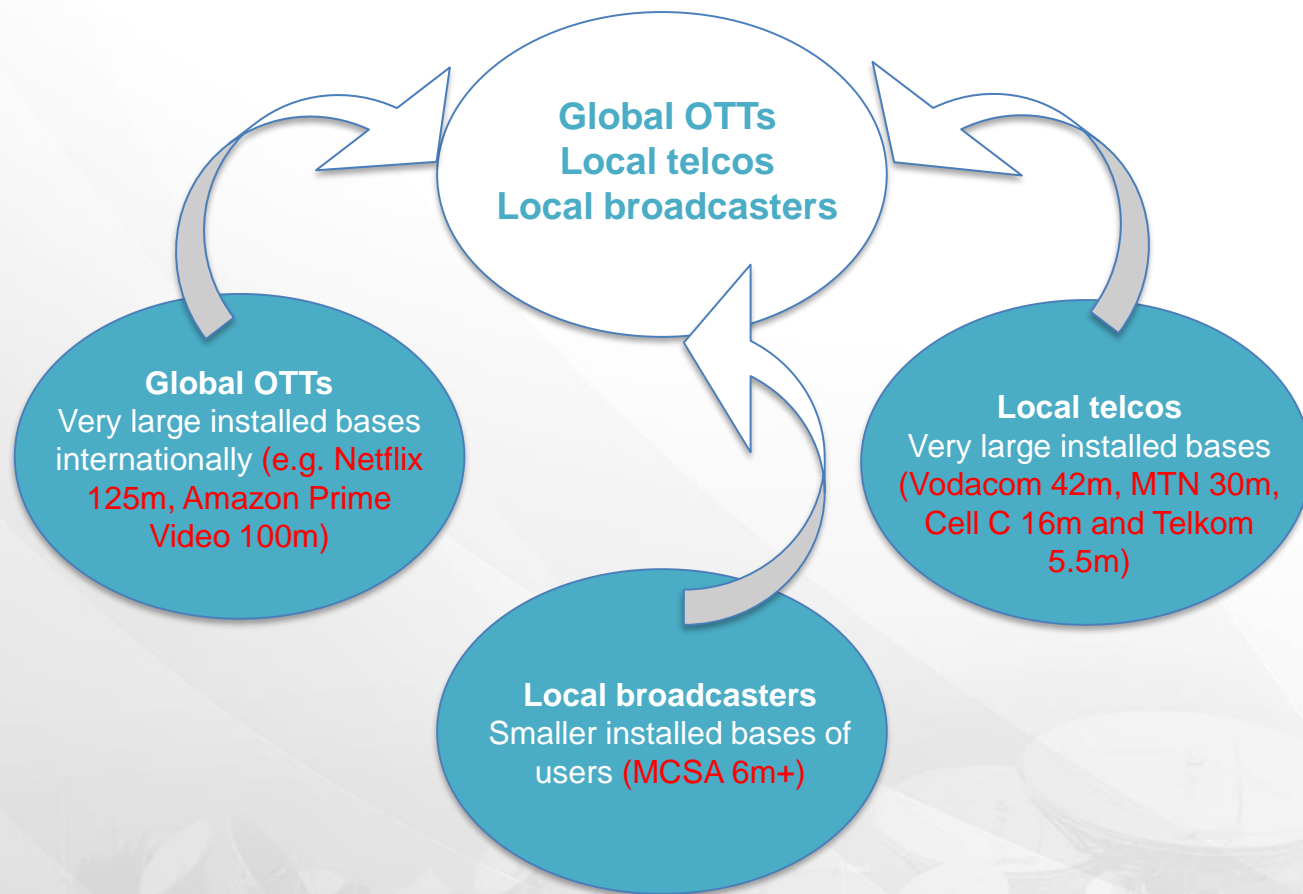
The First Condition Does Not Hold



The Second Condition Does Not Hold



Who is Favoured Even if There is a Vicious Cycle?



Need to understand incentives for exclusivity to assess conduct

- ❑ **Exclusivity is not a symptom of foreclosure**
 - ❑ Content exclusivity a common feature of the electronic audio-visual markets globally, a means by which competing services achieve differentiation
- ❑ **Ex ante competition for exclusive rights also benefits consumers**
 - ❑ Supports broadcaster investment in televising and marketing the content
 - ❑ Promotes investment by the rights holder (e.g. sports leagues) in varied, high-quality content
 - ❑ Contract length (a number of years) is also important in promoting investments by both broadcaster and rights holder
 - ❑ In their responses, sports bodies recognise importance of exclusivity for maintaining value of their rights
- ❑ **Sub-licensing to other platforms can make commercial sense IF this helps with recoupment of content and related costs, and does not devalue the content thus undermining investment**
 - ❑ **Always** a commercial decision (does supply to third parties expand demand or lower distribution costs, wholesale vs retail, will expensive content be devalued by operational and market deficiencies?)

Summary

- ❑ The assessment of markets and competition in ICASA's Discussion Document is static, poor on economic analysis and reliant on international precedents significantly out of date and irrelevant to today's market in South Africa
 - ❑ Despite paying lip-service to economic principles of market definition, these are not implemented
 - ❑ Instead, ICASA relies on descriptions of the industry value chain, product characteristics, licence categories, business models, price levels, etc. which have little economic relevance
 - ❑ Assessment of competition uses concentration measures which are based on incorrect market definitions and, by their nature, ignore market dynamics
 - ❑ Discussion of barriers to entry considers any cost to be an entry barrier, and misstates the wide availability of content
 - ❑ ICASA puts considerable weight on a "vicious cycle" theory that has been rejected elsewhere, and even if valid many other operators would also benefit from such a cycle

LEGAL CONSIDERATIONS AND FAIR PROCESS

Fair Hearing Required

- ❑ This Inquiry is in terms of and subject to s4B to s4D of ICASA Act and s67 of ECA
- ❑ This Inquiry may culminate in the imposition of licence conditions (administrative action) which may materially affect the rights and legitimate expectations of MultiChoice
- ❑ This Inquiry is therefore subject to s33 of the Constitution, PAJA and the Regulations on Fair Administrative Procedures, 2002
- ❑ Those statutory provisions entitle MultiChoice to a fair hearing
- ❑ ICASA must honour that right by giving MultiChoice a fair opportunity to put its case

Opportunity to Make Meaningful Representations

- ❑ An essential requirement of a fair hearing is that MultiChoice must be given such information as is necessary to enable it to make meaningful representations on the matters under consideration by ICASA
- ❑ This is a common law requirement which is codified in Regulation 3(4)(a) of the Regulations on Fair Administrative Procedures, which provides that a notice of a public inquiry must *"contain sufficient information about the matter to be investigated to enable the public to submit meaningful representations"*

Provisions of s67(4) of ECA

- ❑ s67(4) of the ECA makes it clear that ICASA may only prescribe pro-competitive licence conditions if
 - ❑ It has defined the relevant market
 - ❑ It has determined that competition in that market is ineffectiveand
 - ❑ It has determined that there is a licensee with significant market power in that market
- ❑ It is only then that ICASA may prescribe pro-competitive licence conditions, which conditions must be confined to remedying the market failure determined by ICASA i.e. the remedy must be specifically designed to address the ineffective competition
- ❑ It is only then that it will be possible for MultiChoice to make meaningful representations on possible conditions/remedies designed to address the ineffective competition
- ❑ Until then, MultiChoice cannot make meaningful representations on the question of remedies in the abstract without knowing what ineffective competition, if any, those are designed to address

PAJA Requires a Two-Stage Process

- ❑ s3(2)(b) of PAJA provides that a fair administrative procedure normally requires that any affected party be given *"adequate notice of the nature and purpose of the proposed administrative action"* and *"a clear statement of the [proposed] administrative action"*
- ❑ If ICASA finds that there is ineffective competition in a defined market, ICASA will accordingly have to give MultiChoice notice of the nature of and purpose of the pro-competitive conditions it proposes to impose and a clear statement thereof
- ❑ ICASA cannot rationally and reasonably do so in the first stage without pre-empting its decision on whether circumstances requiring the imposition of any remedies exist

Two Stage Process Critical for ICASA

- ❑ From ICASA's perspective
 - ❑ It can only contemplate any possible remedies after it has made a final decision on the merits and if its finding is that there's ineffective competition in the relevant market/s
 - ❑ Those remedies will need to be rationally connected to ICASA's final findings on the merits, reasonable and appropriately tailored to remedy any market failure
 - ❑ ICASA must prepare detailed and robust regulatory impact assessment comparing proposed remedy/licence condition against likely counter- factual in terms of costs and benefits

Proposed Process

- ❑ For these reasons it is vitally important that ICASA should undertake this Inquiry in two stages
- ❑ First stage
 - ❑ ICASA to determine the relevant market/s, and
 - ❑ Whether competition in that market/s is ineffective
 - ❑ If ICASA unable to determine that competition in relevant market/s is ineffective, the Inquiry need not go any further
 - ❑ If ICASA determines that competition is ineffective, then it must determine if any licensee has SMP in that market/s
- ❑ It is only IF ICASA finds that these circumstances are present and determines that one or more remedies are appropriate, that ICASA could move to a second stage to consider possible remedies

Proposed Process: 1st Stage

- ❑ Stage one: Merits
 - ❑ Post the hearings, ICASA publishes a draft Findings Document dealing only with the merits, namely relevant market/s, whether competition ineffective in the market/s, and whether any licensee has SMP in the market/s
 - ❑ Interested persons ought to be given a reasonable opportunity to make written representations, and thereafter oral representations at further public hearings, on draft Findings Document
 - ❑ ICASA publishes final Findings Document on the merits

Proposed Process: 2nd Stage

- ❑ IF ICASA makes a final decision that it is necessary to impose any remedies, a process to determine an appropriate remedy can proceed
- ❑ Stage two: Remedies
 - ❑ Depending on final Findings Document, ICASA may publish proposed remedies
 - ❑ Interested parties ought to be given a reasonable opportunity to make written, and thereafter oral, representations at public hearings, on the proposed remedies
 - ❑ ICASA publishes final Remedies Document
 - ❑ Depending on final Remedies Document, ICASA may then proceed to make regulations in accordance with provisions of s4 of ECA

Ex Ante Regulation and Remedies

No Evidence-based Case for Ex Ante Regulation

- ❑ s67 calls for ex ante regulation only if ICASA can demonstrate that competition in the retail electronic audio-visual services market is ineffective, and that regulatory intervention can bring about effective competition
- ❑ **The case assembled by ICASA does not meet the test in s67 of ECA**
 - ❑ The analysis is static and backward-looking, transplanting into SA historic cases in other jurisdictions and not giving sufficient weight to industry dynamics
 - ❑ Emergence of multiple entrants enjoying various advantages
 - ❑ Proliferation of content which favours multiple platforms

Designing Ex Ante Regulation

- ❑ Because of the invasive nature of regulation, and its potential for distorting and chilling investment on all sides, ICASA must consider very carefully
 - ❑ **Why the developments undeniably underway in the marketplace are unlikely to lead to a vibrant and dynamic ecosystem**, if allowed to play out properly. This must be on a clear forward-looking basis.
 - ❑ **What specific impediment to competition would be addressed by a particular and specific form of intervention, in a way that directly avoids a clearly defined market failure**
 - ❑ **What likely unintended consequences may flow from the regulation**, in terms of
 - ❑ Generating inefficiencies
 - ❑ **Deterring or distorting investment**

Designing Ex Ante Regulation

- ❑ Need careful "**impact assessment**" to ensure consequences are not to the detriment of consumers
- ❑ Must be **causally linked to an identified source of market failure**, and proportionate to the concern
- ❑ **Cannot target one market player in an effort to compensate for multiple business shortcomings of others, and for a failure of policy towards investment and technology – particularly when international evidence is regulatory intervention has not worked**

Proposed Remedies Do Not Have A Good Track Record Elsewhere

- ❑ Where regulators have interfered with the sale and acquisition of content rights (e.g. shortening exclusive contract lengths, introducing a WMO) there is no evidence these measures have successfully stimulated competition
 - ❑ Resisted by rights owners (e.g. sports federations)
 - ❑ Recognised to limit ex ante competition in the bidding for rights
 - ❑ Recognised to undermine incentives to invest in and develop new and innovative forms of quality content of one's own
- ❑ Regulated access to technical services restricts investment in innovation in technical platforms
- ❑ Reality is that "true" facilities-based competition (not "me too" access-based competition) is what matters for dynamic efficiency and this only gets established once technology creates opportunities and regulators no longer step in to support inefficient entrants

Concluding Remarks

Concluding Remarks

- ❑ Relevant market: electronic audio-visual services
- ❑ Dramatic and irreversible disruption in that market
- ❑ Rate of change exponential
- ❑ Competition far from ineffective
 - ❑ OTT (global, regional and local)
 - ❑ FTA
 - ❑ Strong regional Pay TV broadcasters

Concluding Remarks

- ❑ No entry barriers for well-resourced and efficient entrants
- ❑ Failure of previous licensees not indicative of ineffective competition
- ❑ Failure was due to
 - ❑ Strategic business choices
 - ❑ Certain of those licensees being poorly resourced and inefficient
- ❑ Regulatory intervention not warranted
- ❑ Should allow market to evolve

Even Playing Field

- ❑ As market evolves, ICASA should consider evening the playing field between legacy broadcasters and OTTs
 - ❑ Unregulated OTTs don't invest, expatriate their profits
 - ❑ No BEE, no SA shareholding
 - ❑ No requirement to invest in local content
 - ❑ No corporate social responsibility
- ❑ Need to address so national goals for sector can be achieved



THANK YOU

