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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from South Africa

-- Session II --

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-- South Africa --

Introduction

1. Owing to the apartheid government's perceptions of the risk posed by television to its administration, South Africa only saw television broadcasting in 1976. Television broadcasting was only offered by the South African Broadcasting Corporation ("SABC"). However, in October 1985, the South African government issued its first subscription broadcasting license, which led to the establishment of M-Net ("Multichoice") in 1986. M-Net was owned by the big four newspaper groups, Times Media Ltd (now Avusa/BDFM), Argus (now the Independent Group), Naspers and Perskor (now defunct).

2. The National Party government's motivation for undermining the SABC's monopoly was not commercial but political. Ownership of a TV network was seen as a way of saving the Afrikaans press, whose revenue had been hard hit by TV advertising on the SABC. In the apartheid period Afrikaner big business grew under the Nationalist government policy of "Afrikaner favoritism". In 1993, M-Net was divided into two companies. M-Net itself became a pure subscription television station while the company's subscriber management, signal distribution and cellular telephone activities were formed into a new company called Multichoice. Multichoice is now a wholly owned subsidiary of Naspers.¹ Until the establishment of Toptv in 2010, Multichoice had been the only provider of subscription television in South Africa.

3. According to the Department of Communications, there are currently about 11.5 million television owning households in South Africa and approximately 72% of these households rely on free-to-air broadcasting services.²

4. Note at the outset that competition issues in television and broadcasting have not yet been the subject of Competition Tribunal decisions. This submission therefore focuses on how the Competition Commission ("Commission"), which investigates and prosecutes cases of anti-competitive conduct, is approaching the issue. In this regard, the Commission has investigated several third party complaints alleging an abuse of a dominant position in the subscription television market and thus far, non-referred all of them.

5. Yet concerns about the state of competition in the television broadcasting industry have remained. Given the persistency of competition concerns in subscription television broadcasting, the Commission recently embarked on a scoping exercise (or preliminary research study) to assess the state of competition in the subscription television broadcasting sector. Our comments here are thus focused on the

¹ Naspers is a South Africa-based multinational mass media company with principal operations in electronic media (including pay-television, internet and instant-messaging subscriber platforms and the provision of related technologies) and print media (including the publishing, distribution and printing of magazines, newspapers and books, and the provision of private education services).

² See Who Owns Whom research report on the telecommunications industry, July 2012.

issues we are facing in our cases and findings from the scoping exercise. The primary focus of our comments relates to competition concerns about the abuse of dominant a position in subscription television broadcasting. Before addressing the specific questions we provide an overview of the relevant legal provisions for the assessment of alleged abuse of dominant position cases.

1. South African legal provisions governing abuse of dominant position

6. The specific abuse of dominance provisions in sections 8 and 9 of the Competition Act 89 of 1998, as amended, (“the Competition Act”) stipulate effects-based economic tests (with some exceptions, such as for excessive pricing). There are also explicit pro-competitive, efficiency and technology defences for most of the abuse prohibitions. Section 8(a) prohibits a dominant firm to charge an excessive price to the detriment of consumers. An excessive price is defined under the Competition Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value. Economic value is not defined in the Act.

7. Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market. Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and where a penalty may be imposed for a first contravention. The types of conduct specified under section 8(d) are as follows:

- i. requiring or inducing a supplier or customer to not deal with a competitor;
- ii. refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- iii. selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
- iv. selling goods or services below their marginal or average variable cost; or
- v. buying-up a scarce supply of intermediate goods or resources required by a competitor.

8. Price discrimination with the effect of substantially preventing or lessening competition is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition.

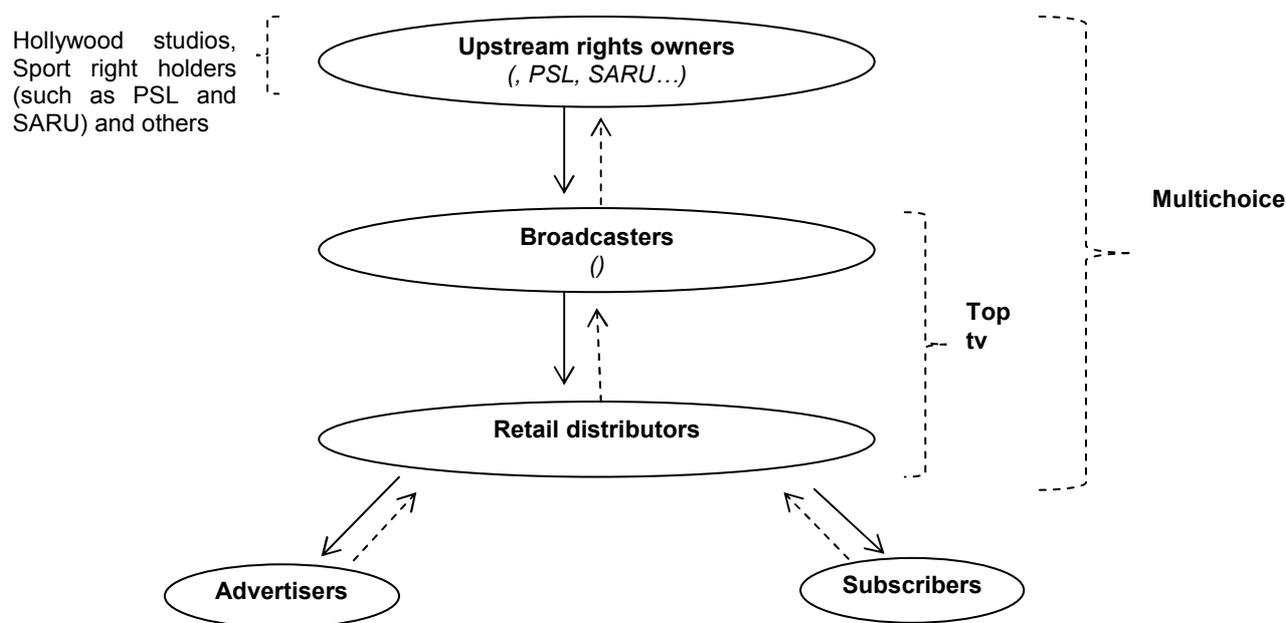
2. The state of competition in the television broadcasting sector

9. A subscription television broadcasting service is a broadcasting service provided to an end user upon the payment of a fee.

10. The subscription television broadcasting market can be thought of as comprising three vertically related layers. As shown in Figure 1, the subscription television broadcasting market can be thought of as comprising three vertically related layers. The uppermost layer produces the content desired by viewers, for example Premier Soccer League (“PSL”) matches, South African Rugby Union (“SARU”) matches, the

Olympic games and Hollywood movies and sells the rights to this content ‘downstream’ to the broadcasting layer for packaging into channels and ultimately transmission to viewers. The retailing layer purchases content and channels from broadcasters and sells these directly to viewers, along with a transmission mechanism (i.e. satellite or cable). The broadcasting layer purchases broadcasting rights, ‘creates’ content and packages this content into channels for sale to downstream retailers.

Figure 1. Vertical Structure in subscription television broadcasting



11. Multichoice is the only fully vertically integrated subscription television company in South Africa, and is active at each level in the vertical structure, although it operates primarily in the broadcasting and retailing layers. Its main activity is the purchase of rights to premium content from original rights owners, such as major sports events and Hollywood movies, for direct distribution to its own satellite subscribers, and for resale to its downstream competitors in distribution.

12. Multichoice is dominant in the subscription television broadcasting market with a market share in the excess of 95%. Multichoice has expanded its offering to nearly 100 video channels from 17 in 1995. Multichoice currently has approximately 4 million subscribers. Multichoice has also expanded with GOtv into other African countries such as Zambia, Kenya, Nigeria, Namibia and Uganda.

13. Multichoice’s only competitor is TopTv. TopTv was licensed as a subscription television broadcaster by ICASA in 2007. TopTv currently has about 200 000 subscribers. ICASA also issued subscription television broadcasting licenses to Esat, Telkom Media and Walking on Water in 2007. In 2012, ICASA issued another subscription television broadcasting license to Deukom. Esat is reported to have withdrawn its application to become a subscription broadcaster late in 2007. Esat signed an agreement with Multichoice to supply channels to Multichoice rather than become a competitor. In doing so, Esat forfeited the subscription television broadcasting license previously granted to it. Apart from TopTv, none of the above mentioned firms are currently in operation.

14. Free-to-air television broadcasting service means a broadcasting service which is broadcast and capable of being received without payment of subscription fees.

15. South Africa has two free to air television broadcasters (that is, the SABC owned by the State and Etv, a privately owned free-to-air commercial broadcaster). Etv has one channel and broadcasts a variety of shows including popular local series, Hollywood movies and current affairs programs aimed at the middle to upper income groups.

16. The SABC has three channels. SABC 1 and 2 are referred to as the public channels while SABC 3 is referred to as the public commercial arm. As public channels, SABC 1 and 2 must be mindful of certain public interest obligations. For example, SABC 1 is under an obligation to broadcast program material that represents a reasonable spread of all official languages of South Africa, paying particular attention to historically marginalized languages. There are also obligations to carry a certain amount of local content as well as content that reflects the diversity of all South African religions.

3. Challenges for competition policy in television broadcasting

17. The main set of issues of concern to the Commission arises from the nature of the exclusive contracts concluded between content rights providers and broadcasters and the impact of these agreements on competition in the downstream subscription television market, more specifically, the exclusive agreements between Multichoice and premium content producers (rights holders). It is not only that the broadcasting rights are exclusive to Multichoice that may be of concern to the Commission, but that Multichoice should end up as the owner of all of the rights available.

18. The attractiveness of any particular television broadcaster to potential viewers depends heavily on its ability to acquire content, particularly premium content. First-release movies are premium content. Hollywood studios generally are tied into exclusive arrangements with local distributors, such as, Ster-Kinekor, Nu Metro and UIP. Local distributors have exclusive arrangements with Multichoice. Multichoice has market power in the subscription broadcasting market and can outbid any competitor for the content rights. Multichoice has built an extensive film library which then allows it to hoard this content and keep actual and potential competitors out of the market. Other than Hollywood theatrical premium content, subscription broadcasters can approach any foreign content providers directly.

19. 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. Multichoice owns the rights to broadcast most sporting events in South Africa.

20. For example, the PSL, the local soccer league, has an exclusive arrangement with Multichoice. The present contract duration is 5 years. The PSL acts as a cartel which sells the rights to the matches played by all of the league clubs. Individual clubs cannot sell the rights to the matches they play on their own. 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). Multichoice currently owns all the rights to broadcast all the PSL games. Unlike the PSL, SARU does not put its broadcasting rights out to tender. SARU exclusively contracts with Multichoice.

21. Because Multichoice's willingness to pay for exclusive rights to the premium content exceeds that of rivals, it obtains a significant competitive advantage over its rivals, and the rivals suffer a negative externality. While competition to purchase the rights to premium content sometimes takes place through a bidding process, the bidding process has "externalities" in which downstream competition is affected by the outcome.

22. The key condition that allows for the persistence of the incumbent's market share in the subscription broadcasting market is possibly the presence of a clear incumbency advantage in favour of Multichoice.

23. Notwithstanding the above, exclusive contracts may enhance efficiencies by promoting investments that are: (a) customer-specific; (b) not directly contractible by the parties involved; and (c) potentially subject to free-riding by other parties (e.g. competitors to Multichoice).

24. In terms of the Independent Communications Authority of South Africa ("ICASA") regulations, Multichoice is required to sub-license sporting events of national interest to the SABC. However, the sub-licensing arrangement excludes other broadcasters such as Toptv and Etv. ICASA only regulates the way in which subscription broadcasting companies sub-licence sporting events of national interest to the national broadcaster. Broadcasters such as the SABC, Toptv and Etv have all concluded sub-licensing agreements with Multichoice in one way or the other. There are concerns that the sub-licensing fees may be excessive.

4. Experience in competition law enforcement relating to television and broadcasting?

25. In relation to television and broadcasting, the Commission has not dealt with competition law enforcement matters relating to merger assessments and horizontal agreements.

26. The Commission has investigated several complaints against Multichoice from third party complaints from consumers and non-referred them. The primary reason for non-referral is that the allegations have focused on outcomes of the state of competition and not the underlying issue which allows Multichoice to maintain monopoly power. The third party complaints have included complaints about:

- i. Subscriber fees: to watch live sporting games consumers have to subscribe to Multichoice. Because of the construction of content bundles they have been forced to purchase a bundle of content, whether desired or not simply to access the sporting events;
- ii. Limited choice: even after subscribing to subscription TV, they have been offered only a very limited selection of sporting games played.

27. In 2012, the Commission undertook a scoping exercise (or preliminary research study) to assess state of competition in television subscription broadcasting. The scoping exercise recommended that the Commission should consider engaging in advocacy with content providers such as sporting unions on (a) the importance of a competitive bidding process (b) the inefficiencies of collective selling and (c) the importance of requiring the winning bidder to sub-license content to other broadcasters.

28. The Commission is currently investigating allegations of abuse of dominance relating to access to premium content against Multichoice.

5. Concurrent jurisdiction

29. ICASA is the regulating authority in the telecommunication sector. ICASA has also been concerned about competition issues in subscription broadcasting. For example, ICASA published a discussion paper ("the 2004 discussion paper") on the inquiry into subscription broadcasting on 23 April 2004. The purpose of the discussion paper was to generate comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa. Following the discussion paper, ICASA published a position paper ("the 2005 position paper") on subscription broadcasting services on 01 June 2005.

30. The position paper sets out ICASA's policy on subscription broadcasting services with respect to matters that were the subject of the inquiry.³ The 2005 position paper notes that the ability of subscription television broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services. For subscription television broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers. Some forms of exclusive arrangements in the broadcasting industry are, therefore, both efficient and desirable. On competition concerns, ICASA's position is that competition issues should be dealt with by way of general competition law.

31. Section 3(1A)(b) of the Competition Act provides that the manner in which the concurrent jurisdiction provided for in section 3(1A)(a) or other public regulation is exercised, 'must be managed, to the extent possible' in accordance with any agreement between the two regulatory bodies.

32. The Commission and ICASA have a memorandum of agreement between themselves effective from 16 September 2002.⁴ The agreement provides that the Commission will deal with complaints concerning restrictive practices and the abuse of a dominant position, and ICASA to deal with contraventions of telecommunications and broadcasting licence conditions and legislation. Provision is made for the process to be followed in the case of complaints: those relating to matters that fall within the concurrent jurisdiction of both regulators must be made available by the recipient regulator to the other regulator.

33. Concurrent jurisdiction exists only where the other regulatory authority has the competence to adjudicate the competition aspects of the conduct. The regulators are required to consult with each other and evaluate the complaint in order to establish how the matter should be managed in terms of the agreement. Provision is also made for the participation of the other regulator in an advisory capacity in any process.

34. The Act applies to all economic activity within, or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Electronic Communications Act 36 of 2005 ("the ECA").⁵ Chapter 10 of ECA deals with regulation of competition matters affecting the broadcasting industry. The purpose of this chapter is to ensure that competition in the broadcasting industry remains vibrant and robust by ensuring that broadcasters do not engage in any act that is likely to substantially prevent or lessen competition. The ECA does not oust the jurisdiction of the Commission authorities but could well be distorted to give rise to defences to the complaints referred.⁶ The legislature has established the competition authorities as the primary authority in competition matters.⁷

³ ICASA also published a position paper ('the 2003 position paper') on 25 July 2003 on sports broadcasting rights. This was followed by discussion document ('the 2008 discussion document') on 02 October 2008 on sports broadcasting rights. The 2008 discussion document raised a number of competition issues as way to locate the review within a broader context. Following this, ICASA issued its findings and reasons document ("2010 findings document") on the sports broadcasting services on 12 April 2010 which also raised competition concerns.

⁴ GN 1747 of 2002 (GG 23857 of 20 September 2002).

⁵ See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009).

⁶ See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009).

⁷ See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009).

6. Conclusion

35. Competition issues in television and broadcasting have not yet been the subject of Competition Tribunal decisions in South Africa. Our comments here are informed by concerns about the abuse of a dominant position in subscription television broadcasting faced in on-going investigations.