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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Zambia

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Zambia* --

1. The State of Competition in the Television Broadcasting Sector in Zambia: Introduction

1. Broadcasting could be defined in numerous ways. According to Zambia's the Independent Broadcasting Authority Act No 17 of 2002, "broadcasting" means the distribution of television or radio, by means of terrestrial or **satellite means**. Zambia's broadcasting industry dates back to the 1940's when the British colonial authorities initiated an African radio service. Twenty years later, in 1961, television arrived in the country, courtesy of the privately owned London Rhodesia Company. However, as soon as the country gained its independence, the Zambian government purchased the television station, and it became part of the Zambia Broadcasting Services (ZBS), the forerunner to the Zambia National Broadcasting Corporation. From then on, it became an integral part of the development of Zambian society.

2. No other broadcasting service was allowed except ZBS as Zambia was between 1972 and 1991 a One Party Participatory Democracy following the country's decision to do away with multi-party politics in 1972. In 1991, Zambia reverted to multiparty politics and media de-regulation became an important offshoot of the democratization process. Since the country's reversion to democratization and de-regulation of the media sector, the country has seen the development of its broadcasting industry, both radio and television.

3. Since then, so much has changed technologically to quicken the development of the sector. With this growth, a whole array of competition issues are more likely to emerge particularly in a concentrated environment. These may range from concentrated media ownership, limited access telecommunications platforms and distribution systems, abuse of dominance and other restrictive vertical and horizontal arrangements.

4. This paper focuses on the application of competition policy and law to Zambia's broadcasting industry, particularly Television, and shares some of the country experiences, through the Competition and Consumer Protection Commission (CCPC) experiences in the enforcement of competition law in the industry.

2. State of Competition in Zambia's Television Broadcasting Sector

5. The Zambian broadcasting sector was liberalized in 1993 following the enacting of the Zambia National Broadcasting Corporation (ZNBC) Licensing Regulations and the Telecommunications Act in 1994. This liberalization led to the introduction of more broadcasting stations. Prior to this, only ZNBC radio and Television were allowed to provide broadcasting services to citizens.

* Contribution submitted by Mr. Brian M. Lingela, Director-Consumer & Education, and Ms. Liya B. Tembo, Director- Legal & Enforcement, Competition & Consumer Protection Commission

6. Since the liberalization of the sector and at the time of compiling this report, there was a combined total of fifty nine (59) fully registered radio and television stations countrywide with full operating licenses. This comprises 17 community radio stations, 15 religious radio stations and 27 commercial radio stations. At least 8 free to air TV stations exist.

7. Currently, there is limited competition in Zambia's TV broadcasting sector. There are eight (8) free to air TV stations and 2 pay TV stations. The free-to-air TV stations include Zambia National Broadcasting Corporation (ZNBC) TV, a government owned Television network with two channels, MUVI TV, private commercial television station which is free to air in the Capital, Lusaka but paid for through decoder to the rest of the country; MOBI TV, a Lusaka based private commercial station, CB-TV a Ndola based private commercial station with limited reach, Central Broadcasting Company (CBC) a private commercial station with limited reach to Lusaka. Others are Trinity Broadcasting Network (TBN) a private station focusing mostly on religious programming. North-West TV in Solwezi in North-West Zambia and Chipata Television in Zambia's eastern province. The latter two are new stations currently on test transmission permit pending final licensing by the Ministry of Information and Broadcasting Services (MIBS). Of these stations, ZNBC TV continues to enjoy monopoly status particularly in the provision of free-to-air television services in Zambia. This is because the broadcaster is presently the only one with reach to most parts of the country including rural areas while the rest of the players broadcast to within a radius of 50kms. ZNBC is the biggest and dominant player, followed by MUVI TV and then the other stations mentioned earlier.

8. The two pay TV stations providing services via digital satellite include Multichoice Zambia, which is a joint venture between Multichoice Africa and Zambia National Broadcasting Corporation (ZNBC) in which ZNBC has a 49% shareholding while Multichoice Africa has 51% shareholding therein, and My TV. MUVI Television also provides a pay TV service to rural consumers. Multichoice Zambia has an estimated subscriber base of 69,000 subscribers representing a market share of 90% compared to My TV with 6000 and MUVI TV 2000. Since Multichoice has a market share of over 90% in the Pay TV product market, it would be considered a dominant firm¹.

9. Although ZNBC TV has been unpopular especially with regard to the provision of balanced news and information in the past², it continues to be relied on by the majority of the population particularly those in rural areas that cannot afford alternative sources of information some of which are considered elitist in nature such as Pay TV. However, it is important to note that in remote areas where terrestrial TV signals do not reach, consumers there rely on the Pay TV DSTV which is powered by Multichoice Zambia using solar energy. This platform carries the ZNBC TV channel and such consumers are abreast with what is happening in the country despite being in remote areas. The many channels that this pay TV provider offers is also an important alternative to ZNBC, MUVI, MOBI or any other free-to-air- TV in the country. Most consumers, particularly the relatively well to do emerging middle class can now afford subscription to pay TV channels. Monthly subscriptions for DSTV can be as low as USD 12³ and consumers can thus have access to not only ZNBC TV but other international news, information and entertainment channels.

¹ Report on Allegations of Anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer PROTECTION Commission, Case File No:CCPC/RBP 003, July 2011

² Especially during the 2011 Presidential, Parliamentary and Local Government elections which ushered in new Republican President His Excellency Mr. Michael Chilufya Sata.

³ Access Bouquet, the low end DSTV product

3. Constraints on competition in the Televisions Broadcasting Sector in Zambia

10. There are a number of constraints on competition in the Television broadcasting sector in the country that are enunciated in this section of the paper. However, most importantly, ZNBC is dominant in the distribution of its content because it is the only TV station with infrastructure throughout the country to deliver its programmes.

3.1 Consumer Choice

11. Consumer choice is an important factor to consider when analyzing competitiveness of a sector. In the television broadcasting sector, ordinary Zambians in urban and rural areas depend mostly on ZNBC TV for their news and information needs when it comes to Television. This is in view of its dominance in the infrastructure as it has a wide national infrastructure available in every district except very remote outpost some of whose few consumers may rely on pay TV. Despite the emergence of Pay TV services like Multichoice's DSTV, MUVI Television and My-TV, pay TV has made little impact especially in rural areas and to this extent, people still rely on ZNBC TV, the dominant player.

3.2 Quality of Service, Innovation and Investment in Television Broadcasting Sector

12. Issues of Quality service, innovation and investment by ZNBC TV would appear to have been improving especially its TV2 Channel, which mostly broadcasts business and entertainment programming with reach to few areas only although from midnight until the following morning, its programmes are broadcast using the ZNBC main TV channel across the country. Prior to the 2011 Presidential and Parliamentary elections, ZNBC TV was perceived highly bias in its coverage of news and information especially during elections⁴. On the other hand, other alternative TV stations such as MUVI TV were considered to provide balanced news and information and appeared to enjoy good audiences.

13. There has also been some innovation particularly with MUVI Television which has given a competitive edge over ZNBC TV especially on news and other entertainment programmes. MUVI TV appears to have also invested in equipment as they are able to broadcast remotely from any part of the country. This gives them effective competition against the main broadcaster, ZNBC.

14. There is presently also a new phenomenon of radio stations operating via the internet broadcasting to Zambia and other countries. Among these is CrossFire blogtalkradio, a radio talk show hosted in the United Kingdom by two Zambians which broadcasts programmes about Zambia every Tuesday evening and Saturday morning⁵. Radio stations such as this, as Djoktoe notes⁶, "*raises questions about the changing face of radio broadcasting in the light of government's attempt to restrict frequencies and the reach of FM stations in the country. It also raises pertinent questions about the freedom of expression, regulation of broadcasters operating outside the jurisdiction of the Zambia Information and Communication Technology Authority (ZICTA) but reaching listeners within Zambia and about the future of radio broadcasting in the age of internet-based broadcasting*". This broadcast is said to be hosted by

⁴ Report of the Study into the Zambia National Broadcasting Corporation (ZNBC) News Coverage During the 2006 Local Government, Parliamentary and Presidential Elections- August 2006. First published on 26th April 2011 on http://issuu.com/misa_zambia_publications/docs/zNBC-news-monitoring-report-august-2006. Jointly researched and authored By Brian M. Lingela and Fidelis H. Muzyamba and similarly in Report of the Commonwealth Observer Group, Zambia General Elections, 20th September 2011, Commonwealth Secretariat, Page 21.

⁵ <http://www.crossfireblogradio.com/> retrieved on 7th January 2012

⁶ Djokotoe, E; State of the media in Zambia 1 July to 30 September 2012 report compiled for Media Institute of Southern Africa (MISA) Zambia

two people who are in different cities of the United Kingdom 400 kilometers apart using Skype and other new media technologies to communicate and co-ordinate among themselves as well as broadcast to listeners in Zambia and others in far-flung places like Russia and New Zealand.⁷

15. It would appear that the sector is slowly opening up with at least eight (8) more applications for Television licenses pending before the Ministry of Information and Broadcasting Services. It would also appear that the sector will continue to be even more concentrated as more channels are made available through the digital migration process currently underway. However, ZNBC is likely to have much more access to viewership in view of their dominant position as a national infrastructure that allows them to broadcast to all parts of the country compared to other operators that are likely to be restricted. It remains to be seen what regulations the IBA will put in place in this regard.

16. With only 3 Free-to Air and 1 Pay TV Station as at 2005, one would hold the view that the Television sector appeared to have been slow in terms of growth). Huge investment costs could be attributable to the slow growth. Despite the granting of “construction permits⁸” by the Ministry as at 2002, for example, MOBI TV, CBS TV, and Telecare still had not began operations by 2005. To this effect, ZNBC TV continued to dominate the free-to air-TV market.

17. For other remaining stations, they have continued to lack innovation in their programming. Their inability to expand due to restrictions also continue to be uncompetitive compared to their players like ZNBC and MUVI TV.

3.3 Barriers to Entry and Expansion

18. The OECD Glossary of Statistical Terms further provides insight into what entry barriers are and defines barriers as factors which prevent or deter entry of new firms into an industry even when incumbent firms are earning excess or monopolistic profits. Thus, a barrier to entry is a rent that is derived from incumbency or a cost of producing which must be borne by a firm, which seeks to enter an industry but is not borne by firms already in the industry.

19. With regard to entry and expansion barriers, there are a few that are regulatory in nature. Since time immemorial, the broadcasting sector in Zambia has been regulated by the Ministry of Information and Broadcasting Services (MIBS). Up until 2002 before the Independent Broadcasting Authority (IBA) Act No. 17 of 2002 was enacted, there were perceived concerns regarding the regulation of the sector. Where radio or TV licenses were given, their license conditions provided for short broadcasting radius. For a long time, for example, most radio station licensees were restricted to broadcast to a radius of only 150 kms. This limitation is reflected in most licenses given to operators.

20. There is no clear and agreed upon policy position on what should constitute the radius for respective types of licenses. It would appear that the restriction of radius was because operators would cease to be “community” in a sense.⁹ However, the current challenge has led to some operators such as MUVI TV and Q-FM radio to circumvent this regulatory bottleneck by using technology, which is the internet to broadcast to national audiences. MUVI TV, licensed to broadcast to Lusaka and surrounding

⁷ ibid

⁸ Temporary license to allow applicant begin construction their station.

⁹ Community Broadcasting in Zambia Country Report Compiled by Lingela B. Muletambo & Presented to a Community Broadcasting Strategy Seminar, May 20-21 2008, The Lakes Protea Hotel, Benoni South Africa.

places, until mid 2009 when it introduced digital broadcasting, now is able it to send signals via satellite using the dish to any place in the country.¹⁰ This has provided competition to ZNBC.

21. The only other licensee that operates outside this unwritten policy is Radio Christian Voice, a private/religious broadcasting station broadcasting to Africa and beyond using a Short Wave (SW) signal. The station benefited from the benevolence of the Government that liberalized the broadcasting airwaves to allow private participation in the sector. Since the start of broadcasting, only the national public broadcaster ZNBC was allowed to operate on Short Wave. To a large extent, Radio Christian Voice has provided an alternative source of information especially to listeners in rural areas at a time when the signals of ZNBC Radio could not reach and continues to provide effective competition. This is because by nature, Short Wave traverses wide boundaries. The National Assembly appears to be of the considered view that *the Government should not insist on restrictions on the area of coverage for commercial broadcasters, as this will be incompatible with the new technological era and the world practices on information dissemination*¹¹.

22. In addition, there have been administrative barriers during the licensing process. There has for a long time now been a dual licensing framework involving both MIBS, who are the current content regulators, and the Zambia Information and Communication Technology Authority (ZICTA) who have been responsible for the frequency spectrum management in the absence of the Independent Broadcasting Authority (IBA). License applicants would have to pay relevant fees to both institutions although this does not appear much of a real barrier.

23. There are also entry barriers into the distribution or delivery of programming via digital technology using the available infrastructure. Currently, only ZNBC has been authorized to carry test digital signals via its infrastructure. Although ZICTA has indicated that other players will be informed that they are free to send their test signals via ZNBC infrastructure there is no evidence yet of this decision¹². As things stand, ZNBC would be the only carrier to do the pre-testing of the digital platform and that all other carriers and applicants would have to go through ZNBC route, free of charge. As ZICTA notes, *“government policy will not allow every player to be a carrier as allowing all willing players to be carriers by themselves would not be an efficient way of managing the system but that the most likely choice will be ZNBC which is a public broadcaster with the mandate to provide country wide coverage. Further that the important thing is that the carrier would have to accommodate all the willing players in the market”*¹³.

24. The Government, through the Zambia Public Procurement Authority (ZPPA), has since advertised the tender for the implementation of the digital terrestrial television migration.¹⁴ However, a group of private Television broadcasters namely, Mobi Television, Muvi Television, Chipata Television,

¹⁰ http://www.muivitv.com/?page_id=10. Retrieved on 6th January 2013

¹¹ Second Report of the Committee on Information and Broadcasting Services for the fourth Session of the Tenth National Assembly appointed on 24th September, 2009, page 14

¹² Report on Allegations of Anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer PROTECTION Commission, Case File No:CCPC/RBP 003, July 2011

¹³ Third Party submission by ZICTA to CCPC enquiry on Allegations of anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer PROTECTION Commission, cited in Case File No:CCPC/RBP 003, July 2011

¹⁴ Remarks by Ministry of Information and Broadcasting Permanent Secretary Mr. Amos Malupenga at a two-day stakeholder consultative conference on digital migration held at the Government Complex in Lusaka on September 19 and 20, 2012

Solwezi Television, CB-Television and other equipment dealers calling itself “Consortium of Stakeholders on Digital Migration” appear aggrieved with the decision by Government to float the tender as they observed “*pertinent observations perceived to be detrimental to the realization of the full benefits to all stakeholders to the programme.*”¹⁵ Before the Commission engaged them, they had resorted to taking a legal course. One of the many terms of reference for the taskforce is to recommend for a carrier of the digital signal in order to have a fair playing field.

25. Other possible barriers to entry include high cost of infrastructure, Set-Top Boxes (STB) costs, Applications Programme Interfaces, verification software (CA), Electronic Navigation Software, satellite transponder capacity and subscriber management services. Further, Set Top Boxes, which are an essential gateway to accessing programmes in the subscription television environment are generally expensive and may not be easily affordable unless subsidized. A STB can be broken into component parts, primarily the Applications Programme Interface (API) the verification software and the Electronic Navigation Software (EPG). Developing STB that is proprietary is high cost and more often leads to high consumer prices¹⁶.

3.4 *Legal and Regulatory Framework*

26. Legally, the legislation which is supposed to be regulating the broadcasting sector in Zambia¹⁷ is the Independent Broadcasting Authority Act No. 17 of 2002 which was subsequently amended in 2010. Inter alia, the specific functions of the IBA as set out in section 5 subsection 2 are as follows:

- (a) *To promote a pluralistic and diverse broadcasting industry in Zambia*
- (b) *To establish guidelines —*
 - (i) *For the development of broadcasting in Zambia through a public process which shall determine the needs of citizens and social groups in regard to broadcasting;*
 - (ii) *For the issuing of licenses, giving due regard to the need to discourage monopolies in the industry in accordance with the Competition and Fair Trading **Cap. 417** Act;*
 - (iii) *On the required levels of local content and other issues that are relevant for a pluralistic and diverse Broadcasting industry;*
- (c) *To safeguard the rational and efficient use of the frequencies allocated to broadcasters by developing a frequency plan for broadcasting, which shall be a public document, in compliance with international conventions;*
- (d) *To grant, renew, suspend and cancel licenses and frequencies for broadcasting and diffusion services in an open and transparent manner;*
- (e) *To enforce the compliance of broadcasting and diffusion services with the conditions of the licenses issued under this Act;*

¹⁵ Letter to Minister of Information and Broadcasting Services Hon. Kennedy Sakeni dated 25th September 2012 copied to the CCPC.

¹⁶ Report on Allegations of Anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer Protection Commission, Case File No:CCPC/RBP 003, July 2011, Page 20.

¹⁷ Section 5(1) of the IBA Act no 17 of 2002

- (f) To issue to any or all broadcasters, advisory opinions relating to broadcasting standards and ethical conduct in broadcasting;*
- (g) To oblige broadcasters to develop codes of practice and monitor compliance with those codes;*
- (h) To develop program standards relating to broadcasting in Zambia and to monitor and enforce compliance with those standards;*
- (i) To receive, investigate and decide on complaints concerning broadcasting services including public broadcasting services;*
- (j) To develop regulations in regard to advertising, sponsorship, local content, and media diversity and ownership;*
- (k) To perform such other functions as may be conferred on it by this or any other Act; and*
- (l) to do all such other acts and things as are connected with or incidental to the functions of the Authority under this Act.*

27. However, the sector has since 2002 when the Act was enacted been supervised and regulated by the Ministry of Information and Broadcasting Services in a caretaker capacity. This is because the IBA as an institution has not yet been established following a protracted legal battle between the Government of Zambia and civil society organizations over the legal interpretation in the appointment process¹⁸ for Board members of the IBA and subsequent need for the Government through MIBS to amend the Act and clarify the appointment process of Board members of the institution. Before the amendment of the Act, Board members were to be appointed by the minister on the recommendation of the appointments Committee subject to ratification by Parliament. To avoid ambiguity, this was amended to provide for the appointment of Board members by the Minister. This is consistent with current Government policy of having Ministers appoint board members for public institutions.

28. Section 5 (2) (b) (iii) of the IBA Act provides that the Authority shall “establish guidelines on the required levels of local content and other issues that are relevant for a pluralistic and diverse broadcasting industry”. This means that all licensees, whether public service, subscription, commercial, community or religious are expected to broadcast a particular percentage of local content to their audiences. This provision, despite not indicating exactly what the local content ratios will be, has at least provided a requirement for developing regulations for such. In order to illustrate the importance of local content in broadcasting, the Act has prescribed several requirements for respective broadcasters to uphold. For example, all programmes by a commercial broadcasting service shall, subject to the conditions of a licence and regulations of the Authority —

- (a) Reflect the culture, character, needs and aspirations of the people in the areas that they are licensed to serve;*
- (b) Provide an appropriate amount of local or national programming;*
- (c) include news and information programmes on a regular basis, including discussion on matters of national, regional, and where appropriate, local significance¹⁹.*

¹⁸ Matibini, P (Phd), *The Struggle for Media law Reforms in Zambia*, MISA Zambia, 2006, pgs 127-149

¹⁹ Section 21 (2) of the IBA Act N0 17 of 2002

29. For Community and religious broadcasting services, licenses for both free-to air radio and television broadcasting licenses shall require programming which shall –

- (a) *Reflect the needs of the people in the community which shall include the cultural language and demographic needs and shall—*
- (b) *Provide a district broadcasting service dealing specifically with issues which are not predominantly dealt with by the broadcasting service covering the same area; and focus on the provision of programmes that highlight grassroots community issues including but not limited to developmental and general, educational affairs, environmental affairs, local, international and current affairs reflection of local culture²⁰;*

30. Similarly, free-to-air- televisions broadcasting services require that programmes shall, as a whole include significant proportions of Zambian drama, documentaries and children's programmes that reflect Zambian themes, literature and historical events²¹. Already, TV stations such as MUVI and ZNBC 1 and ZNBC (TV2) have been trying to ensure local content programming is elevated in their schedules.

31. It is generally hoped that once the IBA is in place²², it shall develop these guidelines in consultation with industry players in a manner that shall develop the TV broadcasting sector in the country. Suffice to indicate that it is common for broadcast regulators to set local content quotas. Notwithstanding this, research has shown that production of local content in Africa is more costly compared with importing foreign content. As Karithi²³ notes, in South Africa, the cost of producing local content is more than USD300 per minute compared with USD 30 per minute for sourcing foreign programmes. Additionally in Zimbabwe, where local content quotas were set at 75% by the Broadcasting Authority of Zimbabwe (BAZ), the costs of producing local content stood approximately at USD 60 million. The costs are higher in countries like Zambia whose local production industry is still in its infancy. Nevertheless, TV broadcasters are free to commission independent local content producers in the country or even beyond and broadcasters have already been doing so.

32. With regard to ownership conditions, section 19 of the IBA Act precludes (a) a political party or organization or a legal entity founded by a political party or organization and (b) a person who is not a citizen of Zambia from holding a broadcasting license. In this section, "citizen of Zambia " in relation to a body corporate means a company in which not less than seventy five percent of shares are held by citizens of Zambia²⁴. It would appear that this quota, if considered too high by potential investors, may discourage foreign direct investment in the sector notwithstanding the sensitive nature of broadcasting for which most African governments approach cautiously.

33. In subsection 4 of section 19, licenses are allowed to provide various classes of broadcasting services namely: (a) a public broadcasting service; (b) a commercial broadcasting service; (c) a community and religious broadcasting service; or (d) a subscription broadcasting service. The inclusion of public broadcasting as part of the categories of applications requiring licenses is good particularly that it does not

²⁰ Section 22 of the IBA Act No. 17 of 2002

²¹ Section 24(2) of IBA Act No. 17 of 2002

²² The Ministry of Information & Broadcasting has recently, in January 2013 advertised for a Director General who shall be the Chief Executive Officer of the institution and secured office space and a budgetary allocation.

²³ Issues in Local Content, in Broadcasting Policy and Practice In Africa, Article 19, 2001

²⁴ Subsection 3 of section 19 of IBA Act No. 17 of 2002

spare the public service broadcaster, ZNBC from being licensed. For a long time and in view of its status as a government owned/public broadcaster, as ZNBC has had a deemed license compared with other private/commercial, community and religious broadcasters that have had to apply to the Ministry. In a sense, this levels the regulatory environment as ZNBC will be subject to the IBA Act just like all other operators.

34. With regard to infrastructure issues, the Act does not preclude operators from complying with other pieces of legislation. Particularly, operators are expected to comply with the Information and Communication Technologies Act No. 15 of 2009 which regulates the ICT sector including technical issues of broadcasting and radio communications. Part IV of the ICT Act specifies the licensing of radio communications services particularly the establishment of transmitting stations and erection of radio apparatus, assignment of frequencies among others. Further, Part VII of the ICT Act prescribes how the frequency spectrum will be managed and broadcasting frequencies, as part of the frequency spectrum are equally included. In this regard, when MIBS is satisfied that a particular TV or radio applicant should be licensed to operate, they have to liaise with the Zambia Information and Communication Technology Authority (IBA) on the available frequencies in a particular locality for them to be granted. This is consistent with section 20 of the Independent Broadcasting Authority (Amendment) Act 2010.

3.5 *Vertical Integration and Cross Media Ownership Issues*

35. Issues of vertical integration of media companies do not appear to raise any competition concerns so far. There is not much vertical integration in the sector so far. However, it is important to note that The Post newspapers, the largest and dominant print (with online presence) media newspaper with widest circulation in Zambia has also joined the ICT sector and runs a broadband Internet Service Provider (ISP), Post ISP Zambia²⁵ So far, there has been no competition concern arising out of this arrangement.

36. Related to vertical integration of media companies in Zambia is the issue of cross ownership of media companies. In Zambia, cross ownership of media companies is a reality, though not pronounced and presently, it is not clear how this is dealt with from a regulatory perspective in the absence of the IBA. For example, it is no secret that The Post Newspapers referred to above were denied a radio broadcasting license in Lusaka for apparent cross media ownership reasons. Similarly, UNI Holdings, the owners of radio Phoenix were in 2002 denied a free-to-air television broadcasting license apparently for reasons of discouraging cross-media ownership²⁶. At the same time, the owners of Petauke Explorers, a private/commercial radio station broadcasting in Petauke, about 300 kms east of Lusaka, have applied to MIBS for a private/commercial Television station known as Chipata Television, which will be a regional based private free-to-air television operator in Zambia. The application is currently before the MIBS for consideration. It will be interesting to see how this will be decided particularly in light of one of the principal responsibilities of the IBA to establish guidelines for the issuing of licenses, “*giving due regard to the need to discourage monopolies in the industry in accordance with the Competition and Fair Trading Cap. 417 Act.*”

37. From the Competition and Consumer Protection Act No. 24 of 2010’s perspective, however, there is no prohibition against being dominant as is common in Competition law. The prohibition is with respect to the abuse of dominance. This is because a firm with market power can bring about economies of

²⁵ [Post Newspaper throws hat into ISP business](http://www.zedian.co.uk/2008/05/post-newspaper-throws-hat-into-isp.html), article on <http://www.zedian.co.uk/2008/05/post-newspaper-throws-hat-into-isp.html> Monday, 19 May 2008 but retrieved on 6th January 2012.

²⁶ Cited in Possible Implications for Regulating the Broadcasting Industry in Zambia Under the IBA Act No 17 Of 2002 – A Practical Perspective, Paper Presented to the Media Institute of Southern Africa (MISA) Zambia Organized Independent Broadcasting Regulation One Day Sensitisation Workshop for Broadcasting Stations on 19th March 2004 at Ndeke Hotel, Lusaka Zambia by Brian Muletambo Lingela

scale and good consumer prices. Therefore, in analyzing a case in this sector, the Commission would first of all have to determine whether a firm is dominant in the provision of broadcasting services in a particular geographic and product market. Thereafter assess whether or not that dominance has been abused. Nevertheless, it is worth noting that the IBA Act recognizes the role of the CCPC in safeguarding competition in all sectors of the economy and obligates the IBA to consider the Competition and Consumer Protection Act when considering cases of a monopoly nature in the broadcasting sector.

4. Significant Current and Future Challenges for Competition Policy in Television Broadcasting In Zambia

4.1 *New Technologies and Future Challenges*

38. There is no doubt that the broadcasting industry even in Zambia is constantly and continuously evolving. The convergence of the Internet and television, in particular is revolutionising the broadcasting industry and has the potential to transform the market for all the players; both actual and potential. Traditional television business models based on proprietary and vertically integrated distribution networks are being challenged by more personalized programming. Where viewers cannot access content on multiple platforms, broadcasters can establish a more direct relationship with the viewer, thereby leading to a long term fragmentation of the audience.

39. In this regard, there is no doubt that competition authorities will face a different set of challenges. Among which include the definition of product and geographical markets especially where markets are fragmented with more personalized content for different viewing audiences.

40. In Zambia, technological challenges in broadcasting are a reality. First of all, convergence of technologies cannot be ignored as can be seen by the decision of privately owned MUVI TV to circumvent regulatory requirements limiting its service to a small radius when they opted to use satellite options to beam their digital signal to subscribers outside their allowable radius. Privately owned Q-FM Radio, Church owned Radio Maria and privately owned Hot FM and Breeze FM, among others have had plans to expand their radius using other new technologies but the absence of a policy framework in the past made it impossible. Currently, Zambia has a National Task Force on Digital Migration charged among other things with overseeing the migration of Zambia's television sector from analogue to digital by 2015, the International Telecommunication Union (ITU) deadline. With the digital framework in place, it is expected that there will be more channels available for Television broadcasters with more and varied programming genres and more competition. It is also expected that markets will be more and more concentrated with more players coming on the scene and the emergence of different and diverse product markets. The Competition and Consumer Protection Commission will thus be expected to ensure that product markets are properly and correctly defined so that cases could be properly addressed.

41. Unfortunately the Commission has save for two cases, not done any market study in the television and broadcasting sector. The two cases that have been done are available with the Commission but are presented in this paper.

4.2 *Access To Content*

42. There does not appear much concern on the exclusive acquisition of premium content by operators. It would appear that broadcasters are free to obtain content from any source. However, it would be of concern if say a private TV operator obtained exclusive content of critical national interest that should be viewed by the general population through other operators like the national public TV.

4.3 *Efficient Spectrum Allocation & Management Issues*

43. As stated earlier, the frequency spectrum is managed by ZICTA and the IBA is expected to liaise with them on available frequencies for television and radio. To that effect, ZICTA sits on the Radio and Television Licensing Committee of the Ministry of Information and Broadcasting Services that is charged with the responsibility of licensing applicants. In the past, there were concerns about the scarcity of frequencies which were considered as a wasting asset and hence their allocation needed to be carefully done. However, this is no longer a technical barrier to entry in the sector owing to improved technologies at global level that have also benefited Zambia. Zambia is presently implementing a frequency plan which is consistent with the International trends and does not worry about scarcity of frequencies anymore.

44. This notwithstanding, there is a possibility that digital frequencies will be contested in view of the many economic opportunities that they offer. Previously, there were allegations of lack of transparency in the award of both radio and Television licenses by MIBS. However, these concerns do not seem to be prevalent following the decision by the MIBS to issue 10 full licenses and 16 construction permits (temporary licenses) to all outstanding radio and Television applications in 2012. As Minister of Information and Broadcasting Services Kennedy Sakeni, MP observed, the move was meant to enhance citizens' participation in the affairs of the nation and to provide them with a platform to air their views on issues of national interest. *“The number of licenses this government has issued is higher than the previous government's record of only two full radio licenses and eight construction permits between 2010 and September 2011. This is a clear demonstration of the PF government's commitment to transparency and accountability by ensuring free flow and public access to information.”*²⁷

5. **Zambia's Experience in Competition Law Enforcement Relating to Television and Broadcasting**

5.1 *Case Studies*

45. In describing Zambia's experiences in enforcing Competition Law in the television broadcasting sector, a case study approach will be employed.

5.2 *Case 1: Tied Selling in Pay-TV Sector*

5.2.1 *Background*

46. On 18th March 2008, the Commission became aware through an advertisement on DStv that MultiChoice Zambia (hereafter referred to as MultiChoice) embarked on *“Smartcard/Decoder Marriage”*. This practice refers to a conduct or situation where a subscriber's smartcard is solely linked and locked to the subscriber's decoder. This means that the smartcard cannot be used on any other decoder apart from the one it had been linked or married to. Thus, another decoder procured from another independent supplier or supplied by MultiChoice itself cannot be used with an already married smartcard unless it is first divorced from one decoder it was initially married to.

47. The Commission viewed this practice as a form of tying by MultiChoice, a practice that is likely *prima facie*, to be anti-competitive from the point of view of both competitors and consumers.

²⁷ As cited by Djokotoe, E; State of the media in Zambia 1 July to 30 September 2012 report compiled for Media Institute of Southern Africa (MISA) Zambia accessed from www.misazambia.org.zm on 6th January 2013

Specifically, the Commission was concerned that the marriage of the smartcard to decoders supplied by MultiChoice, has and/or is likely to lead to the following adverse effects on the market as indicated below:

- (i) Marrying a smartcard to a decoder adversely affects the freedom of the purchaser (consumer) in terms of the flexibility of use of the smartcard with decoders supplied by other alternative suppliers of decoders;
- (ii) Marriage of the smartcard to one decoder would likely foreclose the market for decoders sold by competitors; and
- (iii) Marriage of the smartcard to a decoder supplied by one service provider who holds a dominant position in the market would likely lead to adverse monopolisation effects of abuse of market power and therefore, the restriction, distortion and prevention of competition in the relevant market.

48. This concern arose especially due to the structure of the relevant market, i.e. the provision of Pay TV services in Zambia.

5.2.2 Market Structure

49. The Zambian Pay TV market at the time the case was investigated, and even now, is highly concentrated with only three (3) local players namely MultiChoice Zambia, MUVI TV and MY TV. However, there are also individuals that subscribe directly from other Pay TV digital satellite service providers domiciled outside the Republic of Zambia notably, South Africa. As can be seen in the table below, market share for the three (3) parties was 80% MultiChoice, 10% My TV and approximately 10% for subscribers that pay to service providers abroad and MUVI TV.

Zambian Pay TV Market

FIRM	APPROX MARKET SHARE (%) ²⁸
1 MultiChoice	80%
2 My TV	10%
4 MUVI TV + Foreign Pay TV Service Providers	10%
Total	100%

50. In Zambia, typical customers of the Pay TV service are those in the middle and upper class of socio-economic strata of society. These are people that can afford to procure and sustain receipt of the service that include, kit procurement and remission of monthly subscription payments to the service provider. The rest of the population either does not watch television or opts to watch free –to- air channels.

51. In terms of the distribution channels, the service is mainly in peri-urban and urban areas of the main cities and towns with a few individuals in rural areas receiving the service. Those in rural areas mainly access MUVI TV channel mainly because of its affordability.

²⁸ Submission by Strong Technologies (Providers of MY-TV Pay Services) to Zambia Competition Commission (ZCC) (Forerunner to Competition and Consumer Protection Commission: 15th June 2010

5.2.3 *Justification for the conduct*

52. According to MultiChoice the practice of smartcard marriage is objectively justifiable as it is used by MultiChoice to protect the DStv service from piracy, and as such to protect its commercial viability and integrity; smartcard marriage, together with other technological measures, is an essential tool in the fight against piracy and the protection of copyright; and further, it is essential to the commercial viability of a pay TV service and is standard business practice of pay TV operators globally.

5.2.4 *Conclusions and Determinations*

53. It was found that due to evolving forms of piracy MultiChoice was doing away with the decoders that needed to operate with smartcards and would replace them with smartcard embedded decoders. It was resolved that under the circumstances there was no case worth pursuing by the Commission as such the case was closed.

5.3 *Case 2: Exclusionary Conduct*

54. On 23rd May 2011, the Commission received a complaint from Muvi TV alleging that Multichoice Zambia Limited (Multichoice) and Zambia National Broadcasting Services (ZNBC) had engaged in anti-competitive practices. Specifically it was alleged that the two broadcasting partners launched a project that would allow Multichoice to run a terrestrial signal using public infrastructure (transmitters) belonging to ZNBC. It was alleged that the said project was scheduled for launch on June 6th 2011.

55. According to the Complainant, the result of the project is that Multichoice will provide set top boxes to consumers for free on which eight channels including ZNBC will be hosted for viewing at a monthly subscription of approximately twenty thousand kwacha (K20, 000.00) which is approximately US\$4.

56. There was a concern that the agreement between ZNBC and Multichoice and the decision by the former to allow access to its infrastructure to only Multichoice at that moment in time was likely to create barriers to entry for other players in the market thereby resulting in the prevention, restriction and distortion of competition.

57. The Commission determined that both ZNBC and Multichoice Zambia were dominant firms in the provision of free-to-air television services and Pay TV services respectively. Furthermore, it was determined that because ZNBC was and still is the only entity that has been given frequencies to use to send out test digital signals in preparation for digital migration, no other player could at that moment and even now, send out a digital signal minus the use of ZNBC infrastructure (transmitters). It is on the basis of this that the ZNBC infrastructure was deemed as an essential facility.

58. Having determined the existence of an essential facility, the issue left for determination was whether access thereto was denied. No evidence was submitted to show that access was requested by the Complainant and that the said access was denied. The Commission could therefore not make a determination that ZNBC or Multichoice had abused its dominant position of market power by denying the Complainant access to an essential facility. As such no instance of abuse of dominant position of market power was established.

59. The Commission however issued a directive to the Ministry of Information and Broadcasting Services to ensure that the National Taskforce on Digital Migration established a standard access agreement for parties wishing to use available facilities for transmission of signals in view of the pending digital migration. This is an on-going process.