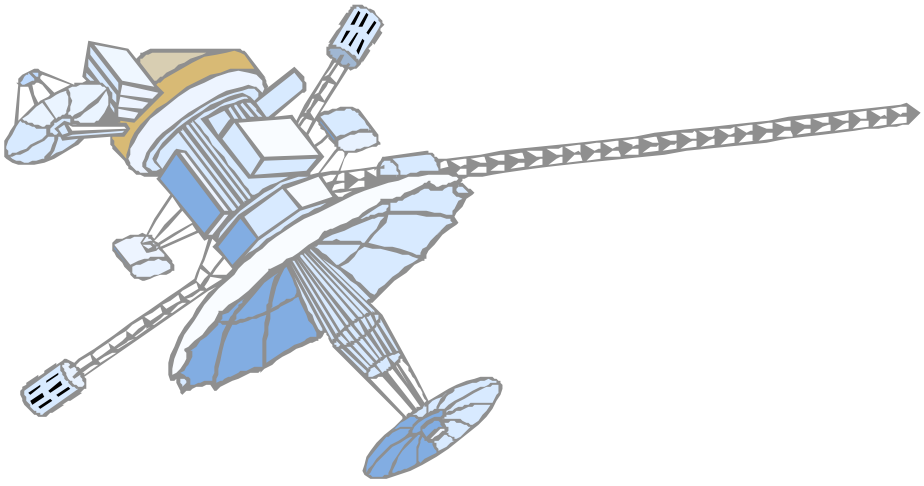
Discussion Paper

Independent Communications Authority
of South Africa

Inquiry into Subscription Broadcasting



23 April 2004

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SECTION A

1. AIMS OF THE DISCUSSION PAPER

The purpose of the Discussion Paper is to generate comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa. Section 28 of the Independent Broadcasting Authority Act, Act No. 153 of 1993 ("IBA Act") provides that the Independent Communications Authority of South Africa ("the Authority") may from time to time conduct an inquiry into any matter relevant to the achievement and application of the principles of broadcasting as enunciated in section 2 of the Act. The primary objective of the inquiry is to:

- solicit public participation and input in developing the regulatory framework for subscription broadcasting in South Africa; and
- generate discussion on the appropriate policy and licensing framework for existing subscription broadcasting services and the introduction of new entrants to subscription broadcasting markets.

In order to achieve this primary objective it is necessary that the Authority consider a number of provisions set out in the IBA Act and the Broadcasting Act, Act No. 4 of 1999 ("Broadcasting Act") that impact on the introduction and operation of subscription broadcasting services. In order to support the development of a regulatory framework for subscription broadcasting, the consideration of these provisions in this inquiry may lead to:

- the amendment of existing policy or regulations;
- the introduction of new regulations; and/or
- recommendations proposing amendments to enabling legislation to the Minister of Communications ("the Minister") or via the Minister to Parliament.

The Authority has, in terms of section 30(7) of the Broadcasting Act read with section 78 of the IBA Act, issued a Position Paper and Regulations on Sports Broadcasting Rights that deals with the requirement that subscription broadcasting services may not acquire exclusive rights for the broadcast of national sporting events, as identified in the public interest by the Authority in consultation with the Minister of Communications and the Minister of Sports. Therefore, sports broadcasting rights will not in any way form part of the Inquiry into Subscription Broadcasting, and any submissions in this regard would therefore not be considered.

This is not the first time that the Authority has conducted an inquiry that deals with issues pertaining to subscription broadcasting. In the Triple Inquiry Report published in 1995, the Authority made some general policy decisions with regards to the approach it would take towards terrestrial (utilising terrestrial frequencies) and non-terrestrial subscription broadcasters. These

general policy decisions were amplified further for analogue terrestrial subscription broadcasting services in the Position Paper for the Introduction of the First Free-To-Air Private Television Service in South Africa published on 12 May 1997. In this position paper the Authority indicated that the policy framework for subscription broadcasting would continue to evolve during future inquiries by the Authority.

Certain aspects of subscription broadcasting were again dealt with when the Authority published a Discussion Paper on Satellite Broadcasting in April 1999, thereby commencing an inquiry in terms of section 28 of the IBA Act. Unfortunately, a number of factors led to the discontinuation of the satellite inquiry process. Firstly, the Independent Broadcasting Authority (IBA) was merged with the South African Telecommunications Regulatory Authority (SATRA) in July 2000 and only one Councillor who presided on the original satellite inquiry was appointed to the new Council. From an administrative law point of view, this lack of continuity made it difficult to conclude the process. Secondly, by mid-2001 the Broadcasting Act had still not been amended to address various legal obstacles in the Act that were creating difficulties in finalising the satellite inquiry process. These legal obstacles were removed when the Broadcasting Amendment Act, Act No. 64 of 2002 came into effect in March 2003 and finally allowed the Authority to commence this process and deal with the key issues confronting subscription broadcasting. However, it should be noted that this Inquiry into Subscription Broadcasting is a new inquiry and submissions that were made in terms of the discontinued Inquiry into Satellite Broadcasting will not be taken into account in this process. Interested parties should make new submissions in terms of the issues set out in this Discussion Paper.

The Discussion Paper is structured in the form of questions supported by explanatory and contextual discussion. Questions posed are not necessarily all encompassing and submitters should feel free to provide additional information and any economic or other research they feel necessary to substantiate their responses.

The Discussion Paper is divided into four sections. Section A details the guiding policy principles and legislative framework that need to be taken into account for the regulation of subscription broadcasting in South Africa. Section B sets out the background of subscription broadcasting. Section C describes the various factors that may need to be considered when approaching the licensing and regulation of subscription broadcasting, and finally, Section D sets out the expected outcomes of this inquiry.

The Authority would welcome input on any issues related to the introduction of subscription broadcasting that stakeholders believe the Authority may have neglected, or unintentionally neglected. The Authority has for the purposes of this Discussion Paper indicated where it believes certain subscription broadcasting services are placed in subscription broadcasting markets. This in no way constitutes a final view of the Authority and stakeholders are welcome to

comment if they believe certain services are best placed elsewhere in a subscription broadcasting regulatory and licensing framework.

The Authority invites interested parties, stakeholders and the public to respond to the issues and questions raised in the Discussion Paper. Submissions will be public documents and should be provided to the Authority in both electronic and hard copy formats. Electronic copies will facilitate the posting of submissions on the Authority's website (http://www.icasa.org.za). All the submissions received by the Authority will be posted on its website.

Interested parties and stakeholders should indicate when they lodge their submission, if they do not wish to have all or part of the submission made publicly available. Reasons why the Authority should restrict access to the material should be provided with the submission, and such requests may or may not be granted.

Written submissions should be sent to:

Mr Aynon Doyle	:	Senior Manager: Policy Development and Research
E-mail	:	adoyle@icasa.org.za
OR		
Ms M Tillek	:	Departmental Secretary (PDRD)
E-mail	:	mtillek@icasa.org.za
OR		
Courier	**:**	Policy Development and Research Department Independent Communications Authority of South Africa 164 Katherine Street, Pinmill Farm Block D Sandton
OR		
Post	**:**	Private Bag x10002 Sandton 2146
OR		
Fax	**:**	(011) 448-2414

Any interested person or organisation who submits written representations should indicate whether they require an opportunity to make oral presentation at the hearings. The closing date for the receipt of representations is **7June 2004** at **16h30**.

2. POLICY DEVELOPMENT PRINCIPLES AND LEGISLATIVE FRAMEWORK

The purpose of this section is to explore the overarching policy principles and legislative framework that provide guidance to the Authority in approaching the regulation of subscription broadcasting in South Africa. As set out in section 28 of the IBA Act, the Authority may from time to time conduct an inquiry into any matter relevant to the achievement and application of the principles of broadcasting as enunciated in section 2 of the Act. This means that any inquiry on developing a policy framework for subscription broadcasting services must be in line with the guiding principles of broadcasting as set out in the IBA Act. It is therefore necessary that the principles set out in section 2 of the IBA Act, and other relevant enabling legislation be considered.

2.1 IBA ACT

Subscription broadcasting services can be offered as sound, television or both. Depending upon the nature of the subscription broadcasting service being offered, the target market or the technology being used, these services may be offered at national, regional or local level. There is, therefore, a very clear link between this characteristic of subscription broadcasting and the introduction of a diverse range of sound and television services at national, regional and local level as required by section 2 of the IBA Act.

Furthermore, section 2 provides that the Authority should promote commercial broadcasting services that are responsive to the needs of the public. Commercial broadcasting services can be divided into those that are free-to-air and those for which the payment of subscription fees are required. The Authority has established a policy framework for free-to-air commercial broadcasting services and analogue terrestrial television subscription broadcasting services. However, there is a regulatory policy vacuum with regard to subscription broadcasting services, generally. This vacuum has persisted despite the existence of a number of broadcasting services that have permission to continue with their services in the absence of policy for satellite, cable or any other class of subscription broadcasting services. The Inquiry into Subscription Broadcasting will address this regulatory vacuum.

Section 2 also requires that the Authority, when considering the introduction of broadcasting services, ensure that, when viewed collectively, broadcasting services develop and protect a national and regional identity, culture and character. In addition, broadcasting services must provide regular news services, actuality programmes on matters of public interest, programmes on political issues of public interest; and programmes on matters of international, national, regional and local significance. The Authority will bear this in mind when considering the regulatory framework for subscription broadcasting services.

Finally, in terms of section 2 of the IBA Act, the Authority must also consider, amongst others, the following objectives as they relate to subscription broadcasting:

- the encouragement of ownership and control of broadcasting services by persons from historically disadvantaged groups;
- the promotion of empowerment and advancement of women;
- the encouragement of equal opportunity employment practices;
- ensuring that broadcasting services are not controlled by foreign persons;
- ensuring that commercial broadcasting licences viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- the application of limitations on cross-media control of commercial broadcasting services;
- the promotion of the most efficient use of the broadcasting services frequency bands;
- ensuring that commercial and signal distribution licensees comply with internationally accepted standards;
- ensuring fair competition between broadcasting licensees;
- the encouragement of investment in the broadcasting industry; and
- ensuring that broadcasting licensees adhere to a code of conduct acceptable to the Authority.

The IBA Act, in addition to the objectives set out in section 2, also provides guidance on how the Authority should consider an application for a commercial broadcasting licence. In terms of section 46(1) of the IBA Act, the Authority shall with due regard to the objects and principles enunciated in section 2, amongst others take into account:

(a) the demand for the proposed broadcasting service within the proposed licence area;
(b) the need for the proposed service within such licence area, having regard to the broadcasting services already existing therein;
(c) the expected technical quality of the proposed service, having regard to developments in broadcasting technology;
(d) the capability, expertise and experience of the applicant;
(e) the financial means and business record of the applicant;
(f) the business record of each person who, if a licence were granted to the applicant, is or would be in a position to control the operations of the applicant either in his or her individual capacity or as a member of the board of directors or top management structure;
(g) the applicant's record and the record of each person referred to in paragraph (f), in relation to situations requiring trust and candour;
(h) whether the applicant is precluded by or in terms of section 48, 49, 50 or 51 from holding a broadcasting licence; and

(i) whether either the applicant or the person referred to in paragraph (f) has been convicted of an offence in terms of this Act.

Section 53 of the IBA Act also requires the imposition of specific licence conditions on broadcasting services with regard to local television content, independent television production and South African music. The Authority will also take section 54 of the IBA Act into account when developing a licensing framework for commercial subscription broadcasting services. The licence term for a commercial television broadcasting licence is eight years and six years in the case of a commercial sound broadcasting licence.

2.2 BROADCASTING ACT

The Broadcasting Act deals with a number of matters that have a direct impact on any inquiry into subscription broadcasting.

a) Permission to continue providing a broadcasting service and authorisation of channels

Section 39 of the IBA Act prohibits the provision of broadcasting services without a broadcasting licence. However, any subscription broadcasting services which existed prior to the Broadcasting Act coming into effect on 30 June 1999 are deemed to have permission to continue to provide such a service if an application for a licence is made to the Authority within six months of the commencement of the Broadcasting Amendment Act, Act 64 of 2002 ("Broadcasting Amendment Act").[1] Similarly section 34(4)(a) makes provision for broadcasting signal distribution services which, provided services prior to the commencement of the Act to be deemed to have permission to continue to provide such services if an application is made to the Authority for a licence within 6 months after the commencement of the Broadcasting Amendment Act. The Authority has received applications, made in terms of section 4(1)(a) or section 34(4)(a) of the Broadcasting Act (as the case may be), from Multichoice, WorldSpace, DMX Africa, Deukom, Comutanet (Comutanet FM and Rank TV), Sentech and Orbicom. In terms of section 4(1)(b) or section 34(4)(b), the permission to continue providing the relevant services is deemed to be in effect until the Authority has refused the application for a licence or in the event of a decision to grant a licence, has issued the licence.

In the case of broadcasting services, these applications will be considered once there is a licensing framework in place for subscription broadcasting – one of the outcomes of this inquiry. In the case of multi-channel broadcasting signal distributors, although there are some related issues to subscription broadcasting, these applications will only be considered when the Authority has held an inquiry to determine the regulatory regime for multi-channel broadcasting signal distribution services. It is the intention of the Authority to hold such an inquiry when it conducts a

1 This permission to continue is applied for in terms of sections 4(1)(a) and 4(1)(b) of the Broadcasting Act.

review of signal distribution in 2004, and it is the view of the Authority that issues pertaining to multi-channel broadcasting signal distribution are best discussed in the context of that inquiry.

Section 4(3) indicates that a licensed broadcasting service consisting of more than one channel may not include a channel in such a service unless the Authority, on application by such a person, has authorised the channel. The Broadcasting Act has defined a "channel" as meaning *"a single defined programming service of a licensee other than a video on demand programming service"*. In the case of unlicensed broadcasting services consisting of more than one channel prior to the commencement of the Broadcasting Act, such services are deemed to have permission to continue to include those channels. However, that `permission to continue' is conditional upon application being made to the Authority for authorisation of the channels, within 3 months of the publication of regulations setting out the procedure and appropriate conditions for the authorisation of channels. It is the intention of the Authority to invite comment as part of this inquiry on section 4(4), as it pertains to subscription broadcasting. It should be noted that section 4(5)(b) indicates that, in the case of an unlicensed broadcasting service which existed prior to the commencement of the Act, the permission for the channel is deemed to continue until the Authority has granted or refused such an application.

Q. 1. In developing regulations for the authorisation of channels for subscription broadcasting services, what administrative procedures and general conditions should the Authority consider?

b) Licensing

The categorisation of broadcasting services is set out within the three-tier system of broadcasting in South Africa namely public, commercial and community. Section 5(2) requires the Authority to consider licences in the following classes:

(a) free-to-air broadcasting services;
(b) terrestrial subscription broadcasting service;
(c) satellite subscription broadcasting service;
(d) cable subscription broadcasting service;
(e) low power sound broadcasting service; and
(f) any other class of licence prescribed by the Authority from time to time.

In this regard paragraphs (b), (c), (d) and (f) of section 5(2) are relevant to this inquiry. With regards to subscription television broadcasting services, section 31(2) of the Broadcasting Act requires that the Authority must as soon as reasonably possible, conduct a licensing process for licences classified under paragraphs (c), (d) and (f) of section 5(2). The purpose of the Inquiry into Subscription Broadcasting is to put in place an overarching policy framework for subscription broadcasting, in terms of which the licensing process as contemplated in section 31(2) can take place. In developing such a policy framework the Authority will consider the licence requirements

and objectives set out section 30 of the Broadcasting Act. In particular, section 30(1) which states that commercial broadcasting services when viewed collectively-

(a) must as a whole provide a diverse range of programming addressing a wide section of the South African public;
(b) must provide, as a whole, programming in all South African official languages;
(c) may provide programming in languages other than South African official languages, where the Authority is convinced that such services can be commercially viable; and
(d) must within a reasonable period of time be extended to all South Africans and provide comprehensive coverage of the areas which they are licensed to serve.

Furthermore, section 30(3) which provides that the programming provided by commercial subscription broadcasting services must be subject to licence conditions determined by the Authority will also be considered in the context of this inquiry. The terrestrial subscription television broadcasting service, M-Net, already has licence conditions and any amendments to its licence would have to follow the requirements set out in section 52 of the IBA Act. Section 30(3), however, does allow the Authority to set licence conditions with immediate effect for programming offered by any subscription broadcasting services that might be licensed in the future. In terms of paragraph (a) of section 11(1) of the Broadcasting Act, the commercial broadcasting services, provided by the commercial services division, of the South African Broadcasting Corporation (SABC) are subject to the same policy and regulatory structures as outlined in the Broadcasting Act for commercial broadcasting services. This seems to imply that the SABC is in a position to apply for a commercial subscription broadcasting service licence if they so wish.

The Authority is aware that the licensing framework may change once the Convergence Bill is promulgated as an Act of Parliament. If any subscription broadcasting licences are issued prior to the new licensing framework coming into effect, they would then be subject to the transitional measures in the new legislation for existing communication licences.

Q.2. ***In determining licence conditions for subscription broadcasting services, what licence conditions should the Authority consider for programming?***

Q.3. ***What other classes of licence should the Authority consider under section 5(2)(f) of the Broadcasting Act, in the context of subscription broadcasting?***

Q.4. ***In your opinion can the SABC apply for a commercial subscription broadcasting service licence? What approach should the Authority take if such an application were made? In responding to this question, the submitter should take into account whether subscription broadcasting is compatible with the universal access principles normally associated with public broadcasting.***

c) Ownership and Control

In terms of section 31(3) of the Broadcasting Act, the Authority is required to conduct an inquiry as to whether sections 49 and 50 of the IBA Act are applicable to subscription television broadcasting services carrying more than one channel and the extent and terms upon which such sections must apply. Section 49 of the IBA Act deals with limitations on control of commercial broadcasting services and section 50 deals with limitations on cross-media control of commercial broadcasting services. Furthermore, section 31(4) of the Broadcasting Act provides that sections 49 and 50 of the IBA Act must not apply to such subscription television broadcasting services until the Authority has issued such a recommendation and that recommendation has been submitted to the Minister for tabling in the National Assembly and has been adopted by the National Assembly[2]. The Authority interprets section 31(3) of the Broadcasting Act as meaning that recommendations must be made as to whether sections 49 and 50 of the IBA Act are applicable to subscription television broadcasting services carrying more than one channel, or that 49 and 50 of the IBA Act are not applicable, or that new provisions are required in the Act to deal with subscription television and sound broadcasting services carrying more than one channel.

While section 31(3) of the Broadcasting Act only precludes section 49 and 50 of the IBA Act from being applied to subscription television broadcasting services with more than one channel until Parliament makes a decision with regards to the recommendations made by the Authority, section 48 still remains in effect. Section 48 provides that:

(1) One or more foreign persons shall not, whether directly or indirectly-
   (a) exercise control over a commercial broadcasting licensee; or
   (b) have financial interest or interest either in voting shares or paid-up capital in private broadcasting licensee exceeding twenty percent.

The Authority has issued the Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences. In this position paper the Authority clearly indicated that the legislative provisions under review only dealt with ownership and control of commercial broadcasting licences in an analogue environment. Furthermore, the Authority stated in the position paper that it believed that a digital broadcasting environment will require a new regulatory regime with respect to ownership and control.[3] The findings of this review process and the Position Paper and Regulations on sections 48, 49 and 50 have suggested two options, to which further public comment on the recommendations was invited.

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2 It would appear that 31(3) of the Broadcasting Act only exempts subscription television broadcasting services from the application of sections 49 and 50 of the IBA Act. The implication of this is that 49 and 50 of the IBA Act continue to apply to subscription sound broadcasting.

3. Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences. (ICASA, 2004), p.36.

A comparative examination of foreign ownership restrictions in the area of broadcasting, cable distribution, and telecommunications, outlined in the two tables below, gives an overview of the foreign control measures adopted in the various markets. The Authority in making recommendations would have to take into consideration the applicability of approaches taken in other jurisdictions in this question.

Table 1: Foreign Ownership Restrictions in Large Markets[4]

Country	Free-to-air (TV and Radio)	Cable/DTH	Telco Assets	Comments on Foreign Investment Activity
United States	20%-25% (Public interest test must be met to exceed limits)	None	20%-25% (Public interest test must be met to exceed limits)	• Shaw Communication owns cable assets in Florida, Texas • Craig Broadcast operates MDS (wireless cable) assets in California and Hawaii • Videotron and Rogers have held BDU assets in the past
France	20%	None	20% Mobile	• Fourth largest cable system (UPC) controlled by U.S based Liberty Media • Telecommunications more restricted than cable
Germany	None*	None	None	• Foreigners have had very little success investing in German free-to-air broadcasting • 35% of cable industry already owned by foreigners (NTL and Callaham) • Deutsche Telekom`s cable systems (50% of German cable industry) on verge of being sold to U.S equity
Italy	49%	None	None	• DTH monopoly created by the merger of Stream and Telepui. Platform to be controlled by News Corporation of U.S
Spain	25%	None	None*	• No. 2 cable system, ONO, controlled by North American investors (Caisse de depot of Quebec, Bank of America, GE Capital) with 49.5 % stake • Administrative authorization required for more than 10% stake in Telefonica
UK	49%	None	None	• Communications Bill calls for abolition of all foreign ownership restrictions in broadcasting • UK cable systems (NTL and Telewest) are entirely foreign owned • Sole UK DTH platform-BSKYB- foreign controlled by News Corporation (37.5%)
Australia	20%(TV) None(Radio)	None	None*	• Telstar, national telephone company, has 35% ownership cap • Largest private cable company-Optus-foreign-held (SingTel)-2.1 million homes passed • Largest DTH platform-Austar-held by U.S based UGC(406 000 subscribers)
Japan	20%	None	None*	• NTT, national telephone company, has a 33.3% foreign ownership cap • Largest cable company-Juniper-is U.S. majority owned

4. Internal Research Report on Subscription Broadcasting. (ICASA, 2003), p.104.

Table 2: Foreign Ownership Restrictions in Key Small/ Medium Sized Markets[5]

Country	Free to Air (TV and Radio)	Cable/ DTH	Telco Assets	Comments on Foreign investment Activity
Austria	Reciprocity Required	None	None	• No. 1 Cable company, Telekabel, (511 000 subscribers) foreign owned by UPC/Liberty Media (US)
Belgium	None	None	None	• Most of Belgium's Free- to- air television licenses controlled by foreigners (RTL Group, AB Group, SBS) • Callahan (US) is a leading cable company in Belgium. • UPC/Liberty Media (US) controls the seventh largest cable company.
Denmark	None	None	None	• SBS, MTG, (TV, radio) NewsCorp (radio) key foreign investors.
Finland	None	None	None	• SBS, MTG, NewsCorp, Lagardere, NRJ among key foreign investors
Ireland	None	None	None	• Foreign Investors permitted but IRTC will look favourably upon those coming from countries with whom agreements of reciprocity have been signed. • CanWest Global and Canada are foreign investors controlling sole free-to-air television assets (TV3) • Leading Cable Company, NTL, foreign owned (370 000 subscribers)
Netherlands	None	None	None	• SBS, RTL (TV, radio) News Corp are foreign investors controlling leading free-to-air assets. • Leading cable company, UPC, controlled by U.S Liberty Media (2.4 million subscribers) • Number three cable company – Casema- acquired in December 2002 by U.S private equity interests - 1.3 million subscribers.
Norway	None	None	None	• Clear Channel, News Corp (radio), SBS(radio and TV) are foreign investors controlling leading free-to-air assets • No. 1 Cable company, UPC Norway, controlled by U.S Liberty Media (365 00 subscribers) • PTO is a limited company in which the state must own shares
Portugal	None	None	None	• Hicks, Muse, Tate Furst and Bavaria (TV and Radio) are foreign investors controlling Free-to-air assets
Sweden	None	None	None	• SBS (radio, television), NRJ, News Corp, (radio) among foreign investors • Stjarn TV, a leading cable company with 283 000 subscribers controlled by UPC/Libert Media (US)
Switzerland	Reciprocity Required	None	None	• Largest cable company- Cablecom – owned by NTL (US) has 53% market share with 1.4 million subscribers. • Federal Government is required to retain majority holding in Swisscom

Q.5. Does the phrase 'broadcasting services carrying more than one channel' refer only to a digital broadcasting service with the capability of carrying more than one channel. Do you agree with

5 Id, p.105.

this view? Should sections 49 and 50 of the IBA Act be applicable to all subscription television broadcasting services carrying more than one channel? Provide reasons for your response.

Q.6. What impact will the Authority's recommendations made in the Position Paper on Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licensees have on new entrants and incumbents in the subscription broadcasting market, if they were to become applicable to subscription television broadcasting services carrying more than one channel?

Q.7. Should the Authority consider recommending that there be ownership and control provisions in the Act that are specifically tailored for subscription television and sound broadcasting services?

2.3 LICENCE FEES

The determination of licence fees for subscription broadcasting would be made in terms of section 78 of the IBA Act, which provides that:

(1) The Council may make regulations, not inconsistent with the provisions of this Act – in relation to-

(bb) payment to the Authority of charges and fees in respect of broadcasting licences, including applications of all descriptions, the issue, renewal, amendment, transfer or other disposal of broadcasting licences of any interest in broadcasting licences and the periodical maintenance of the force and effect of such licences;

(1A) Different charges and fees may be prescribed under paragraph (bB) of subsection (1) in respect of different licensees and different categories and types of licensees based on any characteristic or criterions whatsoever, including the income, revenue or audience size of a licensee or the antenna height, power output or radiation pattern.

In this context, the Authority gave notice in *Government Gazette* No. 1318 of 5 September 1997, of the following non-refundable administrative fees for commercial television broadcasting licensees:

Licence application fee	R300 000.00
Issue of Licence	R 5 000.00
Application for amendment	R200 000.00
Application for renewal	R300 000.00
Annual licence fee	2% of turnover less agency fees and discounts to a maximum of 20% of the 2% subject to certain provisions set out in the government notice.

Similarly, the Authority has set the following non-refundable administrative fees for commercial sound broadcasting licensees in *Government Gazette* No. R709 of 16 May 1997:

Licence application fee	R30 000.00
Issue of Licence	R 2500.00
Application for amendment	R30 000.00
Application for renewal	R30 000.00
Annual licence fee	1% of turnover, less agency fees and other deductions to a maximum of 20% of the 1%, payable three months after the end of each operational year

Q.8. Bearing in mind that the fees set out in Government Gazette No. 1318 of 5 September 1997 were aimed at national commercial television broadcasting services, should the Authority consider amending the regulations if subscription television broadcasting services are introduced at regional or local level?

Q.9. Are the fees for commercial sound broadcasting services appropriate for subscription sound broadcasting services?

SECTION B

3. BACKGROUND TO SUBSCRIPTION BROADCASTING

3.1 SUBSCRIPTION BROADCASTING IN AFRICA

Africa has tended to be divided into two main territories for media business, often using French and English as a basis for demarcation, namely: North and West Africa and Southern and East Africa. The first privately-owned commercial broadcasters in Africa were subscription television broadcasters, such as M-Net established in South Africa in 1986, ABG established in Nigeria in 1991, and Canal+Horizons established in Senegal in 1991. These countries were the logical launch pads for subscription television as they were considered to be the wealthiest countries in sub-Saharan Africa.

3.1.1 NORTH AND WEST AFRICA

In North and West Africa, which have French speaking populations, French and Canadian broadcast technology companies (including Encom) teamed up with the French government to subsidise television channels to provide a package aimed at start-up independent television broadcasters. Jointly they formed PANAFNET in 1995, a "partnership network" which was responsible for the establishment of television stations in the capital cities of Togo, Mali, Madagascar and Benin.[6]

PANAFNET also became involved with technology supply to new stations in English speaking Nigeria, which in a way predicted the blurring of linguistic boundaries in the African broadcast market in the future. These new stations used microwave frequencies in a technology package known as Multipoint Microwave Distribution Systems (MMDS),[7] also known as Multi-channel Multi-point Distribution Systems (MMDS) or wireless cable when it is used as a broadband technology for internet access. MMDS remains popular in certain African countries as it is fairly

6Africa Film & TV. 2000. “Towards an African Renaissance”. http://www.africafilmtv.com/pages/archive/yearbook/2001/television.htm

7 MMDS is not in widespread use worldwide, being mainly confined to some parts of the United States of America, Africa and Ireland, although it is in everyday use where it is in place. The system involves the transmission of picture and sound as low-power microwaves to a roof -top mini-dish or antenna which decodes the signals and sends them to the set-top box which converts the signals to UHF. The Broadcasting Commission of Ireland (BCI) hold the view that the reason for the lack of use of MMDS elsewhere in the word is that Digital Terrestrial Television (DTT) has appeared to have rendered it obsolete. However, the fact that subscribers can transmit signals back to the network on narrowband channels may hold appeal in a converged environment where television, internet and telephone/fax services are bundled together. The appeal to cable subscription broadcasting services is that MMDS-wireless cable TV systems have a definite advantage over traditional cabled systems as they have lower capitalisation and reduced operating costs. http://www.bci.ie

straightforward in those jurisdictions to acquire a microwave frequency allocation as opposed to radio frequencies. In addition microwave does not propagate very far, so it is ideally suited to services which are only aimed at a capital city, with its high income earning and educated audience. To a certain extent under these conditions MMDS has proven itself to be a cheap and flexible system for local multi-channel subscription television broadcasting services. In comparison, it could be argued that cable television would appear to be a more expensive option for local multi-channel subscription broadcasting services to implement, but both Cameroon and Nigeria have also in the past licensed cable operators.[8]

The availability of MMDS frequencies in North and West Africa meant that five or more channels could be offered at start up of the new subscription broadcasting services. These channels were downloaded from satellite and rebroadcast using MMDS. When these services were initiated these channels included CNN, TV5 and CFI. At start-up of the new subscription broadcasting services there was no encryption and conditional access was achieved by purchasing a set top converter so that conventional television sets could receive the MMDS signal. PANAFNET no longer exists, but dozens of independent television broadcasters who benefited from its existence still remain in Africa.[9]

North and West Africa still receives much of its available commercial programming from France by satellite. In this regard, there are two main providers of programming, government funded Le Sat and the commercial subscription television broadcasting service Canal+Horizons. Le Sat offers a bouquet of nine channels of subscription television from a digital satellite platform. African subscribers can choose between a Direct-to-Home (DTH) satellite reception of the full Le Sat bouquet, or if they live in a major city where MMDS or cable is available they can select a lower cost, local, terrestrial service. This option is generally available as there are 24 MMDS operators and 1 cable operator who re-broadcast Le Sat. Since Le Sat subscribers who subscribe to the terrestrial service are managed by the terrestrial re-broadcasters, DTH subscriptions in a sense compete with the terrestrial rebroadcast service.[10]

The Canal+Horizons subscription television channel can be bought together with the Le Sat bouquet, or it can be paid for as a stand-alone DTH channel. Terrestrial re-broadcasters are able to compete with these DTH services as they are in position of being able to offer other subscription television channels such as CNN and the M-Net associate, SuperSport. The price differential between the DTH satellite services and the MMDS services is quite large, as subscriptions to Le Sat, including Canal+Horizons are US$43 monthly, while the subscription packages offered by local re-broadcasters can start at US$8 per month. The Le Sat channels offer little local content, although there are 4 audio channels which do play African music content.

8 Africa Film & TV. 2000. “Towards an African Renaissance”. http://www.africafilmtv.com/pages/archive/yearbook/2001/television.htm

9 Ibid.

10 Ibid.

The subscription base claimed by Le Sat in January 2001, including both the DTH and terrestrial re-broadcast partners, stood at 64,000 subscribers. The Canal+Horizons subscription broadcasting channel at the end of 1999 claimed that it had 150,000 individual subscribers. In 1996, Canal+Horizons joined the Multichoice bouquet (DStv) on the PanAmSat satellite and in 1997 it became part of the Le Sat satellite bouquet as well.[11]

3.1.2 SOUTHERN AND EAST AFRICA

There can be no doubt that the most successful and dominant player leading Africa's broadcast industry by satellite is MultiChoice Africa, who forms part of the MIH Group, based in South Africa. Its satellite service bouquet, DStv, was launched in 1995 and became one of the first multi-channel digital satellite subscription services in the world. MultiChoice not only provides digital satellite transmission, but analogue and other pay-television platform services to a total of 1,298,940 subscribers in Africa and adjacent Indian Ocean islands, of which 936,112 are digital subscribers (July 2003 figures[12]). MIH Group are also the holding company for Electronic Media Network Limited (M-Net), which was granted the first subscription television license on the continent, when it became South Africa's first analogue terrestrial subscription television service in 1986. M-Net channels are also carried on DStv and it is viewed as being Africa's most popular "movie channel" with more than 1,2 million subscribers.[13]

The South African Broadcasting Corporation's (SABC) satellite subscription broadcasting business enterprise, AstraSat, launched in 1996 was seen as an attempt to compete with MultiChoice. AstraSat was initially launched as a free-to-air service in July 1996, with the aim being to provide encrypted subscription channels by 1 December 1996. However, this never transpired. [14] This business enterprise only lasted two years and the main reasons for its lack of success its choice of technology, namely analogue, and its failure to secure programming and suitable encryption technology. In 1998 the SABC terrestrial channels were included on the MultiChoice DStv bouquet. DStv currently carries several SABC radio and television stations, including SABC Africa, the first 24-hour African-originated news channel, and Africa 2 Africa (African entertainment).[15]

A relative new comer is the Vivid bouquet, which was launched in 1999 by Sentech, the South African-based common carrier for broadcasting signal distribution. Replacing the AstraSat analogue Direct-to-Home (DTH) satellite television platform, Vivid is described by Sentech as being a DTH free-to-air digital satellite service carrying audio, video and data channels, but it is planned in the future to introduce low cost subscription channels. The free-to-air channels on the

11 Ibid.

12 http://www.multichoice.co.za

13 Mbendi Information for Africa. http://www.mbendi.co.za/indy/cotl/af/p0050.htm

14 Mbendi Information for Africa. http://www.mbendi.co.za/indy/cotl/af/p0050.htm and van Tonder, I. 1996. Satellite Television – A year of hypes and downs. http://www.sun.ac.za/journalism/sji/1996/satellite.htm

15 http://www.multichoice.co.za

Vivid bouquet are encrypted and a smart card is required to view these channels, however, no monthly subscription is at this stage required to view the channels. The only prerequisites for enabling the decoder are proof of payment of a television licence fee and residence within the borders of South Africa. The set-top box (STB) is equipped with decryption hardware and software to make it possible to provide conditional access to certain channels.[16]

The Authority believes that, prior to encryption, the bouquet offered by Vivid could be regarded as free-to-air, as a consumer only required a decoder and no fee was charged to render the signal intelligible for the receiving equipment. However, now that these channels are encrypted and the consumer is obligated to pay a fee for a smart card (as well as a television licence fee) so that the signal can be received in an intelligible form, the Authority has taken a preliminary view that this is a subscription broadcasting service. Sentech has indicated that the Vivid bouquet currently does not require a monthly subscription to view these channels, however the definition of a subscription broadcaster makes reference to a broadcasting service provided to the end-user upon the payment of a fee. The definition does not specify that the fee be monthly or yearly or even once-off and therefore includes all such payments made in order to view a service that otherwise would not be intelligible without suitable receiving equipment. While it could be argued that consumers are paying for the smartcard and not a service, this is semantic as the consumer only pays for the card in order to be able to receive the broadcast.

Most subscription sound broadcasting services in Africa are included as part of the audio bouquet of the satellite television subscription broadcasting services that have been mentioned above as being active in Africa. In terms of standalone satellite subscription sound broadcasting the main player in Africa is WorldSpace, which provides a bouquet of 47 digital audio broadcasting services.

Q.10. In your opinion, would the sale of a smartcard to view an encrypted bouquet constitute the payment of a fee to view a subscription broadcasting service? Please provide reasons for your response.

3.2 THE SOUTH AFRICAN SUBSCRIPTION BROADCASTING MARKET

The subscription broadcasting landscape in South Africa comprises a wide spectrum of players. These range from broadcasting signal distribution providers such as Sentech and Orbicom, to subscription broadcasting service providers like M-Net and Multichoice, and niche channel broadcasters like Deukom, a German language niche satellite service, offering a separate subscription service through Multichoice. There are also various subscription sound broadcasting services, delivered mainly via satellite.

16 http://www.sentech.co.za

3.2.1 SUBSCRIPTION SOUND BROADCASTING SERVICES

The Authority has granted six subscription sound broadcasting services permission to continue broadcasting in the absence of a licensing framework. These subscription sound broadcasting services are offered by MultiChoice (DStv), Sentech (Vivid), Orbicom, WorldSpace, DMX Africa Music Services and Comutanet FM. The description of subscription sound broadcasting services is based on the applications made by the broadcasting services and do not reflect a position taken by the Authority on the type of licence these services should hold.

The MultiChoice DStv satellite platform in addition to television services is also engaged in the delivery of sound broadcasting services as part of it audio bouquet. Similarly, the Sentech Vivid satellite platform, in addition to television and data services, is also engaged in the delivery of sound broadcasting services. The Vivid platform currently offers subscribers an audio bouquet, it further offers to closed subscriber groups a customised in-store radio service. An example of such corporate subscribers are amongst others Nando's, Mr Price, Clicks, Diskom, Edgars and Pick 'n Pay. Orbicom also supplies satellite sound broadcasting services to closed subscriber groups or corporate clients.

WorldSpace describes its services as providing direct satellite digital sound and data services to Africa, Middle East and Southern Europe, through a combination of subscription-based and free-to-air services. The content broadcast by WorldSpace includes news, information, music and educational programming. The WorldSpace bouquet includes 47 channels of digital sound broadcasting services and one uni-directional channel and non interactive data service.

DMX Africa provides a satellite sound broadcasting service to approximately 1500 South African commercial subscribers. The service has entered into an agreement with MultiChoice Africa to provide its transmission, conditional access and subscriber management services.

Comutanet has described its Comutanet FM service as a commuter-oriented subscription service. The subscription services is a joint venture between Tailormade Creative Media (Pty) Ltd. and Metrorail, providing a satellite sound broadcasting service to 76 of Metrorail railway stations nation-wide. The services signal distribution is provided by Sentech. The radio station is hosted by leading DJs who combine music, news (live feeds from Radio 702), African news and advertisements with the latest train traffic reports reaching 520,000 adults and 300,000 youths.[17]

Internationally there appears to be more demand for subscription television than there is for radio. In South Africa, although aimed at variety of audiences, the standalone subscription sound broadcasting market appears to be mostly confined to corporate subscribers, rather than individual consumers. The difficulties associated with market take up of subscription sound

17 http://www.comutanet.co.za

broadcasting services have been highlighted in the study on digital audio broadcasting (DAB) conducted by the New Zealand Ministry for Culture and Heritage[18]. These difficulties have to do with its demand and viability, which is in turn linked to programming (the number and variety of the services available) and affordability (the cost of receivers and service). As with DAB in the study, unless subscription sound broadcasting services are perceived as necessary or sufficiently desirable, people may be reluctant to enter into additional commitments and costs (including the selection and purchase of new receivers and subscription fees) in order to access services of an essentially similar kind to those already provided for free.

Amongst the regulatory challenges posed by subscription sound broadcasting services are multiple standards, local content, foreign ownership and control and the cost of accessing the service. The viability of simultaneously running multiple standards and platforms, caused by the use of proprietary receivers by operators such as WorldSpace, is questionable. While it is relatively easy for terrestrial services to cater for local and regional content, satellite services tend to cater for cross-border audiences, making locally-based content less popular with service providers. Especially since this might only be relevant to a small percentage of the potential audience. The fact that, WorldSpace for example, is a commercial entity owned by a trans-national corporation makes it difficult for governments to effectively apply regulation limiting foreign ownership of subscription services. Internationally access to subscription sound broadcasting services requires access to often expensive specialised equipment.

In South Africa there are currently no subscription sound broadcasting services, terrestrial or satellite, that target the motorist market. An example elsewhere in the world of this type of service is Sirius Satellite Radio and XM Satellite Radio that provide coast-to-coast coverage in the United States of America since 2001, providing over 100 CD quality music, sport and talk channels for a monthly charge of $10[19].

Q.11. Is the use of proprietary receivers by operators such as WorldSpace desirable? How can any concerns in this area be addressed?

Q.12. Should the same regulatory principles that are applied to subscription sound broadcasting services also apply to subscription television broadcasting services and vice versa?

Q.13. What approach should the Authority adopt to subscription sound broadcasting services offered only to corporate subscribers, for example, customised sound services played at supermarkets or franchises?

Q.14. Do you agree with way in which the subscription sound broadcasting market has been described? If not provide details of how the markets should be viewed and what stakeholders are present in the markets?

18 Digital Audio Broadcasting, Ministry for Culture and Heritage. New Zealand December 2003.

19 http://www.siriusradio.com and http://www.xmradio.com

3.2.2 SUBSCRIPTION TELEVISION BROADCASTING SERVICES

There is only one licensed subscription television broadcasting service in South Africa and that is M-Net (the analogue terrestrial subscription broadcasting service). The Authority has granted four subscription television broadcasting services permission to continue broadcasting in the absence of a licensing framework. These subscription television broadcasting services are offered by MultiChoice (DStv), Sentech (Vivid), Orbicom (Business Television, Africa Growth Network & International Gaming Network), and Comutanet (Rank TV). The description of subscription television broadcasting services is based on the applications made by the broadcasting services and do not reflect a position taken by the Authority on the type of licence these services should hold.

The Sentech Vivid platform combines aspects of both free-to-air and subscription broadcasting services. This service provides a variety of local, regional and global programming which extends news, information, entertainment, human development, health and social services to South Africa, Southern Africa and internationally. Orbicom and Comutanet appear to be offering niche subscription television broadcasting services to corporate subscribers.

The main subscription television broadcasting services offered to consumers are M-Net, CSN and DStv. M-Net was licensed in 1985 and launched in 1986. It commenced broadcasting with a single analogue 24-hour pay channel on a terrestrial platform with a one-hour, free-to-air, 'Open Window', which was later, increased to two hours in 1991. M-Net's main analogue channel focuses on premium movies plus general entertainment and children's programmes. Since 1992 M-Net has offered an additional analogue channel[20] called the Community Services Network (CSN). This channel offers sports and community programmes.[21]

At the time of preparing the Discussion Paper, the major shareholders of M-Net/ Supersport were MNH Holdings (Pty) Ltd ("MNH") with 52.66% followed by MultiChoice Africa (Proprietary) Limited with 10.45%.[22] The shareholding in MNH was as follows: Naspers 50%, Johnnic Communications Limited ("Johncom") 47.5% and Natal Witness 2.5%.

In 2002, after a public process, M-Net's licence was renewed on substantially the same terms and conditions. The renewed licence is valid for a period of 8 years, that is, until 30 March 2010. M-Net 's licence conditions place restrictions on the amount of time the licensee is allowed to advertise during the free-to-air, 'Open Window' to a maximum of twelve minutes in any one hour during the free-to-air period (two hours)[23], which is the same as the encoded time.

20 "Channel" is defined in the Broadcasting Act as "a single defined programming service of a licensee other than a video on demand programming service".

21 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003, p.57.

22 Sworn Affavadit provided by MNet.

23 Ibid.

Based upon an analysis of the market, M-Net originally targeted the high end of the market, then classified as Living Standards Measures 7 and 8 by South African Advertising Research Foundation (SAARF) for a number of reasons including:

- a limited willingness to subsidise set top boxes (STBs) because M-Net wanted to achieve an increased pay back time;
- a limited ability to unbundle its subscriptions (tiering); and
- in the early stages of its development M-Net focused its content offering towards the "more affluent" market as this was made up of the wealthier segment of the South African TV market.[24]

Apart from its analogue services, M-Net also provides 11 channels on the DStv bouquet. The introduction of DStv persuaded M-Net to change its strategic focus as regards its target market. Its current strategy appears to be to migrate M-Net's high-end subscribers to DStv thereby, exploiting its capacity to maximise value with higher monthly rental, and to also attract the medium level LSMs to its analogue channels. As a result of this strategy, it can be argued, M-Net experienced a decline in its subscriber base of 16% from 2001 to 2002.[25]

MultiChoice Africa describes itself as a multi-channel television platform operator that provides premium television entertainment to its subscribers through its DStv bouquet. It started as a subscriber management section of M-Net before it evolved into a fully-fledged company that offers premier television entertainment across Africa and adjacent Islands. It sources its programme offerings from the USA, Britain and Africa (M-Net and Supersport).[26]

DStv was launched in 1995 offering a digital subscription package on a DTH satellite platform. It also offers local and international channels that include 50 television and 48 sound services for 24 hours a day including a number of data channels and recently, a non-return path interactive television offering). DStv offers a "basic" package comprising of general entertainment, movies, sport, news, kids, music and infotainment. It also offers "separate" non-English language subscription services and business subscription services. (These DStv niche channels include the Summit TV, the Indian (Zee-TV) and Chinese channels). In 2001 a Portuguese-language bouquet was launched.[27]

According to MIH, it is M-Net and the Supersport channels that are the driving force growing the subscriber base of DStv through the "delivery of premium thematic channels and exclusive content".[28] The basic service costs R360 per month excluding the STB and a satellite dish, which

24 Ibid.

25 Ibid.

26 Id.,p.64.

27 Ibid.

28 MIH Holdings Limited 2002 Annual Report.

cost approximately R2 000 for outright purchase. The DTH digital satellite services aimed at Southern and sub-Saharan Africa operate under the brand name DStv.

MultiChoice is a 100% subsidiary of MIH Limited whose shareholders include Naspers and JohnCom (in 2003). It should be pointed out that both M-Net and MultiChoice have substantially the same shareholders with MIH. DStv, while primarily a subscription television broadcasting service, also offers an audio bouquet of sound broadcasting services.[29]

The definition of broadcaster as set out in the Broadcasting Act includes any legal person or natural person who composes or packages television or sound programme services for reception by the public, sections of the public or subscribers. Subscription television broadcasting services in South Africa currently could be divided into those who originate programming (commission independent production) and those who package programming. This distinction may be appropriate from a regulatory point of view when dealing with South African content requirements.

In addition to the licensed analogue terrestrial subscription television broadcaster and those broadcasting services which have permission to continue in terms of the Broadcasting Act, there are also illegal operators. The Authority has initiated legal action against subscription broadcasters who do not have permission to continue in terms of the Broadcasting Act. These include 'Don't Panic TV' and 'Otherchoice' who sell smartcards that enable subscribers to receive encrypted digital satellite broadcasts. Otherchoice has applied for a declaratory order from the court that its activities of selling smartcards to members of the public for reception of encrypted digital broadcast from countries outside South Africa are not in contravention of any law.[30]

The Authority has contested the statement made by Otherchoice, in its notice of motion, that it is not in violation of any laws. The Authority regards Otherchoice's operation as a direct violation of sections 32, 39 and 66A of the IBA Act read together with sections 4 and 29 of the Broadcasting Act. The Authority has further argued that the smartcard forms an integral part of the system in terms of which *"signs, signals, sounds, communications or other information"* are conveyed and which enables the applicable subscriber to view the broadcasting material. According to the Authority, the smartcard accordingly falls within the definition of *"apparatus"* as set out in the IBA Act and is a vital link in the broadcasting and signal distribution process, within the meaning as set out in the IBA Act. The matter has been set down for hearing on 20 April 2004, and the findings of the court will be taken into consideration when the Authority finalises the position paper and relevant regulations for subscription broadcasting.

M-Net compiles 8 channels for broadcast on Ku band in Southern Africa, six of which are transmitted to viewers in the rest of Africa via C-band

29 Ibid.

30 Notice of Motion, in the High Court of South Africa (TPD), in the matter between Otherchoice (Pty) Ltd v Independent Communications Authority of South Africa, Case No. 19718/03, 14 July 2003. (A Declaratory order is being sought by Otherchoice that it is not required to obtain a licence as contemplated in sections 32 or 39 of the IBA Act for the purposes of the sale of smartcards intended for use in digital decoders for reception of encrypted digital satellite broadcast from countries outside of South Africa and that the conduct of selling smartcards for this purpose is not in contravention of any law)

Q.15. Is there a need in subscription broadcasting licensing regime to distinguish between broadcasters who commission content creation (for example. M-Net) and broadcasters who merely package content (for example. DStv)? For instance, would such a distinction be appropriate when dealing with South African content issues?

Q.16. What approach should the Authority adopt to subscription television broadcasting services offered only to corporate subscribers and not to individual consumers?

Q.17. Do you agree with the way in which the subscription television broadcasting market has been described? If not provide details of how the markets should be viewed and which stakeholders are present in the markets?

5. SOUTH AFRICAN SUBSCRIPTION BROADCASTING MARKETS

In the absence of a subscription broadcasting policy framework, it is not clear exactly what the subscription broadcasting markets look like, what the market penetration is or what market share different broadcasting services have in those markets. Research that is available from the South African Advertising Research Foundation (SAARF), for instance, tends to be focused on consumer subscribers and does not address corporate subscribers, the research also tends to focus only on DStv and M-Net to the exclusion of other niche subscription broadcasting services which have permission to continue broadcasting in terms of the Broadcasting Act. There also appears to be no attempt at determining the size of the subscription sound broadcasting markets. At the end of March 2003 the subscription television subscriber numbers for M-Net and DStv were reported[31] as a total of 1.045m, which consisted of 366,000 analogue subscribers and 679,000 digital subscribers. However, similar figures are not available for other subscription broadcasting services which would give a clearer picture of the size of the subscription television and sound broadcasting services markets. The Authority did commission research in 2003 to conduct a subscription television market analysis, but it would welcome submissions that provide a market analysis and that provide suggestions on how the subscription broadcasting markets should be approached in a policy framework.

Q.18. How should different subscription broadcasting markets be delineated? In this context, where should incumbents and new services be included? Please motivate your response.

Q.19. Given the possible diversity of subscription broadcasting services and different markets, how can the Authority uniformly enforce regulations in this sector?

31 M-Net 2003 Interim Report

SECTION C

4. LICENSING AND REGULATING SUBSCRIPTION BROADCASTING

This section outlines factors that should be considered in setting out options for licensing and regulating subscription broadcasting in South Africa. The key issues for the Authority is the kind of licensing framework and regulatory environment required to introduce sustainable additional subscription broadcasting services, as well as policies and regulations required to stimulate growth and sustainability of the new entrants. With the dynamic nature of this industry as well as anticipated regulatory challenges, an agile approach should be adopted with the view to accommodate innovation while ensuring a consistent and a stable regulatory regime.

4.1 DEFINITIONS AND ELEMENTS

In approaching an Inquiry into Subscription Broadcasting it is necessary to ensure that the definitions of `broadcaster', `broadcasting', broadcasting service', `broadcasting licence', `broadcasting signal distribution', `commercial broadcasting service', `encryption', `free-to-air service', and `subscription broadcasting service' are clearly understood, by everyone.

A **broadcaster** is defined in the Broadcasting Act as:

> *"any legal or natural person who composes or packages television or radio programme services for reception by the public or sections of the public or subscribers to such a service irrespective of technology used"*.[32]

Broadcasting is defined in both the IBA Act and Broadcasting Act as:

> *"any form of unidirectional telecommunications intended for the public, sections of the public or subscribers to any broadcasting service having appropriate receiving facilities, whether carried by means of radio or any other means of telecommunication or any combination of the aforementioned, and "broadcast" is construed accordingly"*.

The definition of **broadcasting service**, in the Broadcasting Act, includes both sound and television broadcasting *"material to the public, sections of the public or to subscribers to such a service*" and *"but does not include:*

> *(a) a service (including text service) that provides no more than data, or no more than text (with or without associated still images);*
>
> *(b) a service that makes programmes available on demand on a point to-point basis, including a dial-up service; and*

32 Although this definition of a broadcaster is very broad, when it is narrowed when interpreted against the background of the definitions of broadcasting and broadcasting service.

(c) a service or a class of service that the Minister determines, by notice in the Gazette, not to fall within this definition;"

A **broadcasting licence** is defined in the Broadcasting Act as:

"a licence granted and issued by the Authority in terms of this Act or the IBA Act, to a person for the purposes of providing a defined category of broadcasting service, or deemed by this Act or the IBA Act to be so granted and issued"

A broadcasting service cannot be provided if there is no broadcasting signal distribution therefore broadcasting signal distribution is a critical component of the value chain that leads to the consumer of the service.

Broadcasting signal distribution is defined in the Broadcasting Act as:

"the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed to any broadcast target area by means of a telecommunication process and includes multi-channel distribution".

Furthermore the Act defines a **multi-channel distribution service:**

"*as a broadcasting signal distribution service that provides broadcasting signal distribution of more than one channel*[33] *at the same time on the same signal and* ***multi-channel distributor*** [our own emphasis] *is construed accordingly."*[34]

This definition of a multi-channel distribution service is similar to what some in the broadcasting industry understand as being **multiplexing**, which has been defined *"as the simultaneous transmission of two or more information signals in either or both directions over a common transmission medium in such a manner that the information signals may be discretely recovered."* [35]

A **commercial broadcasting service** is defined in the Broadcasting Act as:

"a broadcasting service operating for profit or as part of a profit entity but excludes any broadcasting service provided by the public broadcaster".

In term of section 5(1) of the Broadcasting Act commercial broadcasting is a category of broadcasting service. Within this category there are a number of classes of broadcasting

33 'Channel' is defined in the Broadcasting Act as "a single defined programming service of a licensee other than a video on demand programming service."

34 In South Africa, subscription broadcasting services are the first multi-channel services that the public have been exposed to. When migration from analogue to digital broadcasting takes place multi-channel services will also be offered by public broadcasting services and other classes of commercial broadcasting services.

35 http ://www.uspto.gov/go/classification /uspc370/defs/370.htm. It should be noted that this definition of multiplexing is only worth noting for information purposes as it does not form part of the legal framework set out in the Broadcasting Act or the IBA Act.

licences. These classes of broadcasting licences can be summarised as free-to-air broadcasting service, subscription broadcasting service (terrestrial, satellite, cable), low power sound broadcasting service, and any other class of licence prescribed by the Authority.[36] For the purposes of comparison it useful to compare the definitions of the classes of free-to-air broadcasting services and subscription broadcasting services as they should represent opposites within the category of commercial broadcasting services, with regards to revenue generation.

A **Free-to-air service** is defined in the Broadcasting Act as *"a service which is broadcast and capable of being received without the payment of subscription fees"*, as opposed to a **subscription broadcasting service** which is defined in the Broadcasting Act as *"a broadcasting service provided to an end-user upon the payment of a fee"*. The implication is that commercial free-to-air broadcasting services are dependent upon advertising and sponsorships for revenue generation, whereas commercial subscription broadcasting services are primarily dependent upon subscriber fees.

This distinction is further emphasised by section 30(6) of the Broadcasting Act, which states that:

> *"Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships. In no case may advertising or sponsorships, or a combination thereof, be the largest source of revenue."*

In order to ensure that a subscription broadcasting service is not received free-to-air, the signal is encrypted. **Encryption** is defined in the Broadcasting Act as *"a method for changing a broadcasting signal in a systematic way so that the signal would be unintelligible without suitable receiving equipment".* The term "encoded" tends to be used interchangeably with the term encrypted and for the purposes of this Discussion Paper the terms "encoded" and "encrypted" have the same meaning.

Bearing in mind the above definitions it is possible to argue that the key elements of subscription broadcasting services are as follows:

1. The commercial nature of subscription broadcasting is based on the operation for profit and the implied contractual relationship between the subscription broadcasting service and end-user ('the subscriber'). The relevant definitions indicate quite clearly that a broadcasting service is being provided upon the payment of a fee. Furthermore, in order to receive these broadcasting services the subscribers must have appropriate receiving facilities.
2. The offering of programming to a subscriber is another core element. Broadcasters offer programming services (sound or television) to subscribers, therefore access to content or bouquets by subscribers is a part of the contractual relationship between the provider of a

36 Classes of broadcasting licences are listed under section 5(2) of the Broadcasting Act.

subscription broadcasting service and the subscriber. This access usually provides the subscriber with freedom of choice between a variety of channels[37] along with the capability and responsibility to select the programmes they wish to receive or which they wish to block from receiving. The fact that subscribers choose to enter into a contract voluntarily to view programming services and have the ability to control the content they receive is another characteristic that sets subscription broadcasting apart from free-to-air broadcasting services. This characteristic supports the notion of a more relaxed regulatory approach to subscription broadcasting services.

3. The definitions of `broadcaster', `broadcasting' and `subscription broadcasting' are technology or platform neutral. However, the definition of `broadcasting licence' raises the question of which class of licence should be issued. In order to provide a subscription broadcasting service a broadcasting licence must be granted by the Authority in terms of the framework of the current broadcasting legislation. The licensing framework is not technologically neutral as it views subscription broadcasting services as being terrestrial, satellite or cable. This can be simplified to an element of being terrestrial [38](frequency based or cable) or non-terrestrial. This could be a useful distinction to make from a regulatory perspective in terms of different regulatory requirements for terrestrial/cable subscription broadcasting services and satellite subscription broadcasting services.
4. A key feature of the service delivery irrespective of platform used will be encryption requiring the use of a consumer access device or set-top box with decoding abilities and conditional access hardware or software in order to receive content.

Q.20. Do you agree with the core elements as set out above? If not what other elements or additional elements should be taken into account when describing subscription broadcasting services?

4.2 LICENSING FRAMEWORK FOR SUBSCRIPTION BROADCASTING

The Triple Inquiry Report highlighted the need for a distinction to be drawn between terrestrial subscription broadcasting services which utilise terrestrial frequencies (a scarce national resource allowing access to mass audiences) and non-terrestrial frequency based subscription broadcasting services which are broadcast via cable, satellite or other telecommunication means. Although satellite spectrum is equally scarce, the use of digital technology allows the spectrum resource to be used more efficiently.[39] This distinction was captured in the different licensing categories for subscription broadcasting services outlined in the Broadcasting Act.

37 In an analogue environment a broadcasting service is essentially a single channel on one signal; in a digital environment a broadcasting service can offer multiple channels on a single signal.

38 The above breakdown between terrestrial and non terrestrial subscription broadcasting services differs from the Triple Inquiry's where cable was viewed as being part of non-terrestrial subscription broadcasting services.

39 Independent Broadcasting Authority. 1995. Triple Inquiry Report. Johannesburg: IBA (Report on the protection and viability of public broadcasting services; cross-media control of broadcasting services; and local television content and South African music)

Together the IBA Act and Broadcasting Act contemplate three tiers or categories of broadcasting services: public broadcasting, commercial broadcasting and community broadcasting. These tiers are not platform specific, therefore all classes of broadcasting services as defined in the Broadcasting Act would fall under the most applicable tier or category of broadcasting service, irrespective of the medium of delivery utilised. For example, a broadcasting service offered by the public broadcaster would fall under the category of public broadcasting and a broadcasting service operated by a profit-making entity would fall under the category of commercial broadcasting service.

The classes of licences which the Authority may consider when licensing subscription broadcasting services are:

- terrestrial subscription broadcasting services;
- satellite subscription broadcasting services;
- cable subscription broadcasting services; or
- any other class of licence prescribed by the Authority from time to time.

In approaching these categories of subscription broadcasting licences, the Authority could choose to licence a person to provide a sound broadcasting service or a television broadcasting service. A third option could be to licence a person to provide both a sound and television service as one subscription broadcasting service.

It can be argued that while the distinction been sound and television broadcasts may be relevant in an analogue environment, the need for this distinction falls away in a digital environment. DStv, for example, already provides a television and a sound broadcasting service (audio bouquet). Subscription services that will make use of, for example, Digital Audio Band (DAB) will also be in a position to send streaming video to a consumer access devices that can take advantage of this feature. An example of such an application would be a public transport that has a consumer access device capable of receiving streaming video as it drives through Johannesburg, for the entertainment of passengers.

Section 54 of the IBA Act may prove to be an obstacle to a single licensing approach to a subscription television and sound broadcasting service, as the term of validity of services differs depending on whether the service is classified as commercial television or sound broadcasting. In the case of television the term of validity of the licence is 8 years and for sound broadcasting it is 6 years.

A further question to be considered when developing a licensing framework is what kind of service provider may apply for a subscription broadcasting service licence? At the time that the Authority conducted the Inquiry into Satellite Broadcasting in 1999, there was a blurring of the distinction between the activities of broadcasting and broadcasting signal distribution. This has

now been resolved by the amendment to the definition of multi-channel distributor[40] which clarifies that the latter is really a subset of broadcasting signal distribution.

The Authority believes that maintaining the current separation of 'broadcasting' and 'signal distribution' activities, as in the IBA Act, is of paramount importance. The following aspects of the broadcasting regulatory framework support such a view:

- Each activity has its own distinct rights and obligations under the Broadcasting Act and the IBA Act. Specifically, Chapter 5 of the Broadcasting Act applies to Commercial Broadcasting activities including subscription broadcasting services, whilst Chapter 7 applies to Signal Distribution and Multi-Channel Distributors.

- The issues that affect each activity are distinct. For example, a broadcaster's prime obligations lie in the area of programming, such as fulfilling local content obligations and complying with advertising limits. Broadcasting signal distribution by contrast mainly concerns itself with, amongst other, engineering and technical activities such as the availability and use of spectrum and the use of common distribution standards.

As mentioned previously in the Discussion Paper, the inquiry to determine the regulatory regime for multi-channel broadcasting signal distribution services as required by section 33(1) of the Broadcasting Act will be held later this year as part of the Review of Signal Distribution.

Section 4(3) of the Broadcasting Act has indicated that broadcasting services need to apply for authorisation when adding a channel to their bouquet. The implication is that subscription channel providers, for example CNN, or the Discovery Channel do not require a broadcasting licence, however the subscription broadcasting licensee must apply for authorisation before adding such channels to the bouquet of channels[41].

However, when dealing with add-on bouquets, such as those offered by Deukom on the DStv platform, who manage their own subscribers, the Authority holds the preliminary view that because of the definition of 'broadcaster', such a service would potentially require a subscription television broadcasting licence.

Q.21. When determining a licensing approach, should the Authority make a distinction between television and sound subscription broadcasting services, or should the licence be a single subscription broadcasting licence that caters for both services when necessary?

40 The Broadcasting Act define a multi-channel distribution service as meaning a broadcasting signal distribution service that provides broadcasting signal distribution of more that one channel at the same time on the same signal, and multi-channel distributor is construed accordingly.

41 Refer to section 2.2 a of this discussion paper, which indicate the process that must be followed for authorisation of channels.

Q.22. Section 54 of the IBA Act sets out different licence terms for commercial television and sound broadcasting licences. How should this be dealt with if a single licence were to be granted to a person offering both a subscription sound and television broadcasting service?

Q.23. What is your view on the position articulated by the Authority in terms of its regulatory approach to enforcing the legislative distinction between broadcasting and broadcasting signal distribution in the context of subscription broadcasting?

Q.24. Do you agree with the view set out in the Triple Inquiry Report that there is a need for a distinction to be drawn between terrestrial subscription broadcasting services which utilise terrestrial frequencies and non-terrestrial frequency based subscription broadcasting services?

4.3 APPROACH TO MEDIUM OF DELIVERY

Globally there is a migration from analogue broadcasting to digital broadcasting. In most countries governments have set specific time frames for this transition phase to be completed and have put in place frequency plans to accommodate the interim phase of dual broadcasting when broadcasters will be providing both an analogue and a digital broadcasting service. South Africa will obviously have to follow this trend to remain competitive in a global market and to avoid analogue technological obsolescence. The Authority is aware that in this regard, the Department of Communications is preparing a national strategy that will provide guidance on government's approach to digital migration in South Africa.

When South Africa migrates from analogue broadcasting to digital broadcasting within the next decade, it makes sense for new entrants to the subscription broadcasting market to offer their services on a digital platform (digital cable, Digital Terrestrial Television (DTT) or satellite digital broadcasting). In the case of terrestrial subscription broadcasting services the Authority, in line with the steps already taken in the Terrestrial Broadcast Frequency Plan, proposes putting in place a moratorium on the licensing of any further subscription services utilising analogue terrestrial frequencies.

Q.25. Do you agree that there should be a moratorium on the licensing of any further subscription broadcasting services using analogue terrestrial frequencies?

Q.26. In your opinion, what scope is there for digital terrestrial subscription broadcasting services?

Q.27. What approach should the Authority consider with regard to terrestrial narrowcasting (local) or cable subscription broadcasting services?

4.4 BARRIERS TO ENTRY

An analysis of the South African broadcasting landscape points to various potential barriers to entry into the subscription broadcasting market and the variety of challenges awaiting new market entrants. The most significant are technological standards and other determinants of their ability to compete in this market. These are, amongst others, the cost of programming, demand for specific services, audience segmentation and long term contracts on premium programming and control over the subscription value chain.

4.4.1 Technological Barriers

The main concern regarding technological standards is the ability of a incumbent service providers, given their head-start in the industry, to set subscription broadcasting infrastructure standards and thus dictate the terms of competition.

Digitisation and convergence will potentially affect the entry of new players, that is the different ways in which services are provided to the market and the boundaries of different markets. Depending on the way in which technological standards are regulated, technological change can facilitate entry for the new players. Convergence of technologies may provide complementary or substitute services to existing services (for example subscription television services with potentially greater enhancements) and could actually result in completely new types of services. However, there is always the danger that dominant players in the existing markets would leverage their market power into emerging markets and for the delivery of new services. This may have an effect contrary to the goal of technological innovation facilitating market entry and thus competition. However, it is encouraging to note that in South Africa there seems to be agreement by the industry on standards and this is being supported by the processes undertaken by the South Africa Bureau of Standards (SABS).

The following potential technical bottlenecks do need to be considered in more detail from a competition perspective, namely infrastructure costs, STB costs, Applications Programme Interfaces, verification software, Electronic Navigation Software, satellite transponder capacity, and Subscriber Management Services.

a) High Infrastructure Costs

The cost of setting up the infrastructure is high, depending on the nature of the service, for a national subscription service. Generally, the most important transmission network costs are attributed to broadcasting studio costs, satellite uplinking costs and transponder capacity leasing costs. These costs can be prohibitive if a new operator is not properly capitalised, particularly in the first 4-5 years of operation.

International experience has indicated that new entrants must avoid 'over-specification of a new platform to prevent onerous launch conditions in terms of infrastructure and standards as opposed to allowing competitive dynamics to operate. The examples of the introduction of subscription broadcasting services in the United Kingdom confirm this[42], for example:

42 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003, p.123

- BSB's (UK) launch was delayed due to high technical specifications. This led to them loosing out to the highly commercial BSkyB and eventually being taken-over by the latter; and
- ONdigital specifications (requirements for signing, original production quotas) mean it is more costly for channels to secure carriage on DTT than on (DTH).

Q.28. How best should the Authority deal with the various infrastructure barriers to entry? Should this be regulated? If yes, how?

b) Set-Top Box costs

A set-top box (STB) is an essential gateway to accessing programmes in the subscription television environment. A STB can be broken down into component parts, primarily the Applications Programme Interface (API), the verification software and the Electronic Navigation Software. These components will be dealt with individually in this section. The cost of developing a STB that is proprietary is high and often leads to a high consumer price. In research commissioned by the Authority, the incumbent, claiming trade secrecy and confidentiality, did not provide estimated costs. The retail price is in the region of US$[43]250 for a basic STB.[44]

A strategy that can be followed by subscription broadcasting services is reducing the cost to the subscriber by subsidising STBs. The strategy can lead to an increase in the volumes of sales. However, there is an element of risk for subscription broadcasting services as a high take-up by subscribers would be required in order to make a higher return in the long run. International experience indicates that competition should be 'managed' so that subscription broadcasting services refrain from anti-competitive practices with regard to full STB subsidies.[45]

In terms of section 35 and 66A of the IBA Act, the Authority may determine technical standards for digital television broadcasting signal distribution via cable, satellite or terrestrial means. This is in keeping with section 2 of the IBA Act that requires that the Authority promote the most efficient use of the broadcasting services frequency bands and ensure that commercial and signal distribution licensees comply with internationally accepted standards.[46] However, while this may allow the Authority to determine standards for transmission, it may not be sufficient to allow the Authority to determine some basic interoperability requirements for set-top boxes. From a

43 The price is given USD as STBs are imported.

44 Id., p.134.

45 Ibid.

46 Further technical requirements, are section 29(2) of the IBA Act which requires the Authority to comply with the applicable standards and requirements of the International Telecommunication Union (ITU) and all national standards applicable to broadcasting, when managing and granting permission to use the broadcasting services frequency bands; section 46(1)(c) and (d) which requires that the Authority take into account the technical quality of the proposed service as well as the capability, expertise and experience of the applicant in considering any application for a commercial broadcasting licence; and section 29(5) which provides that the Authority is bound to honour any present and future commitments of the Republic of South Africa in terms of international agreements in respect of radio and telecommunications matters, with particular reference to the Convention of the ITU as well as the main and operating agreements of the International Telecommunication Satellite Organisation (INTELSAT).

competition perspective the need for openness and interoperability appear to be evident, but the critical question is how to implement them.

Mandating open standards may not be an appropriate approach in a market that is characterised by rapid technological change, as this approach requires that a regulator be put in the position of choosing a standard. There is a risk of course if the regulator makes the wrong choice. A related problem is that proprietary technologies tend to evolve more quickly than open standards. This places legislators and regulators in a dilemma as, on the one hand, a rejection of proprietary standards could reduce innovation and not be an appropriate response. But on the other hand proprietary standards do carry a high risk of market foreclosure. The Television Standards Directive adopted in 1995 for the regulation of digital television in Europe, allows proprietary conditional access systems to be embedded in STBs. However, it does attempt to protect the public interest by requiring that these systems be made available on "fair, reasonable and non-discriminatory terms" to third party broadcasters and manufacturers wishing to build consumer equipment. This allows legislators to strike a balance between encouraging innovation and investment by the industry, while at the same time protecting consumer interests and promoting fair competition[47].

Digital broadcasting requires the use of data embedded in the transmitted data stream to guide the operation of the digital STB. One aspect of this "guiding data" is known as Service Information (SI) and it allows a STB to tune to and decode whatever information is being carried in the signal. Well thought-out assignment and management of particular identifiers is needed in order to ensure that STBs are able to differentiate one service from another. It was against this background that the Southern African Digital Broadcasting Association (SADIBA) pointed out that it is important to have co-ordination and registration of these identifiers for multiple operators, and recommended that a body should be formed to co-ordinate and have management control of the SI registration between multiple multiplex operators[48].

Q.29. ***In your opinion, how can the interoperability of set-top boxes be facilitated in the public interest and what role should the Authority play?***

Q.30. ***Section 2 of the IBA Act requires that the Authority ensure fair competition between broadcasting licensees. Bearing this in mind how can the Authority ensure that embedded conditional access systems be made available on fair, reasonable and non-discriminatory terms to third party broadcasters?***

Q.31. ***Should the Authority leave the matter of the SI registration to self-regulation by the industry or is this a matter which because of the potential for anti-competitive practices needs to be regulated? If regulation is required is the Authority the appropriate institution to impose such regulation?***

47 de Cockborne, J, Clements, B. & Brown, A.W. 1999. "EU Policy on Multimedia", a paper presented on 14 July 1999, at the Montreux Symposium '99.

48 SADIBA. 2001. Recommendations on the management of Service Identifiers (SI) for Digital Terrestrial Television. Release 1, 28 February 2001

c) Applications Programme Interface

If a STB were to be compared to a computer, then the Applications Programme Interface (API) would for example be the Windows operating system that screens users from the complexity of the hardware. Essentially the API is the operating language that controls the operation of the STB and which applications (individual pieces of software that provide the consumer with services) need to interact with in order to deliver services. Examples of such software would be side channels, digital teletext or navigation software[49].

There are a number of ways in which the operator of the API could potentially restrict market entry:

- the procedure for getting applets checked and delivered to the STB could be restrictive and a source of delay;
- the API might be unable to support the desired service;
- the operator may refuse to provide access to the technical specifications required to interact with the API; and
- access may be provided but not on advantageous terms[50].

This type of potential abuse is only possible where the controller is active at multiple levels. In the absence of vertical integration there would be no commercial reasons for discouraging new entrants. This holds true not only for controllers of the API, but also Electronic Navigation Software and Verification Software.

Q.32. Is it possible for the Authority to address the anti-competition concerns raised by APIs. If yes, motivate your response. If not, how and by whom should these concerns then be addressed?

d) Verification Software and Compression Technologies

Verification software is more popularly know as Conditional Access (CA) systems. The primary purpose of a CA system is to ensure that there is an auditable means of ensuring that payment is received in return for the consumption of broadcasting programming. The technical system that enables this process to take place is called a CA system – access to certain programming is made conditional upon payment for the content received.

For new entrants the challenge will be whether to use the same CA as the incumbent or find an alternative CA. Table 4 below indicates how various countries dealt with CAs as a barrier to market entry.

49 Cowie, C. & Marsden, C.T. 1998. "Convergence, Competition and Regulation" in International Journal of Communications and Law and Policy. http://www.digital -law.net. published 3 August 1998. p.5.

50 Ibid.

Table 4: International Conditional Access Regulation Benchmark

COUNTRY	CONDITIONAL ACCESS REGULATION
Europe[51]	(1) European Convention classifies conditional access as a protected service (2) Developed regulations around conditional access due to an increase in illicit reception of pay TV services (3) Article 4 of the European Directive requirements 1. Access to systems to all broadcasters on a fair, reasonable and non-discriminatory basis, measures includes obligations regarding separate accounting and the publishing of tariffs. 2. Capability for cost-effective trans-control at cable head-ends, allowing the possibility for full control of access to be exercised by cable TV operators. 3. Licensing by holders of industrial property rights to conditional access systems and products must be granted to manufacturers of consumer equipment on fair, reasonably and non-discriminatory terms. Rights holders required to exclude conditions which prohibit, deter or discourage manufacturers from incorporating additional features in their products in order to allow common interfaces with other access systems or access to secondary systems. 4. Appropriate dispute resolution procedures.
South Korea[52]	DSR-100DN set-top box. (1) Interoperability of the set-top box (2) True open standard, system components must be provided by multiple vendors and be proven to function properly in the open standard platform (3) Benefits include lower receiver prices and reduced subscription fees from lower content distribution charges

Some operators and CA designers assert that CA systems are almost by definition not capable of being standardized except if a new open standard like Multimedia Home Platform (MHP) is used in the STB design. There is a great deal of intellectual property that is associated with CA systems. To disclose the design details of the CA system could compromise the commercial integrity of existing and future broadcasting operations, as well as that of CA system vendors. Consequently, the European Digital Video Broadcasting group (DVB) and the Advanced Television Systems Committee (ATSC) (standards bodies in Europe and USA respectively) have not mandated a CA standard for their digital broadcasting platforms. These standards bodies have instead established certain boundary requirements and promoted the development of standards that permit different CA systems to inter-operate on the same broadcasting platform, without inconvenience to the end-user. The flexibility offered by this open standards approach to CA ensures that multiple CA systems can be implemented on the same broadcasting platform in a fair, reasonable and non-discriminatory manner.[53]

The issues to be borne in mind when addressing the subject of CA and Subscriber Management Service (SMS) is that there is no need to link the two because a CA from one vendor can be

51 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003

52 ibid

53 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003, p.126.

implemented with SMS's from different vendors. The DVB recognized that CAs are proprietary and can be difficult to standardise. As a result the standards recommended by the DVB require that any CA should be implementable in any STB and that there should be flexible STB designs to encourage interoperability.[54]

With the introduction of new services on subscription platforms, the Authority may need to develop policy on the protection of standard conditional access. This may be necessary, in that it could potentially introduce uniformity of STB standards in South Africa, and would address issues of anti-competition[55]

Q.33. Should the Authority regard the limited supply of CA operational expertise combined with the high cost of CA and compression technologies as another potential barrier to market entry.

Q.34. What approach can be taken in South Africa that would lead to the acceptance of an open standard?

e) Electronic Navigation Software

Electronic Navigation Software also referred to as Electronic Programme Guide (EPG) or Electronic Scheduling Guide (ESG). This software can be compared to that used to navigate the Internet, for example the Internet Explorer or Netscape web browsers. This comparison also makes recent competition case law relating to alleged abuse of dominance in this area relevant. While the term EPG is commonly used when referring to navigation software, it is only one possible technology.

An EPG is an information service which can include visual images relating to the promotion, listing or selection of television programmes or services.[56] In practice, EPG's tend to be operated by service providers or digital bouquet operators. EPG's are the point of strategic control in a subscription television environment as they are the first service which the viewer encounters when a digital receiver is switched on. They are used to inform the viewer of programme/event schedules and they also are used to display and sort lists of available services on the particular delivery system or bouquet providers' spectrum allocation.

There are a number of levels an EPG service may take, ranging from a simple TV listing guide to a sophisticated electronic magazine allowing the viewing of programme previews and featuring linkages with conditional access and subscriber management systems. The display characteristics of an EPG service and its function in the receiver will be determined not only by

54 Id.,p.130.

55 It should be noted that a common interface has been defined that would allow a user to plug in a decryption module and thus be in a position to use any additional CA system to that embedded on the STB, which may impact on STB standards.

56 ITC Code of Conduct on Electronic Programme Guides, 1997

the information transmitted, but also by the receiver application software. An EPG is considered to have three elements;

1. The assembly and packaging of television schedule and programme details;
2. The transmitted signal, containing the EPG data, originated and transmitted by the EPG provider; and
3. The receiver application, acting upon the transmitted information and displaying this to the viewer.[57]

From a regulatory perspective the control of the EPG is important as it provides a constant opportunity to influence shares of the viewing audience. The potential for abuse is obvious as consumer selection of programming services may be influenced by the navigation software. The EPG can therefore be a potential barrier to entry for new entrants in that the dominant player or EPG controller can dictate which channels take prominence by dedicating the first few positions on the EPG to its own service.

Q.35. Should the EPG be regulated to take into consideration competition concerns?

Q.36. Should conflict between the EPG controller and third party broadcasters appearing within the bouquet be left to contractual negotiations?

Q.37. If regulation is proposed, please substantiate how the Authority has the jurisdiction to prescribe regulations on EPGs?

f) Availability of satellite transponder capacity

Whether the operator will use DTH satellite or DTT as a platform to deliver subscription services, satellite distribution is often used for national reception. One of the most costly ways of positioning by the incumbents would be to lease most of the available satellite capacity in the target market footprint. However, this will block out any aspiring entrants. In the event that this happens, there may be a scarcity problem for the distribution platform of new entrants. It is expected that new entrants will be able to negotiate favourable lease terms for the satellite capacity, if this were not possible transponder capacity could become one of the highest operating cost items.

Q.38. Can this be considered a high risk, or does the current availability of satellite transponder capacity and the prospect of new satellites becoming available lower this risk?

57 ibid

g) Subscriber Management Service

The incumbent subscription television operator, MultiChoice, has many years of experience in the Subscriber Management Service (SMS) business. This will give new entrants a challenge, but there are various SMS systems available in the world markets that new entrants could choose from.

One of the biggest challenges of SMS apart from the technology is the human resources to manage subscribers. The role of an SMS is not only to record churn, but to strive to reduce it to the lowest level possible. Customer relationship programs are needed to run an efficient SMS operation. The biggest challenge is where to find the people to run a SMS without poaching from the incumbent operators.

Q.39. Who should be responsible for subscriber management systems?

Q.40. Should subscriber management systems be regulated?

Q.41. What consumer protection issues are relevant when considering subscriber management systems?

4.4.2 Competition in South Africa

The current subscription broadcasting regulatory framework is being considered in an environment where some players have been operating for some time. For example the subscription television market has been in existence for 16 years terrestrially, through M-Net, and for seven years on satellite, through DStv, which is owned by MultiChoice, part of the same group as M-Net. The most pertinent questions regarding a new entrant's success in this market would, therefore, be the extent to which current operators have an unfair market advantage and whether there are significant barriers to their entry into the subscription broadcasting market.

In regulating competition in subscription broadcasting services, the Authority is tasked with ensuring that fair market conditions exist, such that all the participants are able to compete on an equal footing. The main purpose of regulating competition is ensuring effective and sustainable competition whilst protecting the interests of the consumer. This would hopefully lead to diversity and choice in programming and investment and growth in the industry. If a market is dominated by a player with market power, such a player could charge monopoly prices and therefore undermine consumer interests.

Internationally, in subscription broadcasting this is normally evidenced by:

- limited tiering and STB subsidies;
- high cost to the consumer resulting in lower penetration in lower income groups; and
- limited programme choices that are less likely to target minority interests.

In addressing competition in South Africa, the following aspects need to be considered, namely market power, control over the value chain, cost of programming rights, access to key rights and channels, and the ability to promote services on other broadcasting services.

a) Market Power of Incumbents

The current subscription television market is characterised by significant barriers to entry and expansion for smaller subscription television broadcasting services. These barriers include the embedded costs of distribution, the need for economies of scale and access to content and the extent to which the incumbent subscription broadcaster is dominant in key subscription television broadcasting areas.

b) Control over value chain

Most subscription television broadcasters regard control over the value chain as key to the success of their service. The value chain could be outlined as follows:

- Content;
- Bundling of content into channels;
- Packaging of content into multi-channel offerings;
- Delivery;
- Conditional Access;
- Consumer reception equipment; and
- Subscriber Management.

The importance of control over the value chain is evident in the South African market where one can examine the history of MultiChoice and M-Net in the early days of operation. Where control was evident from content creation, to packaging to distribution and ownership of the customer database. This control creates the ability to limit effective entry of competition, if a dominant player so wished. For a new entrant the challenge would be in creating its own database in order to protect its business.

c) Cost of Programming Rights

It is estimated that the cost of programming rights constitutes about 50% of total operating costs for a subscription television broadcasting service. Programme content, therefore represents the major challenge for new subscription television broadcasting services who need to secure three types of content:

- 'must have' premium content that will make a household invest between $200-$300 in a dish and set top box and initial subscription;
- a range of 'basic' content packaged to address different consumer interests to ensure ongoing spend of $25 to $45 per month; and
- increasingly, a range of interactive services and content to differentiate itself and offer added value services to consumers which both increases revenue and reduce churn.[58]

International experience shows that the facilitation of content competition is necessary to ensure viable platforms. Regulatory intervention could guarantee premium content access by regulating exclusivity, for example this approach was adopted by France. New entrants should also have the ability to secure premium content to key broadcast channels on fair and equal terms. This is also applicable to the ability to secure exclusive access to key content.[59]

d) Access to key rights and Channels

There is a limited supply of premium programming as it is confined to few genres owned by a few rights holders, and the cost of premium rights is high and rising. Dominant operators are better placed to secure this content because:

- they have already tied up many key rights; and
- they are increasingly integrated with content creation

The ability to invest in content is correlated to subscriber numbers, as a result incumbent operators benefit from a virtuous circle of investment, making it difficult for new or smaller service providers to outbid them for key rights.

International experience demonstrates that access to premium content across platforms (particularly for new entrants) is essential for their success[60]. Sky's dominance of sports is mitigated by an EU regulatory ruling which requires dominant operators to make content available to competitors. In France the Canal+ and TPS managed duopoly resulted in a partitioning of sports and movie rights through commercial/legal negotiations. In other markets failure to secure

58 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003, p.132

59 Ibid.

60 Id., p.136.

key content, for example in Brazil, has led to DirecTV's inability to compete with Sky LA who owns all of the lucrative sports rights.

e) Ability to promote services on other broadcasting services

It can be argued that if the new entrants cannot promote their services on a competing subscription broadcasting service or free-to-air broadcasting services on fair and equal terms this could hinder their potential for success. M-Net 's position is relatively strong due to its ability to cross subsidise investment in prime time free-to-air with revenues from subscription windows. M-Net has benefited profitably from this business model and can count the following among its revenue generators:

- subscription and advertising;
- limited competition for premium content; and
- limited need to subsidise STBs[61].

M-Net operates at a premium of 160% of advertising revenue over its audience because

- it has high-end audiences or high Living Standard Measures (LSMs); and
- it has a critical mass with high investment in popular prime-time programming.

M-Net leveraged its position in analogue by expanding into a portfolio of content channels on digital (DStv). It now has 11 channels which not only drive the penetration for the DStv package, but also generate additional revenues for M-Net.[62]

To build demand for a new platform, new entrants will have to be able to market effectively. This raises the question of whether the regulator needs to stipulate that any new platform has the right to promote it's services on its competitor and/ or on terrestrial free-to-air broadcasting services. In the United Kingdom, the Independent Television Commission (ITC) forced ITV Network Ltd to accept advertising from British Broadcasting Corporation (BBC) on the basis that it had no right to refuse despite initial resistance from the broadcaster[63].

When entering the market new entrants will also have to face the DStv platform which like M-Net has a number of strengths including its capacity, a lack of competition and economies of scale and scope. Strengths that may make self-promotion on other broadcasting services essential are that:

- the DTH platform provides MultiChoice with a high capacity to deliver multiple channels to its subscribers. This is in contrast to the analogue terrestrial channel offering which is

61 Id., p.60

62 Id.,pp. 61-62.

63 Id., p.138.

limited by the scarcity of frequency. DStv is located on a "hotbird" PAS7 and PAS10 satellite where most viewer antennas are pointed;

- DStv is the only subscription platform that offers a bouquet of television and audio channels in South Africa and therefore is a dominant player in the market. When it was launched, MultiChoice took advantage of the regulatory vacuum that existed in South Africa for satellite broadcasting to maximise their position in the subscription broadcasting market; and

- DStv has economies of scale and scope, which are facilitated by its digital satellite capacity. Enabling DStv to offer multiple services, for example video, data and audio, on a single platform. DStv's reach outside South Africa has also enabled it to gain a crucial market share in other African countries and in doing so enabled it to spread its costs over a wider subscriber base.[64]

Another reason to consider the argument in favour of ensuring the ability to promote services on other broadcasting services is the M-Net free-to-air 'Open Window'. In its first licence, M-Net was initially given the free-to-air "open window"[65] until it obtained 150 000 subscribers or 1998 whichever came first. This licence condition was later changed, however it does provide an indicator that the original intention of the free-to-air "Open Window" was to encourage the sustainability of the subscription broadcaster by providing it with an opportunity to promote its broadcasting services to free-to-air audiences. This raises the question of how new entrants into the subscription broadcasting market will be able to promote their services to free-to-air audiences as M-Net has done, especially as it is not technically feasible to do so if they are operating in a digital environment where viewers would require appropriate receiving equipment in order to view the programming services offered. The only reason that M-Net has been able to provide this service is because it is terrestrial and operates in the same analogue environment as the free-to-air broadcasters.

Another reason why it would not be appropriate to consider free-to-air windows for subscription broadcasters is the definition of a subscription broadcaster. A subscription broadcaster provides a broadcasting service to sections of the public in return for the payment of a fee. It is clear that there is a principle involved here, namely that subscription broadcasting services are not free-to-air commercial broadcasting services and as such should not be providing any broadcasting services to free-to-air audiences. In a departure from this principle, M-Net, which is currently licensed by the Authority as a analogue terrestrial subscription broadcaster offers some programmes free-to-air through M-Net's Open Window slot between 17h00 and 19h00.

64 Id.,p.67.

65 Mnet License Conditions

In the absence of free-to-air windows for self-promotional purposes, new entrants may require the ability to promote their services on a competitor's platform or free-to-air broadcasting services on fair and equal terms otherwise their potential for success may be hindered. It has been argued in the past that subscription broadcasters do have access to other media, such as the print media and radio to advertise their services to the public and thus the refusal by other broadcasting services to carry promotional advertising may not be a major obstacle.

A subscription broadcasting service may allege that a refusal by another broadcasting service to carry its promotional advertising is anti-competitive. The Authority is, however, aware of the decision reached in *Times Media Ltd v South African Broadcasting Corporation 1990 (4) SA 604 (W)*.[66]

Q.42. Is promotion on other broadcasting services necessary for new entrants to expose themselves to the market? If yes, what could the Authority do to ensure that new entrants have the ability to promote on other broadcasting services on fair and equal terms?

Q.43. What other competition issues may exist beside those identified above and how should the Authority deal with them?

Q.44. How should a policy framework be developed in order to encourage fair competition among broadcasters?

Q.45. Should the Authority rely upon competition law to deal with technical barriers and essential facilities?

Q.46. Taking into account frequency limitations and the legislative distinction between free-to-air and subscription broadcasting services, the Authority has formed a preliminary view that it may not be possible to create 'free-to-air' "windows" in the new subscription broadcasting licensing framework. Please comment on this view and should you support the creation of new free-to-air terrestrial 'Open windows', please substantiate your proposals taking into account the Terrestrial Broadcast Frequency Plan?

Q.47 Is the decision reached in Times Media Ltd v South African Broadcasting Corporation 1990 (4) SA 604 (W) a barrier to dealing with the promotion by new subscription licensees or their services on their competitors platforms or channels?

66 Where it was held that the *boni mores* of the market place did not require that the respondent (SABC) broadcast an advertisement promoting the interests of its 'competitor'

4.5 SOUTH AFRICAN CONTENT

The regulation of content and in particular, South African content is very important in the subscription broadcasting services markets. It is imperative not only to promote South African content but also to encourage the production of export quality feature films and television productions. The international nature of subscription services means that they would not only provide diversity of types of programme content, but also the widest audience would be available to South African programming services.

An international comparative examination of local content requirements in subscription television indicates that various mechanisms are employed by various countries to reach local content objectives (see Table 5 below).

Table 5: International Local Content Benchmark

COUNTRY	LOCAL CONTENT MEASURES/ QUOTAS
1. Australia[67]	(1) 10 % Expenditure (Acquisition, producing, preproduction costs, investment) versus Broadcast Quota (2) 55% Transmission 6am to midnight, excludes programming funded by the television production fund.
2. Canada[68]	(1) Varies per licence conditions (2) 60 % broadcast time, emphasis on Children and documentary programmes
3. United Kingdom[69]	Independent (local) production 10% of broadcast time across the board.
4. European Union[70]	Media Plus Development Program objectives (1) Improve competitiveness (2) Promote linguistic and Cultural Diversity (3) Enhance and develop the audio visual industry
5. France[71]	Transmission time and programme commissioning process (TV production and Independent production) (1) European works 60% (2) "French as principal language of production" 40% (3) 15 to 20 % net annual turnover invested in commissioning new "original French language" programs (4) Point allocation system for International co-productions and European works

67 Australian Broadcasting Authority (ABA) : Review of Australian Content on Subscription Television, Discussion Paper., www.afc.gov.au

68 www.crtc.gc.ca

69 Australian Broadcasting Authority (ABA) : Review of Australian Content on Subscription Television, Discussion Paper. Taken from the Department of Trade and Industry, Communications White Paper "A New Future for Communications", December 2000, p.37.

70 www.europa.eu.int

71 www.mediaawareness.ca,
www.broadcastingcable.com,
www.uspa.fr

In most countries where the quota is high, there is a lot of money invested by the government or funding agencies in the local film industry and this is combined with incentives for the broadcaster who goes the extra mile to commission local production. A case in point is the Canadian Production Fund.

In the Position Paper on South African Content on Television and Radio, 2002, the Authority set the South African content quotas for subscription television services. Although the content quotas remain the same, the Authority has published proposed amendments on 5 March 2004 in order to clarify the measurement period as being a weekly average measured over the period of a year.[72] The South African content requirements for subscription broadcasting are currently being implemented as:

- a minimum weekly average of 8% of its programming measured over the period of a year or some greater proportion as may be determined by the Authority consists of South African content with such categories as the Authority may determine from time to time;
- where a portion of the broadcast is un-encoded, then for the duration of the un-encoded period a minimum weekly average of 35% measured over the period of a year consists of South African content, within such categories as determined by the Authority; and
- in complying with its obligations for the un-encoded period 20% of drama programming must consist of South African drama and 15% of other programming must consist of South African programming.

The Authority may, in place of the obligations for the encoded period of 8% South African content, direct that a licensee spend a specified sum of money as may be determined by the Authority on programming which has South African television content.

No distinction is made between free-to-air commercial sound broadcasting services and subscription sound broadcasting services in the South African Music Content Regulations, 2002. The Authority has proposed some minor technical amendments to the regulations, but these proposed amendments do not impact on the South African music quota.[73] The regulations provide that where sound broadcasting services devote 15% or more of their airtime schedule to the broadcasting of music they are required to comply with the South African music quota. Commercial sound broadcasting licensees are therefore required to broadcast a minimum of 25% South African music in the performance period.

The fact that the subscription television aspects of the South African Television Content Regulations, 2002, were mainly aimed at dealing with incumbent analogue terrestrial subscription broadcasting service and similarly that the South African Music Content Regulations, 2002, do

72 Government Notice 354 of 2004, Government Gazette Vol. 465, No. 26128, Pretoria, 5 March 2004

73 Government Notice 353 of 2004, Government Gazette Vol. 465, No. 26127, Pretoria, 5 March 2004

not specifically deal with subscription sound broadcasting services, might require that further amendments be made to the regulations to deal with new entrants to the subscription broadcasting market in South Africa. This should be seen against the background that the Triple Inquiry Report proposed that :

- subscription broadcasting services should in general be more lightly regulated than terrestrial free-to-air stations;
- terrestrial subscription broadcasting services should have more South African content requirements than non-terrestrial subscription broadcasting services; and
- a distinction be drawn between subscription broadcasting services using terrestrial and non-terrestrial services which are broadcast via cable or satellite.[74]

In particular it was proposed in the Triple Inquiry Report that, with regards to non-terrestrial subscription broadcasting services, South African content be set in the form of an airtime or a financial obligation. Furthermore, that subscription broadcasting services should make a contribution to national development along with other broadcasting services. However, the form of this requirement needs to reflect the specific nature of their service. For example a movie channel could have a requirement to produce and air South African feature films.[75]

The White Paper on Broadcasting Policy envisaged subscription broadcasters as playing a role in developing the production of local content. This could be done through the payment of license fees and contribution to production funds, similar to the Canadian Production Fund and New Zealand on air.[76]

Q.48. ***Given the fact the above quotas were primarily set for an analogue terrestrial subscription television service and did not consider digital subscription sound broadcasting services, do you think that the regulations should be amended? If the answer is Yes, how should they be amended?***

Q.49. ***In addition to quotas, what other regulations or licence conditions should the Authority consider in order to promote SA content on subscription broadcasting services?***

Q.50. ***Should a subscription broadcasting service who packages content be required to have a number of South African-originated channels on their bouquet? In other words, in a digital subscription broadcasting environment should local content be measured by the number of locally-originated channels rather than by percentage of air-time?***

74 Independent Broadcasting Authority. 1995. Triple Inquiry Report. Johannesburg: IBA.p.79. (Report on the protection and viability of public broadcasting services; cross-media control of broadcasting services; and local television content and South African music)

75 Ibid.

76 Department of Communications. 1998. White Paper on Broadcasting Policy. Pretoria: Department of Communications

4.5.1 PAY OR PLAY

In the Triple Inquiry Report the Authority also accepted the "pay or play" principle for subscription broadcasting services. This allows broadcasters to contribute financially where an in-kind contribution is not practical or financially feasible. The principle facilitates the attainment of a number of public interest goals including, providing diversity and choice of programming for subscribers, encourages contribution to the development of quality local content and independent production, facilitating a fair competitive environment to contribute to a strong and stable broadcasting industry.[77]

Q.51. If subscription broadcasters are allowed to pay instead of play South African content, by who and how should the levy be collected?

4.5.2 EPG AND LOCAL CONTENT

Electronic Programme Guides (EPG) is an information service that can include visual images relating to the promotion, listing or selection of television programmes or services. There are a number of levels an EPG service may take, ranging from a simple TV listing guide to a sophisticated electronic magazine allowing the viewing of programme previews and featuring linkages with conditional access and subscriber management systems. EPG helps the viewers by providing them with information about the television serves and programmes available to their receiver and also helps them select the service or programme of their choice. EPG listing/ packaging can be used to promote South African content, by for example, requiring that such content be displayed as a first item on the programme menus for South African subscribers.

Q.52. Is there a need to regulate EPG for the purposes of SA content or should this be left to the market to dictate? If there is a need to regulate how should this be done?

4.6 MUST CARRY PROGRAMMING OBLIGATION

Most countries have must-carry obligations for broadcasters by requiring that subscription broadcasters carry free-to-air broadcasters on their satellite bouquet and in some cases that cable operators reserve a channel for free-to-air television broadcasters. These must carry obligations, based upon international benchmarking, appear to be applicable only to subscription television broadcasting services and do not apply to subscription sound broadcasting services.

77 Independent Broadcasting Authority. 1995. Triple Inquiry Report. Johannesburg: IBA (Report on the protection and viability of public broadcasting services; cross-media control of broadcasting services; and local television content and South African music)

Table 6: International Local Must Carry Regulations Benchmark

COUNTRY	MUST CARRY OBLIGATIONS
Belguim[78]	(1) Cable television operators required to carry programmes of the public broadcaster, private free to air television stations, local and community television. (2) Also required to carry international broadcasters designated by the government and those in which the public broadcaster is a participant.
Canada[79]	(1) Cable television operators and wireless system operators required to carry programmes of the public broadcaster, local and regional stations and educational programmes (2) Satellite operators must carry programmes of the public broadcaster and of at least one affiliate of each national television networks licensed on a national basis. (3) All operators required to carry all Canadian speciality and Pay TV services appropriate for their markets.
Ireland[80]	Cable television operators required to carry programmes of the national broadcaster and TV3 (private broadcaster with national coverage).
Korea[81]	(1) Cable operators, relay operators and satellite broadcasters required to simultaneously carry programmes of terrestrial broadcasters designated by a Presidential Decree. (2) Cable operators and satellite broadcasters - three or more channels for public and missionary work.

The advantage of must-carry rules is that they extend the reach of the public broadcaster and other free-to-air broadcasting services to areas where there may be no coverage, and therefore, serve the public interest by ensuring that viewers who use cable or satellites as a means of access to broadcasting services have access to, in particular, public service programming. An additional benefit is stimulating the industry's growth and balancing competition in broadcasting services by offering, on one hand choice to subscribers who through scrambling technology and associated remotes may be locked into their subscription service, and on the other hand access to a lucrative market segment for terrestrial free-to-air broadcasters.

In South Africa a must-carry could potentially be applied to SABC and e.tv, requiring that these free-to-air television broadcasting services must be carried by subscription television broadcasting services. Potentially, failure to carry-must carry channels could result in financial penalties.

78 IBA, Position Paper on "A definition of advertising, the regulation of infomercials and the regulation of programme sponsorship", March 1999

79 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003

80 Ibid.

81 Ibid.

Q.53. Should all subscription broadcasters have a must-carry obligation?

Q.54. If subscription television broadcasters have a must carry obligation should it apply to all free-to-air television broadcasting services or only to the public television broadcasting services? Who should bear the cost of carrying the service?

Q.55. Should must-carry channels be carried unencoded and what would the cost implications of this be for subscription broadcasting services?

Q.56. If there are must-carry obligations, what penalties should be applied to ensure compliance?

4.7 PROGRAMME PACKAGING/ TIERING

Subscription broadcasting is a costly business requiring a good strategy for attracting subscribers. As it is generally accepted that audiences follow programmes, it is more so if they have to pay to watch a programme. Access to premium programming and effective programme tiering appear to be the main drivers for subscription broadcasting in this regard.

4.7.1 Premium Programming

The high value *"must have"* content includes so-called 'blockbuster' movies and sport. Programming that will make consumers proactive in buying a satellite dish and a STB is critical to the success of a subscription broadcasting service. Exclusive access to premium programming to restrict effective competition is an advantage. Most of the premium programmes are secured by those broadcasters that are first to market. However, new entrants could still find programmes to differentiate their product from others in the market.

4.7.2 Effective Tiering

There is merit in tiering the bouquet to allow subscribers to choose what they want to watch. The following may be elements of an effective tiering strategy:

- packaging of channels to give perceived "low price" entry point;
- bundling channels to encourage buying into higher value packages; and
- cross-promoting premium channels to ensure buy-through.

The Office of Communications (OFCOM), in the United Kingdom, defines "bundling" as a means of linking one service or product to the supply of others. It may however, also include instances where the supply of services are linked through the use of discounts. Bundling can also take the form of 'full line forcing'. Full line forcing is a form of bundling where in order to obtain an

individual product of service, the full range of products or services must be purchased even though there might be demand for only one product or service in the bundle.[82]

Bundling can have both a negative and a positive impact on the consumers. Where the bundling service results in a product that is supplied at a discount, the consumers will benefit since they can enjoy the subscription service at lower rates. On the other hand where bundling takes the form of "full line forcing", this impacts negatively on the consumers in that they are forced to pay for channels that they do not necessarily watch. Bundling can also have anti-competitive behaviour where:

- a dominant operator ties the sale of a service or product where it has a market power to a product or service to one where it faces competition; or
- it is an effective deterrent to the entry of a free-standing product or service which competes with products or services within the bundle.[83]

In order to ascertain whether a particular bundled offering is anti-competitive it would, therefore, be necessary to consider the economic benefits and the technical/economic feasibility of unbundling. The benefits of unbundling need to be assessed against the benefits that may accrue in the longer term from dynamic efficiency due to the introduction of competition in this arena.

Q.57. Should anti-competitive bundling be regulated? If yes, how should this be done?

4.7.3 Pay-per-view Services

Pay-per-view services, as provided by subscription broadcasting services, are where programmes, particularly premium movies and events, usually premium sports, are provided for the payment of a once-off fee on demand. These kinds of services are normally open to existing subscribers of a particular bouquet. This type of service should not be confused with video-on-demand which does not consist of programming and currently does not fall under the definition of broadcasting and therefore does not form part of the proposed subscription broadcasting licensing regime.

Q.58. Should pay-per-view services require authorisation in the same way as channels for licensed subscription broadcasters, or should they be captured as an integral part of the subscription broadcasting licence when it is issued?

82 Guidelines on ITC's Bundling Remedies, issued 26 June 1998, http://www.ofcom.org.uk/codes

83 Ibid.

4.8 EMPOWERMENT

One of the primary objectives of the IBA Act and the Broadcasting Act, as outlined in Section 2(f) of the IBA Act, and section 2(c) of the Broadcasting Act, is to encourage ownership and control of broadcasting services by persons from historically disadvantaged groups. Empowerment considerations would include, amongst others;

- the extent to which the financial interests in the application reflects the inclusion of the historically disadvantaged;
- the nature and extent of decision-making by the historically disadvantaged in the business venture; and,
- the empowering of historically disadvantaged staff through training and development programmes as well as the extent to which such staff are included in senior managerial, editorial, technical, administrative and decision-making positions.

The Inquiry into the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences has indicated shortcomings in employing licence conditions and promises of performance as a means of ensuring empowerment. Recommendations made in the Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences suggested that the Authority should be guided by a Code of Practice that would result from section 9 of the Broad-Based Black Economic Empowerment Act[84].

Q.59. How can the Authority's empowerment objectives be realised in Subscription Broadcasting? What mechanisms can be used?

4.9 EMPLOYMENT EQUITY AND HUMAN RESOURCES DEVELOPMENT

In accordance to paragraphs (f), (gA) and (g) of section 2 of the IBA Act, and paragraphs (c) and (f) of section 2 of the Broadcasting Act, the Authority must ensure the following in its regulatory activities

- encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
- encourage equal opportunity employment practices by all licensees;
- promote the empowerment and advancement of women in the broadcasting services; and
- encourage the development of human resources and training, and capacity building within the broadcasting sector especially amongst historically disadvantaged groups

84 ICASA's Position Paper on "The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences", January 2004, p. 27.

The Employment Equity Act and the Skills Development Act will, for the most part, guide employment equity and human resources development directives in the subscription broadcasting industry.

4.9.1 The Employment Equity Act, Act No. 55 Of 1998

The Employment Equity Act 55 of 1998, results from a recognition that the disparities that currently exist in employment, occupation and income within the national labour market are a legacy of apartheid and other discriminatory laws and practices, and that these are so pervasive that they cannot be addressed simply by repealing discriminatory laws. The primary objects of the Employment Equity Act are to-

- promote the constitutional right and of equality and exercise of democracy:
- eliminate unfair discrimination in employment;
- ensure the implementation of employment equity to redress the effects of discrimination;
- achieve a diverse workforce broadly representative; and
- promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of International Labour organization.

4.9.2 Skills Development Act, Act No. 97 of 1998

Skills Development Act, Act No. 97 of 1998 was developed to provide an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce. This Act provides for the establishment of the different Sector Education Training Authorities (SETA). SETA's main role is to ensure that skills development is organised and made coherent throughout the sector or sub-sectors. It ensures that skills development meets nationally acceptable standards and will guarantee that any education and training taking place within the sector meets certain minimum acceptable criteria.[85]

The SETA relevant to the development of skills in broadcasting is Media Advertising, Publishing, Printing and Packaging (MAPPP). MAPPP is responsible for the facilitation of education and training in media, advertising, publishing, printing and packaging sector. In order to belong to the MAPPP SETA, the employer must contribute 1% of its payroll for the training and education of their employees. This levy is given to the Receiver of Revenue for Skills Development. Portions of this 1% go to the National Skills Act (NSA) and National Skills Fund (NSF). Broadcasters are expected to contribute this portion of their payroll for the training and development of human resources skills within the broadcasting sector.

85 http://www.mappp-seta.co.za

Q.60. How should the Authority's human resources and employment equity objectives be approached in Subscription Broadcasting. Over and above those objectives mentioned in the Act, what other mechanisms can be used?

4.10 CODE OF CONDUCT FOR BROADCASTERS

The revised Code of Conduct for broadcasters came into effect on 7 March 2003. This Code is underpinned by two elements. Firstly, there is a concept of adequate viewer and listener information and secondly, the notion of sensitivity in scheduling especially around the watershed period. Rather than prohibiting the broadcasting of explicit material, the Authority requires the broadcasters to exercise due care in scheduling decision, especially in relation to children. In terms of subscription services, the Code puts the following restriction on watershed period:

"Where a programme service is only available to viewers on subscription and offers a parental control mechanism, its availability to children may be more restricted and the watershed period may begin at 20h00."

The new code applies to all broadcasters regardless of their delivery platform. All licensees are required to ensure that all broadcasts comply with this Code and should satisfy the Authority that they have adequate procedures to fulfil this requirement. All licensees should further ensure that relevant employees and programme-makers, including those from whom they commission programmes, understand the Code's contents and significance. Furthermore, all licensees should also have in place procedures for ensuring that programme-makers can seek guidance on the Code within the licensee's organisation at a senior level.[86]

Q.61. Although the Code came into effect in 2003, it is the product of consultations that took place in 1999. Is there a need to review the code to take into consideration non-terrestrial subscription broadcasting services? If no, why? If yes, please motivate?

Q.62. In some other jurisdictions subscription broadcasters have their own code of conduct, as subscription broadcasters who package channels do not have editorial control over channels on their bouquet. Should this approach be considered in South Africa? If yes, what should be included in such a code of conduct?

86 Code of Conduct , March 1999

4.11. ADVERTISING LIMITATIONS

Section 30(6) of the Broadcasting Act, states that – "Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships. In no case may advertising or sponsorships, or a combination thereof, be the largest source of revenue."

The general principle for the establishment of advertising limits is to strike a balance between the financial interests of the broadcaster and advertisers on the one hand, and interests of the viewers on the other. In the Position Paper for the Introduction of the First Free-To-Air Private Television Service in South Africa the Authority took the position that protecting and growing free-to-air terrestrial broadcasting services beyond the introduction of a single commercial entrant requires the restriction of advertising on subscription broadcasting services. This position was based on the view that payment of subscriptions provides the primary revenue stream for subscription broadcasting services and therefore subscription broadcasters should not also have unrestricted access to advertising revenue. For this reason the Authority restricted advertising on the terrestrial subscription television broadcasting licensee. M-Net is permitted 8 minutes per hour in open time with a maximum of 12 minutes in any hour, this is in line with free-to-air television broadcasting advertising limits, and 6 minutes in encoded time with a maximum of 12 minutes in any hour.[87]

With regard to the scheduling of advertisements, this area is currently not regulated, even though the Authority has jurisdiction over the scheduling of advertisements. However, the Authority does set specific regulations on the scheduling of infomercials. These are:

- infomercials must not be scheduled during prime time or during children's programmes;
- broadcasters must clearly label infomercials. The viewing audience must be able to distinguish between infomercials and normal programming;
- each channel is restricted to a maximum of two hours of infomercials during performance period in any one day; and
- the viewing audience has a real choice, and accordingly, that infomercials are not carried on all free-to-air broadcasters at the same time.[88]

The Authority commissioned research that conducted a benchmarking exercise to determine what other jurisdictions have done with regards to advertising limitations for subscription broadcasting. Most countries used in the benchmarking exercise limit the amount of advertising that subscription broadcasters are allowed to carry as it is argued that the major portion of revenue of this type of broadcasting should come from subscription fees paid by their

87 Independent Broadcasting Authority. 1997. Position Paper on the Introduction of the First Free-to-Air Private Television Service in South Africa. Johannesburg: IBA.

88 IBA, Position Paper on "A definition of advertising, the regulation of infomercials and the regulation of programmed sponsorship", March 1999

subscribers. In addition to this, some countries have local content requirements on advertising content.

Table 7: International Advertising Limits Benchmark

COUNTRY	ADVERTISING LIMITS
Australia[89]	Self Regulated, requirements for Australian Content (1) At least 80% of advertising time broadcast each year by commercial television licensees 6am to midnight (2) Full Australian crew participation requirement to flight imported adverts. (3) 20% limit on foreign commercial footage, subject to availability of such footage in Australia production being arranged by an Australian company.
European Union[90]	Television without frontiers directive, advertisements and telescoping limits on transmission time (1) Advertisements and Telescoping spots 20% broadcasts (2) Reserved airtime 15% (3) Restriction on scheduling minimising interruption of programmes
United Kingdom[91]	(1) Clear distinction between advertisements and editorial content (2) The amount of time permitted for Advertisements and scheduling (3) Scheduling of Advertisements and telescoping
Canada[92]	(1) Varies per service (2) Foreign cable companies 75 % of local availability
Korea[93]	(1) The government broadcasting agency (Kobaco) has monopoly over broadcasting airtime slots. (2) Korea Broadcasting Advertising Act (amount of advertisements, scheduling and programming of advertisements) (3) 10 minutes per hour - terrestrial television (4) 10 minutes off-peak and 12 minutes peak - cable and satellite TV

Q.63. Are the current subscription advertising limits meeting the objective of the Authority to protect and grow free-to-air terrestrial broadcasting services? If not, what advertising limits would be appropriate for subscription broadcasting in general, Please substantiate your answer.

89 IBA, Position Paper on "A definition of advertising, the regulation of infomercials and the regulation of programme sponsorship", March 1999

90 EU Directive 97/36, Article 11(5),

91 ITC rules on the amount and scheduling of advertising

92 Subscription Television Market Analysis Final Report, prepared for ICASA by Z-Coms, 31 October 2003, p 101.

93 www.uspa.fr

4.12. LICENSING TO STIMULATE THE MARKET

The White Paper on Broadcasting Policy looks at subscription broadcasting (cable and other Multi-Channel Distribution Services) as a means of expanding the distribution infrastructure and as a platform for growth of additional television services in the future. It also acknowledges the fact that its success depends on the ability to provide new services to both the domestic and foreign markets.[94]

In considering the introduction of a subscription broadcasting licensing regime the Authority may have to look at introducing competition into the market in way that would stimulate growth in the market and sustain new entrants.

Q.64. In this regard, what aspects could be considered by the Authority to stimulate growth?

Q.65. What licensing regime should be considered, for example, in balancing the objectives of encouraging programming diversity with developing internationally competitive subscription broadcasters?

Q.66. Taking into account the questions on licensing raised above (Q64 and-Q65), should licence conditions and rules apply across the bouquet or can they also be focused on specific channels?

94 Department of Communications. 1998. White Paper on Broadcasting Policy. Pretoria: Department of Communications

SECTION D

5. CONCLUSION

The potential introduction of new entrants into the subscription broadcasting market at a national, regional or local level on different platforms (DTT, cable, MMDS and satellite), will dramatically change the way the market is structured, introduce competition, address niche market needs and provide consumers with choice and diversity in programming. From a practical implementation perspective, the Authority is of the view that the anticipated outcomes of this inquiry would be the following:

1 a holistic policy framework within which a licensing regime for all subscription broadcasting services will be set;[95]
2 regulations governing the procedure and the appropriate conditions for the authorisation of channels;
3 recommendations on whether sections 49 and 50 should be applicable to subscription broadcasting services carrying more than one channel to be submitted to the Minister for tabling in the National Assembly;
4 proposed amendments to the regulations governing administration fees for commercial television broadcasting licensees and commercial sound broadcasting licensees to accommodate subscription broadcasting services offered on different platforms;
5 potentially amendments to the ICASA South African Television Content Regulations, the ICASA South African Music Content Regulations 2002 or the Code of Conduct for broadcasters to accommodate terrestrial and non-terrestrial subscription broadcasting services; and
6 potentially recommendations to the Minister to amend legislation to meet the requirements of providing subscription broadcasting services in a digital environment if the Council deems it necessary.

It is important to note from an administrative point of view that any amendment to existing regulations or any newly proposed regulations would result in the publication of draft regulations for public comment. Only after a period of public comment and the consideration of that comment would the Authority approve the new regulations or amendments to existing regulations as the case may be.

Q.67. Is this an exhaustive list of outcomes or are there other outcomes that the Authority needs to consider in this inquiry?

95 Such a policy framework would replace the existing general requirements for terrestrial subscription broadcasting services (analogue), as set out in the Position Paper for the Introduction of the First Free-To-Air Private Television Service in South Africa, with a holistic policy framework for terrestrial and non-terrestrial subscription broadcasting services.

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