

**REPRESENTATIONS BY M-NET AND
MULTICHOICE ON ICASA'S INQUIRY
INTO THE STATE OF COMPETITION IN
THE INFORMATION AND
COMMUNICATIONS TECHNOLOGY
SECTOR**

20 JUNE 2014

Introduction

- 1 On 20 March 2014 ICASA gave notice of its intention to conduct an Inquiry in terms of s4B of the ICASA Act into the State of Competition in the Information and Communications Technology Sector ("Inquiry")¹ and invited interested parties to make written representations in relation to this Inquiry.
- 2 While we appreciate that the Electronic Communications Act requires the Authority to promote competition within the ICT sector, the Authority has initiated a public inquiry into a sector which contributes nearly 10% to the country's GDP with a four page document ("the Notice") which is not supported by single piece of evidence or analysis.
- 3 M-Net and MultiChoice are of the view that –
 - 3.1 the current process has commenced with a level of inquiry which is so superficial, that it will compromise any findings in this process ;
 - 3.2 the failure to present any evidence or analysis to support the allegations set out in the Notice will prove to be fatal to the entire process and has already given rise to factual inaccuracies in the Notice ;
 - 3.3 the Authority is inquiring into matters of policy which go beyond its legislative mandate ; and
 - 3.4 the process being proposed will consume time and resources, but will not yield a meaningful result.
- 4 In these representations we will elaborate on these views.

¹ Notice 229 of 2014, Government Gazette No. 37456

Level of inquiry

- 5 Interested parties are being asked to make representations on a four page document. The scope of the Inquiry, set out in paragraphs 3.1 to 3.5 of the Notice, is extremely wide and open-ended.
- 6 The Notice can best be described as anecdotal – it contains a series of general thoughts, unsubstantiated allegations and disjointed questions, none of which are supported by evidence.
- 7 As a consequence, the written representations are likely to be equally wide-ranging, open-ended and disjointed. Superficial and generalised statements and allegations are likely to be made without any factual justification for and rigorous analysis backing those statements or allegations.
- 8 As a result of the superficial manner in which this process has commenced and the manner in which ICASA intends to conduct it, any "findings" are likely to be flawed, and it is difficult to understand what the Authority hopes to achieve in this Inquiry.

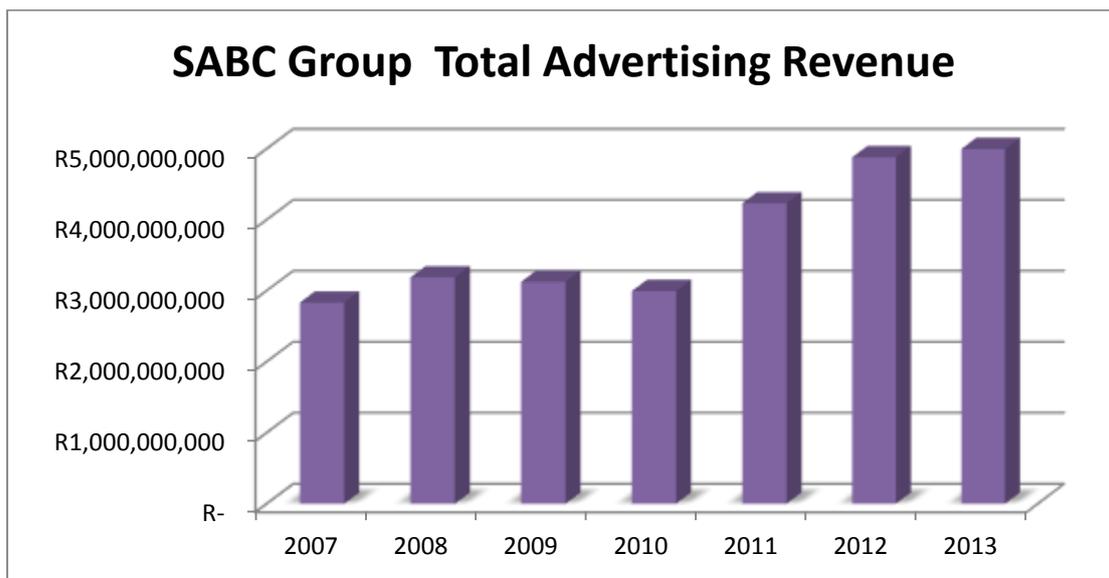
Failure to include evidence or analysis and inaccuracies

- 9 Underlying our concerns regarding the superficial manner in which this Inquiry has been initiated, is the complete absence of any research, data, evidence or analysis to support the allegations contained in the Notice.
- 10 As a result, the Notice contains inaccuracies which could have been avoided with a proper evidence-based approach. For example, the paragraph headed the "Broadcasting market" contains the following statements:
 - 10.1 "Consumers locked in MultiChoice contracts are confronted by escalating costs with no relief in sight". MultiChoice provides access to its DStv service on a pre-paid basis and it is the subscriber who elects whether he or she wants to pre-pay for a month, or for example, a year. Subscribers are free to terminate this agreement at any time. If a subscriber does not want to access the DStv service beyond that elected period, all the subscriber has to do is to refrain from paying the

requisite subscription fee for any further period. To suggest that consumers are “locked” into contracts is patently incorrect.

10.2 "... allegations have been made of unfair competition between subscription TV and free-to-air TV with regard to access to adspend revenues". Even a cursory glance at the available data on this issue would have revealed that free-to-air ad revenue has been growing for the past 10 years. The Authority is in possession of the SABC's Annual Reports for 2007-2013 and these show a continued increase in total advertising revenue with a slight deviation in 2009 and 2010, which their own Annual Reports attribute to the economic decline and internal management issues in the SABC (See Figure 2 below).

Figure 2 – SABC ad revenue growth over 5 years.



Inquiry into policy matters

- 11 ICASA is a creature of statute. It may only act in accordance with the provisions of the relevant empowering statutes, namely, in this instance, the EC Act, the Broadcasting Act and the ICASA Act.
- 12 The Minister/Department of Communications' role is to determine overall policy for the ICT sector. Parliament's role is to pass legislation to govern the sector. ICASA's role is to act in terms of that legislation and to regulate the ICT sector.

- 13 One of the difficulties with ICASA's Notice is that it raises policy issues outside of the provisions of the current empowering statutes. For example, some of the issues raised in the paragraphs dealing with "Convergence and the Internet" and "Innovation, neutrality and disruptive technologies" are issues which can only be addressed through changes to policy and significant amendments to the statutes governing the ICT sector.
- 14 ICASA, in its Notice, in fact concedes this when it states that "many of these issues are policy matters, and ... could be addressed in the ICT Policy Green Paper consultation process".
- 15 ICASA does not have jurisdiction to make any determinations on policy matters and any discussion of these issues would be purely academic. The relevant ministries of Communications and Telecommunications are responsible for matters of policy in the ICT sector.

Process will not yield a meaningful result

- 16 ICASA intends to devote 6 to 8 months to a general inquiry process which will culminate in a final position paper some time in 2015.
- 17 By necessity, any inquiry into competition matters should be evidence based and involve a rigorous assessment of the facts. For the reasons set out in this submission, we are concerned that fundamental flaws in the way in which this Inquiry has been initiated and is to be conducted will only give rise to a superficial and flawed Position Paper. Furthermore, we fail to see the purpose of such a Paper, since it would not ultimately address or regulate any competition concerns in this sector. Proceeding by way of a general inquiry will thus not yield any meaningful or useful end results and we would encourage the Authority to reconsider its decision to proceed in this manner.
- 18 If the Authority wishes to conduct a process which will yield meaningful results, it should do so in terms of the specific powers set out in the empowering legislation.

19 By virtue of the recent amendments to s4B of the ICASA Act and to s67 of the EC Act, which amendments have come into force, ICASA's jurisdiction over competition matters is confined to conducting inquiries in terms of s67 of the EC Act – i.e. to dealing with competition matters in the ICT sector on an *ex ante* basis only. More specifically, s4B(8)(b) now states the following:

"Before the exercise and performance of any of its powers and duties in terms of this section [which section deals with inquiries by ICASA], the Authority must –

(a) ...

(b) subject to section 67 of the [EC] Act ... bear in mind that the Competition Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act."

Furthermore, sub-paragraph (1) to (3) of s67 of the EC Act have been deleted, thus removing from ICASA's jurisdiction the power to deal with any acts which might prevent or lessen competition in the ICT sector.

Conclusion

20 For all the reasons stated above, we submit that there is little merit in ICASA persisting with this Inquiry. Its limited resources should rather be committed to activities which will make a concrete and meaningful contribution to the promotion of competition in the ICT sector.

21 Should ICASA persist with this Inquiry, M-Net and MultiChoice would like an opportunity to make oral representations in any forthcoming public hearings conducted as part of this Inquiry.