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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 5647


6 January 2025



# Supplementary Discussion Document:

INQUIRY INTO SUBSCRIPTION  
TELEVISION BROADCASTING  
SERVICES

December 2024



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**List of abbreviations**

AAVCS	Audio and Audio-Visual Content Services
DSAT	Digital Satellite
DTH	Direct-to-Home satellite service
DTT	Digital Terrestrial Transmission
ECA	Electronic Communications Act, 36 of 2005
EPL	English Premier League
FIFA	Federation Internationale de Football Association
FSPTW	First Subscription Pay TV Window
FTA	Free-to-air
HMT	Hypothetical Monopolist Test
ICASA	Independent Communications Authority of South Africa
ICT	Information and Communication Technology
NAB	National Association of Broadcasters
OTT	Over-The-Top
PSL	Premier Soccer League
SACF	South African Communications Forum
SARU	South African Rugby Union
SEM	Socio-Economic Measure (a market segmentation tool)
SMP	Significant Market Power
SROC	Sports Rights Owners Coalition
SSNIP	Small but Significant Non-Transitory Increase in Price
SVOD	Subscription video-on-demand
TVOD	Transaction video-on-demand
UEFA	Union of European Football Associations
VOD	Video-on-demand

## 1. Background

- 1.1. On 11 July 2016, the Authority published a notice of its intention to conduct an inquiry into the state of competition in subscription television broadcasting services in terms of section 4B of the ICASA Act<sup>1</sup> ("the Inquiry"). The Inquiry sought to establish factors that contributed to the apparent inability of new subscription broadcasting licensees to successfully launch their services and attract a fair number of new subscribers.
- 1.2. The Inquiry commenced in earnest on 13 July 2016, with a preliminary information-gathering exercise on a voluntary basis through the publication of a questionnaire for interested stakeholders to complete.
- 1.3. Following receipt of the responses to the Questionnaire, the Authority published a Discussion Document on 25 August 2017 inviting interested stakeholders to provide their input on the Authority's preliminary analysis in respect of the subject matter of the Inquiry ("**the Discussion Document**"). Pursuant to the stakeholders delivering their written comments in response to the Discussion Document, the Authority conducted public hearings from 7 to 11 May 2018.
- 1.4. The Authority requested that some stakeholders submit supplementary information in relation to aspects arising from or canvassed during the public hearings. The relevant stakeholders provided the requested supplementary information to the Authority during November 2018. The Authority also commissioned an independent consumer survey to understand consumer behaviour with respect to television broadcasting and video-on-demand services for purposes of defining the relevant markets.
- 1.5. On 12 April 2019, the Authority published the Draft Findings Document in terms of section 4B of the ICASA Act, read with section 67(4) of the ECA. The interested stakeholders were invited to submit written representations to the Authority by 21 June 2019 in response to the Draft

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<sup>1</sup> The Initial Notice was corrected by an erratum published under GN 552 in *Government Gazette* 40256 of 7 September 2016.

Findings Document. The deadline was subsequently extended first to **27 August 2019** and eventually to **4 October 2019**.

- 1.6. Having considered the aforementioned representations, the Authority then initially sought to conduct public hearings with interested stakeholders from **6 to 9 April 2020**. However, due to the prohibition of gatherings as contained in the COVID-19 Disaster Management Regulations, the public hearings were held in abeyance.
- 1.7. Pursuant to requests from interested stakeholders to further postpone the public hearings during **28 to 30 October 2020** due to the negative impact of the COVID-19 pandemic on business continuity, the Authority acceded to the request and held public hearings from **12 to 15 January 2021** - providing the stakeholders additional time to prepare for the public hearings. Following the public hearings in January 2021, stakeholders submitted additional information to the Authority.
- 1.8. The Authority subsequently identified that there are rapid developments in the market that could have an impact on broadcasting services. The Authority considered the advent of OTT service providers (inclusive of various types of video-on-demand services) and their impact on television broadcasting services. The Authority found that OTTs are expanding in terms of the number of new entrants and the scale of operations, especially international video-on-demand service providers. There are also a number of local OTT service providers who have exited the market in recent history owing to various challenges. What is undeniable though is that the entry of OTTs is changing the manner in which viewers consume content.
- 1.9. Another development that is likely to impact broadcasting services is the increased ease of access to fast and reliable internet services at prices that make OTTs competitive with traditional broadcast media particularly for premium tier services. Lastly, although there have been delays in the digital migration plans, 5 provinces currently have had their analogue signal switched off with the remaining provinces due for

imminent switch off<sup>2</sup>. This may have implications for the market definition and competition in the sector.

- 1.10. The Authority has identified that the aforementioned rapidly changing market developments could have an impact on the Final Findings Document that will be produced following the conclusion of this inquiry. As a result, the Authority decided to extend the consultation process in respect of the Inquiry. The purpose of the extended Inquiry is to assess the state of competition, with reference to the changes in market conditions and/or dynamics since the public hearings in 2021 were concluded, and to determine whether there are markets or market segments within the subscription broadcasting services value chain that may warrant regulation in terms of section 67(4) of the ECA.
- 1.11. On 10 November 2023, the Authority published a notice of further consultation with stakeholders<sup>3</sup> in terms of which the Authority advised stakeholders that it had compiled questionnaires for the purposes of obtaining updated information from stakeholders in order to “*better understand the developments (if any) that have taken place in the market since the public hearings*”. Stakeholders were initially requested to respond to the questionnaires by 22 January 2024.
- 1.12. The Authority received requests from four (4) stakeholders requesting extensions to provide their submissions after the deadline of 22 January 2024. The Authority acceded to the extension requests and extended the date to 15 February 2024. The Authority received responses from 5 stakeholders by the stipulated deadline. The stakeholders that provided responses are the Premier Soccer League (PSL), the SA Rugby Union, eMedia, On Digital Media (StarSat) and Multichoice. The Authority has updated and refined its preliminary views based on the information received from stakeholders and current market dynamics.

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<sup>2</sup> [DCDT - Media Statement by the Minister on Analogue Switch-off and the End of Dual Illumination on Broadcast Digital Migration](#)

<sup>3</sup> GN 4050 of Government Gazette 49646 dated 10 November 2023.

1.13. For ease of reference, it is worth summarizing that the Authority had previously identified the following markets:<sup>4</sup>

1.13.1. *“a market for the retail distribution of analogue based free-to-air television services in South Africa;*

1.13.2. *a market for the retail distribution of basic-tier subscription television services and satellite -based free-to-air television services in South Africa;*

1.13.3. *a market for the retail distribution of premium subscription television services in South Africa;*

1.13.4. *a market for the retail distribution of video -on-demand services in South Africa; and*

1.13.5. *upstream markets for (1) the supply and acquisition of premium content for distribution in South Africa and (2) for the supply and acquisition of non-premium content for distribution in South Africa”.*

1.14. Having access to updated data such as OTT penetration levels, access to fast and reliable data as well as reduction in the costs associated with such data the Authority has revised the number of identified markets as follows:

1.14.1. The market for the retail distribution of basic-tier subscription television services and free-to-air television services in South Africa; and

1.14.2. The market for the retail distribution of premium subscription television and OTT services in South Africa.

1.15. At the wholesale level for content acquisition, the Authority holds the following preliminary view on the revised relevant markets:

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<sup>4</sup> Draft Findings Document, para. 1.3.10, p.10 – 11 read with paras 9.1.4 and 9.1.5 of the Draft Findings Document.

- 1.15.1. a wholesale market for the supply and acquisition of premium sports content for distribution in South Africa;
  - 1.15.2. a market for the wholesale supply and acquisition of premium movies and series for distribution in South Africa; and
  - 1.15.3. a wholesale market for the supply and acquisition of non-premium content for distribution in South Africa.
- 1.16. The Authority now invites stakeholders to submit written representations on this supplementary discussion document. The written representations must be submitted to the Authority within forty-five (45) working days from the date of publication of this supplementary discussion document by email at [subscriptioninquiry@icasa.org.za](mailto:subscriptioninquiry@icasa.org.za). The Authority will not consider written representations received after the aforementioned closing date.
- 1.17. The written representations should be detailed and views or opinions expressed should be substantiated, by evidence.
- 1.18. Stakeholders may request that specific information of the written representations be treated as confidential as envisaged in section 4D of the ICASA Act. Such section 4D requests must be made in the prescribed form and contain a motivation substantiating why the relevant stakeholder contends such information should be treated as confidential. Stakeholders are required to also indicate in their representations whether they require an opportunity to make oral representations at the public hearing(s), which may be held in due course.



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**Mothibi Ramusi****Chairperson****Date: 13/12/2024**



## 2. MARKET DEFINITION

### 2.1. Overview

2.1.1. The Authority's approach to market definition is detailed in paragraph 3.2 of the Guideline for Conducting Market Reviews.<sup>5</sup> It involves application of the hypothetical monopolist test briefly discussed below.

### 2.2. Application of the SSNIP test

2.2.1. The theory and application of market definition has received significant attention since the inception of the Inquiry because of the far-reaching implications that market definition has for the assessment of the effectiveness of competition.

2.2.2. The Authority outlined the theoretical principles behind the SSNIP test in the Draft Findings Document. The SSNIP test, also known as the hypothetical monopolist test (HMT), is a hypothetical, intuitive test. It is applied in an iterative manner to test whether a hypothetical monopolist could profitably increase prices by 5%-10%. A relevant market is established when it becomes unprofitable for the hypothetical monopolist to raise prices by the said margin. The purpose of the SSNIP test is to determine whether there are substitute products or services to the focal product or service. Evidence of substitution behaviour can be obtained from consumer surveys, where relevant, and other sources of information such as business plans, product characteristics, and pricing behaviour. The manner in which the Authority may choose to obtain and present the evidence aforesaid is dependent on the pertinent facts and market conditions.

2.2.3. When applying the SSNIP test, it is important to be mindful of the potential for the cellophane fallacy. The cellophane fallacy arises where a market is defined much broader than it should

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<sup>5</sup> ICASA. Guideline for Conducting Market Reviews, March 2010

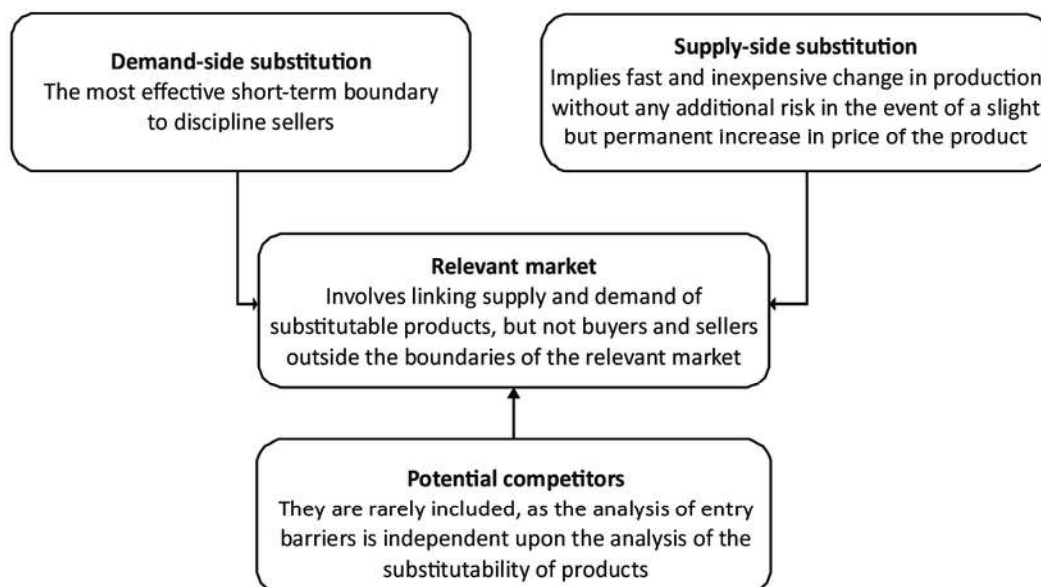
because prices are already above competitive levels. This notwithstanding, the SSNIP test is still a useful tool that the Authority utilises, together with evidence from other sources. In previous representations submitted in response to the Discussion Document, certain stakeholders urged the Authority to be cautious when applying the SSNIP test in broadcasting given its peculiar features.

- 2.2.4. The Authority's view is that focus should be on consideration of competitive constraints. This can be done in a number of ways, including the approach taken in the draft findings document of, *inter alia*, analysing how product characteristics or business models could affect substitution behaviour and consequently competitive constraints.
- 2.2.5. Therefore, the Authority's analysis considers whether enough consumers are likely to switch in the event of a SSNIP.
- 2.2.6. Taking into account the theoretical principles of market definition, which are generally not under dispute, the Authority wishes to emphasise the following principles.
- 2.2.7. The starting point in the market definition exercise is the identification of a focal product or service, which is usually the product under investigation, within a focal geographical location. The SSNIP test is then applied on the focal product taking into account both demand-side and supply-side competitive constraints. In this Inquiry, the focal product is subscription television services. The Authority sought to consider whether a hypothetical monopolist supplier of subscription television broadcasting services (the focal product) in South Africa (the focal geographical area) could profitably raise prices by a SSNIP. The Authority has previously highlighted that this approach is a starting point and does not imply that the relevant market should therefore be confined or restricted to subscription television broadcasting services in South Africa.

Depending on the evidence and analysis, the market can either be broader than subscription television broadcasting services in South Africa.

2.2.8. It is also worth emphasising that there are mainly three sources of competition that have an impact on the relevant market. The two sources, traversing demand-side and supply-side competitive constraints, are considered to have an immediate impact. The third source of competition, referred to as potential competition is considered at the stage of competition assessment, due to its time limitations. Figure 1 below illustrates this approach.

FIGURE 1: MARKET DEFINITION APPROACH



Source: Kostic, M. (2014)<sup>6</sup>

2.2.9. When assessing demand-side substitution, the following factors are usually taken into account:

- Barriers and costs associated with switching demand to potential substitutes;

<sup>6</sup> Kostic, M. (2014). Testing the boundaries of the relevant market in competition policy. *Ekonomska Horiizonti*. 16(1): 31-45. Available at <https://www.researchgate.net/publication/314897478>

- Product characteristics and intended use;
- Evidence of substitution in the recent past;
- Views of customers and competitors;
- Consumer preferences; and
- Patterns in price changes.

2.2.10. **Product characteristics/practical indicia**

2.2.11. In the Draft Findings Document, the Authority stated that it is common practice that, in the absence of relevant data to conduct an empirical SSNIP test, which is rarely done by regulators, in order to test for substitution other tools can be used, including an analysis of product features as well as business models. It is an established approach in competition economics that in the application of the intuitive SSNIP test the analysis considers evidence of substitution. From the demand side this could include analysing evidence of how product characteristics and intended use, price-related evidence, consumer purchase behaviour, habits and preferences as well as switching costs affect substitution. Evidence linked to product characteristics may provide useful information on whether customer substitution patterns are likely to be influenced significantly by those characteristics. For instance, where the objective characteristics of products are very similar and their intended uses are the same, this could be an indicator that the products are close substitutes. However, the following caveats apply:

- even where products apparently have very similar characteristics and intended use, they may still not be substitutable in the presence of high switching costs and entrenched brand loyalty;

- consumers may not necessarily view products that have similar characteristics, as close substitutes; and
- products with very different characteristics may be close substitutes if, from a customer's point of view, they have a very similar use<sup>7</sup>.

2.2.12. This approach was upheld on appeal by the US Supreme Court in the seminal *Brown Shoe*<sup>8</sup> case which listed 'practical indicia' to consider in market definition, as being –

- industry or public recognition of the submarket as a separate economic entity;
- peculiar characteristics and uses of the products;
- uniqueness of production facilities;
- existence of distinct customers;
- existence of distinct prices;
- customer sensitivity to price changes; and
- existence of specialised vendors.

2.2.13. It is also important to note the injunction by the South African Competition Tribunal in *Massmart v Moresport*<sup>9</sup>, in this context, that –

*"Practical indicia are considered by competition authorities not simply to determine that one business is different from another, but for the purpose of determining the market in which companies (businesses) strive for profit or where in fact competition exists."<sup>10</sup>*

*"Indeed the "determination of a relevant product market is a matter of business reality ...of how a market is perceived by those who strive for*

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<sup>7</sup> Botswana Competition Commission. Market definition guidelines

<sup>8</sup> *Brown Shoe* 370 US 294; 82 .C.T. 1502

<sup>9</sup> Competition Tribunal of South Africa. *Massmart Holdings Limited and Moresport*. Case No: 62/LM/Jul05

<sup>10</sup> *Federal Trade Commission v. Staples Inc. and Office Depot Inc.* 970 F. Supp. 1066.

profit in it." <sup>11</sup> It is not an exercise whereby the practical indicia are simply enumerated in an exhaustive manner in order to highlight the similarities or differences between businesses but is rather an exercise in which competition authorities endeavour to identify from whom and from where a business faces competitive constraints or effective competition."

2.2.14. The Competition Commission in its submission in response to the Discussion Document stated that in most cases, the nature of economic evidence considered for such purposes includes product characteristics, survey evidence, and trends in prices and subscriber numbers.<sup>12</sup>

2.2.15. There are a number of sources that can be relied upon for demand side evidence such as, among others, consumer surveys, industry studies, journals and publications, previous agency investigations and internal company strategic documents, questionnaires and submissions by stakeholders and industry participants. Where relevant, the Authority has also analysed domestic and foreign jurisprudence to assess whether there is jurisprudential support for the Authority's views.

**Question 1: Do you agree with the Authority's market definition approach provided above? Motivate your response by providing reasons and any supporting evidence or data as far as possible.**

### 2.3. Defining the relevant retail markets

<sup>11</sup> Federal CTrade Commission v. Swedish Match et al, 131 F. Supp.2d 151 (D.D.C. 2000)  
Competition Commission Comments on the Discussion Document for the Inquiry into Subscription Television Broadcasting Services. 17 December 2017

<sup>12</sup> Competition Commission Comments on the Discussion Document for the Inquiry into Subscription Television Broadcasting Services. 17 December 2017

2.3.1. The Authority considered, *inter alia*, the following factors and tools in defining the relevant markets:

- Use of the SSNIP test;
- Product characteristics, price levels, business models and other differentiators;
- Evidence provided by stakeholders in response to the initial questionnaire and Discussion Document published in 2016 and 2017 respectively;
- Consideration of evidence provided by stakeholders in response to the Draft Findings Document and the questionnaire issued on 10 November 2023;
- Findings from research papers, studies and reports; and
- Case precedent, both local and international, where relevant.

2.3.2. The Authority did not utilise the results of the previous consumer survey conducted in 2018 due to the passage of time and changes in market dynamics which would have made the consumer survey irrelevant at this point in time. Further, the Authority did not consider it necessary or appropriate at this stage to conduct a new consumer survey due to the availability and the Authority's analysis of other relevant third-party independent consumer behaviour research such as the Broadcast Research Council of South Africa's TV Establishment Survey<sup>13</sup> as well as research by the Marketing Research Foundation's Maps Data Overview. Furthermore, other compelling information was submitted by respondents to the recent questionnaires which information highlights the main competitive dynamics in the market as well as the use of statistical data that indicates the impact of the various market players on competition.

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<sup>13</sup>[TAMS Universe Update 2023 - 19 January 2024 - Broadcast Research Council of South Africa](#)

**Question 2: Do you agree with the Authority's identified tools for defining the relevant market? Motivate your response by providing reasons and any supporting evidence or data as far as possible**

**2.3.3. The Authority's position in the Draft Findings Document**

2.3.3.1. In this section, the Authority does not repeat what is contained in the Draft Findings Document but seeks to examine the evidence it has gathered following the decision to extend consultation to ascertain whether there are developments that require adoption of a different view.

2.3.3.2. For ease of reference, it is worth summarizing that the Authority had previously identified the following markets:<sup>14</sup>

1. *"a market for the retail distribution of analogue based free-to-air television services in South Africa;*
2. *a market for the retail distribution of basic-tier subscription television services and satellite - based free-to-air television services in South Africa;*
3. *a market for the retail distribution of premium subscription television services in South Africa;*
4. *a market for the retail distribution of video -on-demand services in South Africa; and*
5. *upstream markets for (1) the supply and acquisition of premium content for distribution in South Africa and (2) for the supply and*

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<sup>14</sup> Draft Findings Document, para. 1.3.10, p.10 – 11 read with paras 9.1.4 and 9.1.5 of the Draft Findings Document.



*acquisition of non-premium content for distribution in South Africa".*

2.3.4. *Retail level*

2.3.4.1. At the retail level, the Authority considered whether FTA television services compete with subscription television services. The Authority considered several factors including differences in product characteristics and price as well as case precedent that separated free-to-air services from subscription television services. Ultimately, the Authority concluded that satellite free-to-air services compete with basic-tier subscription services and thus belong in the same relevant product market.

2.3.4.2. The Authority also considered whether OTT services compete with subscription television services. In its assessment, the Authority acknowledged the rapid growth and expansion of OTT services and their impact on viewing patterns and behavior which has implications for traditional television broadcasting. At the time, the Authority took the view that the impact of OTT services on subscription television services in South Africa was mitigated by several factors including the cost of data, low broadband penetration rates, the lower penetration of internet enabled TV sets; the preferred method of watching television; differences in content; access to broadband in terms of penetration and cost; internet speeds; whether OTT services were substitutes or complements; and differences in business models and pricing.

2.3.4.3. The Authority recognized the competitive constraint posed by OTT services on subscription services but was

of the view that the constraint was not strong enough to include the OTT services in the same market.<sup>15</sup>

**2.3.5. Upstream level**

2.3.5.1. At the upstream level, the Authority separated premium content from non-premium content. However, the Authority recognized that the concept of premium content is a fluid concept that is dependent on the circumstances prevailing at a particular point in time in a market and is specific to a geographical area, given the culture and preferences of the population at a specific point in time.<sup>16</sup>

2.3.5.2. The Authority also noted that there is a wide array of content that broadcasters considered as premium content including local content which has become a key differentiator and source of audiences and revenues for FTA, subscription and OTT services. The Authority therefore opted to identify what it considered to be premium content based on the characteristics of premium content.<sup>17</sup>

**2.4. Recent developments and their implications for market definition**

2.4.1. Following the Public Hearings held in January 2021 and the additional information provided by stakeholders thereafter, the Authority embarked on further analysis of the evidence and information. Pursuant to this exercise, the Authority recognized the rapidly changing nature of the market (including the effect of the COVID-19 pandemic) and took a decision to extend the consultation with stakeholders and the general public in relation to this Inquiry.

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<sup>15</sup> Draft Findings Document, para. 5.13.17, p.100

<sup>16</sup> Draft Findings Document, para. 1.3.11, p. 11

<sup>17</sup> Draft Findings Document, para. 1.3.12, p.11

2.4.2. In this section, the Authority considers evidence that it has gathered from its internal research as well as via the responses to the questionnaire published on its website on 10 November 2023.

2.4.3. **Competition between FTA and subscription services (satellite-based, digital terrestrial and analogue)**

2.4.3.1. The Authority previously held that basic-tier satellite subscription services compete with satellite-based FTA services. The Authority notes the progress that has been made regarding digital migration, including the analogue switch off that has already occurred in five provinces<sup>18</sup>. The Authority considered that the imminent analogue switch-off renders the previously defined retail market for analogue television services moot. As indicated in the Digital Migration Policy<sup>19</sup>, the benefits of digital terrestrial television include a better-quality picture and the ability to provide many channels using less radio frequency spectrum. These benefits are similar to satellite broadcasting transmission. As a result, once full migration is achieved, FTA broadcasting services will be in a position to offer many channels of a better quality, in competition with satellite based free-to-air and basic tier subscription television. Thus, in the event of a SSNIP on basic tier subscription television services, viewers will in future be expected to switch not only to satellite-based FTA but also to digital terrestrial FTA television services. The Authority notes that Analogue signal will continue in four other provinces until 31 December

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<sup>18</sup> Free State, Limpopo, Mpumalanga, North West and Northern Cape, [DCDT - Media Statement by the Minister on Analogue Switch-off and the End of Dual Illumination on Broadcast Digital Migration](#)

2024<sup>20</sup>. The Authority finds that even in the event that this date is further extended, this is likely to have limited impact on competition as the affected households who have not yet transitioned to the Digital Terrestrial Transmission format have been identified as indigent and unlikely to switch to satellite or other means. Therefore, having regard to the developments outlined above, the Authority considers that there is a market for the retail distribution of basic tier subscription television and digital (both satellite-based and terrestrial) FTA television services.

2.4.3.2. In light of the above, on a forward-looking basis, the Authority does not view that there will be a separate market for analogue FTA and Digital FTA.

2.4.3.3. Since broadcasting is a two-sided market, the Authority also considers the possible reaction of advertisers when faced with a SSNIP. Advertisements are often targeted at specific audiences that are segmented according to certain characteristics such as SEM level, gender, age, language and race. Basic-tier bouquet and free-to-air audiences tend to be targeted at people in the lower-level SEMs. It is important to note that advertising is linked to viewership regardless of the distribution technology used to deliver content to end-consumers or based on classification of a bouquet. For example, when the SABC competes for advertising revenue, it does so based on viewership of its content on analogue, DTT and satellite, and across all services on which the content is available. As such, competition for

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<sup>20</sup> We note a recent media statement by the Minister of Communications and Digital Technologies extending the analogue switch of date to 31 March 2025 - [DCDT - Analogue Switch-Off extended to 31 March 2025](#)

advertisers is not strictly limited by the categorisation of services into basic-tier and satellite-based FTA services.

2.4.3.4. Econet Media notes that subscription television attracts more advertising revenue which crowds out the primary source of revenue for FTA channels. In both their written and oral submissions, e.tv and the SABC lamented the competition for advertising revenue exerted by subscription broadcasters on free-to-air television. According to e.tv, advertising revenue for FTA declined by 14% between 2012 and 2016, whilst that of subscription television grew by 7% over the same period<sup>21</sup>.

2.4.3.5. According to e.tv, MultiChoice accounts for 37.8% of the total television broadcasting advertising revenue<sup>22</sup>. The SABC quoted the Adynamix data which indicates that at 48% market share, MultiChoice had almost half of the total advertising revenue in 2017.<sup>23</sup> e.tv contends that this tide of subscription services accounting for a bigger share of advertising revenue started to turn when MultiChoice began encroaching on the lower LSMs or SEMS, i.e., when basic tier bouquets were introduced.

2.4.3.6. Therefore, the Authority concludes on a market for the retail distribution of basic-tier subscription television services and free-to-air services in South Africa.

**Question 3: Do you agree with the Authority's preliminary view that FTA is in the same market as basic tier subscription television? Motivate your response by providing reasons and any supporting evidence or data as far as possible.**

<sup>21</sup> Comments by e.tv on the Discussion Document into Subscription Television Broadcasting Services. p 5, para 18.

<sup>22</sup> E.tv presentation. Inquiry into Subscription Television Broadcasting Services. 10 May 2018

<sup>23</sup> SABC submission on the Icasa Discussion Document: Inquiry into Subscription Television Broadcasting Services. p. 26 para 3.1.4

**2.4.4. Competition between subscription services and OTT services in South Africa**

2.4.4.1. The advent of OTT services has changed the consumption patterns of viewers in relation to audio-visual content. Thus, service providers such as Netflix, Amazon Prime Video, Showmax, MTN Play, Apple TV, YouTube, Disney Plus, Viu and others use broadband to provide their streaming services.

2.4.4.2. Traditional broadcasters have also entered the streaming market with DSTV launching DSTV "Stream" which is a full streaming subscription service separate from its traditional satellite subscription; it has both video on demand and live streaming. Similarly, SABC has launched SABC Plus which also provides both live streaming and video on demand. Sentech has also launched a streaming and VOD platform called Freevision Play. Subscription video-on-demand services (SVOD) sell access to a catalogue of films, television content, documentaries, series and lately sports content against payment of a monthly subscription fee. Transactional video-on-demand services (TVOD) on the other hand are services such as Apple's iTunes, which sell or rent films and television content on a pay-per-view basis, also called electronic sell-through (EST).

2.4.4.3. SVOD and TVOD services are replacing DVD and Blu-ray discs sold in physical stores for retail and rented in video clubs. These services act as a digital store and video club as consumers pay their purchase or rental fees on a pay-per-view basis.<sup>24</sup> This has resulted in the

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<sup>24</sup> Cabrera Blázquez F.J., Cappello M., Grece C., Valais S. 2016. VOD, platforms and OTT: which promotion obligations for European works?, IRIS Plus, European Audiovisual Observatory, Strasbourg. Available at <https://rm.coe.int/1680783489>

death of video and music stores throughout the world and country. Other types of VOD include advertising video-on-demand (AVOD), which is funded through advertising revenue such as YouTube and premium video-on-demand (PVOD), which is a form of TVOD, that allows access to content sooner than other forms of video-on-demand at a premium fee and on a pay-per-view basis. Thus, the term "OTT" is broad and includes all forms of offering various services over the Internet.

2.4.4.4. For purposes of this Inquiry, the term "OTT" refers specifically to subscription video-on-demand and internet-based services. The terms OTT, SVOD, non-linear audio-visual services and audio-visual streaming services are used interchangeably in this Discussion Document.

2.4.5. ***Differences in content between OTT services and subscription services***

2.4.5.1. The Authority also considered that there may be some differences in content between providers of video entertainment services, including between subscription services and OTT services. As stated above, the differentiated nature of video entertainment services makes market definition complicated because one of the key ways that providers of these services use to differentiate their offerings is through content. For example, MultiChoice sees sports and local content as key ways to differentiate its services (both subscription television (DStv) and OTT services (Showmax and DSTV Stream) from those of its competitors. This means that mere observation of differences in content is not sufficient to conclude that OTT services and subscription television

services are in separate markets. For example, the Authority recognises that Showmax services with sports content compete with other subscription television services.

2.4.5.2. The Authority has also observed that the competitive strategies of providers of these services evolve over time and has resulted in the differences in offerings becoming less observable. For example, between the time of inception of the Inquiry and now, Netflix started investing in and including local content in its service offering. This includes local series and movies as well as reality tv content. It has also started investing in sports-related content, which started with sports documentary-like content covering several genres but appears to be gradually moving towards live sports content. For example, on 14 November 2023 Netflix hosted its first live sports event<sup>25</sup> and is expected to broadcast more live sport with live NFL games coming up.<sup>26</sup> Netflix has already leaned into live programming with live comedy and other events.<sup>27</sup> Other OTT providers like Amazon and DAZN are already players in sports programming.

2.4.5.3. These evolving strategies mean that in a forward-looking market Inquiry, the Authority should be cautious not to adopt a static view in assessing relevant markets and the state of competition as the strategies of providers are likely to continue to change. The Authority analyses differences in content discussed below.

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<sup>25</sup> <https://www.netflix.com/tudum/articles/netflix-cup-live-event-date-news>.

<sup>26</sup> <https://www.cnn.com/2024/05/12/from-tyson-paul-fight-to-nfl-netflix-live-sports-interest-is-rising.html>.

<sup>27</sup> <https://www.cnn.com/2024/05/12/from-tyson-paul-fight-to-nfl-netflix-live-sports-interest-is-rising.html>.



**Sports content**

2.4.5.4. A NAGRA<sup>28</sup> report analyses the global market for premium sports OTT services and captures the trends within the sector as well as the key attributes of the services offered. The findings in the aforementioned report are based on interviews with senior executives and an analysis of the world's leading leagues, clubs and sports OTT services.

2.4.5.5. The NAGRA report found the following:

2.4.5.5.1. Over a third of the top 25 football clubs and six of the top ten largest leagues and federations offer premium OTT services;

2.4.5.5.2. Traditional subscription-TV providers are increasingly focusing on tier one rights<sup>29</sup>;

2.4.5.5.3. These subscription-TV providers are experimenting with 'skinny bundles' to attract consumers unwilling to pay for full-fixed contracts;

2.4.5.5.4. Several emerging specialist OTT sports aggregators, including DAZN, Eleven Sports and FloSports, are creating value-for-money global offerings, aggregating tier two and three rights not acquired by pay-TV providers; and

2.4.5.5.5. Other major internet companies are experimenting with sports content as well, for example, YouTube's

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<sup>28</sup> NAGRA. 2019. The Global market for Premium Sports OTT services. Available at [sportottreport.pdf](https://www.nagra.com/~/media/Files/Reports/2019/01/sportottreport.pdf) ([hubspotusercontent00.net](https://www.hubspotusercontent00.net/))

<sup>29</sup> Rights pertaining to top national sports leagues with a global appeal such as the EPL, La Liga, UEFA etc

Champions League partnership with BT in the UK, in which it shows live matches free-to-air. Amazon also has acquired some Tier one content, including a small package of English Premier League content in the UK.

2.4.5.6. The NAGRA report further goes on to state implications of sports in OTT as follows:

- 2.4.5.6.1. Live sports are the last bastion of live TV – it is mission critical for subscription-TV companies to retain tier one sports rights in their bundles;
- 2.4.5.6.2. In many ways, subscription-TV companies appear well-placed to retain these rights given their ability to cross-subsidise sports from high-margin broadband businesses and their existing billing relationships;
- 2.4.5.6.3. The biggest challenges they are likely to face are from Amazon, should it decide to prioritise tier one sports rights in key markets, or major sports broadcasters such as ESPN reserving their key rights for their direct-to-consumer services;
- 2.4.5.6.4. Subscription-TV providers will consolidate by rationalising their investment in tier two sports and entertainment and focusing spend on premium content;
- 2.4.5.6.5. They and other premium sports OTT providers will continue to experiment

with different pricing and packaging models, seeking the right balance between being attractive to cord-cutters, and being profitable; and

- 2.4.5.6.6. Subscription-TV providers will seek to evolve their service offerings in response to innovations from agile challenger brands – ranging from shared viewing experiences and personalised content through to data-services such as Formula 1's real-time telemetry.
- 2.4.5.7. It is important to note that not all aspects of the NAGRA report and its findings may be applicable to South Africa. for instance, subscription broadcasters in South Africa may not have high-margin broadband businesses to use to cross-subsidise the cost of sports content. Similarly, South African subscription and FTA broadcasters may have lesser financial resources compared to the global streaming services.
- 2.4.5.8. The proliferation of various OTT platforms in the sports market including in South Africa changes the manner in which sports content has traditionally been consumed, similar to the changes that have occurred in the movies and series space. In the South African market, the most significant distinction in terms of offering between linear subscription television and OTTs has historically been the limited availability of live sport content on OTT services. The launching of DSTV Stream, Showmax Mobile Premier league and SABC Plus shows that live sports broadcasting on OTT services is possible in South Africa. There are various OTT players who provide sports streaming services that are accessible to South Africans today, including Red Bull

TV, StarTimes ON, Rugby Online, WWE Network, UFC Fight Pass, F1TV Pro and DAZN.

2.4.5.9. Most of the larger OTT service providers, do not provide live premium sports content. The Authority also observes that while most of the OTT sports content providers have a minimum subscription amount, most of them provide access to only a single sporting code, for instance, F1TV Pro only provides racing content. However, the individual sporting codes may be premium content.

2.4.5.10. The Authority also recognises that the SABC Plus streaming service has a wider array of sports content including content that the Authority has previously identified as premium content and is available to consumers free of charge. This includes PSL Matches, a selection of EPL matches and local national Cricket team games as well as some National Rugby Team games when they are able to successfully negotiate sublicences<sup>30</sup>. It is also important to note that the SABC Plus is also available on internet-enabled television sets and as such can be accessed on a wider screen (such as a television set) by consumers. Consumers are not all the same and some consumers may not be fans of some sports content<sup>31</sup> and as such may be satisfied with having access to a single sporting code. For example, consumers who only prefer F1 may be content with subscribing to F1TV. The creation of Showmax Mobile's EPL<sup>32</sup> offering further drives the point that users may prefer a specific sport and not all sports

<sup>30</sup> The Authority notes that this remains a contentious issue between the rights holders and the SABC over the cost of sublicences; [MEDIA STATEMENT | SUPERSPORT AND SABC REACH AGREEMENT TO TELEVISION ICC T20 MEN'S WORLD CUP FINAL AND SPRINGBOK CASTLE LAGER INBOUND TESTS ON PUBLIC BROADCASTER – SABC – Official Website](#)

<sup>31</sup> Hanna Patch, *Which factors influence Generation Z's content selection in OTT TV? A Case Study*, (2018), The Royal Institute of Technology School of Electrical Engineering and Computer Science. [Content Consumption Preferences in South Africa | Blog | KLA](#)

<sup>32</sup> Showmax Premier League Mobile.

aggregated. The Authority is aware that some consumers are also able to use simple virtual private network (VPN) service to appear to be accessing the internet from another country and in this way get access to even more sports content online from providers such as ITVX, Stan Sport and ESPN+ amongst others. However, the overall impact on competition is unclear at this stage.

2.4.5.11. Stakeholders such as the EPL and MultiChoice<sup>33</sup> argue that OTTs are able to grow without sports content. This appears to be consistent with the evidence on the rapid growth of OTT services when compared to subscription services.

2.4.5.12. One key area that may indicate competition is the number of subscribers that pay-tv and OTTs are able to attract. It is clear that over time, OTTs have managed to grow from minuscule numbers of around 3.7 million in 2017 to having over 8.3 million subscribers in 2024 in South Africa.<sup>34</sup> For the same period, Multichoice had a total subscriber number of approximately 7.6 million in 2023 across all its bouquets.

2.4.5.13. The Authority notes that Multichoice has been experiencing a steady decline in subscribers since 2019 while in the same period OTTs have been adding subscribers. In this regard, the Authority notes that in the premium bouquet, **[Redacted]**.<sup>35</sup>

2.4.5.14. **[Redacted]**.<sup>36</sup>

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<sup>33</sup> See para 66.5 of the MultiChoice response to Questionnaire dated 15 February 2024.

<sup>34</sup> Refer to Statista data accessed here [Video-on-Demand - South Africa | Statista Market Forecast](#)

<sup>35</sup> See MultiChoice response to Questionnaire dated 15 February 2024; Refer to Statista data accessed here [Video-on-Demand - South Africa | Statista Market Forecast](#)

<sup>36</sup> MultiChoiceGroup Limited. Business Plan Fy 23\_24

- 2.4.5.15. Despite this and notwithstanding MultiChoice having the most comprehensive sports content on its services, *the* Authority notes that MultiChoice has been losing a non-trivial number of subscribers including in its DStv Premium bouquet which contains all the sports content. Between 2016 and 2023 the DStv Premium bouquet lost **[Redacted]** of its subscribers. More recent trends show that MultiChoice has also lost subscribers to its DStv Compact bouquet.<sup>37</sup>
- 2.4.5.16. When MultiChoice won the PSL rights in 2012, that agreement was meant to expire at the end of the 2016/17 season, yet on 15 April 2015 the agreement was amended by both parties to extend it by a further two (2) seasons, effectively making it a seven-year agreement.
- 2.4.5.17. Notably, a large proportion of the content was available on the SABC's television broadcasting services through a sublicensing agreement. At the same time, the New Media rights relating to distribution through mobile devices and the internet was extended to eight (8) years, from seven (7) years. The term of this contract is unusually long by any standard. Waiting for the contract to expire, if it is still in force, might unduly perpetuate the market failure and limited competition experienced in the market, to the detriment of consumers.
- 2.4.5.18. Apart from this single instance, the Authority has not observed any other instances where contracts were amended.

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<sup>37</sup> See MultiChoice response to Questionnaire dated 15 February 2024

2.4.5.19. Cell C also submits that linear subscription television consumers that do not switch to OTT services are limited by inability to access live sport.

### **Movies and Series content**

2.4.5.20. In the Draft Findings Document, the Authority reasoned that windowing is a form of price discrimination that categorises consumers into different market segments based on their elasticity of demand<sup>38</sup>. As such, different windows can be defined as distinct relevant markets from a demand side perspective.

2.4.5.21. In the period following the publication of the Draft Findings Document, the Authority has observed that the length of the windows has been changing over time and in some instances even reversing. Over time, there has been a multiplication of windows accompanied by a push for a shorter window length.

2.4.5.22. Every window tends to get closer to the initial release in theatres. Further, as Table 1 below shows, the evolution of windows has also resulted in significant overlaps in the windows in which content is available to both SVOD, subscription and even FTA services.

**Table 1: Evolving nature of movie-release windows**

OLD WINDOWS		EVOLVING WINDOWS	
Medium of exploitation	Window	Medium of exploitation	Window
Theatrical release (cinemas)	4 to 24 months exclusive	Theatrical release and SVOD	Varies from single week to 4 months
Video and DVD rental and sales (or VCD) + Pay per view	4 to 24 months after theatrical release	Transactional VOD and Electronic sell-through (EST) +	A few days (exceptionally) to 6 months after theatrical

<sup>38</sup> Paragraph 5.17.2.6 read with 1.3.5 of the Draft Findings Document

		DVD/Blu-ray sales/ rental	– sometimes offered during theatrical release at premium pricing
Pay-Television	12 to 36 months after theatrical	Pay-Television and Subscription Video on Demand (SVOD)	Varies from single week (operator commissioned the film for its platform and supports a small initial theatrical run for marketing purposes) to 12 months after theatrical
Free Television	12 to 24 months after theatrical	Free Television and free VOD (e.g., 'catch-up' TV)	Varies from single week (Broadcaster financed the film and agrees to limited cinema release) to 36 months after theatrical
		Advertising-supported Video on Demand (AVOD)	After the TV through some new AVOD platforms in the TVOD space (above)

Source: Moullier, B. & Galvis, A. (2019)<sup>39</sup>

2.4.5.23. The COVID-19 global pandemic, with its emphasis on social distancing and the various periods of lock-down, had a devastating impact on the entertainment industry, including cinemas. Movie theatres and production houses had to be temporarily closed. Viewers turned more to home entertainment in the form of video-on-demand. The economic distress wrought by the COVID-19 pandemic has forced some national associations, such as the French Independent Distributors Union (Syndicat de Distributeurs Indépendants, SDI) and UniversCiné, to team up to release theatrical films on VOD, thereby relaxing the

<sup>39</sup> Moullier, B. & Galvis, A. (2019). Study on the audiovisual legal framework in Latin America.

N/B Whilst this report is based on the Latin American experience, the same phenomenon can be observed in other parts of the world



release window schedule rules.<sup>40</sup> As a result, studios began releasing films directly to consumers via premium video-on-demand (PVID) and various other streaming platforms.

2.4.5.24. The simultaneous release of movies in cinemas and OTT platforms, changes the sequencing of windowing with OTTs getting access to movies ahead of subscription tv broadcasters. The reduction in the window period between OTT services and subscription television services increases competition between the OTT services and subscription broadcasters. Where OTT services receive content before subscription television services, those OTT services would thus enjoy a competitive advantage, which was previously enjoyed by subscription television services, even if the content is only available to a studio-owned OTT service.

2.4.5.25. Further, OTT providers like Netflix, Amazon and Apple TV have become major content creators and produce their own movies that are released directly on their platforms increasing their ability to compete with subscription broadcasters despite windowing of content. Similarly, major producers such as Disney, Universal and HBO have established their own OTT services where movies from a theatre run are immediately or simultaneously released on to the OTT platform. Table 2 below depicts the different types of content offered by different OTT service providers available in South Africa. The varied type, quantity and quality of content is also reflected in the different prices charged. DStv Premium has about 155 channels

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<sup>40</sup> European Audiovisual Observatory. 2020. The European audiovisual industry in the time of COVID-19. Available at [iris plus 2020en2 online.pdf](#)

at a current subscription fee of R929 per month. Amazon Prime Video has by far the greatest number of movies and TV shows compared to any other OTT service provider.

**TABLE 2: COMPARISON OF OTT CONTENT**

Service	Content		
	Movies	TV Shows	Main content
Netflix Standard	3 628	2 020	Netflix Originals and others including local content
Showmax	1 199	562	HBO shows and local content
Amazon Prime Video	7 269	1 103	Amazon Originals and Twitch Prime
Apple TV+	30	53	Apple TV+ Originals
Vodacom Video Play	94	43	Blockbusters and rentals
eVOD	1500 hours of content		Soaps, TV shows and Hollywood movies

Source: Mybroadband<sup>41</sup>

2.4.5.26. Despite differences in content, Netflix has submitted to the Authority that all providers compete against each other regardless of differences in content and delivery mechanism.

#### 2.4.6. **Viewer experience**

2.4.6.1. The Authority finds that there are currently no major differences in viewing experiences between watching traditional tv and streaming or watching video-on-demand services. A recent survey by Tengeh & Udoakpan<sup>42</sup>, found that the large television set is still the preferred mode to consume TV content by all age groups, although younger people tend to consume content using all devices at their disposal. Despite an increasing ownership of smartphones, most people still prefer to watch TV on a bigger screen and therefore, tend to use TV sets and laptops to consume video

<sup>41</sup> MyBroadband. [Netflix vs Showmax in South Africa — video streaming price showdown \(mybroadband.co.za\)](https://mybroadband.co.za/news/entertainment/11111-netflix-vs-showmax-in-south-africa-video-streaming-price-showdown)

<sup>42</sup> Tengeh, R& Udoakpan, N. 2021. Over-The-Top Television Services and Changes in Consumer Viewing Patterns in South Africa. *Management Dynamics in the Knowledge Economy*. Vol. 9(2):257-277

content. Advances in smart TVs and devices such as android boxes allow for streaming content to be watched on large sets that most consumers are used to. Some cell phones can also cast their streams onto the smart television or other casting device connected to the TV set.

- 2.4.6.2. Traditional broadcast television viewers historically could watch only the content, which was being broadcast, with no control in terms of fast forwarding or changing the program. However, technology has advanced to offer catch up features which are now common with most subscription television services, giving greater viewing control and convenience to consumers. A video-on-demand user chooses to watch any video, movie or clip anywhere, anytime at his or her convenience. As with catch-up services on traditional subscription services, a video-on-demand user can find any type of programme of his or her interest.
- 2.4.6.3. Online viewing also allows consumers to choose a payment plan that suits their viewing habits whether it is weekly, monthly or quarterly subscriptions or flexible charge per download.
- 2.4.6.4. A standard feature of television services is advertising. From a consumer perspective, excessive adverts interfere with the viewing experience and can become irritating. Some OTT services do not have any adverts while others like eVOD and SABC Plus have. Global OTT services like Netflix and Disney+ have started to introduce advertising on some of their lower-

tier services<sup>43</sup> and these can be expected to be rolled out in South Africa in the near future. This is one example of the dynamic nature of the entertainment industry.

#### 2.4.7. Differences in price points

2.4.7.1. One of the factors to consider when defining relevant markets is whether two or more products are priced similarly to allow for substitution. Consumers take into account relative prices when deciding to switch between products.

2.4.7.2. The Authority recognises that differences in prices could be a result of various factors including differences in quality and differences in cost. As such, price comparisons may not automatically mean products are separate markets. Table 3 below is a comparison of the subscription fees of different packages across service providers. The fee for OTT services shown excludes data costs.

**Table 3: Price comparisons**

Service Provider	Price/month
DSTV Premium (satellite)	R929
DSTV Stream Premium (OTT)	R699
StarSat Max <sup>44</sup>	R549
DSTV Compact	R469
Netflix Premium	R199
Netflix Standard	R159
Netflix Basic	R99
Disney+	R139
Amazon Prime	R79

<sup>43</sup> <https://www.hollywoodreporter.com/business/business-news/netflix-disney-now-pushing-subscribers-to-ad-tiers-1235572459/>. See further <https://www.reuters.com/technology/netflix-squeak-past-disney-us-advertising-revenue-2024-report-2023-12-12/>

<sup>44</sup> Recently Starsat's licence was not renewed due to failure by StarSat's owners to file a renewal application within the specified period required by the ECA.

Showmax + Premier league	R140
Apple TV+	R125
MUBI	R139.99
VIU	R69

Source: Own Construction (based on publicly available information and correct as at 30 June 2024)

- 2.4.7.3. When we compute the breakdown of the cost of accessing a typical OTT combination, consisting of a Netflix Basic subscription at R99 plus an average fixed LTE or FTTH broadband service at approximately R349.

**TABLE 4: BREAKDOWN OF A TYPICAL OTT PRICE COMBINATION**

Typical OTT combination	
Netflix: Basic	R99.00
Axxess MTN	R349
<b>Total</b>	<b>R448</b>
Disney+	R139
<b>TOTAL</b>	<b>R587</b>

Source: Own Construction (based on publicly available information and correct as at 30 June 2024)

- 2.4.7.4. Table 4 above shows that a Basic<sup>45</sup> Netflix subscription and an FTTH service priced at R349 combined are cheaper at R448, compared to a premium subscription of R929. This is still also cheaper than DSTV stream at R699<sup>46</sup>. Consumers could get even cheaper combinations where there are cheaper broadband packages with one starting at R247 per month. This makes the combined price competitive with the DStv Premium<sup>47</sup>, DSTV Stream, DStv Compact and DStv Compact Plus packages.

- 2.4.7.5. As a result, the Consumer is in a position to pay for an additional OTT service and still come in cheaper than the DStv Premium package. This could be the reason

<sup>45</sup> basic is the cheapest entry point for Netflix with no impact on the content subscribers can access.

<sup>46</sup> This is before including the cost of a data package

<sup>47</sup> Refer to publicly available pricing on Service Providers' Websites as at 30 June 2024

MultiChoice has been losing subscribers to OTT services in its mid to high-end bouquets<sup>48</sup>.

- 2.4.7.6. The competitiveness of OTT services compared to DStv Compact, DStv Compact Plus and DStv Premium has been supported by declining data prices, which was not the case when the Inquiry started and leading up to the publication of the Draft Findings Document.

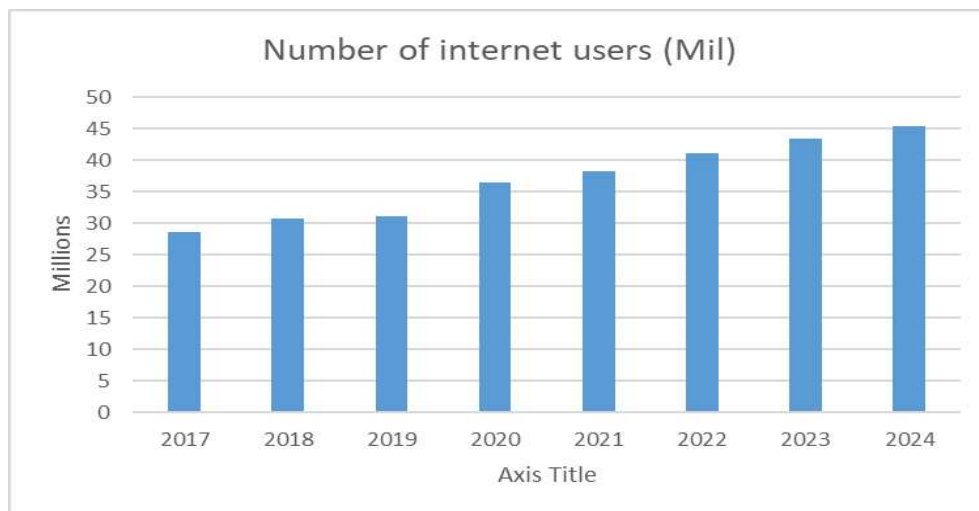
**2.4.8. Access to streaming-ready internet**

- 2.4.8.1. SVOD services are highly dependent on widely available, good quality and affordable broadband services, due to the type of consumption mediums. One requires high speed data, ability to pay subscription fees as well as a smart device that can handle this type of content at a stable enough speed.
- 2.4.8.2. At the time of developing the Draft Findings Document in 2021, South Africa had about 38 million<sup>49</sup> internet users. This number has grown to 45 million users as of January 2024<sup>50</sup>, up from 36.54 million in 2020 and 34.18 million in 2019. This has resulted in a penetration rate of 74.7% of the total population, compared to a global penetration rate of 66.2%. Figure 1 below shows the trend in internet usage over the last 8 years in South Africa.

<sup>48</sup> Udoakpan, Nokuphiwa & Tengeh, Robertson. (2020). The Impact of Over-the-Top Television Services on Pay-Television Subscription Services in South Africa. *Journal of Open Innovation Technology Market and Complexity*. 6. 139. 10.3390/joitmc6040139.

<sup>49</sup> <https://www.statista.com/statistics/685134/south-africa-digital-population/> accessed 11 February 2021. & Digital2020: South Africa. DataReportal. Available at [Digital 2020: South Africa — DataReportal – Global Digital Insights](#)

<sup>50</sup> DataReportal (2024) *Digital 2024: South Africa* [Online]. Available from: <https://datareportal.com/reports/digital-2024-south-africa> (accessed October 2024).

FIGURE 2: NUMBER OF INTERNET USERS IN SOUTH AFRICA: 2017-2024<sup>51</sup>

Source: Digital South Africa. DataReportal (various reports)<sup>52</sup>

2.4.8.3. *Digital 2024: South Africa* reports that 99% of South Africans own a smartphone, while 21.8% own a television streaming device. Other devices used to access content include game consoles, tablets and laptops.<sup>53</sup> The proliferation of these devices coupled with high levels of internet access as shown in Figure 2 above, facilitates access to online content.

2.4.8.4. Despite the high rate of internet penetration and the increasing number of smart devices, access to OTT services is dependent on the availability and affordability of quality broadband, considered to be speeds of 1 Mbps and above. Netflix recommends a connection speed of at least 3 Mbps or higher for high-definition video quality, 5 Mbps or higher for its full definition and 15 Mbps or higher for its ultra-high-definition video quality<sup>54</sup>. As shown in Table 5 below,

<sup>51</sup> As at January 2022

<sup>52</sup> Digital: South Africa. DataReportal. Available at [Digital 2022: South Africa — DataReportal — Global Digital Insights](#)

<sup>53</sup> [Digital 2024: South Africa — DataReportal — Global Digital Insights](#)

<sup>54</sup> See [Internet connection speed recommendations \(netflix.com\)](#) or [Netflix Help Center](#)

South Africa has sufficient internet speeds to facilitate streaming of content.

- 2.4.8.5. The majority of consumers use mobile broadband as the primary means of accessing the Internet<sup>55</sup>. The Speed test results show that as at March 2024, South Africa scored median download speeds of 47.95 Mbps for mobile broadband, and 43.66 Mbps for fixed broadband,<sup>56</sup>. Regardless of the test method or source of data, it is clear that South Africa's average broadband speeds have been increasing over time (see Table 5 below).

**TABLE 5: SOUTH AFRICAN AVERAGE BROADBAND SPEEDS: 2020-2024**

Year	Mobile Broadband download speed (Mbps)	Fixed Broadband download Speed (Mbps)
2024	47.95	43.66
2023	34.71	43.23
2022	30.36	28.63
2021	38.95	38.25
2020	31.36	26.87

Source: ICASA's report on the state of ICT sector in SA - March 2024<sup>57</sup>

#### 2.4.9. **Broadband data cost (prices)**

- 2.4.9.1. The Authority's data tariff analysis report reveals that, generally, the standard headline tariff for data prices continue to decrease. It is worth noting that data prices do differ depending on whether you are using prepaid or postpaid. Prepaid data typically costs more than postpaid data. Furthermore, MNOs and ISPs offer fixed mobile plans that allow for uncapped data at prices that are cheaper than prepaid and are also

<sup>55</sup> [state-of-the-ict-sector-in-south-africa-2024-report](#)

<sup>56</sup> Speedtest. South Africa's Mobile and Fixed Broadband Internet Speeds. Available at <https://www.speedtest.net/global-index/south-africa#mobile>

<sup>57</sup> Available online at <https://www.icasa.org.za/legislation-and-regulations/state-of-the-ict-sector-in-south-africa-2024-report>



able to service customers who do not have fixed fibre connections.

- 2.4.9.2. When the Authority compares prices for instance, on prepaid valid for 30 days, Cell C offers 1 GB for R65 and 10Gb anytime + 10 Gb nite data for R469 and 40 Gb for R489. MTN and Vodacom on the other hand offer 1.2 Gb of data at R89, a 12 Gb anytime + 12 Gb nite for R499 and 40gb+40Gb for R715 for MTN and R712 for Vodacom. Telkom offers 3Gb+3Gb LTE Bundles valid for 14 days for R49. It also offers a 10Gb LTE bundle valid for 61 days at R149 while the 40Gb is R379.

**Table 6: data costs per Network**

	Vodacom	MTN	Cell C	Telkom
<b>Bundle Size (mb)</b>	<b>Current Price</b>	<b>Current Price</b>	<b>Current Price</b>	<b>Current Price</b>
1024	R 85	R 79	R 85	R 79
2048	R 149	R 149	R 149	R 146
3072	R 179	R 199	R 199	R 209
4096	R 249	N/A	R 249	N/A
10240	R 469	R 469	R 469	R493
51200	R 799	R 799	N/A	N/A

Source: Biannual Tariff report December 2023<sup>58</sup>

- 2.4.9.3. Of note is that there are other deals through MVNOs particularly those run by banks that offer cheaper per GB rate. For instance, Capitec offers 10 GB (10240) for R199. Furthermore, MNOs also offer packages that are specifically aimed at video streaming usage with far larger amounts of data available at a cheaper price to be used exclusively on streaming videos. For

<sup>58</sup> [https://www.icasa.org.za/uploads/files/2023-24-FY-Q4-Bi-Annual-Tariff-Analysis-Report\\_240326\\_114251.pdf](https://www.icasa.org.za/uploads/files/2023-24-FY-Q4-Bi-Annual-Tariff-Analysis-Report_240326_114251.pdf)

instance, Telkom offers 'Streaming Bundles' specifically for streaming usage<sup>59</sup>

2.4.9.4. Some fixed mobile and Fibre to the home (FTTH) plans with uncapped data can be found for as little as R249 as demonstrated in the table below. These deals are also typically on a month-to-month basis and therefore allow consumer flexibility. The table below provides some deals available for consumers to get fast and adequate data for prices that are lower than standard prepaid prices.

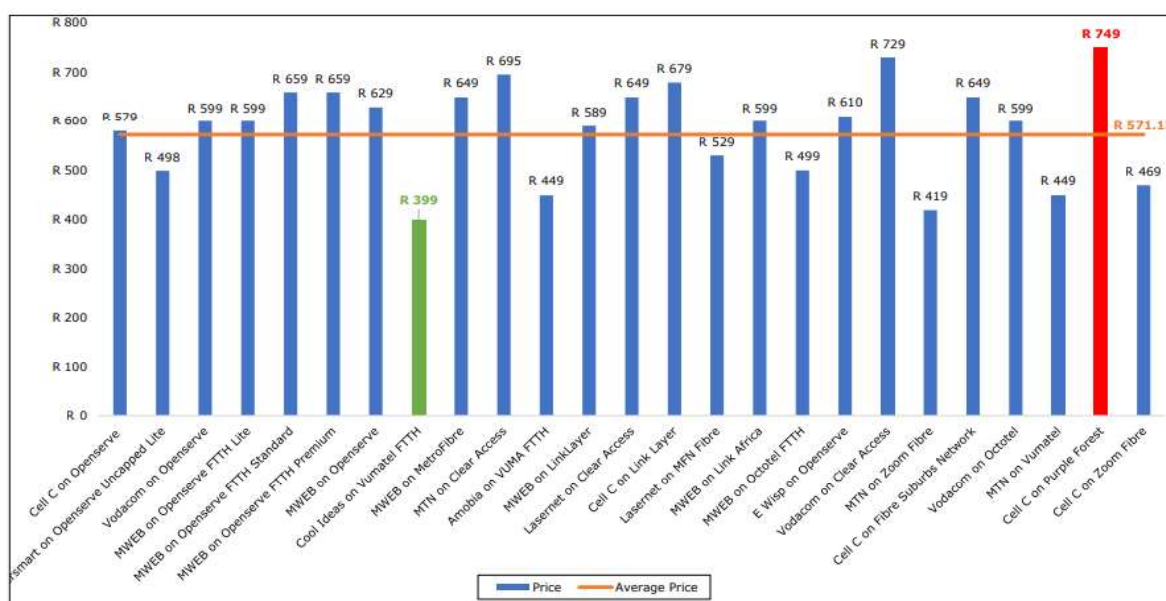
Table 7: FTTH and Fixed Mobile data prices

Fibre /fixed Mobile Network	FTTH / mobile	Download speed Mbps	Price/month
Afrihost zoom	FTTH	15	R249
Afrihost Vumatel	FTTH	25	R449
Rain	5G mobile fixed	30	R559
Axxess Fixed MTN LTE	LTE Mobile Fixed	50	R349
Webafrica Telkom LTE	LTE Mobile Fixed	10	R399
Supersonic	LTE Mobile Fixed	10	R399

Source: Own construction (based on publicly available information accurate as at 30 June 2024)

Diagram 1: Average prices of 20mbps FTTH providers

<sup>59</sup> Telkom (2024) Streaming Bundles [online]. Available at <https://www.telkom.co.za/personal/mobile/voice-%26-data?voiceCategory=FreeMe&sort=PRICE%20LOW%20TO%20HIGH> (accessed 13 October 2024).

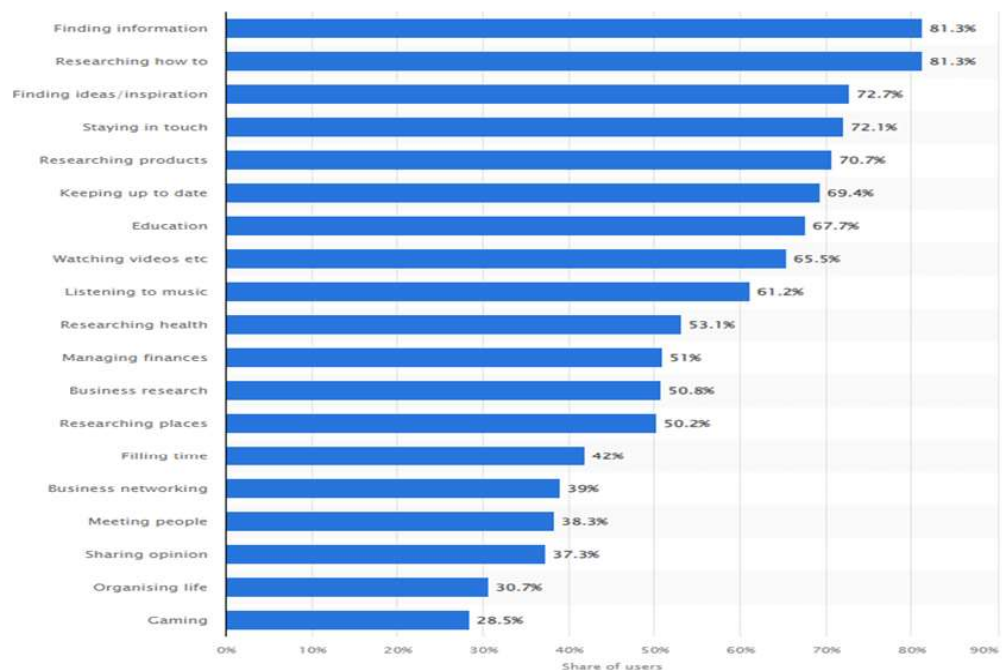


2.4.9.5. Operators across the board are also offering OTT related price bundles, with lower effective rates per MB. Thus, the Authority notes that when the total cost of OTT (subscription fee + internet) is compared to the cost of subscription-TV (subscription fee) it is higher than most basic tier subscription-TV packages, but lower than some middle and premium tier packages.

2.4.9.6. However, the Authority notes that some stakeholders posit that the total cost for OTT should include the cost of internet access given the fact that when the total cost of OTT (subscription fee + internet) is compared to the cost of subscription-TV (subscription fee). However, the Authority notes that access to the internet has become akin to a primary utility such as electricity and water. It is used for many other activities beyond just watching videos, such as access to education and working from home (which a large section of the office workers had to undertake following the covid 19 epidemic). As a result, the decision to have a stable

internet service in the home is unlikely to be limited to its use for entertainment purposes only. Ascribing the full cost of internet to the cost of OTT services is therefore likely to overstate the cost associated with consumption of such services. The various uses of Internet are depicted in the diagram below,

**Diagram 2: Uses of the internet**



Source: Statista

2.4.9.7. Notwithstanding the above, the Authority is engaged in processes aimed at reducing data costs. On 10 December 2021, the Authority issued an Invitation to Apply (ITA) notice inviting applications for the radio frequency spectrum licences for the International Mobile Telecommunication (IMT) spectrum bands. On 17 March 2022, the Authority announced the results of the auction that was conducted as a means of

assigning spectrum pursuant to the successful bidders. The purpose of assigning the designated spectrum bands is to promote competition and increase broadband coverage, and in so doing bridge the digital divide and the disparities between urban and rural access to broadband networks. Successful bidders have five (5) years from the date of licence issue, or from the date the digital migration process is completed, whichever comes later, to meet the roll-out targets set by the Authority.

#### 2.4.10. **Substitutes or complements?**

2.4.10.1. Another relevant aspect for consideration by the Authority in conducting this Inquiry is whether OTT services are more of a complement than a substitute to traditional television broadcasting services.

2.4.10.2. In the Draft Findings document, the Authority in addressing the above question considered the prevalence of 'cord stacking', where OTT services tend to complement rather than replace subscription TV services. The information submitted by MultiChoice appears to indicate that whilst cord cutting and cord shaving are prevalent among DStv subscribers, there are those that are willing to subscribe to both DStv and OTT service.<sup>60</sup> The Authority recognises that cord-stacking can work through cord-shaving behaviour where subscribers downgrade their subscription and take up an OTT service. The Authority has been provided with information suggesting that there has been an increase in cord-shaving particularly in the

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<sup>60</sup> MultiChoice submission to the Draft Findings Document:2019, para161.2

DStv Compact Plus, DStv Compact, DStv Family, and DStv Access bouquets.<sup>61</sup>

- 2.4.10.3. According to PWC, while OTTs continue to grab the headlines, in the short term at least, the likes of Netflix and Amazon Prime will, likely be taken as complementary services due to the dearth of premium entertainment content in the South African market.<sup>62</sup> Moreover, PWC views MultiChoice's access to premium sporting rights as another reason why OTT services will most likely be taken as complementary, thus leaving subscription TV services little changed.
- 2.4.10.4. Nyarenda<sup>63</sup> conducted a quantitative study in South Africa to explain variability in consumers' behavioural intent to use OTT platforms. About 89% of the respondents interviewed indicated that they use OTT services in conjunction with their subscription television platform (DStv). According to Nyarenda, OTT platform users acquire and utilise competing products concurrently, a concept known as multi-homing or multi-purchase.
- 2.4.10.5. However, the Authority notes that none of these studies conduct detailed analysis of the impact of the nature of cord-stacking behaviour on the revenue and profitability of MultiChoice.
- 2.4.10.6. Mostly, they simply observe that some consumers use OTT services together with DStv services. The Authority recognises that even where there is cord-stacking, it may still have a revenue and profit impact on

<sup>61</sup> MultiChoice submission of 15 February 2024, para. 84.

<sup>62</sup> PWC, Entertainment and media outlook: 2018-2022. An African perspective. [www.pwc.co.za/outlook](http://www.pwc.co.za/outlook)

<sup>63</sup> Nyarenda, R. 2020. Drivers of continued use of OTT platforms. A research report submitted to the Gordon Institute of Business Science, University of Pretoria in partial fulfilment of the requirements for the degree of Master of Business Administration. Available at [https://repository.up.ac.za/bitstream/handle/2263/79633/Nyarenda\\_Drivers\\_2020.pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/79633/Nyarenda_Drivers_2020.pdf?sequence=1)

MultiChoice. Submissions by MultiChoice regarding the behaviour of MultiChoice subscribers appear to contradict the findings of these studies. MultiChoice has been losing a significant number of subscribers, with a significant number of those lost subscribers switching to OTT services.<sup>64</sup> Between 2016 and 2023, the DStv Premium bouquet has lost **[Redacted]** of its subscribers to alternative services. MultiChoice submitted that in the period between 2019 and 2023, it has also been losing subscribers to its DStv Compact Plus (declining by **[Redacted]** between November 2021 and November 2023) and DStv Compact bouquets (declining by **[Redacted]** between November 2021 and November 2023).<sup>65</sup> **[Redacted]**.<sup>66</sup> Nonetheless, the Authority notes that as per Table 8, MultiChoice has been losing subscribers while OTTs have been rapidly gaining subscribers. Intuitively it appears that those subscribers who cancel their MultiChoice subscriptions for whatever reason end up choosing OTTs based on the growth of OTTs in recent years. Therefore, the Authority is of the view that premium-tier subscription television is substitutable with SVOD offered by OTTs.

2.4.10.7. Further, Netflix, in its submission to the Authority stated that different providers compete against each other.<sup>67</sup>

#### **2.4.11. Impact and growth of OTT services**

2.4.11.1. The most recent 2024 Broadcast Research Council of South Africa (BRCSA) survey has found that TV set only viewing currently sits at 72% and streaming only at

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<sup>64</sup> MultiChoice submission of 15 February 2024, para. 83.

<sup>65</sup> MultiChoice submission of 15 February 2024, para. 83.

<sup>66</sup> MultiChoice submission of 15 February 2024, para. 81.2.

<sup>67</sup> Netflix submission of 15 February 2024.

6.3%<sup>68</sup>. Those who both stream and watch TV are at approximately 21.75%<sup>69</sup>. The BRCSA has identified factors that contribute to these changes that have seen more streaming and less traditional TV viewing. In the main, BRCSA identifies the Covid lockdown and the significant behavioral changes that accompanied it<sup>70</sup>. Furthermore, the BRCSA notes that there are greater streaming options coupled with high levels of internet access with approximately 15% of households having access to permanent/fixed internet<sup>71</sup>. In addition, young people living alone skew towards fewer or no TVs in the home.<sup>72</sup> The BRCSA also corresponds with findings by the Market Research Foundation Maps Overview survey<sup>73</sup> which found that 8 million South African consumers have access to on demand streaming services (OTT), with a 19% penetration rate. This indicates that a significant portion of South Africans have taken up streaming services.

2.4.11.2. The Authority received several comments from Stakeholders on the impact and implications of OTT growth on television broadcasting services that were discussed in the Draft Findings Document. The Authority does not repeat these here but provides a high-level summary of the views received. The Authority received more comments following the

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<sup>68</sup> BRCSA TAMS Universe Update January 2024 (2024) at page 10 [online]. Available at <https://brcsa.org.za/tams-universe-update-2023-19-january-2024/>

<sup>69</sup> Ibid.

<sup>70</sup> Ibid at page 11.

<sup>71</sup> BRCSA TAMS Universe Update January 2024 (2024) at page 11 [online]. Available at <https://brcsa.org.za/tams-universe-update-2023-19-january-2024/>

<sup>72</sup> Ibid

<sup>73</sup> MAPS Data overview: Jan 2021 – Dec 2023



publication of the Notice and questionnaire on 10 November 2023<sup>74</sup> in the Government Gazette.

2.4.11.3. A number of stakeholders agree the rapid disruption brought about by technological innovation in electronic communications has had the effect that there are changes that will bring about segmentation which will impact on business models in the future. Customers will be able to choose which content they want; advertising income will become more fragmented while content will be a key determinant of success. Viewers will migrate to the best content of their own choice and viewer loyalty will decrease.

2.4.11.4. However, some stakeholders were of the view that although the OTT impact will be huge in future, currently its impact is not felt in the industry and as such OTT services are unlikely to constitute a substantial competitive threat to subscription television for the majority of viewers in the near term. In this regard, e.tv stated that the over-the-top (OTT) market does not directly compete with or pose a threat to the satellite market. In this regard, e.tv states that *"It's unrealistic to propose that a service reliant on substantial bandwidth is a viable choice for all consumers. Rather, it's a luxury accessible primarily to those with the means to afford high-speed internet, which, in terms of monthly expenses, often exceeds the costs of lower-tier DStv packages."*<sup>75</sup>

2.4.11.5. To obtain a sense of the level of access to OTT services and the impact that they have on subscription services, one key area to consider is the trends in

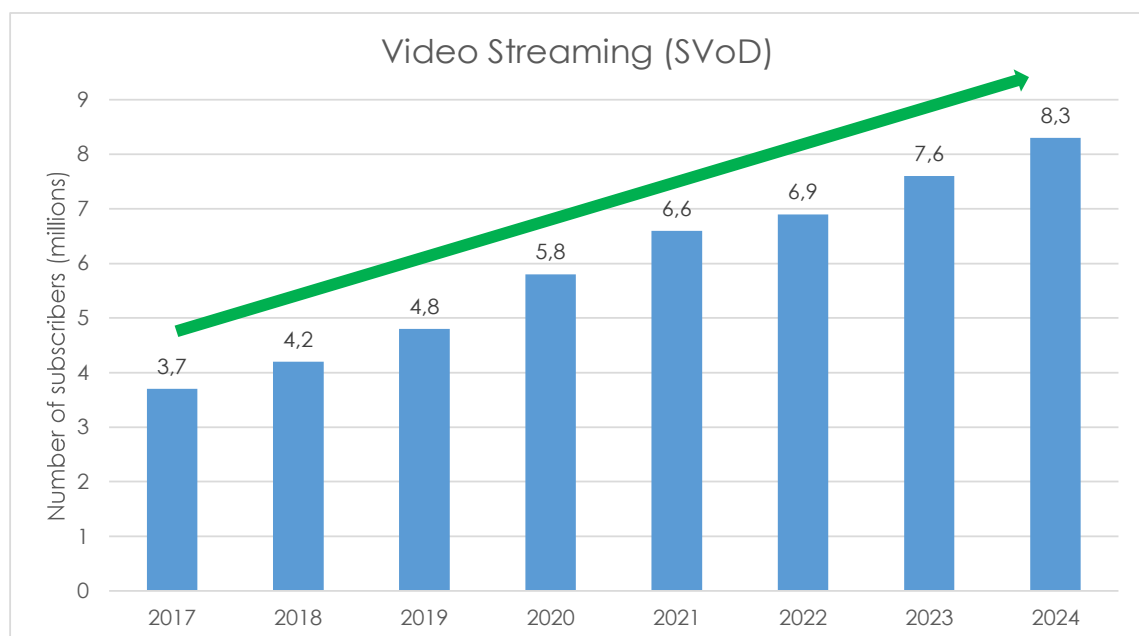
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<sup>74</sup> Refer to Notice with questionnaires for relevant stakeholders on 10 November 2023

<sup>75</sup> Refer to eMedia submission dated February 2024

number of subscribers that pay-tv and OTTs are able to attract. OTT proliferation in South Africa is leveraging growth in internet penetration, accompanied by growth in smartphone penetration as well as declining data costs.<sup>76</sup> It is clear that over time, OTTs have managed to rapidly grow from around 3.7 million in 2017 to having over 8.3 million subscribers in 2024 in South Africa<sup>77</sup> (see Figure 3). This suggests that access and cost of internet may not be as prohibitive as initially thought.

Figure 3: Number of active subscribers on OTT services (SVOD) in South Africa <sup>78</sup>



Source: Statista SVOD data

2.4.11.6. For the same period MultiChoice had a total subscriber number of 7 601 542 in 2023 across all its bouquets. The Authority notes that MultiChoice has been experiencing a steady decline in subscribers since 2019

<sup>76</sup> Digital 2022: South Africa, available at <https://datareportal.com/reports/digital-2022-south-africa>  
MultiChoice presentation to ICASA public hearings on the draft Findings Document, Jan 2021, slide 17-19

<sup>77</sup> Refer to Statista data accessed here [Video-on-Demand - South Africa | Statista Market Forecast](#)

<sup>78</sup> Refer to Statista data accessed here [Video-on-Demand - South Africa | Statista Market Forecast](#)

while in the same period OTTs have been adding subscribers. In this regard, the Authority notes that in the DStv Premium bouquet, there has been a decline of approximately **[Redacted]** between 2016 and 2023. This has lowered the number of premium bouquet subscribers to under 1 million, and the overall number of MultiChoice subscribers to just above 7 million.

2.4.11.7. As explained above and below, the information provided to the Authority reflects that MultiChoice's loss of subscribers has not been limited to just the DStv Premium bouquet. Between November 2021 and November 2023, it has experienced significant subscriber losses ranging between **[Redacted]** to its DStv Compact Plus, DStv Compact and DStv Family bouquets. DStv has blamed this on a number of factors including loadshedding and poor performance of the economy which is affecting the disposable income of consumers.

2.4.11.8. Further evidence that MultiChoice may be experiencing greater competitive constraints from OTT services could be observed in its pricing behaviour. In 2021 MultiChoice increased its DStv Premium bouquet price by only 1.21% (well below inflation) despite having the most comprehensive content portfolio. The Authority is of the view that one of the most significant factors, including other macro-economic factors, contributing to the lower price increases could be the loss of subscribers to alternative platforms. Furthermore, the Authority has observed that MultiChoice's price increases are not keeping pace with Netflix's own price increases. In 2021 Netflix increased its subscription fees for the standard plan by 14.4%, from R139/month to R159/month and by 17.85%,

from R169/month to R199/month for the premium plan.<sup>79</sup> At the same time, Netflix subscriptions continue to increase.<sup>80</sup> Substitute products are characterised by similar movements in price. Nonetheless, the prices of the substitute products even when accounting for data costs remain below the cost of the premium packages offered by DSTV.

2.4.11.9. Since the commencement of the Inquiry, Cell C's Black, Econet Media's Kwesé (including iflix), TelkomOne, MTN Frontrow, Altech Node and Vidi have also been discontinued. In addition to the above services, BritBox exited the South African market in August 2024<sup>81</sup>. Cell C has previously attributed the failure of the Black product to MultiChoice's dominance in the market. However, Cell C's CEO explained in an interview that launching Cell C Black was not a good move, highlighting *inter alia* that the business had too many staff members for its relative size and could not compete with incumbents on capex.<sup>82</sup>

2.4.11.10. However, since the publication of the Draft Findings Document, other OTT services have become available in South Africa including Apple TV+, VIU, eVOD, Acorn TV, among others. Traditional movie houses and channel provider-linked OTT services such as Disney+, HBO Max and Discovery+ have also launched or are also planning to launch in South Africa. There are also local OTTs including Showmax and eVOD. The SABC has also recently launched an OTT service, namely,

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<sup>79</sup> TechCentral. 2021. Netflix is hiking its prices in South Africa  
<https://techcentral.co.za/netflix-is-hiking-its-prices-in-south-africa/203672/>

<sup>80</sup> The Authority notes that OTTs face a significantly different cost structure as they do not invest in broadcast infrastructure, this is another factor creates a unique new niche competitor for traditional Satellite broadcasters.

<sup>81</sup> ITWeb SA's saturated streaming market too hot for BritBox to handle? (21 May 2024) [Online]. Available at  
<https://www.itweb.co.za/article/sas-saturated-streaming-market-too-hot-for-britbox-to-handle/rxP3jqBERbdMA2ye>

<sup>82</sup> YouTube Cell C CEO Douglas Craigie Stenerson is in the C-suite (12 November 2020) [Online]. Available at  
[https://youtu.be/M7uJK\\_2IIPw](https://youtu.be/M7uJK_2IIPw)

SABC Plus (formerly TelkomOne). In a press release dated 3 July 2024, the SABC indicates that *"SABC Plus will now be accessible across multiple devices, ensuring that our audiences can enjoy their favorite content anywhere, anytime. Our most beloved brands, including our top-rated radio stations as well as exciting new range of podcasts, will now be just a tap away."*<sup>83</sup>

#### 2.4.12. **The evolving case law on competition between subscription television services and OTT services**

2.4.12.1. The Authority has also considered the evolution of case law where various adjudicative forums have indicated a willingness to consider OTT services as exerting competitive constraint on subscription services.

2.4.12.2. More recent cases include EC decision, 30 April 2020, M.9604, *Nent/Telenor/JV*<sup>84</sup>, where the European Commission found that *"Considering the hypothetical market including non-linear OTT services, OTT players would exercise a competitive constraint on the Parties and the JV. In this respect, it is notable that in Norway there would remain post-Transaction numerous OTT players who would constrain the JV, namely Netflix and HBO Nordic as well as new entrants Disney+ whose OTT service is expected to launch in the second half of 2020 in the Nordics."*<sup>85</sup>

2.4.12.3. EC Decision, 21 December 2021, M.10475, *United Group/Wind Hellas*, where the European Commission found that *"the results of the market investigation*

<sup>83</sup> [MEDIA STATEMENT | SABC UNVEILS REVAMPED SABC PLUS – SABC – Official Website](#)

<sup>84</sup> European Commission Case M.9604, *Nent/Telenor/JV* (30 April 2020) [Online]. Available at [https://ec.europa.eu/competition/mergers/cases1/20217/m9604\\_872\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/20217/m9604_872_3.pdf)

<sup>85</sup> *Ibid* at paragraph 151.

*confirm that OTT players (such as Amazon and Netflix) exert significant competitive pressure on market players using other distribution models”<sup>86</sup> –*

2.4.12.4. EC Decision, 10 March 2022, Case M.10515, *Iliad/UPC Polska*, where the European Commission found that “global OTT platforms such as Netflix, Amazon Prime, HBO GO or Viaplay have gained significant traction in the market, and the market investigation confirmed that OTT players exert significant competitive pressure on AV service providers in Poland”<sup>87</sup> –

2.4.12.5. EC Decision, 15 March 2022, Case M.10349, *Amazon/MGM*, where the European Commission found that “SVOD players face competition by other retail suppliers of AV content (TVOD platforms, Pay-TV, etc). (...) ARD/ZDF and Vodafone were indicated by market participants as the leading players.”<sup>88</sup>

**Question4: What other changes can the Authority expect to occur in OTT services and subscription services which have an impact on competition between these services?**

**Question 5: Do you agree with the Authority’s preliminary view that premium tier subscription television is in the same market as SVOD OTTs? Motivate your response by providing reasons and any supporting evidence or data as far as possible.**

<sup>86</sup> European Commission M.10475, *United Group/Wind Hellas* (21 December 2021) at paragraph 203 [Online]. Available at [https://ec.europa.eu/competition/mergers/cases1/202230/M\\_10475\\_8417682\\_335\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202230/M_10475_8417682_335_3.pdf)

<sup>87</sup> European Commission Case M.10515, *Iliad/UPC Polska* (10 March 2022) [Online] at paragraph 174. Available at [https://ec.europa.eu/competition/mergers/cases1/202230/M\\_10475\\_8417682\\_335\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202230/M_10475_8417682_335_3.pdf)

<sup>88</sup> European Commission Case M.10349, *Amazon/MGM* (15 March 2022) at paragraphs 203 to 204 [Online]. Available at [https://ec.europa.eu/competition/mergers/cases1/202250/M\\_10349\\_8691929\\_626\\_3.pdf](https://ec.europa.eu/competition/mergers/cases1/202250/M_10349_8691929_626_3.pdf)

## 2.5. **Subscription television and piracy**

- 2.5.1. SROC submits that the Authority needs to consider the impact of piracy in the industry. It points out that in the UK, a framework called “Dynamic Injunctions” was developed to pre-empt piracy before it happens.
- 2.5.2. This view is supported by MultiChoice who estimates that more than 2 million people view pirated versions of the series and movies available on DStv in SA, pointing to its pervasiveness. According MultiChoice, piracy is a competitive constraint on subscription television services in SA.
- 2.5.3. Rojas and Bricelo<sup>89</sup> studied the effects of piracy on competition, using the subscription television market in Peru as a case study. The study found piracy to be a close substitute for subscription television services in Peru, where about 50% of subscription television users rely on a pirated service. There are various other articles that highlight the plight of subscription service providers in the face of piracy.<sup>90</sup>
- 2.5.4. The Authority recognises that piracy is a pervasive problem for content creators and *broadcasters* alike. The Authority considered the advent of piracy and whether it constrains subscription broadcasting in South Africa, as claimed by MultiChoice. It has been reported that with pirated live sports content, high income viewers who can afford subscription services are less likely to engage in piracy<sup>91</sup>. A report by Akamai<sup>92</sup> lists the 10 most pirated films in 2021. None of them are currently

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<sup>89</sup> Rojas, C. & Briceno A. 2019. The effects of piracy on competition: Evidence from subscription TV. *International Journal of Industrial Organisation*, Vol 63 (2019): 18-43

<sup>90</sup> See for example Sandvine. IP subscription television piracy, available at [https://www.sandvine.com/hubfs/Sandvine\\_Redesign\\_2019/Downloads/Internet%20Phenomena/Sandvine\\_IP\\_Subscription%20Television%20Piracy%20AW%2020190820.pdf](https://www.sandvine.com/hubfs/Sandvine_Redesign_2019/Downloads/Internet%20Phenomena/Sandvine_IP_Subscription%20Television%20Piracy%20AW%2020190820.pdf)

And Sullovan & Frost. How content piracy is dampening growth of pay tv in MENA, available at <https://www.frost.com/frost-perspectives/how-content-piracy-dampening-growth-pay-tv-mena/>

<sup>91</sup> *ibid*

<sup>92</sup> Akamai. 2021. Pirates in the outfield. Available at <https://www.akamai.com/resources/state-of-the-internet/soti-security-pirates-in-the-outfield>

available on DStv. In terms of the report South Africa does not feature in the top 15 countries for piracy website visits. Moreover, various efforts have been undertaken to stem the tide of piracy not only in South Africa but globally.

2.5.5. However, the fact that piracy may be a significant problem for MultiChoice is evident in the efforts it makes to stem piracy.<sup>93</sup> MultiChoice is quoted as saying *"Digital piracy, far from being a fringe activity, has become a widespread practice that transcends demographics and geographies, challenging the norms of intellectual property rights"*<sup>94</sup>

2.5.6. The Authority still recognises that piracy may have a significant impact on MultiChoice and any other paid service. However, because of its pervasive nature, it is difficult to ascertain with certainty the precise nature of the impact that it has as a competitive constraint.

## 2.6. Supply-side substitution

2.6.1. From a supply-side perspective the question is whether there are alternative suppliers who would switch production to the focal product, in this case subscription television services, in the event of a price increase.

2.6.2. First, the Authority considers whether FTA service providers would switch. In the South African context, a subscription television service licence is required in order to provide a service. However, the Authority notes that technological advances, shifting consumer behaviour, the absence for licensing requirements for OTT services, declining broadband prices and the fact that providers of both FTA services and OTT services can acquire some of the content mean that it may not be necessary to supply-side substitute by launching a traditional subscription

<sup>93</sup> [https://www.businesslive.co.za/bd/companies/telecoms-and-technology/2024-03-07-multichoice-clamps-down-on-broadcast-piracy/#google\\_vignette](https://www.businesslive.co.za/bd/companies/telecoms-and-technology/2024-03-07-multichoice-clamps-down-on-broadcast-piracy/#google_vignette); <https://mybroadband.co.za/news/broadcasting/540417-dstv-cracks-down-on-piracy-kingpins-in-south-africa.html>; <https://www.multichoice.com/partners-against-piracy.php>

<sup>94</sup> <https://mybroadband.co.za/news/broadcasting/540417-dstv-cracks-down-on-piracy-kingpins-in-south-africa.html>



service. For instance, an FTA service wishing to offer a subscription service competing against MultiChoice need not have a licence to provide traditional subscription services. They can simply launch an OTT service taking advantage of existing broadband networks.

- 2.6.3. The French Competition Authority considered whether to define separate markets for linear and non-linear audio-visual services. It noted that the qualitative differentiating elements between subscription TV services and subscription video on demand services in terms of content tend, to a certain extent, fade. It also noted that non-linear operators were starting to invest in sports programs as well as recent films, even if it meant self-financing films not shown in cinemas first. This development tends to bring linear services closer to non-linear services. However, while noting this convergence, it left open the question of defining separate markets for linear and non-linear services because the decision would not have an impact on competition. Given the above, the Authority recognises the competitive constraint posed by OTTs on subscription services<sup>95</sup>.

2.7. ***The relevant geographic market***

- 2.7.1. From a geographic market perspective, whilst all other stakeholders point to a national market confined to South Africa, MultiChoice considers itself to be in competition not only with domestic free-to-air broadcasting services, subscription broadcasting services and electronic communications network service providers but also with regional and international OTT and other video-on-demand service providers.
- 2.7.2. The Authority has previously expressed the view that insofar as the geographic market definition is concerned, broadcasters are licensed on a national basis. OTT service providers also tend to configure their services by taking into account local viewer

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<sup>95</sup> Decision 24-DCC-04 of 12 January 2024

preferences, in addition to international content like movies and series. Rights to content are also given for specific geographical areas, usually limited to national boundaries.

- 2.7.3. In the circumstances, the Authority considers the geographic market to be South Africa while also acknowledging that some of the competitors referred to by MultiChoice operate globally and supply their services from outside the country.

**2.8. Upstream Markets for the Supply and Acquisition of Content**

- 2.8.1. At the upstream level, content owners supply their content to retail providers including subscription television services, OTT services and FTA services. These retailers compete against each other to acquire content to use in their services based on their chosen strategies.
- 2.8.2. In the Draft Findings Document, the Authority had distinguished content into two categories, that is, premium and non-premium. The Authority had also found that there was no consistent definition of premium content and concluded that the concept was fluid. The theory was that access to premium content is the main driver of competition within the retail market.
- 2.8.3. Some stakeholders have pointed to the fact that there is no exact definition for premium content as the concept is fluid, since emphasis on what is premium is based on high audience ratings and high audience appeal. Therefore, the definition implies that there is also a time-sensitive component to it. Premium content is linked to consumer demand for content and can be described as content which viewers find desirable and are willing to pay a subscription fee for. In the South African context, premium does not necessarily imply that it is content that is available on the highest available subscription package/bouquet. It may also refer to content which will draw the most viewers. It is also important to note that there is also

highly sought after content that consumers are not willing to pay a subscription for.

- 2.8.4. Stakeholders indicate that local content especially has become important in the South African context, and some stakeholders considered it to be premium content.
- 2.8.5. The Competition Commission's view is that it is generally accepted that the attractiveness of any particular television broadcaster to potential subscribers or viewers depends heavily on its ability to acquire content, particularly premium content. Broadly defined, premium content, *inter alia*, includes sports, movies and series.
- 2.8.6. With respect to movies, they derive their premium element from the 'release window' structure whereby consumers value movies more the closer they are to the theatrical release date. Notably, not all content that is released closer to the theatrical release date manages to attract viewers. When it comes to sports, for it to be regarded as premium the Commission is of the view that it must have the following five features: (i) be of a high-quality production; (ii) must be broadcast live; (iii) with sufficient regularity; (iv) popularity; and (v) costs of acquiring the content rights should be relatively higher.
- 2.8.7. The complexities faced by the Authority in trying to define premium content as a concept to use to define relevant markets were not just limited to the differences in stakeholder views but can also be illustrated in different ways. There is a wide array of high-quality produced content but not all such content manages to attract high viewership and have consumers willing to pay for the content. Equally, live broadcast of content does not mean that content automatically attracts greater viewership or ability to attract subscribers. For example, there is a wide variety of content that is broadcast live which does not manage to attract large audiences or to convince consumers

to pay a subscription fee. Some content that the Authority had considered as premium content is not available regularly and in fact is only available for a very limited period of a month once every four years or constitutes a few number of matches per year. In South Africa, some freely available content enjoys the highest TV ratings. The cost of content is influenced by a lot of factors including production costs and level of marketing making it difficult to use cost as a basis to delineate content as either premium or non-premium.

- 2.8.8. Content has been a driving force behind changes in the television and video-on-demand industry. These changes have brought new players with new business models to the landscape. However, there is no denying that despite these changes, the strategic nature of different types of content remains relatively constant. Content can be categorised into three main broad areas: news; sport; and entertainment.
- 2.8.9. Sport has the strongest reputation for delivering large live audiences and retention of subscribers for broadcasters and pay TV providers. It remains a premium product for which viewers are willing to pay a higher amount and in return for paying that higher amount, they expect a premium experience. Operators and channels have shown a willingness to spend substantial amounts on this proven customer-acquisition tool and ARPU driver. This translates into significant revenue generation, of both advertising and subscription. Global sports programming spend has been increasing over time, predicted to reach a total of \$62 billion in 2024 compared to \$51.207 billion in 2019,<sup>96</sup> Although sports accounts for only 15% of all viewing, it accounts for some 65% of the direct revenues earned by content creators.<sup>97</sup> It is a significant differentiator among broadcast networks and distributors in most markets.

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<sup>96</sup> [Global value of sports media rights nears \\$56bn, SportBusiness report reveals | SportBusiness](#)

<sup>97</sup> Boston Consulting Group. The value of content.

- 2.8.10. According to ESSEC Sports Chair<sup>98</sup>, the “sports broadcasting product” has two main economic characteristics which distinguish it from other audio-visual products. First, it is time sensitive. The outcomes of a sports competition are uncertain, and therein lies its value: in not knowing who the winner is.<sup>99</sup> Once the outcome of a match is known, its uncertainty no longer exists, and the value of the broadcasted competition is diminished<sup>100</sup>. Like any “flow program”, the sports product has no heritage value and favours live broadcasting<sup>101</sup>. Second, the sports broadcasting product is a non-substitutable good. No other sports program can replace, for example, a World Cup or European Champions League final. The main consequence of this non-substitutability is that broadcasters bid for these premium rights, because of their uniqueness. The exclusive nature of the premium rights gives the winning channel the sole right to broadcast major events or competitions. At the same time, it deprives its competitors of the opportunity to broadcast the respective event, and they will not be able to find substitute programs of the same importance. As such, this explains the big difference in costs between premium and catalogue rights.<sup>102</sup>
- 2.8.11. News is regarded as having a more strategic value than economic value for broadcasters and content producers. It accounts for only about 2% of direct payments to producers and rarely creates sustainable profits for networks.<sup>103</sup> However, news can help channels offer a full range of programming and, while it can take varying forms, some more premium (for example, investigative journalism) than others, it is generally not as expensive as sports and entertainment.

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<sup>98</sup> ESSEC. 2021. Sports TV rights in France. Stakeholders strategies, market dynamics and emerging trends. Available at [ESSEC Sports Chair - Sports TV Rights in France](#)

<sup>99</sup> ESSEC. 2021. Sports TV rights in France. Stakeholders strategies, market dynamics and emerging trends. Available at [ESSEC Sports Chair - Sports TV Rights in France](#)

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> ESSEC. 2021. Sports TV rights in France. Stakeholders strategies, market dynamics and emerging trends. Available at [ESSEC Sports Chair - Sports TV Rights in France](#)

<sup>103</sup> <sup>103</sup> Boston Consulting Group. The value of content.

- 2.8.12. Entertainment can either be scripted, such as films, series, comedy and drama or it can consist of reality shows and live events. This type of programming drives the lion's share of network profitability.<sup>104</sup>
- 2.8.13. According to Preta and Zamengo<sup>105</sup>, premium content (i.e. sports events and football in particular, and first-release Hollywood movies) is seen as primary means of differentiation among broadcasters in the subscription-TV sector, given their ability to attract high audience and, as a consequence, to drive subscriptions and advertising investments<sup>106</sup>.
- 2.8.14. The BEREC report<sup>107</sup>. demonstrated how premium content impacts the electronic communications sector and the implications thereof. Critically, the survey conducted among 30 European national regulatory authorities (NRAs) as a basis for the report, revealed that not all countries have the same definition of what qualifies as premium content. Yet in a number of countries a national definition with a legal basis corresponding at least partially to the concept of "premium content" could be found. Where no definition of premium content exists, countries could still indicate what they regard as premium content. In the end, according to BEREC, *"audio-visual content, such as sports, films and TV series represent the vast majority of what can be considered as premium content in Europe"*<sup>108</sup>. The BEREC report further states that *"...content that is valued enough by end-users to make a sizeable share of them switch ECS provider (such as, but not restricted to, certain sports events and blockbuster films and TV series) is qualified as 'premium content'*<sup>109</sup>".

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<sup>104</sup> ibid

<sup>105</sup> Preta, A. & Zamengo, L. The role of exclusivity in premium content distribution: economic efficiency and social welfare. Available at [SIE RSA 55-151 \(siecon.org\)](https://www.siecon.org/RSAs/55-151)

<sup>106</sup> Ibid

<sup>107</sup> BEREC. 2018. BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet. BoR (18) 35

<sup>108</sup> BEREC. 2018. BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet. BoR (18) 35 at p.5

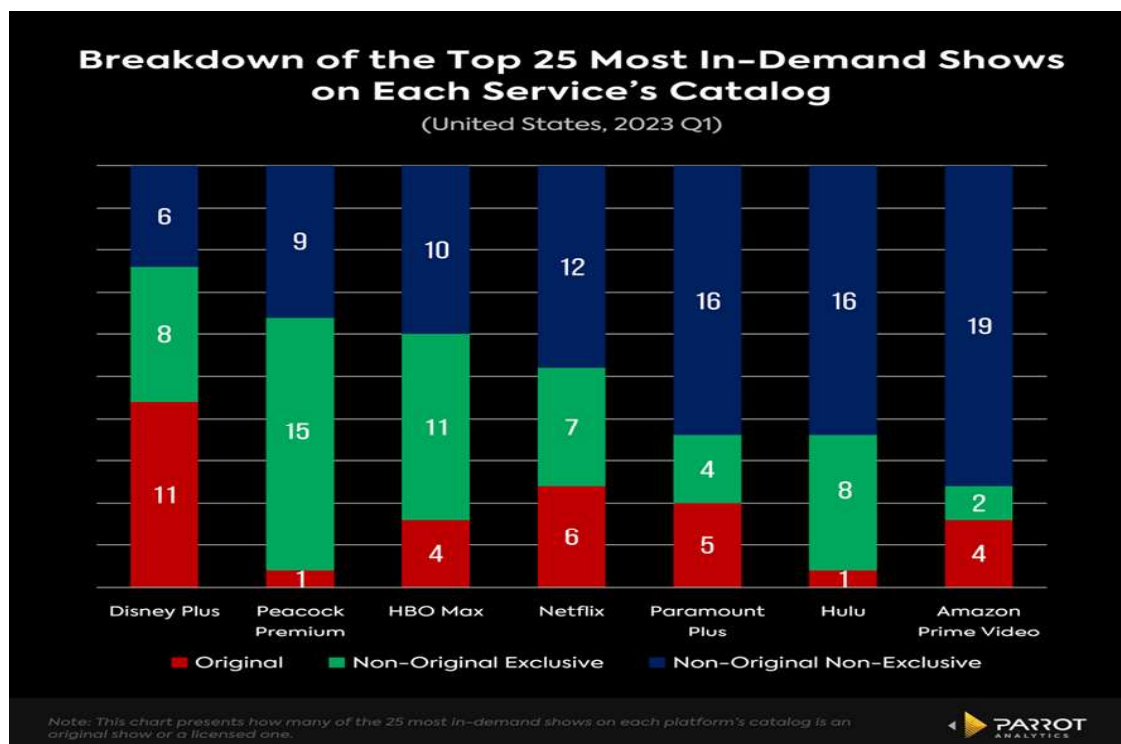
<sup>109</sup> BEREC. 2018. BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet. BoR (18) 35 p.2 & p.5

- 2.8.15. The importance of content is also seen in the way major OTT players such as Netflix, Amazon Prime, Disney plus amongst others focus on creating their own inhouse content to drive new subscriptions. This content is primarily limited to movies, series and others. However, Disney plus in particular as a major content creator turned OTT player has in some instances released some movies exclusively on the platform without first having a cinema run in order to continue to attract subscribers onto the platforms and reduce the dependence on third-party studios or other broadcasters.
- 2.8.16. This has resulted in many of the in-house produced content by the OTTs achieving high viewership numbers globally and being nominated for major industry awards such as Golden Globes and Academy Awards (Oscars) etc<sup>110</sup>. The OTT platforms are willing to spend significant amount in the production of these exclusive productions. Nonetheless content from third parties still dominates as being the most in demand. As per the diagram below, despite producing their own content, most of the OTT platforms still have a considerable proportion of their offering being third-party content.

**Diagram 3: Source of content for SVOD service providers**

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<sup>110</sup> [12 Most Oscar-Winning Netflix Original Movies, Ranked](#)



2.8.17. The Authority notes that local content has become a key driver for creating a loyal following on the various platforms. This is one area where even international OTTs such as Netflix and Amazon Prime Video have started investing heavily in South Africa to commission and produce local movies and series to attract subscribers both locally and to provide diverse content to its international audience. Similarly, MultiChoice has increased its investment in local content as a strategy to differentiate itself from the many international OTTs that entering the SA market and have access to previously exclusive series and movies that were unique to Multichoice. This complicates the definition of what constitutes premium content.

2.8.18. For instance, shows like Uzalo on SABC 1 consistently top local viewership numbers, with a total viewership number of 4.9 million while similarly the top viewed show on MultiChoice in June 2024



was Sibongile & the Dlamini on its basic tier channel Mzansi Wethu, with a total viewership of 1.6 million. Therefore, FTA broadcasters and basic tier subscription TV channels by virtue of their channels being free/or available to the public will have higher viewership than content shown exclusively on the premium bouquet by MultiChoice as there are fewer premium subscribers due to the cost. Nonetheless, in order to attract customers to its higher priced bouquets, MultiChoice has spent more money on content for this tier as compared to the basic tier bouquets that attract greater viewers.

2.8.19. However, as pointed out in other sections below, the OTT players such as Disney+ and Netflix also produce own content which could be viewed as premium content such as movies and series.

2.8.20. The Authority also considered that soccer, rugby and cricket are popular sporting events in South Africa.<sup>111</sup> Moreover, live UEFA and PSL matches, together with the top four domestic leagues in the world, that is the EPL, La Liga, Bundesliga and Serie A attract large live audiences and can be used to retain subscribers, as argued by e.tv and the SABC and supported by the European Commission's approach to premium content in the *Liberty Global/Ziggo* case.<sup>112</sup>

### **The Authority's preliminary views**

2.8.21. The Authority starts its analysis by asking what a television or video-on-demand service provider, would do if the price of a particular set of content increases by a margin of 5%-10%.

2.8.22. First, the wholesale demand for content is a derived demand. Broadcasters act to satisfy the preferences of their viewers. For example, it would be a fallacy to assume that lovers of live soccer would all of a sudden be satisfied with watching a movie, drama series, a reality show or news, in the event that a

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<sup>111</sup> See para 5.19.20 below

<sup>112</sup> See para 5.7.14; 5.19.9 and 6.5.65

broadcaster that airs such live matches is faced with a SSNIP and decides to purchase other content. A broadcaster who does that is likely to lose viewers.

2.8.23. This explains the high demand for rights to live soccer matches despite the high cost of such rights. Furthermore, the characteristics of movies, sport and other content also differ. For instance, movies have a much longer shelf life and for that reason are sold in specific time-bound windows, whereas live sporting events on the other hand are perishable and lose value much faster once the event is over. Thus, the Authority proposes a further distinction, between types of content, distinguishing between feature films and movies; series and live sport, including live rugby, cricket and premium soccer matches.

2.8.24. Therefore, in line with international precedent and some stakeholder submissions for the purposes of this assessment, the Authority will consider the following to be premium content in South Africa: (a) Hollywood premium FSPTW movies and series; (b) major live football matches of the top competitions<sup>113</sup>; (c) major live rugby matches; and (d) major live cricket matches.

### **Series and movie content**

2.8.25. As already discussed, it is quite difficult to determine what constitutes premium content as this concept is fluid and is dependent on a number of factors. The Authority will however focus on Hollywood movies and series as these are the categories of content that have been identified as "premium" by some stakeholders and previous international case precedents.

### **Sports**

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<sup>113</sup> The EPL, La Liga, Bundesliga, Ligue 1 and Serie A are the top 5 domestic leagues in terms of the Soccer Power Index. [www.globalfootballrankings.com](http://www.globalfootballrankings.com)

2.8.26. When it comes to live sport, a nation's culture, tastes and preferences determine what constitutes premium sport. In South Africa live rugby, cricket and PSL soccer matches are regarded as the top three sporting codes with a large following and offered on an exclusive basis on television. According to Statista data<sup>114</sup>, the top category of sports watched by the 'sport' audience, that is, those who chose sport as a top 3 viewing priority, includes, soccer, rugby and cricket. Therefore, the three sporting codes can be viewed as premium content.

2.8.27. Considering the (a) SSNIP test (b) characteristics of premium and non-premium content (c) the contents of and responses to the Draft Findings Document and questionnaire; (d) internal research. The Authority defines the following markets at the upstream level –

a) a wholesale market for the supply and acquisition of premium sports content for distribution in South Africa.

b) a wholesale market for the supply and acquisition of premium movies and series for distribution in South Africa; and

c) a wholesale market for the supply and acquisition of non-premium content for distribution in South Africa.

2.8.28. Having considered that there are differences in content, the Authority recognises that the relevant question for market definition purposes is whether other content is substitutable for the content categorized as premium content. This exercise is complicated by the fact that video entertainment services (OTT, subscription and FTA) are not made up of one type of content and that consumers' preferences for content are not uniform and change over time. This creates possibilities for substitution.

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<sup>114</sup> [Interest in sport types in South Africa 2024 | Statista](#)

**Question 6: Do you agree with the Authority's views on the wholesale market definition? Are there any factors that the Authority should have either included or excluded from the wholesale market definition?**

**Question 7: Do you agree with the Authority that market definition in upstream content markets should not be limited to simply establishing whether the notion of premium content exists and whether there are differences between premium content and non-premium content? Provide evidence to support for your answer.**

### 3. CONSIDERATION OF THE EFFECTIVENESS OF COMPETITION IN RELEVANT MARKETS

3.1. Once the relevant markets and market segments have been identified and defined pursuant to an inquiry in terms of section 67, the ECA provides that the Authority must then determine whether there is effective competition in those relevant identified markets and market segments.

3.2. Section 67(4A) of the ECA provides a guide that should be followed when making a determination regarding the effectiveness of competition in a relevant market. It states that –

*“(4A) When determining whether there is **effective competition**<sup>115</sup> in markets and market segments, the Authority must consider, among other things –*

*(a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments; and*

*(b) the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward-looking assessment of the relative market power of the licensees in the markets or market segments.*

3.3. The Authority proposed to consider the following factors in fulfilling the requirements of section 67(4A):

- Non-transitory (structural, legal and regulatory) barriers to entry;
- The dynamic character and functioning of the market (including market power and concentration levels);
- the nature and extent of vertical integration in the market; and
- whether competition law alone will be sufficient to deal with the identified market failure.

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<sup>115</sup> Own emphasis

### **The Authority's Preliminary views**

3.4. The Authority wishes to re-iterate that it is a creature of statute and derives its powers its enabling legislation. Therefore, it can only act in accordance with the powers given to it by the legislature. This is not to say that the Authority is prohibited from utilising good practice and learning from other jurisdictions when undertaking such an Inquiry. This is certainly the case when it comes to the factors that need to be considered when assessing the effectiveness of competition.

3.5. Section 67(4A) of the ECA is quite clear in terms of what factors the Authority must consider when assessing the effectiveness of competition. It states that the Authority must consider among other things (a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments and (b) the dynamic character and functioning of the markets or market segments, including (i) an assessment of relative market shares of the various licensees or providers of exempt services in the markets or market segments, and (ii) a forward looking assessment of the relative market power of the licensees in the markets or market segments

3.6. That notwithstanding, the list in the Guideline is also not mandatory but provides guidance to the Authority on what factors it may consider in its analysis. The Authority exercises its discretion in terms of both the number and the type of factors to consider.

3.7. Again, the ECA is clear in terms of what the Authority is expected to do. The Authority is enjoined to undertake an analysis of the dynamic character and functioning of the markets. This considers market dynamics and the interactions of market players. Part of this assessment is to then take into account the relative market shares of the various licensees or providers of exempt services and to conduct a forward-looking assessment of the relative market power of the licensees in the relevant markets in order to assess and/or deal with any identified impediments to fair and effective competition in the relevant markets.

3.8. From the above, it is clear that the Authority is enjoined to apply both a structural and dynamic analysis of the market. It cannot do the one and not the other, as both are requirements of the law. Of course, in the end, a decision on whether competition is effective or not will be arrived at based on the conspectus of all factors under consideration. Therefore, to then attempt to elevate one set or type of factor over another is misdirected.

3.9. The Authority will, for purposes of its analysis, consider both static and dynamic factors as enjoined by the ECA.

3.10. Having discussed the factors that need to be taken into account when assessing the effectiveness of competition in the Discussion Document, the Authority then applied those factors to the identified markets and posed the following questions:

*"Question 7. Kindly comment on the nature of barriers to entry in the upstream market*

*Question 8. What in your opinion are the premium rights in the South African television sector? Who currently holds them?*

*Question 9. 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?*

*Question 10. Do you consider the nature and extent of vertical integration in subscription television likely to harm competition? Kindly elaborate your answer.*

*Question 11. 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?*

*Question 12. 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?"*

**Stakeholder comments**

- 3.11. Stakeholders agree with the three barriers to entry discussed in the Discussion Document, namely the scarcity and cost of premium content, long-term exclusive contracts, and incumbency of special relationships. These barriers to entry in acquiring premium content play an important role in the viability of a broadcast network. It notes that these barriers to entry are also present in the upstream market for non-premium content, but that it poses less of an impediment to success for broadcasters than it does in the case of premium content.
- 3.12. With respect to the applicability of competition law, Stakeholders agree with the Authority's view that competition law alone is not enough to deal with challenges in the relevant markets. A market failure is not necessarily the result of anti-competitive behaviour. As such, competition law cannot sufficiently address market failures on its own. Regulatory action is required to address structural problems in the market on an ex-ante basis, especially given the rapidly changing landscape of the television broadcasting industry.
- 3.13. The Commission is of the view that barriers to entry in the relevant markets, *inter alia*, include sunk costs (such as the cost of acquiring content rights, marketing expenditure, among others), economies of scale and scope, incumbency advantages and brand loyalty, exclusive contracts and network effects.
- 3.14. In respect of the other factors for consideration, the Commission notes that given the differentiated nature of the products in these markets as well as the fact that these are sometimes bidding markets, it is helpful to consider the strength of both existing and potential competitive constraints. In this regard, an incumbent firm with a high market share in a market characterised by significant entry barriers is likely to have market power. In the alternative, it is well recognised that the likely constraint from potential competitors is increased when barriers to entry or expansion are lower.



- 3.15. The Commission notes that, depending on the circumstances, vertical integration can give rise to either pro-competitive efficiencies or anticompetitive outcomes or at times both.
- 3.16. The Commission further argues that vertical integration in subscription television broadcasting stifles competition by giving upstream (wholesale) firms an incentive to deny downstream (retail) firms adequate content, leading to the form of market foreclosure associated with an uncompetitive broadcasting environment.
- 3.17. According to the Commission, in the context of there being possible suboptimal outcomes in the acquisition of premium content in South Africa, especially with the bulk of premium content vesting on the incumbent firm, it is likely that ex post interventions through competition law may have limitations. Instead, a regulatory intervention may be needed to promote favourable conditions for all broadcasting licence holders to compete.
- 3.18. Accordingly, the Commission is of the view that a combination of competition law and ex ante regulatory interventions are required to deal with the market failures and potential competition challenges that are observed in these markets.

#### **The Authority's preliminary views**

- 3.19. At the retail level, taking into account the feedback received in response to the 10 November 2023 questionnaire and further information received by stakeholders, the Authority has now defined two markets: (a) a market for the retail distribution of basic-tier subscription television services and FTA television services in South Africa; (b) a market for the retail distribution of premium subscription television and OTT services in South Africa.

##### **3.19.1. The market for the retail distribution of basic-tier subscription television services and free-to-air television services in South Africa**

- 3.19.1.1. In the draft Findings Document, the Authority had identified and defined separate markets for the retail distribution of analogue free-to-air services and the

retail distribution of satellite-based FTA and basic tier subscription services.

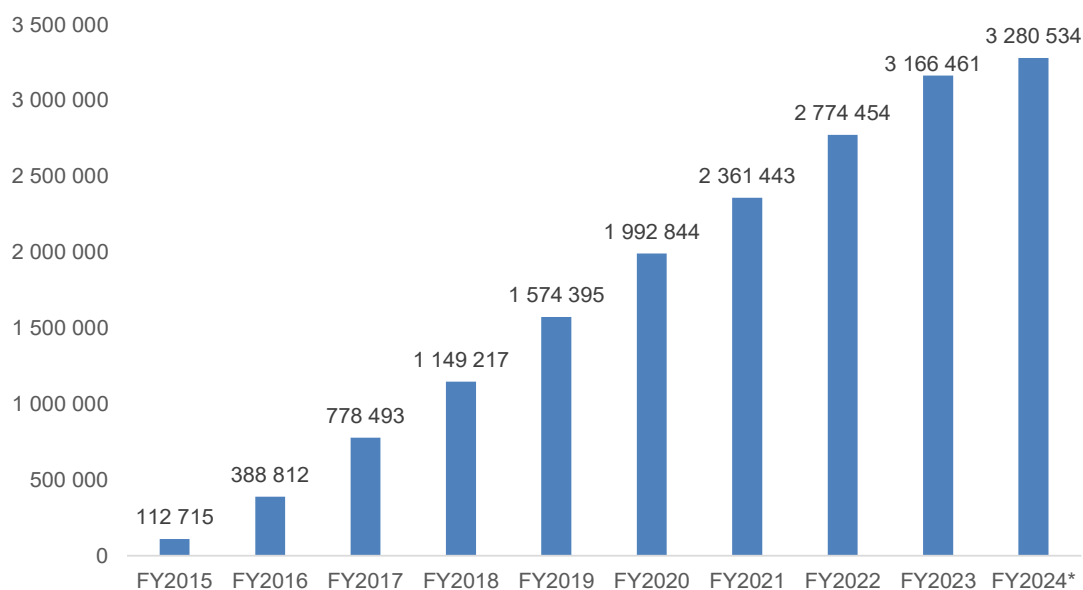
- 3.19.1.2. However, given the imminent analogue switch-off, the Authority considers it necessary to take into account digital terrestrial television into account, hence the expansion of the market to encompass all FTA and basic tier subscription services. Even with a possible delay, the Authority understands this will only account for 4,4 million indigent households who cannot afford to purchase set-top boxes or digital televisions. These are households on the periphery of the markets and are unlikely to have an impact on the competitive dynamics.
- 3.19.1.3. This market has a number of players. It comprises free-to-air broadcasters, that is, the SABC, e.tv and a number of community television broadcasters as well as basic tier subscription television service providers in the form of StarSat and DStv. As argued above, once digital migration is completed, the current free-to-air incumbents will have capacity to introduce more channels that are of a better quality. This will enable the free-to-air incumbents and new entrants to compete with basic tier subscription and satellite-based FTA services in the long term.
- 3.19.1.4. The Authority received concerns from FTA service providers regarding MultiChoice unfairly squeezing them out from what they consider to be the ever-shrinking advertising revenue pie. As this is based on regulations, the Authority will consider whether there is need for intervention in this regard through the appropriate review of the regulations by a council committee duly constituted by the Council.

### 3.19.2. *The non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments*

#### 3.19.3. Barriers to entry: Switching costs

3.19.3.1. The lack of set-top box interoperability can lead to high switching costs because a consumer who has invested in a set-top box and a satellite dish may view these as sunk costs that he or she cannot recover when switching to an alternative satellite broadcaster. However, further evidence of the exceptional growth of OpenView (Figure 4 below) shows that this may not be a prohibitive barrier to switching.

**Figure 4: OpenView growth**



#### 3.19.4. Barriers to entry: Brand loyalty

3.19.4.1. Viewers tend to develop brand loyalty, especially in a market such as South Africa where there was a single subscription television broadcaster for a long time. New entrants may find it difficult to break the

brand loyalty barrier. The Australian Competition and Consumer Commission for instance, considers brand loyalty and customer loyalty as barriers to entry.<sup>116</sup>

3.19.4.2. In its pre-listing statement MultiChoice states that –

*“Our DStv brand, which is a household name in South Africa, has high awareness and consumer support<sup>117</sup>.”*

3.19.4.3. A new entrant has to contend with establishing its brand among consumers and gain their loyalty. This process takes time, thus potentially weakening the competitive constraints exerted by new entrants. However, evidence of the rapid growth of OpenView suggests that this potential challenge can be overcome with success (Figure 4 above). Similarly, the rapid growth of OTT services also shows that this can be overcome.

#### **Barriers to entry: Vertical integration**

3.19.4.4. The Authority notes that whilst vertical integration is a legitimate business model that may produce economic benefits, such as internal efficiencies and economies of scope, it can also lead to market foreclosure. For instance, in the television broadcasting and video on-demand sector, a vertically integrated incumbent has the incentive to leverage its market position downstream to gain power in an upstream market for content. It would then use its upstream position to exercise additional market power in the downstream market, and consequently, the cycle continues to self-reinforce itself perpetually.

<sup>116</sup> Australian Competition and Consumer Commission. Merger Guidelines. November 2008, (amended Nov 2017). European Commission [http://ec.europa.eu/competition/mergers/cases/decisions/m5778\\_2891\\_2.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5778_2891_2.pdf).

<sup>117</sup> MultiChoice Group Limited. Pre-listing Statement. p30

- 3.19.4.5. MultiChoice is vertically integrated along the supply chain. It has its own in-house content production and channel packaging capabilities. MultiChoice's vertical integration, whilst legitimate, can weaken the competitive constraint from other subscription and FTA services in this market.
- 3.19.4.6. In order to be an effective competitor a new entrant would have to enter more than one stage of the value chain, which requires a lot of capital outlay as argued by the SABC.
- 3.19.4.7. The Authority notes that all traditional broadcasters in South Africa are vertically integrated meaning that they are able to match the advantage that it may give MultiChoice. Further, OTT providers are also mostly vertically integrated producing their own content. In addition, there are many content suppliers that are independent and are not vertically integrated with any of the broadcasters. These players are in a position to negate any competitive advantage from vertical integration as new players can readily acquire services from third parties.
- 3.19.5. ***The dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward-looking assessment of the relative market power of the licensees in the markets***
- 3.19.6. **Strategic behaviour by incumbent**
- 3.19.6.1. Strategic behaviour refers to actions taken by a firm in order to improve its competitive position or gain commercial advantage relative to actual or potential competition. Firms can improve their competitive position through innovation or efficiency

enhancing investments. However, strategic behaviour can also take the form of inhibiting competition, such as when a firm invests in resources for purposes of limiting rivals' choices.

3.19.6.2. When MultiChoice launched the DStv subscription service in 1995, it was a premium bouquet of 16 channels targeted at consumers in the 8-10 LSM bracket. In 2005, the Authority began a process of licensing new subscription television service providers. From the applications received, most of the applicants would target lower end and middle-income consumers since MultiChoice already catered for the high-income consumers. Immediately, MultiChoice introduced DStv Compact, which at the time was an 11-channel bouquet targeted at the middle-income consumers in the LSM 5-7, with a price range similar to what new entrants were targeting. Since then, MultiChoice has introduced various other packages targeting the lower income consumers, with price points as low as R29 per month. The following list of MultiChoice packages and the corresponding household income levels targeted to show that MultiChoice has covered the entire market, a move that might discourage new entry:

- Premium        LSM 9-10
- Compact Plus   LSM 8
- Compact        LSM 5-7
- Family         LSM 4-7
- Select          LSM 4-7
- Access         LSM 4-5
- EasyView       LSM 4-5

- 3.19.6.3. From a quantity perspective an incumbent may build extra capacity as a means of reducing pricing and therefore discouraging new entry. By reducing prices or increasing capacity, the incumbent is able to build a much larger customer base, leaving the potential entrant with less of the market, lower prices and lower profits, thus making entry unattractive<sup>118</sup>.
- 3.19.6.4. While the Authority had previously considered that MultiChoice having several bouquets at different price points could crowd out competitors, it recognises that this is also legitimate in the evolution of many businesses. For example, e.tv started as an analogue FTA service and has since expanded in various way to offering an OTT service (paid), satellite FTA and subscription services. Similarly, the SABC has expanded its business to offer an OTT service. OTT services like Netflix which used to not have advertising-supported services are expanding to now offering these services. They also include mobile versions of their services to cater for those consumers who prefer to subscribe to the service at a lower price.

### **Forward looking assessment of relative market power of licensees**

#### Potential competition

- 3.19.6.5. Competition in this market is expected to be enhanced through digital migration. Despite recent progress, the Authority, notes that there had been challenges with respect to the implementation of the digital migration policy. In 2015, e.tv instituted court action against the Minister of Communications,

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<sup>118</sup> Klemperer P. 1987. Entry Deterrence in Markets with Consumer Switching Costs. *The Economic Journal*. Vol 97: 99-177 available on <http://www.nuff.ox.ac.uk/users/klemperer/entry.PDF>

alleging that the Minister acted outside her powers in amending the digital migration policy to provide for non-encryption of set-top boxes. MultiChoice joined the Department of Communications in opposing the court action. In 2017, the Constitutional Court upheld Electronic Media Network Limited's (M-Net) appeal against the previous ruling of the Supreme Court of Appeal in e.tv's favour, thereby confirming government's policy that digital migration will proceed on the basis of non-encryption of government distributed set-top boxes.<sup>119</sup> The question of encryption versus non-encryption was central to this case, with e.tv arguing that non-encryption would affect its ability to offer high-definition television services and acquire premium content to compete with MultiChoice.

- 3.19.6.6. In another matter, the S.O.S Support Broadcasting Coalition and others brought an appeal to the Constitutional Court<sup>120</sup> against the decision of the Competition Appeal Court regarding the powers of the Competition Commission to investigate whether the channel licensing agreement entered into between the SABC and MultiChoice (the Agreement), constituted a notifiable merger in terms of the Competition Act.

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<sup>119</sup> *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others*; 2017 (9) BCLR 1108 (CC) at para 16: "Minister Muthambi pursued a policy "direction" that is significantly dissimilar to that of Minister Carrim in relation to the production specifications of set top boxes. She formulated a policy that is inclined to exclude decryption capabilities from set top boxes whilst leaving it open to free-to-air broadcasters to decide whether to encrypt their signals and if that be their preferred option, to do so with their own financial resources"

<sup>120</sup> Constitutional Court of South Africa. *S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others*. Case No. CCT 121/17, 28 September 2018



3.19.6.7. The Constitutional Court held that the Commission has the power under the Competition Act to investigate transactions to determine whether they constitute or give rise to a notifiable merger as defined in the Competition Act. In terms of the channel licensing agreement MultiChoice undertook to pay the SABC fees of more than R500 million over a period of five years in exchange, the SABC agreed that the SABC entertainment channel would be broadcast on the MultiChoice platform and also not to encrypt any of its free to air channels when the country migrated to digital terrestrial television.

3.19.6.8. At the Competition Appeal Court<sup>121</sup>, the appellants had argued that the undertaking made by the SABC to accept non-encryption of its channels would fundamentally affect its ability to compete with MultiChoice. It further ensures that subscribers to MultiChoice's low-cost offerings will receive everything that the SABC has to offer via MultiChoice's decoders plus its new channel offerings. This would increase MultiChoice's market share and solidify its position to the exclusion of other players or potential competitors in the industry.

*"This is so, because encryption is critically important for free-to-air channels in order to compete with Pay-TV broadcasters. It provides a high-quality signal and is less susceptible to signal piracy. These advantages make it possible for broadcasters to attract premium high-definition content. Non-encryption would as a result make it difficult for second respondent and potential new free-to-air entrants to access to premium content. First respondent on the other hand, being the only broadcaster with an established base of encrypted signals would*

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<sup>121</sup> Competition Appeal Court. Caxton And Ctp Publishers and Printers and others V MultiChoice(Pty) Ltd and others. Case No 140/CAC/MAR 16

*remain as the only broadcaster with the ability to attract premium content and would easily be able to increase its market share."*

3.19.6.9. The Commission in its submissions to the Competition Appeal Court also argued for encryption as a means to promote competition between subscription and FTA services.

3.19.6.10. MultiChoice argued that digital migration has occurred around the world with non-encryption of free-to-air decoders.

3.19.6.11. In September 2018 the Constitutional Court granted the Commission its right to investigate whether or not the agreement concluded between the SABC and MultiChoice in 2013 constitutes a notifiable merger and ordered the Commission to file a report on the matter to the Tribunal within 30 days. On 9 November 2018, the Commission filed a report with the Tribunal where-in it found that MultiChoice, through the Agreement, influenced the SABC's position on the encryption of its free-to-air channels. In the Agreement, the SABC undertook in favour of MultiChoice not to encrypt all its channel signals in respect of its free-to-air channels transmitted on its DTT platform. Critically for purposes of this Inquiry, the Commission found that the encryption of SABC's free-to-air channels including set-top box control would have, inter alia, enabled the entry of new entrants into the market and that the Agreement had the effect of protecting MultiChoice's dominance in the subscription television market.<sup>122</sup>

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<sup>122</sup> Competition Commission. Media release. Commission finds that the agreement between SABC and MultiChoice enabled MultiChoice to influence the strategic direction of the SABC. 12 November 2018.

3.19.6.12. It is clear to the Authority that the non-encryption of government subsidised set-top boxes might affect the nature of competition that is likely develop post full migration.

3.19.6.13. PWC predicts that in the longer term some households might look to supplement their digital terrestrial channels with SVOD platforms rather than traditional subscription television packages.<sup>123</sup> Thus, competition in the digital era will likely be about choosing between an SVOD service and a subscription television service as a complement to DTT.

3.19.6.14. Noting the above, the Authority believes that this market is likely to tend towards competition. The Authority notes that majority of the content at this level of the market is freely available, with local productions being the most watched content at this level of the market.

**3.20. The market for the retail distribution of premium subscription television and OTT services in South Africa**

***The non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments***

3.20.1.1. Per the market definition, premium satellite faces competition from the multitude of OTT service providers that exist currently in South Africa. This includes OTTs such as Netflix, Disney Plus, Amazon and VIU. These players are able to provide similar content such as movies and series that can compete directly with those offered on MultiChoice.

**Barriers to entry: Switching costs**

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<sup>123</sup> PWC. Entertainment and media outlook: 2018-2022. An African perspective. [www.pwc.co/za/outlook](http://www.pwc.co/za/outlook)

- 3.20.1.2. The analysis on switching costs as a barrier to entry above also apply in this market when it pertains to satellite-based players. The growth of OpenView shows that there are no switching costs that are insurmountable and for OTT players switching costs from satellite to OTT is typically affordable with only a need to subscribe to an OTT online. Furthermore, the ease of subscribing online with no long-term contracts allows for customers and in some instances "free trial" period allows consumers to test the service without paying for it. However, depending on the type of television that the customer has, they may also either need to upgrade to a smart TV or alternatively purchase an android box that can easily be plugged into the HDMI slot of a TV and turns it into a smart TV<sup>124</sup>. Alternatively, consumers can consume the content on other platforms such as cell phones, tablets or laptops.
- 3.20.1.3. Furthermore, since OTT requires internet access, the customer may need to purchase an internet subscription or use their existing mobile as a hotspot. Typically for FTTH, the broadband service provider will sponsor the installation fixed home internet. Alternatively, mobile broadband merely requires the purchase of an internet router or alternatively use of own cellphone as router etc. The Authority considers the rapid growth of OTT services over the past few years as pointing to these switching costs being capable of being overcome.

### **Barriers to entry: Bundling**

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<sup>124</sup> [What is an Android Box and how to turn your TV into a smart TV? | Blog | Strong.eu](https://strong.eu/blog/what-is-an-android-box-and-how-to-turn-your-tv-into-a-smart-tv/)

- 3.20.1.4. The Authority stated in the Discussion Document that bundling involves the selling of a primary good or service, in conjunction with one or more secondary goods or services that can be acquired separately. The idea is that the consumer benefits from the convenience and cost saving of purchasing a bundled product than buying the individual elements separately. However, bundling and tying may foreclose the market, by incentivising consumers to purchase from a firm that offers a bundled good or service instead of dealing with other suppliers of the secondary goods or services.
- 3.20.1.5. In the South African market, the Authority sees an increase in the phenomenon of offering access to discounted data services in addition to subscribing to a television or video-on-demand service.
- 3.20.1.6. MultiChoice has various products that are available to its premium subscribers, including Showmax, Explora and DStv Stream. MultiChoice aims to continue developing and marketing bundled products, that would include DStv Wi-Fi Connectors in order to increase the number of connected Explorers. The Authority considers that any potential negative impact of this is likely to be mitigated by the arrangements that OTT services have with telcos. In any event, the rapid growth of OTT services taken together with the significant loss of subscribers across the board which MultiChoice is experiencing indicates that any bundling taking place has not hampered competition.

**Barriers to entry: Brand loyalty**

- 3.20.1.7. The analysis on brand loyalty above applies in this market for satellite players and will not be repeated. The Authority notes that OTT players such as Netflix, Disney Plus and Amazon amongst others have managed to effectively grow their subscriber base in South Africa despite the incumbency of MultiChoice. Furthermore, these firms are large multinational firms that have become synonymous with audio-visual entertainment.

**Barriers to entry: Vertical integration**

- 3.20.1.8. The analysis on vertical integration above applies in this market and will not be repeated. The authority notes that Netflix, Disney Plus, Amazon Prime, Apple Tv etc, have their own upstream production capabilities and continue produce their own content without the need to purchase from third parties. Disney Plus in particular, is one of the largest movie and series producers in the world since its merger with 21st Century Fox in 2017. Netflix on the other hand is not typically listed as a major studio since it only produces for its own platform and does not distribute this content to any other third parties. Nonetheless, there also continues to be a multitude of third-party independent studios and content producers that are not vertically integrated and compete and are able to offer services to non-vertically integrated players.

***The dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward-looking assessment of the relative market power of the licensees in the markets***

- 3.20.1.9. In this tier, Multichoice competes with OTT services including Netflix, Disney Plus, Amazon Prime Video

and others. In terms of market shares. The Authority unfortunately does not have official data from most OTTs as they did not respond to information requests, save for Netflix. It has been reported that Viu has said that it has a subscriber base of 4.5 million active monthly users in South Africa<sup>125</sup>. However, based on Statista and data involving Netflix and MultiChoice, it is clear that OTTs pose a significant competition as they have grown their numbers.

**Table 8: Market size based on number of subscribers**

Market participant	2021	2022	2023
Netflix	[Redacted]	[Redacted]	[Redacted]
MultiChoice	[Redacted]	[Redacted]	[Redacted]
Viu			4,500,000
Other OTT services <sup>126</sup>			1,080,000

Source: Own construction

3.20.1.10. When the Authority considers other data from Statista, OTTs currently have an estimated number of subscribers of over 8 million. If the trends continue, MultiChoice will likely lose more subscribers while subscriber bases of OTT services continue to grow. Furthermore, OTTs have access to content both local and international that keeps driving viewership numbers.

### Strategic behaviour by incumbent

3.20.1.11. Industry or sector renewal can be driven by the re-invention of the business through innovation and the adoption of new technologies. Like OTT services, MultiChoice is taking advantage of technological

<sup>125</sup> Moyo, A., (2023) OTT player VIU targets low-budget streamers in SA. Available online: <https://www.itweb.co.za/content/xnklQaz1dNxM4Ymz>

<sup>126</sup> Difference between Statista estimates of total SVOD in 2023 and Netflix and Viu subscriber numbers

changes happening in the television and video-on-demand sector to try and protect its market position. MultiChoice has implemented this strategic approach through the introduction of various service offerings targeted largely at its premium subscribers. In 2016, just before the launch of Netflix in South Africa MultiChoice introduced Showmax, an internet-based video-on-demand service that offers a catalogue of TV shows and movies. Showmax is available either as a standalone subscription service or for free as a complementary product to premium subscribers. Currently, the majority of Showmax subscribers are existing DStv Premium subscribers. The Authority notes that it is legitimate for firms to respond to competition by innovating and offering consumers added value. In fact, firms that do not respond to competition likely have significant market power and are not concerned about the risk of losing customers.

- 3.20.1.12. In 2014, MultiChoice introduced DStv Now an internet-based service that has evolved into DStv Stream which allows DStv subscribers to access all content online without the need for satellite installation. Subscribers can catch content through broadband connections via computers, tablets, smartphones and smart TVs. MultiChoice has launched the Explora Ultra decoder that will allow subscribers to seamlessly shift between satellite and online platforms. On 30 September 2020, Showmax launched Showmax Pro, MultiChoice's first standalone streaming service with online sport offering. Showmax Pro allows subscribers to watch their series, movies, kids and sport content across several devices, while also offering a mobile option at a lower price point. During November 2020,



MultiChoice launched Netflix on its platform and will be adding another major international subscription video on demand (SVOD) service<sup>127</sup>. This move is similar to what has taken place across the world<sup>128</sup>.

3.20.1.13. Showmax continues to grow in parallel with Netflix. MultiChoice and other industry experts<sup>129</sup> had predicted the OTT market to grow to 2.5 million subscribers by the end of 2021, where it expected to capture just over 2 million of the market, through Showmax. It is clear that MultiChoice intends to use Showmax as its key product offering that will compete directly with OTT service providers. This indicates a strategy of renewal by taking advantage of technological advancement. The Authority notes that the OTT market has grown much faster than MultiChoice anticipated, and its OTT rivals are also expanding rapidly as evidenced by Netflix having more subscribers than the DStv Premium product.<sup>130</sup>

3.20.1.14. Given the structure of this evolving relevant market the Authority finds that competition is likely to continue to be dynamic becoming even more effective. Evidence considered by the Authority, which was discussed under market definition showing significant subscriber losses by MultiChoice, supports the view that it is facing greater levels of competition including from well-financed global competitors.

**3.21. The wholesale market for the supply and acquisition of premium sports content for distribution in South Africa and the wholesale market for the**

<sup>127</sup> Multichoice SA. Condensed consolidated interim financial statements for the period ended 30 September 2020

<sup>128</sup> DigitalTVEurope – Pay TV and OTT: Partners or Competitors

<sup>129</sup> Refer to the PwC Entertainment and media outlook: 2017 – 2021 report

<sup>130</sup> See the MultiChoice response to Questionnaire dated 15 February 2024; Refer to Statista data accessed here [Video-on-Demand - South Africa | Statista Market Forecast](#)

**supply and acquisition of premium movies and series for distribution in South Africa.**

**3.21.1. The wholesale market for the supply and acquisition of premium movies and series for distribution in South Africa**

3.21.1.1. As explained earlier, the entry of OTT services has completely changed the landscape for the wholesale market for the supply of and acquisition of premium movies and series. Most of the OTTs such as Netflix, Disney Plus, and Amazon all have access and compete for what is termed premium movies and series. The increasing cost of premium sports content is now beyond the reach of many broadcasters and new smaller local OTT service providers. However, OTT providers like Netflix and Amazon have financial resources that enable them to compete against MultiChoice. For instance, Netflix's global content budget was over \$10bn, this amount includes over \$125 Million spent on local content commissioned and produced in South Africa<sup>131</sup>. This dwarfs MultiChoice's content spend. They also self-produce their own content which competes within the premium market as the shows are very popular and highly rated. This has meant that the cost of content is no longer a barrier for some of the larger players that have entered the market in South Africa as they can compete for content. Therefore, the authority does not go on further to access the wholesale market for movies and series.

**Wholesale market for the supply and acquisition of premium sports content**

**Barriers to Entry: Cost**

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<sup>131</sup> [South Africa got 71% of Netflix's \\$175m investment](#)

- 3.21.1.2. The Authority previously highlighted that it considered the major barrier to entry into the upstream market for the supply and acquisition of premium content to be the cost and scarcity of premium content.
- 3.21.1.3. MultiChoice noted that sport rights have become increasingly expensive and hotly contested<sup>132</sup>, having spent R2.3 billion on local sports content and R2.5 billion on local content in 2018<sup>133</sup>. The Authority notes that apart from PSL games and some EPL games. Majority of the premium sports, being Cricket and Rugby are broadcast on the premium and most expensive bouquet offered by DSTV.
- 3.21.1.4. In 2015 e.tv lost rights to broadcast the UEFA Champions League, citing the prohibitive costs of the rights.<sup>134</sup> In 2007, the SABC lost its exclusive rights to the PSL to SuperSport, in a deal worth R1.6 billion. of note is that prior to this, the SABC had enjoyed monopoly access to PSL games with no competition. After the rights were put out for competitive bids, the Authority understands that the SABC did not submit a bid for the rights. Nonetheless, the SABC as a free to air broadcaster was offered a number of games to broadcast, however, the PSL submits that the SABC did not broadcast all the games offered to it. Both broadcasters indicate that they lost viewers as a result of failing to secure these premium sports rights, which MultiChoice has managed to win ever since and leverages on them. The competition for premium sports content is driving up its cost and pushing it out of reach of new entrants. The Authority recognises

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<sup>132</sup> Multichoice. Intergrated Annual Report. 2016

<sup>133</sup> Multichoice. Abridged Integrated Annual Report. 2018

<sup>134</sup> TimesLive. e.tv loses Champions League rights to SuperSport

<http://www.timeslive.co.za/sport/soccer/2015/05/26/e.tv-loses-Champions-League-rights-to-SuperSport>

that MultiChoice has a legitimate right to compete for and bid for the content, as would be expected of any competitor.

3.21.1.5. The PSL's 2011 Invitation to Tender document has minimum production requirements with quality and investment specifications that bidders must meet. It is clear from these requirements that it would be difficult for new entrants to break into the market, without deep pockets. These requirements favour the incumbent and only work to reinforce MultiChoice's ability to keep winning the rights perpetually, thus further negatively affecting competition. However, the Authority recognises that content owners across the world have legitimate reasons to ensure that their content is produced and broadcast in the highest possible quality. This enhances the appeal of the content, raising future demand and value to the owner, broadcaster and consumers as well as using the funds to grow the sport and ensure grass roots development.

3.21.1.6. The current agreement entered into between MultiChoice and the PSL runs for 5 years, covering the 2019/20 season through to the 2023/24 season. The English Premier League agreement has also been renewed. Any provider interested in these rights had the opportunity to bid for the rights when the PSL issued its tender and the EPL conducted its rights selling process. Of Note is that the SABC recently also managed to obtain the FTA rights for the EPL Games in South Africa<sup>135</sup>.

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<sup>135</sup> [MEDIA STATEMENT | SABC WILL BROADCAST THE EPL FTA PACKAGE DURING THE 2024/2025 SEASON – SABC – Official Website](#)

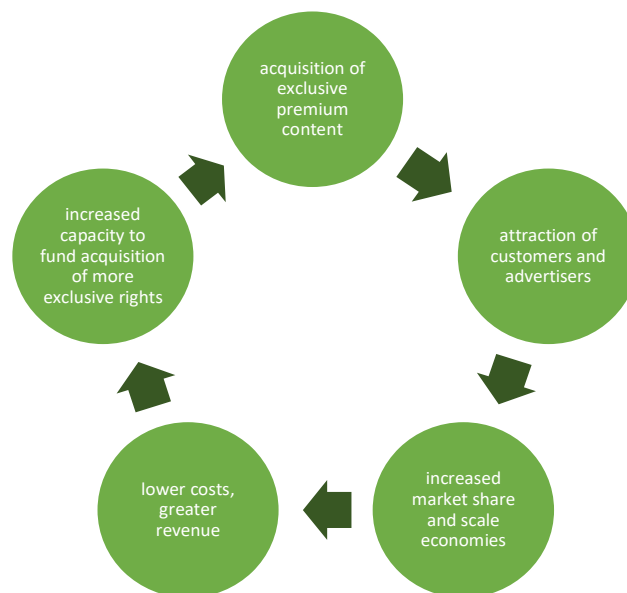
- 3.21.1.7. As already noted, MultiChoice recently launched Showmax mobile premier league, an OTT service focusing on football content. The Authority notes that globally Disney (ESPN) and Amazon Prime have started bidding for sports, and Netflix is clearly making moves into live sports content. The SABC does also bid and broadcast a vast number of sports, particularly tournaments such as AFCON and Olympics. For instance, MultiChoice lost the Indian Premier League rights in South Africa to DAZN in 2023. The Authority also notes that Star Sat has previously managed to get rights to broadcast Bundesliga, Serie A and Ligue 1 matches. This indicates that not all rights are exclusively held by Multichoice.
- 3.21.1.8. Evidence of significant losses of subscribers by dstv to providers who do not have sports content also points to the fact that competitors may be able to successfully compete to a large extent without having to spend significant amounts of money on expensive sports content. This applies to both OTT providers and the OpenView service which continues to grow rapidly without sports content.

**Barriers to Entry: long-term exclusive contracts**

- 3.21.1.9. Apart from the high cost, premium sports content is usually tied up in long term exclusive contracts, meaning that for a new entrant such content would not be readily available until the end of the contract. Even then, there is no guarantee that a new player will outbid an incumbent at the next round of bidding due to the competitive advantage that exclusive content bestows on the holder. This may create a vicious cycle. The cycle begins with the acquisition of premium content on an exclusive basis for a

stipulated time frame. Exclusive premium content attracts more viewers thereby increasing the broadcaster's chances of acquiring even more premium content as rights holders would prefer to sell to an established broadcaster with an established and growing subscriber base. More viewers also mean an increase in advertising and subscription revenue that enables the broadcaster not only to outbid its rivals but also acquire even more exclusive content. Consequently, new entrants are foreclosed from the market.

**FIGURE 5. EXCLUSIVE PREMIUM CONTENT AND MARKET POWER VICIOUS CYCLE**



Source: Windsor Place Consulting<sup>136</sup>

3.21.1.10. MultiChoice disputes the existence of a vicious cycle in the market for content supply and acquisition, on the basis that the vicious cycle requires the following strict conditions to hold:

<sup>136</sup> Windsor Place Consulting. 2012. Exploring content related issues: Will exclusive content rights be the new bottleneck in the Australian telecommunications sector? Paper for the competitive carriers' coalition. Available from [www.ccc.asn.au/secure/downloadfile.asp?fileid=1001538](http://www.ccc.asn.au/secure/downloadfile.asp?fileid=1001538)

- exclusivity over specific content must be capable of attracting a substantial subscriber base; and
- a larger installed subscriber base must substantially increase future profits

3.21.1.11. The Authority had previously held that without delving into the question of whether MultiChoice is correct in its assertion that the vicious cycle theory is dependent on the cited two conditions, it is the Authority's view that in the South African market, MultiChoice has benefited from the first mover advantage, having provided subscription television services over a long period of time with limited competition. The Authority took the view that this enabled MultiChoice to secure a large subscriber base and build a strong brand that reinforced customer loyalty. MultiChoice has bid and won premium sports rights, which are globally accepted to be crowd pullers.

3.21.1.12. The Authority has observed from development between 2019 and 2024 that MultiChoice's subscriber base is experiencing significant decline, particularly in those bouquets that it places most live sports content. This suggests that the conditions for the vicious cycle that the Authority had considered to exist may be weakening. The scale of subscriber losses that MultiChoice is experiencing to its DStv Premium, DStv Compact Plus and DStv Compact bouquets is instructive.

3.21.1.13. The evidence also suggests that there is other content, other than the sports content which can be used to win subscribers from MultiChoice's services. This is evidenced by the continued growth of OTTs in South Africa despite not having access to the premium sports content. As explained above, the

larger global OTT services have the financial resources to successfully challenge MultiChoice for content rights if they consider the content key to subscriptions. Netflix is making moves towards live sports content whereas Amazon and DAZN have established involvement in Sports. Despite MultiChoice's longstanding investment in cricket, DAZN successfully competed for IPL rights against MultiChoice in the past.

- 3.21.1.14. The Authority notes that due to excessive prices for sports content it remains difficult for FTA service providers to get access to the sports. It is unlikely that FTA services will be in a position to compete for premium sports in the long to short term. The authority notes that in some instances FTA services are able to enter into sublicensing agreements with the winning bidder. This was seen most recently with the sublicensing agreement between the SABC and DSTV for the Rugby World Cup. However, these do appear to be few and far between with the SABC accusing DSTV of opening negotiations late, which does not give them an opportunity to raise sponsorships and advertising revenue to recoup the cost of the sublicense.

#### **Barriers to entry: incumbency of special relationships**

- 3.21.1.15. **Incumbent operators take advantage** of lack of competition to establish strong relationships with suppliers, advertisers and even viewers. Content suppliers and advertisers would want to do business with an established operator than a new entrant. For an advertiser, an established broadcaster usually has a larger base of subscribers than a new entrant and therefore more eyeballs to see the advert. Similarly,



for content producers an established broadcaster ensures that there is broader access to their content than a new entrant's subscriber base.

3.21.1.16. In *Deutsche Telekom* it was recognised that where an incumbent has strong links with certain key constituencies like advertisers these can present barriers to entry and the court held that:

*"To have any hope of acquiring broadcasting rights, it is vital to have access to viewers in the form of an established subscriber base since rightsholders usually want to see their product distributed widely.... [A] newcomer would run a considerable financial risk by concluding output deals since he would have to guarantee a minimum subscriber base, without knowing whether he could achieve the guaranteed figure<sup>137</sup>."*

3.21.1.17. The Authority notes that despite MultiChoice's longstanding investment in cricket (including the IPL), DAZN managed to successfully compete for the IPL rights against MultiChoice<sup>138</sup>. Multichoice was able to air the IPL after negotiating a sublicense<sup>139</sup>.

***The dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward-looking assessment of the relative market power of the licensees in the markets***

3.21.1.18. Given that demand for content is derived from demand for video entertainment services, the effectiveness of competition can be assessed by considering whether subscription television services that have the content identified as "premium" lose

<sup>137</sup> Case IV/M.1027 Deutsche Telekom/BetaResearch

<sup>138</sup> [SuperSport Lose IPL Broadcast Rights - Cash N Sport](#)

<sup>139</sup> <https://x.com/SuperSportTV/status/1641764985238855681?s=20>

subscribers to services that do not contain that content.

3.21.1.19. In this regard, for subscription television services, the Authority considers whether the DStv bouquets that contain the content lose subscribers to other DStv bouquets that do not have the content or to OTT services that do not contain or have limited amounts of the content or to FTA services that do not have the content. The Authority has noted above that the DStv Premium bouquet, despite having all the content identified as Premium content has been losing subscribers to alternative services including OTT services. Between 2016 and 2023, the DStv Premium bouquet has lost **[Redacted]** of its subscribers to alternative services. MultiChoice submitted that in the period between 2019 and 2023, it has also been losing subscribers to its DStv Compact Plus **[Redacted]**<sup>140</sup>. A significant percentage of subscribers that switched from DStv reported that they were now watching paid OTT services<sup>141</sup>. **[Redacted]**<sup>142</sup>.

3.21.1.20. Furthermore, data on internal subscriber movements shows that there is significant switching from high bouquets to basic-tier bouquets representing significant revenue losses for MultiChoice. For instance, MultiChoice data also shows that there has been significant incidence of downgrades from the DStv Compact bouquet which has some of the content that the Authority has identified as premium content to lower bouquets that primarily do not contain that content<sup>143</sup>.

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<sup>140</sup> MultiChoice submission of 15 February 2024, para. 83.

<sup>141</sup> MultiChoice submission of 15 February 2024, para. 83.

<sup>142</sup> MultiChoice submission of 15 February 2024, para. 83.

<sup>143</sup> MultiChoice submission of 15 February 2024, para. 84.

- 3.21.1.21. Amongst FTA services, it appears e.tv can compete successfully against the SABC without investing in content that the Authority considers as premium. e.tv advertising revenue has shown consistent stability with some growth in 2022. While SABC advertising revenue has been on a decline.<sup>144</sup>
- 3.21.1.22. This evidence suggests that to some extent consumers and providers of video entertainment services can substitute other content for the content that the Authority has identified as premium content and be able to attract a significant number of subscribers from DStv services. This is also supported by the rapid growth of OTT services described above and appears to be consistent with the Authority's view that OTT services compete with mid to high end subscription services. It does not mean that content is the same or that it has the same appeal to both consumers and providers of audio-visual entertainment services. It simply recognises that in a differentiated market, providers of the services can compete against each other despite differences in their content.
- 3.21.1.23. MultiChoice submitted that OTT services constrain subscription television through, cord-shaving, cord-cutting and cord-nevers<sup>145</sup>. With respect to cord-shaving and cord-cutting, the Authority notes that MultiChoice has had a significant loss in subscriber numbers over the last few years. This is in contrast to the continued growth of OTT services coupled with greater access to the internet.

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<sup>144</sup> [DStv vs Etv vs SABC — One big loser in advertising – MyBroadband](#)

<sup>145</sup> MultiChoice presentation, slide 33 and MultiChoice written submission,

3.21.1.24. In the quest for even greater viewership, both DStv and the OTT services such as Netflix have increased the number of locally produced films and tv shows which has grown the local market. Furthermore, when it comes to first run movies, again the OTTs are able to compete effectively as in some instances they directly produce the movies in-house. Disney Plus movies are consistently within the top 20 top grossing movies. According to Ferreira (2021)<sup>146</sup>, MultiChoice's DStv Premium and DStv Compact Plus subscribers keep declining due to MultiChoice's shift in focus to offer a bigger value proposition to mass-market customers on lower-tier DStv bouquets. The likely impact of this shift is that it will sooner or later have a knock-on effect and start to impact premium content budgets. It is also likely that MultiChoice content cost centres such as M-Net, kykNET and Showmax, as well as the division working on acquiring and retaining premium third-party linear TV channels carriage agreements on DStv will find it difficult to justify spending on big-budget items, shows, projects and expensive TV channels if this premium audience is dwindling.

3.21.1.25. In its 2020 Integrated Report, MultiChoice<sup>147</sup> reports that –

**“[Redacted].” 43**

3.21.1.26. Therefore, in light of the factors highlighted above, the Authority's preliminary view is that OTTs constitute

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<sup>146</sup> Ferreira, T. 2021. As MultiChoice keeps losing DStv premium subscribers, it puts premium content at risk. Channel24. Available at <https://www.news24.com/channel/tv/news/as-multichoice-keeps-losing-dstv-premium-subscribers-it-puts-premium-content-at-risk-20211113>

<sup>147</sup> MultiChoice. 2021 Integrated Report. p60. Available at <https://www.multichoice.com/media/1782/2019-multichoice-south-africa-integrated-annual-report.pdf>

a strong competitive constraint in the premium market.

- 3.21.1.27. Taking a forward-looking view, the Authority considers that as a result of the current trends and the competition from OTT services, MultiChoice is unlikely to maintain its current market position into the foreseeable future if the global growth of OTTs continues.

**The wholesale market for the supply and acquisition of non-premium content for distribution in South Africa**

- 3.21.1.28. The market for the wholesale acquisition of non-premium content is characterised by low barriers to entry. Content in this market is generally available with no restrictions. It is the Authority's current view that there are no significant competition concerns in this market. As such, there is no need to proceed with the analysis of significant market power in this market.

**Question 8: Since the inception of this Inquiry in 2016 and more specifically in the last 5 years have you competed for any premium sports content and or premium movies and series directly from the owners of the content?**

**Question 9: If you have competed for the rights identify each of the rights you have competed for and provide details of each bid/request.**

**Question 10: If you intend to acquire any content from rights owners provide details of your content acquisition strategy over the past 5 years and over the next 3 to 5 years including and/or particularly in relation to sports content.**

**4. CONSIDERATION OF LICENSEES WITH SIGNIFICANT MARKET POWER**

- 4.1. This section analysed the Authority's initial views regarding the identification of licensees with significant market power in the proposed relevant markets, as guided by section 67 (5) of the ECA, which provides that –

*"A licensee has significant market power in a market or market segment if that licensee –*

- (a) is dominant;*
- (b) has control of an essential facility; or*
- (c) has a vertical relationship that the Authority determines could harm competition"*

- 4.2. Once a market has been defined, the next step is to identify players in that market, calculate their market shares and identify those players who have significant market power. The concept of significant market power is used specifically in the electronic communications and broadcasting sectors, not only in South Africa, but in other countries as well. This concept is not different from the concept of market power used in general competition law and policy circles.

- 4.3. The Competition Act defines market power as the ability of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers. A firm is irrefutably presumed to have market power and be dominant in a market if it has 45% or more market share.

- 4.4. A market share of between 35% and less than 45% presumes dominance unless the firm concerned can show that it has no market power. A market share of less than 35% presumes dominance if it can be proven that the firm concerned has market power. In terms of the ECA a licensee has significant market power if, among other things, it is dominant, within the meaning of the Competition Act.

- 4.5. After discussing the concept of significant market power, the Authority then posed the following two questions:

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

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

#### **Stakeholder comments**

- 4.6. Stakeholders disagree with the notion that "...a licensee has significant market power if, among other things, it is dominant, within the meaning of the Competition Act", as stated in the ECA, since this statement implies that having high market shares bestows market power upon a firm. They posit that, it is inadvisable to make *a priori* assumptions regarding the structure of a market and the existence of market power. Such a determination would place significant weight on the market share calculations, as such, making a determination on whether a firm has SMP given its market shares is essentially flawed.
- 4.7. The Commission is of the view that the identification of players with significant market power is mandated by legislation and is therefore deemed appropriate for the evaluation.
- 4.8. In respect of vertical integration, some stakeholders note that this can, depending on the circumstances, give rise to either pro-competitive efficiencies or anticompetitive outcomes or at times both. The pro-competitive efficiencies largely relate to promotion of investment, the removal of double marginalisation and the reduction of transaction costs which ultimately can be expected to result in lower prices and product quality, among others. On the other hand, vertical integration can contribute to the heightening of barriers to entry and/or expansion in a market as well as perverse incentives on the part of vertically integrated firms.
- 4.9. Lastly, stakeholders indicate that the proper approach when determining significant market power is to first consider the effectiveness of competition in the retail market. If the Authority is unable to find that competition in the retail market is ineffective, then the inquiry ends there.

If ineffective competition is found at the retail level and wholesale markets are assessed, it is only those within which ineffective competition is found which should be the subject of any SMP test.



**The Authority's Preliminary view**

- 4.10. The Authority reiterates that Section 67(5) clearly states that a licensee has significant market power if it is dominant, has control of an essential facility, or is vertically integrated in a manner that harms competition. The ECA ascribes to dominance the same meaning it has in terms of section 7 of the Competition Act. Section 7 of the Competition Act states that a firm is dominant in a market if –
- (a) it has at least 45% of that market;
  - (b) it has at least 35%, but less than 45% of that market unless it can show that it does not have market power; or
  - (c) it has less than 35% of that market but has market power.
- 4.11. The Competition Act further defines market power as the ability of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.
- 4.12. In terms of the above definition, a firm is irrefutably presumed to have market power and be dominant in a market if it has 45% or more market share. A market share of between 35% and less than 45% presumes dominance unless the firm concerned can show that it has no market power. A market share of less than 35% presumes dominance if it can be proven that the firm concerned has market power. In terms of the ECA a licensee has significant market power if, among other things, it is dominant, within the meaning of the Competition Act.
- 4.13. Thus, from the above, a firm can have significant market power on account of possessing high market shares only. To the extent that other factors are at play, they only magnify the extent of the market power that already exists due to the size of a firm in the market.
- 4.14. However, significant market power can also stem from vertical integration and the control of an essential facility.

- 4.15. Contrary to MultiChoice's contention that vertical integration is not a necessary condition to enter the market since content can be obtained from third parties, or commissioned from independent producers, it is vertical integration that has given rise to the current market structure that exhibits outcomes that prevent entry and expansion in the market. There are inherent economies of scale and scope associated with vertical integration.
- 4.16. The Authority starts its analysis at the retail level where it identified two relevant markets:
- 4.16.1. a market for the retail distribution of basic-tier subscription television services and FTA television services in South Africa; and
  - 4.16.2. a market for the retail distribution of premium subscription television and OTT services in South Africa.

**The market for the retail distribution of basic-tier subscription television services and digital free-to-air television services in South Africa**

- 4.17. The Authority's preliminary view is that MultiChoice and Starsat offer basic tier subscription TV bouquets while the SABC and e.tv offer digital FTA services in this market. Due to the imminent full migration to digital broadcasting, the Authority deems it necessary to monitor the development of competition in this market and will intervene should there be signs of market failure. It is therefore not necessary at this stage to identify a licensee with significant market power since there is no indication of ineffective competition.

**The market for the retail distribution of premium subscription television and OTT services in South Africa**

- 4.18. The Authority's preliminary view is that the satellite players compete with OTTs such as Netflix, Disney Plus and Amazon Prime amongst others. The Authority will monitor developments in this market and will intervene when required. The Authority notes further that there are collaborations among players, including between subscription service providers and OTTs as well as between electronic communications service providers and OTTs.

Again, the Authority will monitor the nature of the collaborations to ensure that they are competition enhancing. Most notable to the Authority from evidence gathered for the period after 2019 is that MultiChoice has been experiencing significant subscriber losses to competing services pointing to increased levels of competition, mainly from OTT services.

- 4.19. Various stakeholders also raised concerns with the fact that OTTs are currently not subject to any form of regulation in South Africa, including BEE and local content requirements. It must be recognised that this Inquiry is based on section 67 of the ECA, in terms of which, regulations can only be imposed on licensees who are found to possess significant market power in an instance where there is ineffective competition in an identified market. The regulation of OTT services is being considered at a policy level.

**The wholesale market for the supply and acquisition of premium movies and series for distribution in South Africa**

- 4.20. The Authority considered the broadcasting and video-on-demand value chain to indicate that some broadcasters are able to produce content in-house. Those with no such capabilities acquire content from third parties.
- 4.21. The Authority views this market as not having high barriers to entry. There are many suppliers of content locally and internationally. Both free-to-air and subscription television broadcasters and channel producers can acquire content in this market. Vertical integration here does not appear to cause any harm to competition and as such there is no need for regulatory intervention.

**The market for the wholesale supply and acquisition of premium sports content for distribution in South Africa**

- 4.22. The Authority identified live soccer matches; live rugby matches; and live cricket matches. The Authority has considered the fact that MultiChoice owns the majority of the rights to the major live soccer matches, including the PSL, EPL, Bundesliga, La Liga and Serie A. MultiChoice has also

acquired rights to the major rugby tournaments as well as the cricket competitions. MultiChoice has held these rights over an elongated period of time. At this point, the Authority is unclear whether MultiChoice having more sports rights is a result of outbidding competitors or competitors not competing for the rights. The Authority considers that it may be inappropriate to conclude that MultiChoice having the rights causes market failure if this is a result of competitors choosing to invest in other content rather than compete for the content.

- 4.23. Furthermore, the Authority notes that despite Multichoice holding on to the majority of the premium sports rights, OTT competitors have continued to grow while MultiChoice loses subscribers.

***Question 11: Do you agree with the Authority's view that none of the players in the defined markets hold significant market power? In your answer kindly provide a detailed reasons for your view and evidence***

## 5. CONCLUSION

- 5.1. The Authority, in defining the relevant markets, considered the impact of OTTs, DTT and free-to-air television, on subscription television services and concludes on the following relevant retail markets:
- (a) The market for the retail distribution of basic-tier subscription television services and free-to-air television services in South Africa; and
  - (b) The market for the retail distribution of premium subscription television and OTT services in South Africa.
- 5.2. Given the additional information, responses to the 10 November 2023 Questionnaire and the Authority's internal research, the Authority's preliminary view is that competition in subscription television is effective in both retail markets it has defined and set out above.
- 5.3. The factors considered by the Authority were analysed through the lens of the factors prescribed by the ECA, which factors include non-transitory barriers to entry in the relevant markets, the dynamic nature and

character of the identified markets and market segments, the relative market share of the various licensees or operators in the relevant market or market segments as well as a forward-looking assessment of market power in the relevant market or market segments.

- 5.4. In particular, the Authority's preliminary view is that competition has increased in the premium tier as a result of the entry of OTTs in the subscription video-on-demand market.
- 5.5. At the wholesale level for content acquisition the Authority defined the following relevant markets:
  - 5.5.1. a wholesale market for the supply and acquisition of premium sports content for distribution in South Africa;
  - 5.5.2. a market for the wholesale supply and acquisition of premium movies and series for distribution in South Africa; and
  - 5.5.3. a wholesale market for the supply and acquisition of non-premium content for distribution in South Africa.
- 5.6. When it comes to assessing the effectiveness of competition in the relevant markets, the Authority's preliminary view is that competition is effective in all three markets. The Authority notes that new entrants at the OTT level have continued to grow their market share despite not having access to premium sports.
- 5.7. Stakeholders are invited to provide alternative approaches, research and other such evidence on the Authority's preliminary views set out in this Discussion Document.
- 5.8. **This Supplementary Discussion Document is intended to enable the Authority to obtain public and stakeholder comment in relation to its preliminary views arising from the further information and feedback it has received from stakeholders regarding developments in the industry since the public hearings conducted in January 2021.**
- 5.9. Following the publication of this Supplementary Discussion Document, the public will be afforded an opportunity to provide representations and

supporting evidence in relation thereto. Once such representations are received, the Authority shall determine whether to convene public hearings and thereafter a findings document will be published, which shall constitute the end of this stage of the Inquiry.