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**Agenda Item 3a. Competition issues in the sale of audio-visual rights for major sporting events**

Contribution by  
Competition Commission  
South Africa

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## Preface

1. This submission is made on behalf of the Competition Commission of South Africa (**CCSA**) alongside the Independent Communications Authority of South Africa (**ICASA**) as part of the United Nations Conference on Trade and Development 17<sup>th</sup> Session of Inter-Governmental Group of Experts on Competition Law and Policy (**UNCTAD-IGE**) (11 – 13 July 2018).
2. In particular, these submissions are made for the Roundtable Discussion on “*Competition issues in the sale of audio-visual rights for major sports events*”.

## Institutional framework

3. Section 3(1A)(b)<sup>1</sup> of the Competition Act No. 89 of 1998 (as amended) (**Competition Act**), envisages the concurrent jurisdiction over competition matters by the competition authorities and a regulator in a regulated sector. To this end, the information and communications technology sector (**ICT**) is regulated by ICASA. Further, the policy framework for the ICT sector vests with the Department of Telecommunications and Postal Services (**DTPS**) and the Department of Communication (**DoC**). We set out below the roles and functions of the CCSA and ICASA in relation to broadcasting and competition within the broader frameworks of their mandates.

### *Competition Commission of South Africa*

4. The CCSA is one of three independent competition authorities established in terms of the Competition Act of South Africa. The CCSA has the mandate to regulate competition of all economic activity within South Africa through, *inter alia*, merger control and the investigation of prohibited practices such as cartel conduct and the abuse of dominance. The role of the CCSA is both investigative and prosecutorial.
5. The other two independent competition authorities of South Africa are the Competition Tribunal and the Competition Appeal Court. The Competition Tribunal is the adjudicative body and the court of first instance in relation to the review and/or appeals of decisions of the CCSA. The Competition Appeal Court, a high court, is the appellate body and the

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<sup>1</sup> Section 3(1A)(a) and (b) read as follows,

3(1A)(a) – *In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct*

3(1A)(b) – *The manner in which the concurrent jurisdiction is exercised in terms of this Act on any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).*

court of last instance in relation to competition litigation. The highest court in the land remains the Constitutional Court.

6. Section 3(1A)(a) of the Competition Act provides for bilateral agreements between competition authorities and the sector regulator in relation to managing concurrent jurisdiction. Concurrent jurisdiction exists only where the other regulatory authority also has the mandate to adjudicate competition aspects of regulated conduct. To this end, the CCSA and ICASA have a memorandum of agreement which came into effect on 16 September 2002.<sup>2</sup> The agreement provides that the CCSA will deal with complaints concerning restrictive practices and the abuse of a dominant position and ICASA will deal with contraventions of telecommunications and broadcasting licence conditions and legislation. Moreover, where necessary, the CCSA and ICASA have a process of sharing information especially in relation to complaints which fall within the concurrent jurisdiction of both regulators. Provision is also made for the participation of the other regulator in an advisory capacity in any process relating to the other regulator.

#### *The Independent Communications Authority of South Africa*

7. ICASA is a creature of statute formed in terms of the Independent Communications Authority of South Africa Act, 13 of 2000, as amended. ICASA is responsible for regulating telecommunications, broadcasting and postal industries. ICASA also issues licenses to telecommunications and broadcasting service providers, and enforces compliance with rules and regulations, as determined by the Electronic Communications Act, 26 of 2005 (**ECA**).

#### **Overview of broadcasting in South Africa**

8. Prior to the advent of constitutional democracy in South Africa in 1994, the broadcasting industry was primarily governed by the Broadcasting Act, 1976. The government had exclusive rights over the provision of broadcasting services through the South African Broadcasting Corporation (**SABC**). Shortly after South Africa's first, democratic elections in 1994, the Independent Broadcasting Authority (**IBA**) came into being. The IBA was established in terms of the Independent Broadcasting Authority Act No. 153 of 1993. The IBA was tasked with regulating the broadcasting industry, which was previously under the direct control of the Department of Home Affairs. In June 2000, IBA and the telecommunications regulator, the South African Telecommunications Authority, merged into ICASA.

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<sup>2</sup> GN 1747 of 2002 (GG 23857 of 20 September 2002)

9. From a regulatory perspective, the ECA makes provision for a three-tier system of broadcasting in South Africa, namely, public<sup>3</sup>, commercial<sup>4</sup> and community<sup>5</sup> broadcasting services. Section 8 of the ECA stipulates that ICASA may prescribe standard terms and conditions to be applied to the licenses issued. The terms and conditions may vary according to the type of license in question. The standard terms and conditions take into account a number of factors including, whether the service is intended for the public in general or a limited group and the duration of the license. Once the license is granted, the license holder is obliged to pay non-refundable license fees as set out in the General License Fees Regulations published in April of 2009<sup>6</sup>. The broadcasting license may be revoked for a number of reasons, including, reoccurring non-compliance with legislation and license terms and conditions.
10. In South Africa, television broadcasters fall into two categories, namely, free-to-air (**FTA**) broadcasters and Pay-TV broadcasters. FTA broadcasters operate a different business model compared to Pay-TV broadcasters as FTA television requires no subscription payment by customers. There are only two FTA broadcasters in South Africa, namely the SABC, which is the sole public broadcaster, and e.tv, an independent commercial FTA entity. The SABC and e.tv operate FTA analogue terrestrial channels and almost all households in South Africa have access to FTA channels.
11. On the other hand, Pay-TV broadcasters require certain critical inputs such as access to channels' rights, broadcasting infrastructure, access to a platform and the acquisition of services of a broadcasting signal distributor as well as a marketing and customer service function to deal with customer-related matters. Subscription broadcasting or Pay-TV broadcasting can be defined as a broadcasting service provided to an end user upon payment of a fee.
12. It was only in October 1985, that the South African government issued its first subscription broadcasting license, which led to the establishment of M-Net in 1986. M-

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<sup>3</sup> "Any broadcasting service provided by the South African Broadcasting Corporation or other public state owned enterprise".

<sup>4</sup> "Broadcasting service operating for profit or as part of a profit entity but excludes any public broadcasting service".

<sup>5</sup> "Is fully controlled by a non-profit entity and carried on for non-profit purposes; Serves a particular community; Encourages members of the community served by it or persons associated with or promoting the interests of such a community to participate in the selection and provision of programs to be broadcast in the course of such broadcasting services; May be funded by donations; grants, sponsorships or advertising fees".

<sup>6</sup> Notice 32084 accessed on [www.icasa.org.za](http://www.icasa.org.za)

Net is a subsidiary of Naspers and in 1986, offered a single channel service. In 1993, Naspers created MultiChoice South Africa Holdings Proprietary Limited (**MultiChoice**) as a subsidiary to handle the business arm of M-Net such as the sale of decoders, subscription services and account management. In October 1995, Naspers officially launched the flagship product, DStv which was a new digital satellite service.

13. It was only again in 2007 that ICASA issued On Digital Media (ODM) a broadcasting licence, which at the time offered TopTv and began operations in 2010. TopTv later exited the market when ODM went into business rescue and was relaunched as StarSat after a Chinese broadcaster, StarTimes purchased shares in ODM.
14. During the same year of 2007, ICASA also issued broadcasting licenses to other firms such as Esat, Telkom Media and Walking on Water. However, none of these firms entered the market.
15. In 2014, in trying to address the lack of entry in the subscription broadcasting market, ICASA further granted Pay-TV broadcasting licenses to Mindset Media Enterprise, CloseTV, Kagiso Media and Siyaya TV as potential new entrants. However, none of these license holders have entered the market either. Moreover, in 2015, ICASA had a call for submission for the FTA broadcasting licence, however, all the 5 applicants were rejected, as they could not meet the relevant criteria set by ICASA.
16. Therefore, the current state of the Pay-TV market in South Africa is that there are only two operational Pay-TV broadcasters; MultiChoice and ODM, with MultiChoice having over 6.5 million subscribers.<sup>7</sup>

### **Competition intervention in broadcasting**

17. Given the structure of the subscription market in South Africa, with MultiChoice being a dominant player, the CCSA has previously undertaken a number of investigations and research into this sector. Much of the focus of the CCSA has been in the Pay-TV/subscription broadcasting market and in particular the broadcasting of premium content, where it is widely understood and accepted that MultiChoice holds a substantial number of exclusive broadcasting rights of premium content.

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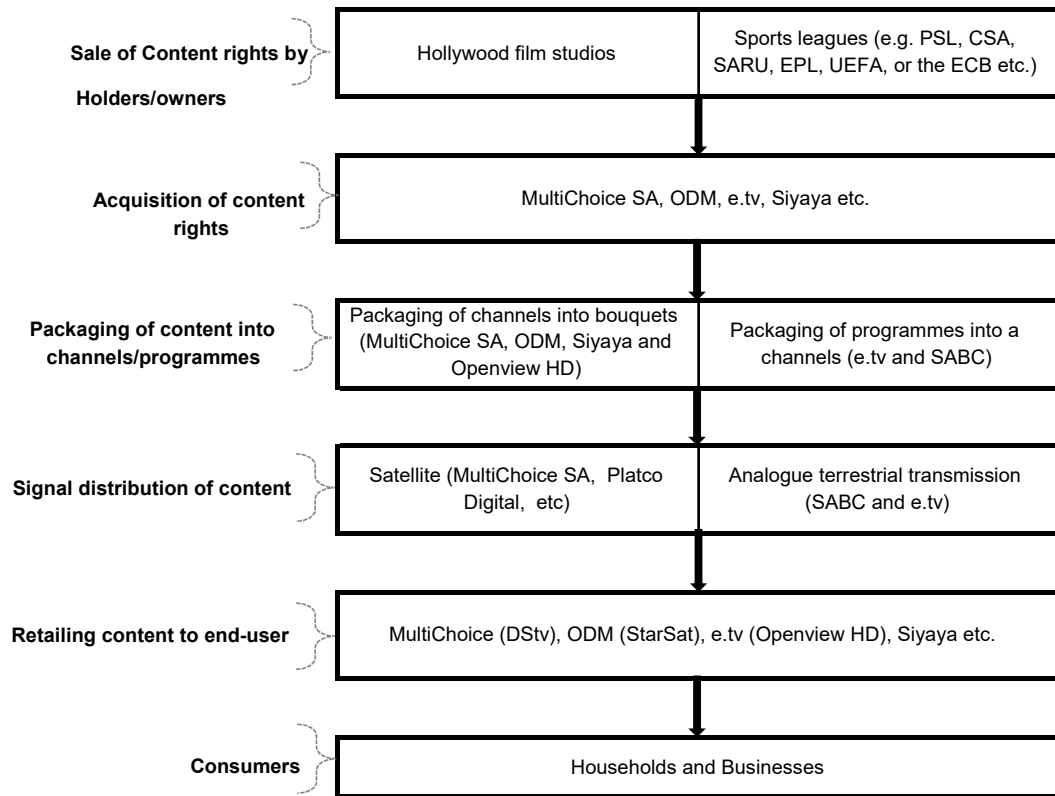
<sup>7</sup> <https://www.multichoice.co.za/wp-content/uploads/2017/11/MultiChoice-interim-results-announcement-30-September-2017-for-web.pdf>

18. In relation to sports content as a product, this is sourced externally, from sports leagues. Methodologically, the broadcasting industry can be represented as a value chain. At each stage of the value chain, the product becomes more commercially valuable. From the perspective of their exploitation, audio-visual products in relation to sports content can therefore be distinguished on the basis of the age of content. The more mature a product (such as a major sports event) is, the less incremental value it is likely to provide to users. Content providers typically base their pricing decisions on the basis of the incremental utility of products, which will, in turn, be affected by both the age of the content and the number of 'passages' or 'windows of exploitation' that product has been offered for.
19. In order to attract viewers, a broadcaster must have access to premium content. Premium content can be defined as content which has a significant appeal to a broad audience like a major sports event such as soccer, Formula 1 and the Olympics games.
20. The CCSA is of the position that there are particular salient features which can be adopted to characterise whether sports content falls within the descriptor of premium or non-premium. These salient features are in line with international norms and include:
  - 20.1. **High-quality production** – the quality of the games and the technical production of the broadcast are key components that attract viewers along with the skills and the celebrity of the top players in the various leagues across the world.
  - 20.2. **Live broadcast** – sports content consumers derive satisfaction and utility from being able to watch a game live, "*as it happens*", and that sports content loses attraction once the outcomes of a game are known.
  - 20.3. **Sufficient regularity** – sports content attracts viewers and establishes credibility with sports consumers on the basis of regularity. It is for this reason that scheduling and fixtures cannot be changed once they have been established.
  - 20.4. **Popularity** – this is a key criterion and varies from country-to-country depending on the sports content consumption patterns of that populace. Popularity is generally gauged by using viewership numbers per event. This approach of using viewership numbers to gauge popularity is a well-accepted standard and widely used by market participants.
  - 20.5. **The costs of acquiring the content rights** – another indicator that illustrates that premium sports content may be a distinct antitrust market is the cost of acquiring such content. It is well accepted that in order to acquire the exclusive rights to premium sports content, firms will pay substantial amounts of money.

21. The acquisition of premium content can take place in a number of ways. Content can be acquired through a tender process or through private contractual negotiations. The rights are sold through one of the following methods:
  - 21.1. **Collective selling** – this is where the licensing of content rights is done on an aggregated basis rather than each content rights owner selling these on their own. This method is popular in the sports industry. Content rights are sold by the relevant sports bodies on behalf of their individual club members.
  - 21.2. **Individual selling** – in this instance, content rights are sold by individual content rights owners. This method is prevalent in the sale of movies and other general entertainment content.
  - 21.3. **Intermediaries** – this is where rights are sold to a specialist intermediary who sells on the rights to buyers (e.g. FIFA rights to Kirch for the 2002 and 2006 FIFA World Cups).
  
22. By way of example, in South Africa, like many other countries, the acquisition of soccer rights often takes place through a tender process. For instance, the South African Premier Soccer League (**PSL**) would typically issue an “intention to tender” and broadcasters (both FTA and Pay-TV/subscription) are then invited to the bidding process. A number of factors are taken into account when choosing a winner including the amount of money being offered as well as whether or not the minimum production standards have been met. Another factor taken into account is whether or not the broadcaster has magazine/commentary shows to complement the matches being broadcast. In relation to other major soccer such the English Premier League, UEFA Champions league and La Liga, it is MultiChoice that is usually awarded these rights.
  
23. On the other hand, the South African Rugby Union (**SARU**) has previously approached broadcasters privately and individually rather than through the medium of a competitive tender process. In awarding the broadcasting rights, the most important factor taken into account is the amount of money being offered by a prospective broadcaster. SARU will also consider whether a prospective broadcaster has the facilities (for example, cameras) and capabilities to meet the broadcasting standards expected. Cricket South Africa also does not advertise the acquisition of their rights on tender but generally issues two broadcasting rights; one for Pay-TV and one for FTA relying on the criteria of the types of matches being played.

24. A pictorial description of the South African audio-visual broadcasting value chain is as follows:

**Figure 1: Television broadcasting value chain**



*Source: Commission's own formulation*

25. Although the CCSA has yet to prosecute any firm in the Pay-TV/subscription broadcasters market, its research and investigations have established concerns largely centred around allegations of excessive pricing, refusal to grant access to an essential facility, requiring or inducing a supplier or customer not to deal with a competitor by concluding exclusive agreements with content rights holders and selling goods or services below their marginal or average variable cost. Concerns have also been raised in relation to collusive conduct arising from the collective selling of broadcasting rights.
26. In the South African market, MultiChoice owns the exclusive broadcasting rights to the majority of the major sports events available to subscription TV. The CCSA has found that MultiChoice is dominant in the upstream market for the acquisition of premium sports rights from content rights holders, and the downstream market for the retail supply



of Pay-TV packages carrying premium sports channels with a market share of approximately 98% in both markets.

27. As stated above, SARU does not go on tender, and would thus conclude an agreement with MultiChoice through private negotiations. The lack of a competitive bidding process in respect of rugby games, a popular sport in South Africa, potentially forecloses other broadcasters from entering or expanding in the market.
28. The CCSA noted that even where a compromise position is reached to sublicense broadcasters to delayed transmission the concern still persists. Unlike movies which have a much longer life cycle, sporting events only have a premium value when they are broadcast live. Therefore, any delayed broadcasting loses value and adversely affects the ability of any broadcaster to attract viewers and raise revenue through advertising.
29. The CCSA has also found that barriers to entry into the Pay-TV market are high and that these include amongst others, the existence of exclusive agreements for content such as major sports events as well as regulatory barriers. This is demonstrated by the fact that MultiChoice was the only Pay-TV broadcaster in South Africa for 12 years until 2007 when ICASA licensed 4 satellite broadcasters and 1 cable broadcaster. Out of these 5 license holders, only ODM managed to launch its subscription television offering in 2010. Nonetheless, by 29 October 2012, ODM had applied for business rescue due to financial distress.
30. Previous research has identified two factors that are likely to heighten the extent of foreclosure to broadcasters the premium sport content market, including:
  - 30.1. Unlike in Italy and Spain where soccer clubs individually sell their broadcasting rights, the PSL soccer clubs jointly sell their broadcasting rights. Although there might be efficiency justifications for such a joint selling arrangement, it limits soccer clubs' freedom to market their rights individually.<sup>8</sup>
  - 30.2. While the PSL breaks down the broadcasting rights into small packages, the bidding process does not prevent any particular broadcaster from owning all the broadcasting rights to broadcast the PSL games (the winner takes all principle applies) as has happened with MultiChoice.

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<sup>8</sup> Smaller clubs which might struggle to sell their rights individually benefit from the joint selling arrangement.

31. It should be noted that the Competition Act of South Africa, like many of its counterparts in other jurisdictions, does not prohibit dominance or market power *per se*, but rather the anticompetitive exercise of that dominance or market power. However, the CCSA has noted in assessing the nature and impact of the use of exclusive agreements in this market, that it is important to keep in mind that the upstream market, although not in its entirety, is characterised by competitive bidding processes aimed at ensuring that potential and actual Pay-TV and FTA players “compete” for the award of these rights. Notwithstanding this, the CCSA has found that the Pay-TV market is marked by MultiChoice’s incumbency advantage in that it was the first entrant in the market, thereby having the benefit of establishing relationships with the sports rights holders and entrenching its dominant position in both the upstream and downstream markets.
32. The CCSA continues with its investigations of alleged anticompetitive conduct by MultiChoice. Over and above the CCSA interventions, ICASA also continues to intervene in this market.

#### **Policy and regulatory developments<sup>9 10</sup>**

33. South Africa has been undergoing policy changes in relation to ICT. These policy positions cut across the state of audio-visual broadcasting in South Africa. It is accepted that the ICT sector requires a new approach to regulation if policy objectives are to be achieved, especially with the emergence of convergence and other technological changes including digital migration.
34. In 2017, DoC published the Draft White Paper on the Audio-Visual and Digital Content Policy for South Africa (**White Paper**) which sought to address a number of issues relating to:
  - 34.1. The distribution of audio-visual content.
  - 34.2. The formalisation of minimum spend obligations towards the development of the local industry.
  - 34.3. The applicable licencing framework.

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<sup>9</sup> In 2014, the DTPS published the National Integrated ICT Policy Discussion Paper for public comment which sought to address a number of issues in the telecommunications and postal services sector which broadly related to, *inter alia*, infrastructure and services competition in telecommunications markets, the promotion of access to information and the opening of government data in the quest of building a digital society, investments and the growth of the ICT sector and the optimisation of the ICT regulatory institutional framework.

<sup>10</sup> On 15 September 2015, ICASA, published a Notice Discussion Document which broadly sought to develop the appropriate approach to infrastructure sharing in the mobile telecommunications industry with a particular focus on the objectives of infrastructure sharing, facilities leasing regulations and models of infrastructure sharing and their competition implications.

- 34.4. Cross-media ownership control of South African music and television content.
- 34.5. Competition, including developing a policy and legislative framework regulating the limitations on advertising and sponsorship revenue for Pay-TV broadcasters, wholesale access or sub-licensing regulatory framework for access to premium content (sports, movies and series) and determining the appropriate approach to assessing the competitive effects of vertical integration in the broadcasting sector, particularly in Pay-TV.

### **ICASA's Inquiry into Subscription Broadcasting Services**

35. On 11 July 2016 ICASA published a Notice of Intention to Conduct an Inquiry into Subscription Television Broadcasting Services (**Inquiry**). The trigger for the Inquiry was a realisation and concern that despite having issued subscription television broadcasting service licences in 2007 and 2015 only three licensees were operational, and even then, one of them faced sustainability challenges. Thus, in order to fulfil its mandate of ensuring that markets are effectively competitive, ICASA had to conduct an inquiry to gain an understanding of the impediments to competition, if any.
36. Competition matters relating to broadcasting and electronic communications are regulated in terms of section 67 of the ECA, which provides that the Authority [ICASA] must –  
*“(4)...following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments.”*
37. ICASA published a questionnaire to gather information, in addition to one-on-one meetings with some stakeholders. It also conducted research, including international benchmarking of subscription television services.
38. The information collated was then analysed and used to develop a Discussion Document which set out ICASA's preliminary views with respect to market definition, the effectiveness of competition in the defined markets, the identification of players with significant market power and proposed remedies.
39. At the upstream level the following relevant wholesale markets were identified:

- 39.1. A market for the acquisition of first-window subscription television broadcasting premium movies for retail distribution in South Africa.
  - 39.2. A market for the acquisition of premium live soccer matches for retail distribution in South Africa.
  - 39.3. A market for the acquisition of premium live rugby matches for retail distribution in South Africa.
  - 39.4. A market for the acquisition of premium live cricket matches for retail distribution in South Africa.
  - 39.5. A market for the acquisition of other premium content for retail distribution in South Africa.
  - 39.6. A market for the acquisition of non-premium content for retail distribution in South Africa.
40. ICASA further defined:
- 40.1. A market for the wholesale supply of basic-tier subscription television channels for distribution in South Africa.
  - 40.2. A market for the wholesale supply of premium-tier subscription television channels for distribution in South Africa.
41. At the retail level the following relevant markets were identified:
- 41.1. A market for the retail distribution of premium subscription television channels in South Africa.
  - 41.2. A market for the retail distribution of basic-tier subscription television channels in South Africa.
42. The Discussion Document proposed certain criteria for assessing the effectiveness of competition.
43. ICASA also considered whether over-the-top service providers (**OTTs**) offer meaningful competition to subscription broadcasters in South Africa. This within the context of low levels of internet penetration coupled with high data costs. ICASA also considered the likely impact of imminent migration to digital television broadcasting as offering an alternative to subscription television.
44. A preliminary view suggests that the incumbent MultiChoice likely holds significant market power in the relevant markets.

45. The Discussion Document also proposed various remedies to be imposed on a licensee with significant market power, including shortening the length of exclusive contracts, imposing a wholesale must-offer, unbundling sports rights, splitting sports rights and introducing set-top-box inter-operability.
46. On 25 August 2017 ICASA published the Discussion Document soliciting responses from interested parties, including television broadcasting licensees, OTT service providers, telecommunications service providers, sporting associations and the general public. By the closing date ICASA had received eighteen written submissions to its Discussion Document.
47. Public hearings were then held between 7 and 11 May 2018.
48. ICASA is currently in the process of drafting a Findings Document which will be published for comment before a final Findings Document is released.

## **Conclusion**

49. Currently South Africa has a number of policy and regulatory interventions which are underway and aimed at dealing with the issues in broadcasting including competition-related issues. We have already set out that the South African Pay-TV broadcasting services market is characterised by the presence of a dominant incumbent, significant barriers to entry, limited countervailing power (by both sellers of content rights and end consumers) and ineffective entry.
50. The policy and regulatory discussions currently underway are useful in initiating potential interventions to make broadcasting accessible to all consumers as well as dealing with how to open up this market.
51. It is noted that long-term exclusive contracts raise barriers to entry and could potentially be addressed through various remedies including:
  - 51.1. **Shortening the length of exclusive contracts** – the continuous renewal of exclusive contracts with the same broadcaster may serve to entrench incumbency which will confer a competitive advantage in the market, effectively foreclosing new entry and/or expansion by existing players.

- 51.2. **Unbundling** – this may encourage the use and uptake of other types of broadcasting platforms such as mobile television, thereby increasing choice.
  - 51.3. **Rights splitting** – this may allow for more players to have access to critical input with due regard to the design of the various rights packages and may open up the market by ensuring that all rights acquirers are afforded the opportunity to acquire sufficiently compelling packages that will enable them to effectively compete in the market.
  - 51.4. **Imposition of wholesale-must-offer** – this can promote competition by ensuring that smaller and new market participants are able access critical inputs such as premium content. This obligation will however necessitate the regulation of terms of access as vertically-integrated broadcasters may have incentives to stifle competition at the downstream retail level.
52. However, these remedies may not be sufficient if considered in isolation. Rather, a combination of these types of remedies, underpinned by effective regulation could serve to deal with the identified market failures and competition challenges.