COMPETITION STUDY IN THE BROADCASTING SUBSECTOR AND SIGNAL DISTRIBUTION PRICING FRAMEWORK

INTERIM REPORT FOR THE COMMUNICATIONS AUTHORITY

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List of Acronyms

AFC	Asian Football Confederation
AM	Amplitude Modulation
ARCEP	Authorité de Régulation des Communications Électroniques, des Postes et de la Distribution de la Presse
ARPU	Average Revenue Per User
ATC	American Tower Company
BBC	British Broadcasting Corporation
BBFC	British Board of Film Classification
BEREC	Body of European Regulators of Electronic Communications
Broadcaster	Any legal or natural person who composes or packages or distributes 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
Broadcasting	Unidirectional conveyance of sounds or television programmes, whether encrypted or not by radio or other means of telecommunications, for reception by the public
Broadcasting Service	Any service which consists of the broadcasting of television or sound broadcasting programs to the public, sections of the public or subscribers to such a service
Broadcasting Signal Distribution	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
BSD	Broadcasting signal distribution
CA	Communications Authority of Kenya
CABASE	Argentine Internet Chamber
CAGR	Compound Annual Growth Rate
CAPEX	Captial Expenditure
CAPIT	Chamber of Independent Television Producers
CAPM	Capital Asset Pricing Method
CMA	Competition and Markets Authority
Community	A geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest

Community Broadcasting Service	A broadcasting service which meets all the following requirements— (a) is fully controlled by a non-profit entity and carried on for nonprofitable purposes; (b) serves a particular community; (c) encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and (d) may be funded by donations, grants, sponsorships or membership fees, or by any combination of the aforementioned
COMREG	Commission for Communications Regulation
CRTC	Canadian Radio-television and Telecommunications Commission
CRTC	Canadian Radio-television and Telecommunications Commission
DSB	Digital sound broadcasting
DTH	Direct to Home
DTT	Digital Terrestrial Television
EC	European Commission
ECS	Electronic Communication Services
ENACOM	Ente Nacional de Comuniciones
Encryption	A method transforming signals in a systematic way so that the signal would be unintelligible without a suitable receiving apparatus
EPG	Electronic Programme Guide
EPL	English Premier League
FIFA	Federation Internationale de Football Association
FM	Frequency Modulation
FPB	Film and Publications Board
Free to Air Service	A service which is broadcast without encryption and capable of being received by conventional broadcasting receiving apparatus
FTA	Free to Air Television
HD	High Definition
IAM	Internet Access Management
ICASA	Independent Communications Authority of South Africa
ICC	International Cricket Council
IP	Internet Protocol
IPL	Indian Premier League
IPTV	Internet Protocol Television

ISP	Internet Service Providers
ITU	International Telecommunications Union
ITV	Independent Television
KBC	Kenya Broadcasting Corporation
KICA	Kenya Information and Communications Act, 1998
LCD	Liquid Crystal Display
LCFU	Licensing and Content Follow Up
LRAIC+	Long Run Average Incremental Cost Plus
LSM	Living Standard Measure
Mbps	Megabytes per second
Media	Broadcast, electronic and other types of media but does not include print and book publishing
Media Council	Media Council of Kenya established under the Media Council Act;
MENA	Middle East and North Africa
MNO	Mobile Network Operator
MTR	Mobile Termination Rate
NBC	National Broadcasting Commission
NCC	Nigerian Communications Commission
NFVCCERC	National Film and Video Censorship, Classificationand Exhibition Regulatory Commission
ODPS	On-demand Programme Services
OPEX	Operating Expenditure
OTT	Over-the-top Services
PANG	Pan Africa Network Group
PMG	Parliamentary Monitoring Group
PPV	Pay-per view
Private Broadcaster	A person licensed by the Commission under this Act to provide commercial broadcast services
Programme	Sound, vision or a combination of both, intended to inform, educate or entertain, but does not include text or data
PSTN	Public switched telecommunications network
Public Broadcaster	The Kenya Broadcasting Corporation established by the Kenya Broadcasting Corporation Act (Cap. 221)

public broadcasting services	Broadcasting services of the public broadcaster
RAO	Reference Access Offer
SD	Standard Definition
SSNIP	Small but significant non-transitory increase in price
subscription management service	A service which consists of the provision of support services to a subscription broadcasting service which support services may include, but not limited to, subscriber management support, subscription fee collection, call centres, sales and marketing, and technical and installation support"
SVOD	Subscription Video on Demand
TDRA	Telecommunications and Digital Government Regulatory Authority
TOR	Terms of Reference
TVOD	Transactional Video on Demand
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UEFA	Union of European Football Association
VAT	Value Added Tax
VOD	Video on Demand
VOIP	Voice Over Internet Protocol
VPN	Virtual Private Network
VSP	Video-sharing Platform
WACC	Weighted Average Cost of Capital
WTA	Women's Tennis Association

1 Introduction

Tilil Technologies and Acacia Economics have been contracted by the Communications Authority of Kenya ("Authority") to study competition in the broadcasting sub-sector and review the broadcasting signal distribution ("BSD") pricing and access framework. This is done with a view to enhancing fair and healthy competition to maximize the efficiency of the market.

Broadcasting is defined in the Kenya Information and Communications Act, 1998, as amended ("KICA")[1] as the *"unidirectional conveyance of sounds or television programmes, whether encrypted or not by radio or other means of telecommunications, for reception by the public."* Broadcasting in Kenya is diverse and comprises participants in television and radio across a range of formats. They can be categorized by payment (namely, free-to-air or subscription/pay television), technologies (terrestrial, satellite, internet and cable) and whether they are public, commercial or community. The broadcast value chain further comprises different components including content, aggregation, and signal distribution. For the regulator, ensuring access, coverage, diversity, innovation and competition in the broadcast sector is important to ensuring that broadcasting has a positive impact on society.

However, given the vast economies of scale in broadcasting, historical monopolies and other issues such as strategic behaviour from incumbents, broadcasting is often subject to challenges from a competition perspective. There are indications that in Kenya at least some of these sub-markets exhibit inadequate competition. The Authority has studied these markets historically:

- A study for the Authority in 2012 suggested that **the market for radio, digital terrestrial television (DTT), satellite or direct to home (DTH) and FTA television was concentrated**, though competition was increasing. The study suggested monitoring of the market over time.
- In 2015, **signal distribution** in Kenya was found to have a structure that was **duopolistic**, with high barriers to entry and a high level of market power possessed by each firm present in the market. At that time, the limited coverage in some areas in Kenya was noted, and so there was a need to strike a balance between incentivizing investment in expanding infrastructure,promoting competition and safeguarding the interests of consumers.

The current project provides an update and revision of the prior market studies, particularly in the context of technological changes that have altered the market dynamics for broadcasting and signal distribution.

The report is structured as follows:

- First, we provide a regulatory overview to place this review in context.
- Second, we discuss some of the factors and trends that have changed the market in Kenya and elsewhere, namely digital migration and the introduction of over-the-top services (OTT). We also provide an overview of regulatory tools related to OTTs in other countries and legal routes available in Kenya.
- Third, we examine competition in television markets. In this section we provide a brief market overview, define markets and assess competitive dynamics.
- Fourth, we examine competition in radio markets.
- Fifth, we examine Broadcasting Signal Distribution Pricing.
- Sixth, we provide overarching conclusions and suggested remedies.

[1] Kenya Information and Communications Act, 1998, retrieved from the website of the Communications Authority. Available here

2 Regulatory Framework and overview

2.1 The regulatory framework in Kenya

This section provides a brief overview of key regulatory issues. We provide an overview of the Kenyan legislation and regulations which are relevant to the project, our methodology and our conclusions.

2.1.1 The KICA

The KICA has been amended several times[2], but remains the starting point for a review of the regulatory framework for broadcasting and signal distribution in Kenya. Relevant definitions are included in Appendix F. For ease of reference, we have replicated some of them here.

"**broadcasting service**" meaning any service which consists of the broadcasting of television or sound broadcasting programmes to the public, sections of the public or subscribers to such a service";

"**broadcaster**" meaning any legal or natural person who composes packages or distributes television or radio programme services for reception by the public or sections of the public or subscribers to such a service, irrespective of the technology used;

"**broadcasting**" meaning unidirectional conveyance of sounds or television programmes, whether encrypted or not by radio or other means of telecommunications, for reception by the public;

"**media**" means broadcast, electronic and other types of media but does not include print and book publishing;

"**Media Council**" means the Media Council of Kenya established under the Media Council Act;

"**programme**" means any sound, vision or a combination of both, intended to inform, educate or entertain, but does not include text or data;

"**telecommunications service**" means any of the following –

1. a service consisting of the conveyance by means of a telecommunications system of anything falling within sub-paragraphs (i) to (v) in the definition of "telecommunications system"….; and

"**telecommunications system**" means a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of –

1. speech, music and other sounds;
2. visual images;
3. data;
4. signals serving for the impartation (whether as between persons and persons, things and things or person and things) of any matter otherwise than in the form of sound, visual images or data; or
5. signals serving for the activation or control of machinery or apparatus and includes any cable for the distribution of anything falling within (i) to (iv) above."

Section 5B was introduced in 2013 and provides:

[2] Amendments have been made under Act 1, 2009; Act 6, 2009; Act 4, 2012; Act 12, 2012; Act 41A, 2013; Act 25, 2015; Act 11, 2017; Act 5, 2018; Act 18, 2018; Act 24, 2019 and Act 1, 2020.

“5B. (1) The Authority shall, in undertaking its functions under this Act comply with the provisions of Article 34 (1) and (2) of the Constitution.

(2) Subject to Article 24 of the Constitution, the right to freedom of the media and freedom of expression may be limited for the purposes, in the manner and to the extent set out in this Act and any other written law.

(3) A limitation of a freedom under subsection (2) shall be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

(4) The right to freedom of expression shall not extend to-

(a) the spread of propaganda for war;

(b) incitement to violence;

(c) the spread of hate speech; or

(d) advocacy of hatred that-

(i) constitutes ethnic incitement, vilification of other persons or community or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

(5) The Authority may make regulations for the better carrying out of the provisions of this section.”

Section 46A sets out the functions of the Authority in relation to broadcasting services, and provides:

“*The functions of the Commission in relation to broadcasting services shall be to –*

1. *promote and facilitate the development, in keeping with the public interest, of a diverse range of broadcasting services in Kenya;*
2. *…;*
3. *…;*
4. *promote diversity and plurality of views for a competitive marketplace of ideas;*
5. *…;*
6. *…;*
7. *carry out such other functions as are necessary and expedient for the discharge of all or any functions conferred upon it in terms of the Act;*
8. *administer the broadcasting content aspect of this Act;*
9. *develop media standards; and*
10. *regulate and monitor compliance with those standards.”*

The introduction of “media” and reference to the “Media Council” is somewhat confusing, since a Media Council was established under the Media Council Act, 2013[3], but its mandate seems to relate specifically to ‘the media’, meaning journalists and reporting. However, the amendments to section 46A indicate that the Authority also has certain powers in relation to “media”, which includes electronic media which, by extension, could include online content. We will discuss this later relation to OTTs.

Section 46I provides, among other things, "(3) A broadcaster licensed to distribute radio or television programme shall broadcast on radio or television such percentage of Kenyan programmes as shall be prescribed by the Authority.”

[3] Media Council of Kenya. (Undated). *Mandate*. Available here.

Section 46O applies to broadcasting signal distribution licences. A licence granted under subsection (2) "*may require the signal distribution licensee to –*

1. *…*
2. *provide services promptly upon request, in an equitable, reasonable, non-preferential and non-discriminatory manner;*
3. *provide capability for a diversity of broadcast services and content;*
4. *provide an open network that is interoperable with other signal distribution networks; and*
5. *comply with any other conditions that the Commission may determine*,"

and section 46O(3) provides that the Authority may require a broadcasting service licensee to "*comply with conditions as to the nature and location of transmitters and their transmission characteristics*".

The Authority has the power to license both broadcasters and signal distributors, and in terms of section 46C(1) of KICA, no person may provide broadcasting or signal distribution services except in accordance with a licence issued under Part IVA. In addition, section 46C(3) provides that the Authority may require a licensee to fulfill such other conditions as it may decide.

Part VI of KICA, section 82, specifically empowers the Authority to modify the conditions of licences. Before making any changes, the Authority must publish the changes in the Gazette and give notice to the relevant licensee or licensees, with reasons and a timeframe within which the licensee may make representations with respect to the proposed changes. For completeness, we note that this Part also deals with enforcement of licence conditions and the procedure to be followed in the event of a contravention by a licensee[4].

Part VIC of the KICA is headed 'Fair Competition and Equal Treatment'. This chapter introduces a general prohibition on anti-competitive conduct. This Part also permits the Authority to "investigate" any licensee (under KICA) which it believes or has reason to believe is in breach of fair competition or equal access, and this includes, under section 84S(2),

1. "*any abuse by a licensee, either independently or with others, of a dominant position;*
2. *entering any agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition, or which:*
    i. *directly or indirectly fix purchase or selling prices or any other trading conditions;*
    ii. *limit or control production, markets, technical development or investment;*
    iii. *share markets or sources of supply;*
    iv. *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
    v. *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.*
3. *the effectuation of any anti-competitive conduct in the communications sector*."

Section 84T provides for investigation by the Authority and the determination of anti-competitive conduct, along with the possible orders. These orders include a direction to stop the unfair competition, payment of a fine, declaration of anti-competitive contracts as null and void, or, importantly for this project, any other lawful remedial measure to redress the offence.

[4] For example, if an existing broadcasting service licensee were to refuse to comply with a request made for information or a condition imposed by the Authority pursuant to the findings of a market review.

Also relevant to this project are the definitions of “market” and “significant market power”. We set these out here for ease of reference:[5]

- “**market**” means a market in Kenya or a substantial part of Kenya and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers and acquirers, or potential suppliers or acquirers of those goods or services; and
- “**significant market power**” means a position of economic strength enjoyed by a licensee which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave independently of its competitors, customers and consumers.

Although the KICA contains a reference to dominance, this is only defined in relation to telecommunications service providers[6], and not broadcasting or broadcasting licensees or signal distribution licensees.

Section 4 of the Competition Act, 2010 (Competition Act) which is intended to deal with *ex post* matters (unfair competition and mergers) defines “competition” to mean competition in a market in Kenya and refers to the process whereby two or more persons— (i) supply or attempt to supply to; or (ii) acquire or attempt to acquire from, the people in that market the same or substitutable goods or services. This Act defines a person to be a “competitor” of another person if they are in competition with each other or would, but for an agreement to which the two persons are parties, be likely to be in competition with each other.

The Competition Act also provides, in relation to the assessment of the effects on competition or determining whether a person has a “**dominant position in a market**”, that the following matters, in addition to other relevant matters, shall be taken into account[7] by the Competition Authority of Kenya (CAK) —

1. the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and
2. the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.[8]

A “**dominant position in a market**” exists in the Competition Act if a person—

1. produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or
2. provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof. [9]

The Authority has no jurisdiction under the Competition Act, but these definitions are useful when considering how best to approach this project.

[5] Section 4(1) of the Competition Act.
[6] The definition used in the KICA is “dominant telecommunications service provider”.
[7] Section 4(1) of the Competition Act.
[8] Section 4(2) of the Competition Act.
[9] Section 4(2) of the Competition Act.

Finally, in relation to KICA, we note an Amendment Bill was presented to Parliament in 2019 which was tabled in October of that year[10]. The Bill introduces the following definitions:

"**blogger**" means any person who is registered as such by the Commission under section 84D;

"**blogging**" means collecting, writing, editing and presenting of news or news articles in social media platforms or in the internet;

"**social media platforms**" includes online publishing and discussion, media sharing, blogging, social networking, document and data sharing repositories, social media applications, social bookmarking and widgets; and

"**widgets**" means an application, or a component of an interface, that enables a user to access a service.

An amendment is also proposed in this Bill to introduce Part VIAA, for the regulation of social media. According to Bowmans attorneys, the definition is wide enough to capture ordinary users of social media platforms such as YouTube, Facebook and Twitter; and a social media licence is required for the operation of any social media platform in Kenya. The definition of social media is wide enough to capture any online medium that allows for social networking and media sharing, and an administrator of a group on a social media platform including a WhatsApp group admin must, among other requirements, approve members of the group and the content being published. The Bill makes it an offence for a person to contravene these requirements.[11] This Bill does not seem to have progressed since 2019[12] however, another Bill has apparently been drafted for consultation in 2023.[13] The draft bill has not been published but as it is a draft, it does not bear on our report.

For completeness, we note that section 5C of the KICA provides that the Cabinet Secretary may issue policy guidelines to the Authority "of a general nature relating to the provisions of this Act". The history and context of this amendment are unclear, but it is a wide provision and arguably could permit a policy guideline to be issued in relation to the treatment of any matter.

2.1.2 Relevant regulations for market reviews and determinations

The Kenya Information and Communications (Broadcasting) Regulations, 2009 (Broadcasting Regulations) contribute further definitions, such as –

> "subscription broadcasting services" which includes, among other services, cable broadcasting and multi-channel satellite distribution services from foreign territories that are offered through subscription; and
>
> "terrestrial digital signal distributor" means any person who provides network facility operator services for multimedia broadcasting.

There are some disconnects between the Broadcasting Regulations and KICA, given the differences in dates, for example in relation to licensing. Without dwelling on these, as the KICA will always take precedence, there are provisions that are not dealt with in KICA which include specific obligations on broadcasters in relation to local content, news and programming codes. The Regulations also deal with specific obligations imposed on each of public, commercial and community broadcasters, and

[10] Mwathe, D., Syekei, J. (2019, October 30). *Kenya: Highlights on proposed law on strict regulation of social media*. Mondaq. Available here.

[11] See footnote 10.

[12] Kenya Gazette Supplement No. 125 (National Assembly Bills No. 61). Available here.

[13] Abuya, K. (2023). *KICA Amendment Bill Proposes changes to Compliace with Intellectual Property Rights.* Tech Weez. Available here.

address the rights of pay tv broadcasters that broadcast from outside Kenya, to provide services through subscription management licensees or by way of a subscription service licence. Such an entity must acquire landing rights in Kenya.

Signal distribution providers and terrestrial digital broadcasters in particular, may be required to carry the channels of FTA and pay tv licensees, and provide their services on such terms and conditions as to access, tariffs and quality of service as determined by the Authority. These provisions may become relevant to our consideration of remedies in due course. The Regulations also impose obligations on licensees to "in consultation with other broadcasters, prepare an electronic programme guide for audiences to use to access information relating to the schedules of programme materials for all broadcasting services it carries". This suggests that where channels of other broadcasters are carried by signal distributors, and in general, all licensees must liaise regarding what is known as the "EPG". In some countries this is considered to be anti-competitive or is simply not done because it may result in the prioritisation of some programmes above others on the EPG, relegating others to a lower level which in the past, was suggestive of viewer attraction and priority for advertising purposes. We will take this into account in our review.

Part IV of the Regulations deals with many important issues including content regulation particularly as regards children, advertisements and infomercials, sponsorship, political messaging, the right of reply, news reporting and reporting on controversial issues. It also deals with the manner in which interviews should be conducted, and how broadcasters should ensure that the physically challenged can view and understand their programmes.

Part V of these Regulations deals with the "Programming Code" which is intended to set the standards for the time and manner of programmes to be broadcast by licensees, which may be determined by the Authority, or by a group of broadcasters themselves. In the latter case, the Authority may require the group to make changes to their Code. All of the issues dealt with in Part IV must be addressed in the Code. The Code must deal with enforcement measures. Every 2 years the Code must be reviewed and submitted to the Authority for approval.

2.1.2.1 Fair Competition Regulations

The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 ("Fair Competition Regulations") can be accessed through the Authority's website. They define "communications services" as "all services provided for under the Act" which could include broadcasting services, or it could include another class of "broadcasting services" designated by the Authority in regulations under section 46B of KICA.

The purpose of these Fair Competition Regulations is stated in regulation 3(1) to be "to provide a regulatory framework for the promotion of fair competition and equality of treatment in the communications sector".

Regulation 6 is particularly relevant in that it requires the Authority to designate "communications market segments" which requires an assessment of demand and supply-side substitutability, the geographic scope of a market for a given group of consumers, taking various factors into consideration[14] as well as "any other factors or issues which are, in the opinion of the [Commission] relevant". Regulations 7 and 8 set out the factors that might be considered by the Authority in determining dominance and "dominant market power reports" and the possibility that the Authority

[14] Regulation 6(2)(b)((i) to (iv).

can publish guidelines to be followed when determining "if a licensee is in a dominant market position in a specific communications market".

Regulation 7(2) specifically refers to market concentration or market shares determined by reference to revenues, numbers of subscribers or volumes of sales; the degree to which a licensee's prices vary over time; the ability of the licensee to maintain or erect barriers to entry including by control of essential facilities, access to superior technology, privileged access to resources or capital markets or superior buying or negotiating power; the licensee's ability to earn super-normal profits; global technology and commercial trends affecting market power; the licensee's power to make independent and rate-setting decisions; the degree of product or service differentiation and sales promotion in the market; the ability to materially raise prices without suffering a commensurate loss in service demand to other licensees; but importantly, also "any other matters which the [Commission] considers relevant."

Regulation 8A deals with investigations into competition concerns, also allowing the Authority to determine practises it considers relevant from time to time, such as unfair discrimination, bundling, and unfairly preventing, restricting or distorting competition.

2.1.2.2 Tariff Regulations

In addition, the Kenya Information and Communications (Tariff) Regulations, 2010 ("Tariff Regulations") are applicable. The purpose of these Tariff Regulations is said to be to provide a framework for the determination of tariffs and tariff structures. More specifically, regulation 3(2) notes that "the Regulations seek to –

1. ensure licensees maintain financial integrity and attract capital;
2. protect interests of investors, consumers and other stakeholders;
3. provide market incentives for licensees to operate efficiently; and
4. promote efficient and fair competition within the framework for a free market economy; [and]
5. ensure compliance with all competition laws."

These important Regulations define "**regulated services**" to mean "a service offered or supplied by a licensee –

1. in a market or market segment that is uncompetitive; or
2. subject to price controls by the [Commission] on the basis that the provider of the service has been found to be dominant in the relevant market and the [Commission] has judged that the price control is appropriate, pursuant to both the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 and regulation 4 of these Regulations."

The Tariff Regulations also define "**uncompetitive market**" as a "market or market segment in which there is no competition in the provision of service or in which consumer choice of service provider or service is either absent, limited, impeded, obstructed or constrained". If the Authority determines that a service no longer meets the conditions that describe a "regulated service", then regulation 7 of the Tariff Regulations provide that the Authority may gazette a notice to notify the public that the service is no longer a "regulated service".

The Schedule to the Tariff Regulations contains various 'Guidelines':

1. to address regulation 3A(2)(c)(i), which requires the Authority to consider 6 factors when determining if competition 'cannot' develop with existing players; being current market

shares and their evolution over time, price trends and pricing behaviour for the services under analysis, control of essential facilities[15], barriers to expansion, product or service diversification, or other factors determined by the Authority;

2. to address regulation 3A(2)(c)(ii), which requires the Authority to assess the existence of high and non-transitory barriers to entry, such as sunk costs, scale and scope economies, control of essential facilities, technological advantages, easy or privileged access to capital or financial resources, barriers to development of distribution and sales networks, switching costs and product diversification, vertical integration, licensing requirements, limits and conditions attached to the use of spectrum, and effects of general regulation over new entrants;
3. to address regulation 3A(2)(c)(iii), in terms of which the Authority should consider all the factors to follow to address the "insufficiency of competition law to address the competition concern identified in sub-regulations 4(c), condition 3A(2) of these Regulations"; being degree of generalisation of non-competitive behaviour associated to the competition concern, degree of difficulty to address the competition concern, expected damage created by non-competitive behaviour associated to the competition concern, need of regulatory intervention to ensure the accomplishment of the objectives stated in Regulation 3(2)"; and
4. to address regulation 3(2)(c)(iv), in relation to a retail service, whether the identified competition concern can be addressed with existing remedies imposed in related wholesale markets or alternative wholesale remedies.

Finally, the Guidelines also provide for the Authority to consider whether the identified concern can be addressed with existing remedies or alternative remedies, following a regulatory impact assessment.

These are unusual provisions in that in substance they are relatively similar to the process that is generally followed in undertaking a market review, despite being included in Regulations regarding tariff regulation.

2.1.2.3 Terrestrial Broadcast Signal Distribution ("BSD") Pricing and Access Framework

In 2016 the Authority published a "Determination No. 2 of 2016 on Terrestrial Broadcast Signal Distribution ("BSD") Pricing and Access Framework". This Determination resulted from the further review of the BSD market in 2015 and when published, it superseded the 2013 Determination. This Determination was made pursuant to section 46A(a), (d) and (g) of the KICA, and regulation 3 of the Tariff Regulations, and was intended to ensure that BSD access charges were cost-based, and that there was equitable access to wholesale broadcasting network infrastructure. The LRAIC+ methodology was used in setting prices for access and prices were capped. The Determination had the effect of imposing tariffs on BSDs through amendments to their licence conditions.

Any future Determination in relation to BSD should indicate that it will take precedence over any existing licence terms or Determinations to the contrary.

Under the 2016 Determination, signal distribution providers and terrestrial digital broadcasters were required to carry the channels of FTA and pay tv licensees and provide their services on such terms and conditions as to access, tariffs and quality of service as determined by the Authority. These provisions may become relevant to our consideration of remedies in due course.

The Regulations also imposed obligations on licensees to "in consultation with other broadcasters, prepare an electronic programme guide ("EPG") for audiences to use to access information relating to

[15] The provisions of (c) are "control of an infrastructure not easily duplicated".

the schedules of programme materials for all broadcasting services it carries". This suggests that where channels of other broadcasters are carried by signal distributors, and in general, all licensees must liaise regarding the EPG. In some countries this is considered to be anti-competitive or is simply not done because it may result in the prioritisation of some programmes above others on the EPG, relegating others to a lower level which in the past, was suggestive of viewer attraction and priority for advertising purposes.

Part IV of the Regulations deals with many important issues including content regulation particularly as regards children, advertisements and infomercials, sponsorship, political messaging, the right of reply, news reporting and reporting on controversial issues. It also deals with the way interviews should be conducted, and how broadcasters should ensure that the physically challenged can view and understand their programmes.

Part V of these Regulations deals with the "Programming Code" which is intended to set the standards for the time and manner of programmes to be broadcast by licensees, which may be determined by the Authority, or by a group of broadcasters themselves. In the latter case, the Authority may require the group to make changes to their Code. All the issues dealt with in Part IV must be addressed in the Code. The Code must deal with enforcement measures. Every 2 years the Code must be reviewed and submitted to the Authority for approval.

The 2022 Broadcasting Baseline Survey[16] recommended ongoing reviews of the Regulations. We note that a draft set of Broadcasting Regulations was published in 2022. The draft does not relate to the proposed method of analysis of competition in the broadcasting and signal distribution markets and therefore has no bearing on the study.

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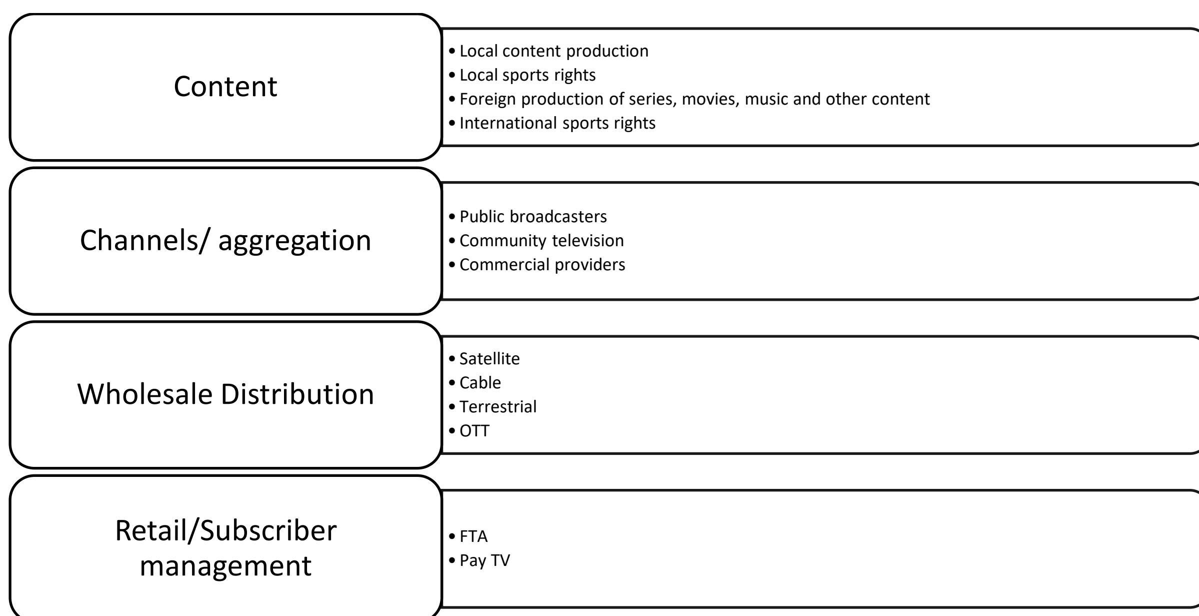
[16] Communications Authority. (2022). *Broadcasting Report: Baseline Survey for Broadcasting Services in Kenya*. Available here.

3 Overview: Market trends and changes

The broadcasting market in Kenya is a dynamic and growing industry characterized by a mix of broadcasters across television and radio. This is comprised of public, commercial and community broadcasters with services provided across various delivery media, namely terrestrial, satellite and cable. Changes in technology have meant that broadcasting is also provided through internet streaming through both publicly available (eg. YouTube) and subscription sources (eg. Netflix). The range and variety of broadcast options available is likely to increase with further technological developments.

The broadcasting value chain comprises various layers from content production through to retail distribution as follows:



The broadcasting sub-sector has changed significantly over the past 10 years. This is a result of technological change and subsequent shifts in the way that content is distributed and consumed. Two key trends that have affected broadcasting include digital migration and the growth of OTTs.

3.1 Digital migration

FTA television is offered across three key platforms internationally. These are analogue terrestrial television, digital terrestrial television and satellite. While historically most FTA was offered on analogue, a migration to digital has meant that countries have or are migrating to more efficient digital platforms which allows for more channels to be broadcast more efficiently using the same spectrum.

While digital migration in Africa has been slow compared to developed economies, Kenya has been one of the leaders in the region and one of the countries in Africa to meet the analogue switch off by the international deadline of 2015. As shown in Figure 1 below, it is one of only 14 African countries (four from the East African Community) that have migrated already (in green) compared to 39 countries in Europe, with many African countries finding it difficult to meet the internationally set

analogue switch-off deadline due to obstacles such as funding, regulatory reforms, technical capabilities, consumer outreach and legal challenges.[17] [18]

Figure 1: Ongoing digital migration (in orange) by country

Source: ITU. (2023). Status of the Transition to Digital Terrestrial Television (accessed May 22, 2023). Available here.

However, the countries that have moved to digital have faced additional challenges. Some of the patterns in other jurisdictions have included the following:

Fragmentation: Digital signals allow more channels to be carried compared to analogue. As a result, one of the key changes from digital migration has been a rise in the number of channels broadcast, including FTA channels. For example, in the UK the number of channels increased from five channels available on analogue to over 100 on DTT and even more on free satellite. As is discussed later, the growth in channels in Kenya has been even larger with 334 licensed FTA channels on the DTT platform as at Q4 2023. However, this has created challenges as a multichannel environment can lead to fragmentation in viewership, as seen in other countries. A review in the UK found that digital migration, together with alternative means of broadcast, meant that public service broadcasters (who were the key FTA providers in that market) have lost market share. For example, ITV and BBC dropped from 42% and 39% of the market respectively in 1989 to 15% and 22% by 2017.[19] Indications are that Kenya is facing similar fragmentation now with an increase in the number of FTA channels on DTT leading to fragmentation of advertising.

Online viewing is reducing the amount of linear television viewed leading to DTT switch off in some regions: International studies suggest that online options are impacting on the amount of television viewed with a marked impact on younger viewers. For example, Ofcom in the UK found that while 60% of all ages watch live TV, only 40% of 16–24-year-olds do, while they watch far more OTTs. There has been an increase in online viewing in Kenya as well. Given the growth in OTT and other platforms some jurisdictions with high penetration of IPTV are moving towards a DTT switch-off. This includes the public broadcasters in countries such as Switzerland[20] and Belgium.[21] This is not universal and

[17] GSMA (2022, October). *Digital Switchover in Sub-Saharan Africa: Bringing low-band connectivity within reach*. Available here.
[18] Modise. E. (2022, July 1). *South Africa's Constitutional Court rules against communications minister's digital migration deadline*. Available here.
[19] Ofcom (2018). *Public service broadcasting in the digital age: Supporting PSD for the next decade and beyond*. Available here.
[20] Krieger, J. (2018). *Switzerland to switch off DTT on June 3, 2019.* BroadbandTV News. Available here.
[21] Briel, R. (2018). *Belgian pubcaster VRT terminates DTT broadcasts*. BroadbandTV News. Available here.

other countries such as the UK expect DTT to remain important for some time. Within the Kenyan market there has been an increase in online viewing and OTT platforms. However, DTT still remains important as will be discussed further in the document.

3.2 Over the top ("OTT") platforms

3.2.1 Overview of OTTs

The second key change in the Kenyan market since the last market review has been the growth in OTTs. OTT refers to content that is streamed or provided over the internet, bypassing traditional broadcasting platforms. There are various forms of OTTs that differ according to whether they are subscription or advertising funded (and free), linear (watched in real time) or non-linear (watched on demand) and streamed or downloaded. Some of the key categories are as follows:

- Linear video streaming via a subscription service (e.g. DSTV Now)
- Non-linear video streaming via a subscription service (e.g. Showmax, Netflix)
- Pay-per view which provides time-limited access to video content (e.g. iTunes, Google Play, Amazon Prime Video),
- Advertising video-on-demand which provides content that is advertising rather than subscription funded (e.g. YouTube)
- Video downloads which require one-time payment for video that is permanently available (e.g. iTunes, Google Play, Amazon Prime Video).

Worldwide, consumers have increasingly migrated from traditional pay-TV to OTT services, with many pay-TV operators experiencing declines in their subscriber bases.[22] Based on a report by Omdia, online video subscriptions increased by 17.7% in 2021 while global pay-TV subscriptions grew by just 0.6%.[23] Furthermore, a PwC study reported a global decline in pay-TV revenue of 1.5%.[24]

The growth of OTT has been attributed to a number of factors including growing and more affordable broadband coverage, reduced cost of mobile devices (phones and tablets) and computers especially in developing markets, the ability to stream video on connected TVs (including smart TVs and televisions with streaming devices), more streaming services, and the proliferation of varied high-quality original content (28% of original content in 2022 was from streamers[25]).[26] While access to fixed broadband was the original driver of OTT growth in mature markets, mobile broadband appears to be driving growth in developing markets. 5G technology, with its faster speeds and more reliable connections, will also drive OTT using mobile broadband.[27] To mitigate losses, many traditional pay-

[22] McCarthy, S. (2022). *The Future of OTT: What Lies ahead for the Industry*. Available here. Accessed 24 April 2023.
[23] Thomas, A. (2022). *Pay-TV and Online Video Report: Global – 2022*. Available here. Accessed 24 April 2023.
[24] Pennington, A. (2022). *Pay-TV Fighting Decline with OTT Offerings: PwC Report*. Available here. Accessed 24 April 2023.
[25] Abarinova, M. (2023). *Streamers to spend $8.5 billion on sports rights in 2023 – Ampere*. Available here. Accessed 24 April 2023.
[26] McCarthy, S. (2022). *The Future of OTT: What Lies ahead for the Industry*. Available here. Accessed 24 April 2023.
[27] McCarthy, S. (2022). *The Future of OTT: What Lies ahead for the Industry*. Available here. Accessed 24 April 2023.

TV operators have either launched their own streaming services, acquired them, or partnered with them.[28] This has led to greater competition in video streaming.[29]

As such, OTTs intersect with a range of broadcasting submarkets. OTTs in Kenya are not licensed unless they are associated with a licensed broadcasting service and in this case, they are not licensed as standalone services. OTTs include services from international companies such as Netflix, Amazon Prime Video and YouTube (which has been available since 2011). In addition, some of Kenya's DTH and DTT licensees also have streaming products in alignment with the international trends. For example, MultiChoice (DTT and DTH) offers Showmax and ViuSasa Kenya is an affiliate of Royal Media Services (DTT).[30] There are also local platforms that facilitate streaming provided by telecommunications companies such as Safaricom's Baze.

The data below is based on estimates, but shows an exponential increase in the revenue, user base, and penetration rate of video-on demand in total in Kenya between 2017 and 2021 followed by a slower increase in users and penetration rates in 2022 (see the figures below).[31]

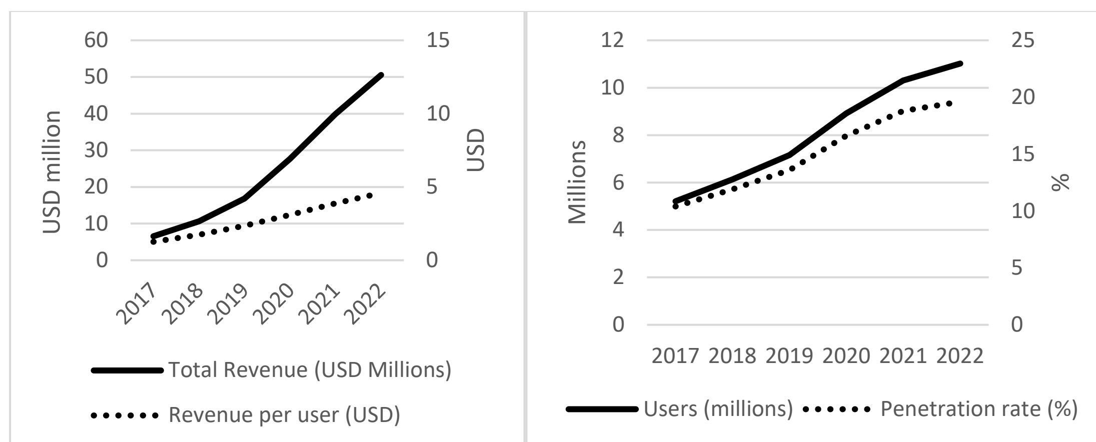


Figure 2: Video-on-Demand revenue, average revenue per user, users, and penetration rates in Kenya (2017-2022)

Source: Statista data, available here and here.

While advertising video-on-demand has the highest number of users from the different types of OTTs in Kenya, video streaming accounts for the most revenue. Streaming has also been growing as a percentage of total revenue and total users while advertising video-on-demand declined as a percentage of total revenue and total users (although they increased in absolute value). Pay-per-view and video downloads also declined as a percentage of total revenue over the 2017-2022 period.

[28] Tarr, G. (2022). *Studies: Traditional Pay-TV and OTT Streaming to see challenges ahead*. Available here. Accessed 24 April 2023.

[29] Pennington, A. (2022). *Pay-TV Fighting Decline with OTT Offerings: PwC Report*. Available here. Accessed 24 April 2023.

[30] Sunday, F. (2022). *Streaming giants flock to Kenya in new fight for eyeballs*. Standard Media. Available here; Jonaz KE. (2020). *Here is the billionaire owner and founder of Viusasa*. Opera News. Available here.

[31] As there is limited publicly available data, we have relied on Statista estimates to examine trends in the usage and revenue of video on-demand in Kenya. However, this data may exclude certain services and so potentially underestimates the use of OTT in Kenya. Furthermore, the sources for the data and the methodology underlying these statistics are not transparent. Therefore while we utilise them for purposes of showing market trends, we note that they are imperfect.

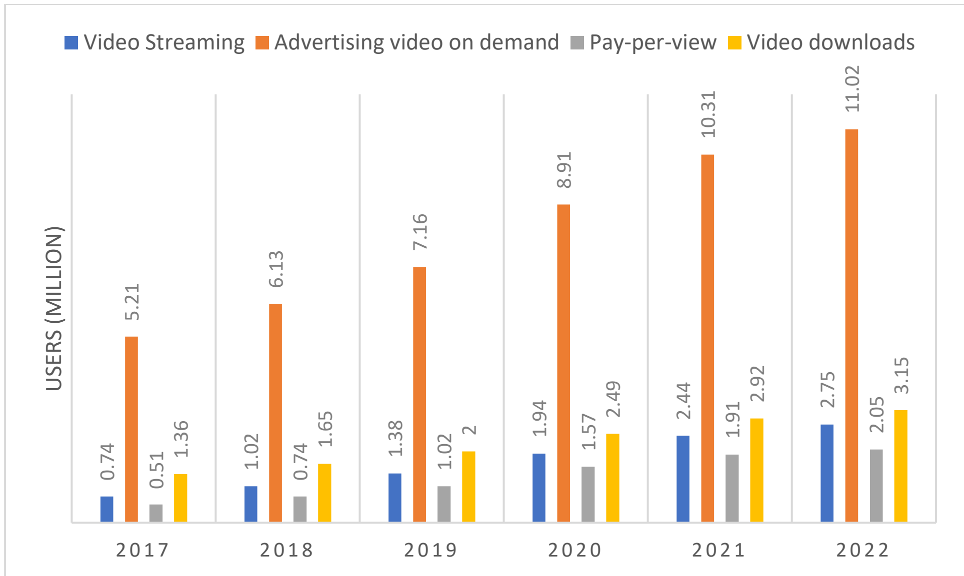


Figure 3: Breakdown of Video-on-Demand users (2017-2022)

Source: Statista data, available [here] and [here].

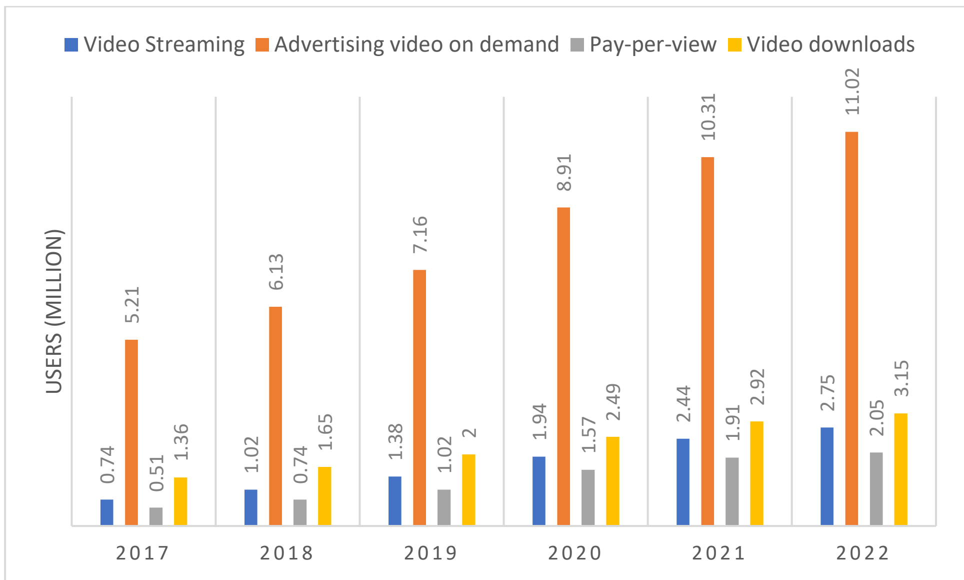


Figure 4 :Breakdown of Video-on-Demand revenue (2017-2022)

There was a more than 200% increase in the average revenue per user ("ARPU") of video streaming between 2017 and 2022, which was far greater than the other three categories of video-on-demand (see Figure 3). The ARPU of video downloads increased by just 15% over the period and the ARPUs of advertising video-on-demand and pay-per-view both increased by 49%.

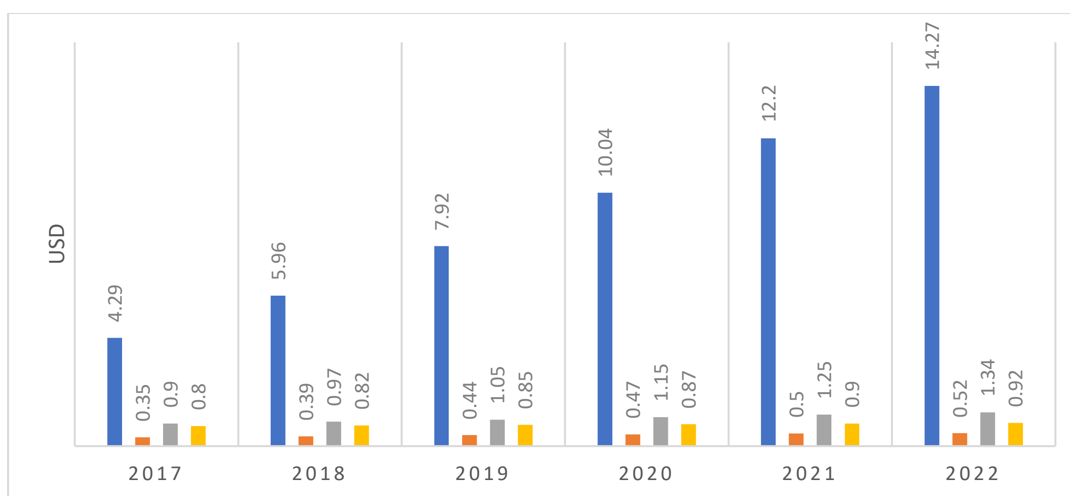


Figure 5: Average revenue per user in Kenya (2017-2022)

Source: Statista data, available here.

As can be seen, there have been significant increases in the amount of OTT video services consumed in Kenya over time. Furthermore, although a large proportion of the population uses advertising video on demand (such as YouTube), revenue is also being generated from streaming.

Access to OTT services in Kenya

Use of OTTs is facilitated by access to the internet. This results in two broad sub-groups of customers that use OTTs. Firstly, those that view higher quality content on smart TVs, typically using high speedbroadband internet to the home (typically through fixed or fixed wireless connections) and a second group that utilises mobile internet on a mobile device such as a mobile phone or tablet. OTT usage consumes data so there is an incremental cost to watching on a mobile device in comparison to DTT or satellite.

For OTT customers using a television to watch content over the internet, an unlimited fast connection is important to achieving reasonable quality. This limits access to those who can pay for and connect to a fast internet connection. At present while high speed internet is available in Kenya, penetration is limited and costs are relatively high relative to income for a large part of the population. As is shown below, the cost of uncapped wifi (typically used by individuals who utilise the internet for television consumption) ranges from KSH 1500 per month to 6299 per month. If we consider that the mean consumption expenditure in Kenya per month per adult in 2021 was KES 7,393, while the median was KES 5354, it is a significant cost.[32] These costs limit the proportion of households that utilise broadband.

Table 1: Costs of uncapped internet access

	Cost range (KSh) of different Wi-Fi offerings in 2023
Zuku	2899-6299/month (uncapped)
Safaricom	2900-11999/month (uncapped)
Airtel	2000-4000 for 40-100GB, plus 7499 for router
Jamii Telecommunications Limited	5250-21000/month (uncapped)
Poa! Internet	1500/month (uncapped), plus 3500 installation

[32] Kenya National Bureau of Statistics. (2023). *The Kenya Poverty Report Based on the 2021 Kenya Continuous Household Survey*. Available here.

Liquid	2395-11499/month

Source: Company websites

As shown below, at present there are approximately 567 570 premises in Kenya with sufficient internet speeds and which at least have the option to be uncapped, which are both characteristics for streaming via fixed internet. The numbers rise to 1.112 million if we include premises with a line that is faster than 2Mbps. Netflix requires a minimum of 3Mbps for SD, 5Mbps for HD and 15Mbps for UHD while Showmax works with 2Mbps but recommends uncapped internet of 4Mbps or faster. We note that these figures include enterprises and institutions so the number for households would be significantly lower.

Table 2: Fixed data and broadband subscriptions

Internet Technology/Speeds	=>2 Mbps < 10 Mbps	=>10Mbp s <30 Mbps	=>30 Mbps <100Mbps	=>100 Mbps <1Gbps	=>1 Gbps	Total
Cable Modem	51,010	131,049	12,711	329	-	**329**
Copper (DSL)	406	339	18	-	-	**797**
FTTH	242,358	196,524	174,064	3,011	-	**617,763**
FTTO	26,652	30,719	4,474	1,357	102	**67,887**
Fixed Wireless	200,761	9,494	2,743	392	-	**229,526**
Satellite	22	132	-	-	-	**411**
Other Fixed	675	85	25	2	-	**787**
Totals	**521,684**	**368,342**	**194,035**	**5,091**	**102**	**1,112,288**

Source: CA Sector Statistics Report, Q3 for 2022 - 2023

While internet penetration is likely to grow going forward, at present high-speed broadband limits the size of the market that is able to access broadcasting over the internet.

Another platform for watching OTTs is by means of a mobile device. Although just 3.3% of internet users in Kenya own Smart home devices, 99.8% own smart phones.[33] Mobile phone usage in Kenya is prevalent with more than 96% of Kenyans who are connected to the internet, accessing the internet via their mobile phones.[34] Furthermore, mobile internet speeds in Kenya are relatively high compared to the rest of the continent.[35] 4G networks are extensive with a 97% population coverage rate.[36] As shown below there are over 20 million Kenyans who have access to mobile internet. This is a far higher number than those using fixed networks to connect to the internet.

Table 3: Mobile subscribers in Kenya

Mobile Data and Broadband Services	Q3 FY 2022/23
4G	21 228 953

[33] Data Reportal. (2023). *Digital 2023: Kenya.* Available here. Accessed 25 April 2023.
[34] Data Reportal. (2023). *Digital 2023: Kenya.* Available here. Accessed 25 April 2023.
[35] Onyango, C. (2022). *As mobile internet speeds rise, Africans are spending more time streaming*. Available here. Accessed 25 April 2023.; Ngila, F. (2022). *Africa's mobile internet speed remains far below the global average. The economic impact is huge*. Available here. Accessed 25 April 2023.
[36] Sunday, F. (2022). *Streaming giants flock to Kenya in new fight for eyeballs.* Available here. Accessed 18 April 2023.; Ambani, B. (2023). *Safaricom increases 5G coverage to 28 towns.* Available here. Accessed 25 April 2023.

5G	373 573

Source: CA data Sector Statistics Report, Q3 for 2022 - 2023

Indications are that many Kenyans use their mobile phones to access video-on-demand. Based on a 2022 GSMA survey, 78% of Kenyans use their mobile devices to watch free-to-access online video.[37] Watching OTT content on mobile phones is further facilitated by data bundles for this purpose (mobile operators often provide various bundles of data for video). This includes inexpensive time-limited data (such as KSH10 for 1 GB of data for YouTube content valid for an hour).

The introduction of OTTs in Kenya affects the market study as we need to consider how and in what ways OTTs interact with broadcasting submarkets (regardless of the fact that they are provided over what are essentially 'telecommunications systems'). This includes the following:

1. The impact of OTTs on the general market environment e.g. impact on fragmentation of advertisers.
2. Whether OTTs are part of the same relevant competition market as broadcasters.
3. Whether OTTs impact on competitive dynamics in different submarkets.
4. The extent to which OTTs have an impact on anticompetitive behaviour.
5. What regulatory and legislative changes may be appropriate or possible.

This is considered further in the competition analysis. However, we next consider the regulatory treatment of OTTs internationally as a background to further consideration of OTTs.

3.2.2 Summary of the international review of treatment of OTTs

OTTs currently co-exist with broadcasting licensees in Kenya, however, as is the case in other countries, OTTs are not licensees, and the Kenyan regulatory framework does not currently require OTTs (by that name) to be licensed nor does it regulate them in any other way. Under the Terms of Reference, the Authority would like to determine the best approach to address the co-existence of OTTs and traditional service providers, enhance effective management of competition in the sector, while ensuring the growth of both types of services.

In preparing the recommendations in this section, the treatment of OTTs in other countries has been considered. The findings are set out in Table 4. Overall, there are three key categories of concerns that can be observed:

- Regulation of harmful content or content that is inconsistent with country values
- Promotion of local content including financial support for local production
- Taxes and fees

Table 4: Summary of regulatory position in each country

Country	OTTs regulated Y/N	Key concerns	Type of regulation	Other observations
UK	N	• Harmful content	• Notification to Ofcom by OTTs • Guidance notes relating to content that have been published by Ofcom must be applied	OTTs are divided into 2 types, depending on the level of control of the content.

[37] GSMA. (2022). *The State of Mobile Internet Connectivity, 2022*. Available here. Accessed 25 April 2023.

Nigeria	Y	• Promoting local content • Fees	• Registration of OTTs with NBC	Fines issued have been overturned, though the NBC has taken a judgement on appeal, arguing it is not attempting to stifle freedom of speech
South Africa	N	• Harmful content	• Self-regulation while adhering to the FPB[38] rules of classification	Pay TV providers argued for regulation because of falling revenues
Canada	N	• Supporting (financially) and promoting locally produced content	• Light touch, still in phase 1 of 3 phases of consultation	Attempts to amend laws to give CRTC more power have been rejected numerous times for restricting freedom of speech
Argentina	Y	• Funding the production of local content • Tax • Content	• Taxing foreign players through levies imposed on credit card companies collecting subscriptions, • Blocking websites and apps	Blocking has been roundly criticised as being too harsh and restricting freedom of speech
MENA	Y	• Content	• Telecoms: ISPs must be licensed and must take down offensive content on request; • Monitoring • Other: censorship by other Ministries	OTTs are not licensed as such but the platforms must be licensed, and the operators are responsible for taking down content.

In summary, the approach tends to vary depending on the key concerns in each country, or put another way, depending on the context in which the OTTs operate in that country. For example, in the MENA countries UAE and Oman, concerns about content are raised against the background of religion, regulation sometimes taking the form of censorship.

The information in this section is, to the best of our knowledge, current up to 14 September 2023 unless otherwise indicated, and based on desktop research only.

3.2.3 Issues arising in decisions to regulate OTTs

3.2.3.1 How should we characterise OTTs?

OTT content is largely transmitted or made accessible over the internet, in other words over platforms made available by telecommunications operators that are not themselves OTT players. The content, however, is comparable with that made available by broadcasters and is sometimes made available by the broadcasters themselves under a different name through a different platform i.e. not across typical broadcasting platforms such as satellite, Free-To-Air ("FTA"), Direct-To-Home ("DTH") or Digital Terrestrial Television ("DTT").

[38] The Film and Publications Board which has the power to classify films, videos, and other forms of online content, and to charge a fee.

There have been some differences in the categorisation of so-called 'over-the-top' services ("OTTs") by regulatory authorities and platform providers. In 2016, BEREC[39] defined OTT services as "content, a service or an application that is provided to the end user over the public internet"[40], and this definition has not changed much over time, although there has been disagreement over the categorisation of OTTs as electronic communications services ("ECS") or 'not' ECS. In 2019, the European Court of Justice found that SkypeOut was an ECS as it allowed connectivity via the Public Switched Telecommunications Network ("PSTN").[41]

In the electronic communications (telecommunications) sector, OTTs might include virtual conferencing or calling platforms such as Teams, Zoom, and Skype; social communication platforms and services such as Voice-Over-Internet-Protocol ("VOIP"), WhatsApp, Twitter, Facebook, Viber and Instagram. In the broadcasting sector, OTTs have come to include film and television streaming or video-on-demand services including Netflix, GooglePlay, YouTube, Amazon Prime, and Hulu (owned by Disney). It is this last category of OTTs that is of relevance to this review and on which we focus. In addition, these services can be differentiated from video-sharing platforms that feature user generated content (such as YouTube and TikTok) as opposed to content created and sold by content companies (such as studios or sports rights owners).

While the offerings have exponentially increased choice for consumers, in many countries, electronic communication network operators and traditional broadcasters have each expressed dissatisfaction with the fact that OTT players are not (except in limited instances and in a few countries) regulated in the same way that they are. They have complained that OTTs are, as a result, having a negative impact on their subscriber base and their revenues.

Despite equally massive growth in what is called 'user-generated content' which is content created and distributed by end users across platforms like TikTok, Facebook and YouTube, we are concerned with use of the internet made possible by high-speed networks for which *end users* pay their providers. The only reason to consider this type of content in this report is because in some countries, the platform owner or operator may be required to take down inappropriate content posted by others if directed to do so by a regulatory authority that is not necessarily a telecommunications or broadcasting authority but has authority to monitor and direct the removal ("take-down") of certain types of content.

If OTTs are to be regulated at all, who is best-placed to do this, and how should they do this? ResearchICT Africa produced the following suggestion as Table 3 of a November 2019 report entitled "The Regulatory Treatment of OTTs in Africa"[42]:

[39] The Body of European Regulators of Electronic Communications.
[40] BEREC. (2016). *Report on OTT services*. BoR (16) 35. Available here.
[41] EC. (2019). *Skype Communications SARL v Institut Belge des Service Postaux et des Telecommunications (IBPT)*, case 142/18. Available here.
[42] Esselaar, S., Stork, C. (2019). *Regulatory and tax treatment of OTTs in Africa*. Researchgate.net. Available here.

Table 5: Proposed definition of OTTs in Africa

	OTT-ECS	OTT-Com	OTT-Content	OTT-Other
Competing with ECS?	Yes	Potentially	No	No
Competing with national broadcasting services?	No	No	Potentially	No
Description	OTT voice and text with the ability to make calls to fixed or mobile telephone networks (eg Skype Out)	Applications that allow voice calls and instant messaging provided to the end user over the public Internet	Content provided to the end user over the public Internet	E-commerce and online services provided to the end user over the public Internet
Ex-Ante Regulatory Bodies	Telecom Regulator	Telecom Regulator	Broadcasting Regulators	None
Potential regulatory impact	Termination and roaming regulation	Lighter voice and sms wholesale regulation	VAT collection from foreign streaming services	None

Source: ResearchICT Africa, 2019

With this in mind, we have considered some of the ways in which OTTs are regulated in other countries:

- Are they regulated as telecommunications operators, broadcasters or "other"?
- Are they regulated in relation to content and if so, by whom and for what purpose for example, for the protection of children, or to promote local content?
- Are they regulated in a way that requires them to pay a fee or a tax, or both?
- Are they subject to competition regulation as part of an existing market, or considered to be a separate market for competition purposes?
- If regulation is required, how is this achieved – is it light-touch, by way of notification, or by application for and grant of a licence?

A further question is whether OTTs are or should be subject to competition regulation as part of an existing market or considered to be a separate market for competition purposes. We consider the international experience on markets in the competition review, where relevant.

The countries we have reviewed are:

1. The United Kingdom
2. Nigeria
3. South Africa
4. Canada
5. Argentina
6. MENA (Oman and UAE)

The full report for each country is attached in Appendix G.

3.2.3.2 The United Kingdom

The United Kingdom ("UK"), has been concerned with whether to regulate OTTs (particularly video on demand services), recognising the regulatory differences and the potential impact it has on competition between traditional broadcasters and OTT providers. There has been a particular focus on regulating content to ensure audience protection.

Ultimately the government decided on a light touch approach to regulation with the development of a code akin to the existing "Broadcasting Code." It also requires notification by OTTs to the UK communications regulatory authority, the Office of Communications ("Ofcom"), but not licensing. Notification must be made in terms of two Guidance Notes published by Ofcom,[43] recognizing the influence of the EU's 2018 Audio-Visual Media Services Directive[44] and the UK's 2020 Audiovisual Media Services Directive Regulation transposing the Directive[45]. The UK differentiates between different types of OTTs, in particular providing different guidance to "on-demand programme services" and "video-sharing platforms".

The first Guidance Note applies to "on-demand programme services" ("ODPS") including video-on-demand services, TV catch-up and online film services. The ODPS must ensure that under-18s cannot watch "specially restricted material" (which has been or would be classified in the R18 category by the British Board of Film Classification ("BBFC")), or material which might seriously impair the physical, mental or moral development of under-18s; and there must be no "prohibited material" (which would be refused a classification by the BBFC). In addition, the service must not contain any material likely to incite hatred based on race, sex, religion or nationality; and must comply with rules about product placement and sponsorship.

The second Guidance Note applies to a video-sharing platform ("VSP"), which is defined as "*a type of online video service which allow users to upload and share videos with the public*" [46] noting that "*The level of control that an online provider exercises over video content available on their service (see paragraphs 3.25 to 3.36 [of the Guidance]) is a key factor in assessing whether the service falls to be regulated as an ODPS under Part 4A of the Act or a video-sharing platform ("VSP") under Part 4B of the Act*". A 'VSP provider' refers to the person who provides the relevant VSP service.

VSPs are required to have appropriate measures to protect all users from videos that are likely to incite violence or hatred against particular groups; and which include content which would be considered a criminal offence under laws relating to terrorism; child sexual abuse material; racism and xenophobia. They must also protect under-18s from videos containing pornography, extreme content and other material which might impair their physical, mental or moral development. Advertising standards must also be upheld.

While licensing is not required, from 2021, VSPs must notify Ofcom that they intend to operate in the UK[47]. The same is true for ODPs.

Key issues:

- OTTs must notify Ofcom that they intend to provide a service falling into one or other category of OTTs
- They must comply with the audience protection (sensitive content) rules

3.2.3.3 Nigeria

The initial approach to the regulation of OTTs in Nigeria was, in 2016, to focus primarily on social media, and to consider the impact of content transmitted across electronic communications

[43] Ofcom. (2021). *On-demand programme services: who needs to notify Ofcom?* Available here.
[44] EU. (2018). *Directive (EU) 2018/1808 of the European Parliament and of the Council of 4 November 2018*. Available here.
[45] The Audiovisual Media Services Regulations. (2020). Available here.
[46] Ofcom. (2022). *Ofcom's video-sharing platform framework: a guide for industry.* Available here.
[47] Ofcom. (2021). *Video-sharing platforms – who needs to notify Ofcom?: Guidance notes*. Available here.

networks.[48] The National Broadcasting Commission ("NBC") published a directive requiring all "online broadcast services" and social media platforms to apply for a broadcasting licence by claiming that it was empowered to regulate "radio and television stations including cable television services, direct satellite broadcast and any other medium of broadcasting".[49]

Various Bills put forward by the NBC from 2019 to 2022 were not passed[50] including the NBC Act Amendment Bill to empower the NBC to regulate social media, internet broadcasting, and fix tariffs for pay TV services, among other functions.

Undaunted, the Nigerian Broadcasting Code, 2016 was amended in 2020 by the NBC to define "broadcasting" to include OTTs, and international broadcasters that transmit signals into Nigeria are required to "take cognisance of Nigeria's broadcast laws and the international principle of reciprocity".[51] In August 2021 the amendment to the Code was challenged in court by the Media Rights Agenda[52] on the basis that NBC's attempt to regulate and license social media platforms constituted a violation of the right to freedom of expression as well as a breach of Nigeria's treaty obligations by virtue of its being a signatory to the international legal instruments and various other declarations. In February 2023, the NBC urged foreign broadcasters which transmitted signals into Nigeria to apply for licences, and also "*called on the Internet Protocol Television (IPTV) and other broadcast stations streaming online, to register with the commission to avoid disconnection and prosecution*." At the same time, OTTs were 'urged' to promote and sustain Nigeria's diverse culture by ensuring diversity in programming content for "Nigeria's widest audience".

In May 2023, a court overturned various fines imposed on social media platforms by the NBC in terms of the Code.[53] A few days later, the NBC announced its intention to appeal the finding.[54]

The regulatory position in Nigeria is therefore somewhat unclear at present and is still being challenged.

Key issues:

- NBC wants to regulate OTTs including social media platforms on the basis that they are "broadcasters" and change the law to enable it to mandate local content obligations
- This position is being challenged as having an impact on freedom of speech

3.2.3.4 South Africa

In 2016, the South African Parliament held hearings into the role of and reason for regulation of OTT players. South African MNOs, in particular, argued that *"they contend with certain domestic regulatory requirements that the international OTT service providers do not face, including universal*

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[48] Okonji, E. (2016). *NCC Explains OTT Technology Regulation.* This Day. Available here.
[49] Section 2(1)(d) of the Nigerian Broadcasting Commission Act, 2004.
[50] Nigerian Tribune. (2021). *NBC, NPC Ace Amendment Bills: Not to be.* Available here.
[51] Paragraph 2.12.8 of the Amendment Code.
[52] Media Career Development Network. (2021). *NBC sued over regulation, licensing of social media.* Available here.
[53] Nnochiri, I. (2023). *NBC lacks power to impose fines on broadcast stations – Court*. Vanguard. Available here.
[54] Onyedike-Ugoeze, N. (2023). *NBC plans to appeal Court judgement that forbade it from fining broadcast stations.* The Guardian. Available here.

service and access regulations, tariff regulations, taxation, and-the focus of this article - heavier-touch regulation in respect of the sharing of customer data" which the OTTs fiercely rejected. [55]

Towards the end of 2020, the Department of Communications and Digital Technologies published a White Paper – a draft policy on Audio and Audio-Visual Content Services.[56] The approach proposed will consist of three categories of licence (broadcasting, on-demand content service and video sharing platform), aimed at the type of platform across which OTTs are supplied, but also at the revenue earned by each platform. The on-demand content services would be assessed having regard to whether they could be said to compete with broadcasting services and whether their revenue exceeded the threshold to be set by Government (with reference to global size and the impact of this on the South African entity). The video-sharing platform service could be exempted provided that content would be subject to a code of conduct.[57] No further steps have been taken.

In 2021, Netflix agreed to accept certain rulings by the Film and Publications Board ("FPB")[58] which is created by the Film and Publications Act, 1996[59] and regulates content including rating films, games and some types of online content. The FPB also claims to regulate "streaming services such as Netflix and Showmax, cinema houses including Nu-Metro and Ster-Kinekor, gaming companies such as Konami and Capcom, as well as Apple TV and Google." The Independent Communications Authority of South Africa ("ICASA") which regulates broadcasting, electronic communications and postal services, does not have authority to regulate "content", but it does regulate "broadcasting" and "broadcasting services".

In 2022 under new FPB regulations,[60] Netflix (and other OTTs providing content services) were required to self-regulate within the guidelines of the FPB, to classify and rate their content specifically to protect children being exposed to content that could be harmful, and they must submit their ratings to the Board. Part 11 of the Regulations requires internet service providers to register with the FPB and they must "indicate in the application form all measures, or steps taken or put in place to ensure that children are not exposed to child pornography and pornography".

Other chapters deal with the procedure for classification and exemption, appeals and take-down orders, and importantly, with complaints.

Key issues:

- The focus of regulation in South Africa is therefore also, at present, limited to the nature of the content distributed by OTTs
- OTTs do not need to apply for a licence from ICASA

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[55] Parliamentary Monitoring Group (PMG). (2016) Over-the-Top (OTT) policy and regulatory options Meeting Summary. 26 January. Cape Town: Portfolio Committee on Telecommunications and Postal Services, Parliament of South Africa. Available here and here.

[56] Government Gazette No. 43797 South Africa. Available here.

[57] Clause 3.4 of the draft policy.

[58] Film and Publication Board Website. Available here. Accessed: 06 October 2023.

[59] The objects of the Act are "*Regulate the creation, production, possession, and distribution of certain publications and certain films by means of classification, the imposition of age restrictions, and giving of consumer advice; And make exploitative use of children in pornographic publications, films, or on the internet punishable.*"

[60] Films and Publications Amendment Regulations. (2022). Government Gazette No. 46843 South Africa. Available here.

3.2.3.5 Canada

The genesis of the move to regulate OTTs in Canada can be summed up by this statement, published in 2020 by the Canadian Heritage Minister, "*One system for our traditional broadcasters and a separate system for online broadcasters simply doesn't work…This outdated regulatory framework is not only unfair for our Canadian businesses, it threatens Canadian jobs and it undermines our ability to tell our own Canadian stories*."[61] A Bill proposed at that time defined "online undertakings" as a distinct class of broadcasting undertaking, but it did not pass.

Users of social media services uploading material to be shared with other users which were not affiliated with the service provider, would not be subject to broadcasting regulation; and online undertakings would not have to be licensed (although registration would be required).[62] However, concerns were raised about the failure of the Bill to explicitly protect content uploaded on social media which, it was felt, could have serious implications for freedom of speech.

In May 2023, the Canadian Radio-Television and Telecommunications Commission ("CRTC") launched new public consultations about aspects of regulating online services that echo those in the failed Bill[63]:

- what contributions online services will need to make to support the Canadian broadcasting system – the system is likely to recognize different models and propose different contributions
- which online streaming services need to be registered and which services will be exempted (the proposal is that streaming services with annual revenues under $10 million not be required to register, and that registration would not apply to individual Canadians or creators of user-generated content)
- basic conditions of service to be imposed on certain streaming services

In the meantime, Bill C-11 passed in April 2023, making amendments to the Broadcasting Act which now include the regulation of online streaming services that provide their programming to the public,[64] but not user-generated content. CRTC may make certain orders and decisions and introduce certain regulations, but they must consult before doing so.

Key issues:

- Online streaming services are regulated in Canada in a light-touch manner
- The CRTC is considering how best OTTs might contribute to the development and funding of Canadian programming in future

3.2.3.6 Argentina

As far back as 2015, telecoms operators and particularly cable television operators in Argentina have been calling for the regulation of OTTs, claiming they (the licensees) are limited in the provision of services, whereas OTTs do not have to invest in fixed infrastructure like they do but can provide whatever services they want to over any platform. In addition, concerns have been expressed about

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[61] Careless, J. (2020, November 19). *Canada moves to regulate OTT, Charge Netflix, and other OTT service millions*. StreamingMedia. Available here.
[62] House of Commons. (2020). *Bill C-10: An Act to amend the Broadcasting Act and to make consequential amendments to other Acts.* Government of Canada. Available here.
[63] Government of Canada. (2023, May 12). *CRTC launches consultations to modernize broadcasting system*. Available here.
[64] Broadcasting Act S.C 1991. Government of Canada. Available here.

the obligations on the OTT providers, many of which are foreign, to provide or promote local content and to pay tax in Argentina.

From June 2018, VAT of 21% has been levied on digital services including online services such as Netflix, Amazon Video, and Apple TV. Foreign OTT providers making services available to end users located in Argentina are affected and although the online providers themselves are not required to pay the VAT, intermediaries, such as credit card companies, are designated to act as collection agents.

An attempt to legislate contributions to local content has not been successful, but in October 2020, a new law promoted different digital and technological activities through tax incentives, subject to their development in Argentine territory and compliance with the criteria defined by the law. However, OTT providers providing services from outside Argentina must pay an 8% tax on each transaction in relation to online services provided from abroad to end users located in Argentina. The services include audiovisual content (e.g., streaming) that involves access to and/or downloading of images, text, information, video, music, and games. Payment must be collected by credit card companies.

In a regional survey of the regulation of the internet, the perception of the Internet seems to have changed - going from being considered a democratizing tool to being perceived in many cases as a "growing threat"[65], with ENACOM blocking access to several websites and apps, often without offering an explanation (as recently as in 2023).[66]

Key issues:

- Disparity in financial contributions by licensees and unlicensed foreign OTTs have led to taxes being imposed on foreign OTTs, collected through credit card companies and paid to Government
- OTTs that promote or invest in local content in Argentina may receive tax incentives

3.2.3.7 MENA

In this section we consider the OTT market in two Middle East countries as this region is growing substantially and each of Oman and the United Arab Emirates ("UAE") demonstrates the general position in regulation in this region. In these markets a key focus is control over content broadcast.

In Oman, for example, the Law on the Censorship of Artistic Works (Royal Decree 65/97) censors all audio, visual and audiovisual artistic works including movies, and it seems likely that streaming would fall under this law. A person may not display or perform an "artistic work" without a licence from the Ministry of Information which is empowered to censor a work to protect "public order, public morals and state interests".[67]

In the UAE, the Telecommunications and Digital Government Regulatory Authority ("TDRA") is tasked with implementation of the Internet Access Management Regulatory Policy ("IAM Regulatory Policy") and must co-ordinate with the Media Regulatory Office and the licensed internet service

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[65] Del Campo, A. (2018). *Internet regulation and its impact on freedom of expression in Latin America.* Center for Studies on Freedom of Expression and Access to Information (CELE) of the Universidad de Palermo for the Legislative Observatory. Available here.

[66] ENACOM. *Webiste Blocking.* Accessed on 6 October, 2023. Available here.

[67] Al-Farsi, M. (2023). Banned Barbie: *Censorship law in Oman*. Decree Blog. Available here.

providers ("ISPs") in the UAE. The policy contains various categories which must be considered by ISPs to ensure the security of the internet and to protect end users from "harmful websites" meaning those that contain material that is contrary to the religious and ethical values of the UAE. Among others the Media Regulatory Office issues licences that are required under the 2018 Electronic Media Regulation[68]. This Law sets out what will be "Licensable Electronic Media Activities".

The Licensing and Content Follow Up department ("LCFU") within the Media Regulatory Office is responsible to, among other things, "Follow up on the media and media professionals inside the country, including the free zones, monitor violating content and take the necessary measures in accordance with the legislations and regulations in force in this regard." In addition, the LCFU is mandated to:

- "Monitor the media content of all that is printed, published and broadcast within the country, including the free zones.
- Implement the necessary measures in case the media licenses and media and advertising content violate the laws and regulations in the media and publishing field".

TDRA also monitors content made available to users in the UAE to notify website operators of any breach (including a potential breach). Licensees including ISPs are required to block online content if requested to do so by the TDRA. A 2009 Regulation on Voice-over-Internet-Protocols ("VOIP") requires any VOIP provider to be licensed, and to comply with strict technical protocols.

Key issues:

- While OTTs are not regulated as electronic communications service providers or broadcasters, ISPs must be licensed
- OTTs and ISPs are subject to content restriction and censorship

3.2.4 Conclusion and recommendations regarding OTTs

In a 2015 ITU publication[1], the "world of OTTs" was described as having the following characteristics:

- No Regulation (own policy/rules)
- No service license required
- No intercompany obligations
- Disruptive models (free, freemium, Ad based etc)
- The World as Market Place
- Scalable investment (no obligation of availability)
- Limited direct employment

Regulatory authorities' duties in that context were summarized as:

- Protect our citizens' interests
- Provide incentives for the industry
- Attend to national-level needs and issues
- Create and sustain investor confidence
- Remain mindful of future needs of the consumers and the industry"

[68] STA Law Firm. (2019). *Overview: Media Regulations in the United Arab Emirates*. Available here.

Since then, the world has changed considerably, changing the way that these characteristics are viewed (no regulation, limited direct employment, scalable investment), or changing the characteristics completely. Concerns about the type of content that can be made available over the internet, and partly as a result of perceived inequality between OTTs and licensees, regulatory activity in relation to OTTs has increased.

However, regulation is aimed at addressing a marketplace in which the participants are unlikely to regulate themselves, but where regulation is necessary to prevent harm or promote a public good. As is evident from our review, regulations internationally vary but include notification, licensing, licence fee obligations, content regulations and protection against harmful content.

In considering the regulation of OTTs in context of this international review, the first question is whether OTTs can be regulated under KICA.
There are three possible ways in which OTT services could be subject to KICA. These are as a telecommunications service, a broadcasting service, or as media. However:

1. OTTs in Kenya do not fall within the KICA definition of "telecommunications services" and cannot therefore be regulated as such.
2. OTTs cannot be addressed under section 46A. This is because it currently defines a "broadcaster" as "a person who composes packages or distributes "television or radio programme services" for reception by the public or sections of the public or subscribers to such a service, irrespective of the technology used"; and
3. OTTs could potentially be regulated as "media" which is defined as encompassing "broadcast, electronic and other types of media but does not include print and book publishing". This not a licensable service under KICA but the Authority has rights to make regulations under section 5B in relation to the exercise of "freedom of expression".
4. Even taking into account section 84D of KICA which refers to "*any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious, or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein...",* the Authority's powers are not extended to OTTs.

The fact that some broadcasting licensees have launched and operate their own OTTs will not make any difference to these conclusions, thus there is no basis in KICA on which to regulate DStv which streams DStv (recently renamed DStv Stream), or the radio channels streamed by KBC.

The Authority's power to make regulations under the current section 5B is limited. Article 33 of the Kenyan Constitution[2] states:

"(1) Every person has the right to freedom of expression, which includes--

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to--

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

Article 34 states, in relation to media:

"(1) Every person has the right to freedom of expression, which includes--
(a) freedom to seek, receive or impart information or ideas;
(b) freedom of artistic creativity; and
(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to--
(a) propaganda for war;
(b) incitement to violence;
(c) hate speech; or
(d) advocacy of hatred that—
(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

These rights are recognised in the 2013 amendment to KICA in the introduction to section 5B, and in the changes made to section 46A. This seems to point to the only path to regulation, which is:

1. under section 46A -
   a. *"...(i) administering the broadcasting content aspect of this Act;*
   b. *(j) developing **media standards**; and*
   c. *(k) regulating and monitoring compliance with those standards;" and*
2. *under section 5B - "The Authority may make regulations for the better carrying out of the provisions of **this section***".

Section 5B(1) states that "*The Authority shall, in undertaking its functions under this Act, comply with the provisions of Article 34(1) and (2) of the Constitution."*

The practical application of these powers is unclear and would benefit from discussion with the Authority regarding the genesis of the provisions and whether any explanation was given for this approach. Was it, for example, the intention of the legislature to enable the Authority to require licensees or third-party content providers or both, to remove harmful content, provided the Authority does not limit freedom of speech?

The use of the word "*media*" has, in addition, perhaps resulted in some confusion. The word is capable of several interpretations and although the KICA defines it to include "*electronic and other types of media*", the reference to "*media standards*" in section 46A and separately in that section, the reference to "*broadcasting content aspect*", and the obligation on the Authority in section 7(f) to "*establish a broadcasting standards committee or such other committee as may be necessary to carry out its functions*", suggests that "*media*" is not intended to include "*broadcasting content*" and the reverse is also true. This is borne out by section 102A(1) which deals with complaints about the conduct of "*a journalist or media enterprise*", and section 102E(1) which provides at (c) that the Tribunal may "*make any directive and declaration on freedom of expression*", and at (e) that the offending editor "*of the broadcast, print or online material*" may be ordered to publish the Tribunal's decision, and at (h) that "*the journalist may be suspended or removed from the register of the journalist involved*".

The Media Council[3] ("MC") is also tasked with the regulation of '**the media'** in the sense of journalism and reporting, rather than "*media*" in the sense of content as "media" is defined as "the production of electronic and print media for circulation to the public, but does not include book publishing". The Film and Publications Board ("KFPB") was established under Films and Stage Plays Act, 1998 ("KFPB Act") and its duties are primarily to classify films, however, it has also proposed to regulate OTTs. In a notice published in 2022[4], it announced, "Digitization and increase in the number of players in the broadcast sector have witnessed a proliferation of unclassified audiovisual content on broadcast, VOD and online streaming platforms. It then developed a Co-Regulation Framework aimed at equipping content broadcasters, VOD and OTT platform operators with the requisite knowledge and skills to enable them classify a determined proportion of content in conformity with KFCB's Film Classification Guidelines." It defines "over-the-top service" as a distribution or exhibition service used to offer films directly to viewers through the Internet which bypasses broadcast platforms" and defines ""video-on-demand service" as a distribution or exhibition service that allows a person to access a film library through the use of technology without the use of a traditional video playback device or through a broadcasting schedule".
In addition, the Draft Film and Stage Plays (Self-Classification) Regulations, 2023 are intended to "apply to broadcasters and providers of video-on-demand and over-the-top services that are accessible in Kenya[5]". This overlapping jurisdiction is bound to create confusion which we address in our Recommendations.

However, what is clear is that, at present, OTTs cannot be classified as broadcasters under KICA and the Authority is therefore not empowered to require OTTs to apply for a broadcasting licence, and it cannot impose, for example, any obligations on OTTs regarding local content, or to pay licence fees or to make any contribution to the cost of local production.

In contrast, we set out below the position adopted in the countries we have reviewed. We have summarised this in Table 1 together with some of the key characteristics and our findings in relation to the Kenyan position at present:

Characteristic or concern	**Countries reviewed**	**Findings**
Categorisation for purposes of regulation	• "Other" - United Kingdom, South Africa • "broadcasting" - Nigeria, Argentina • Not clear – MENA, Canada (Canada is more closely aligned with broadcasting)	OTTs cannot be categorised as "telecommunications services" or "broadcasting services" or "media" under the KICA, but the licensed platform operators can be regulated, whether telecommunications or broadcasting. This is not ideal since the platform owners will typically be broadband or mobile operators which offer internet services which are not regulated.
Content concerns (harmful or inappropriate)	5 out of 6 countries, ranging from the most strictly regulated (MENA, Nigeria) to the lightest regulation (Argentina, United Kingdom and South Africa)	The Authority could perhaps regulate content by stretching the provisions of section 46. However, this power is limited by the right to freedom of expression.
Local content concerns (paying for development, or promoting local content on their platform)	Nigeria, Argentina and Canada	The KICA empowers the Authority to mandate local content obligations on broadcasting licensees only.
Tax or other financial obligations/payee	• Nigeria (NBC – fee) • Argentina (Government – tax) • Canada (CRTC – fee)	The Authority may only charge fees to and receive fees from licensees, but other regulatory authorities in Kenya may impose taxes on entities operating

		a business in Kenya, if deemed appropriate, payable to Government.
Competition concerns	None addressed under competition law, although the imposition of fees in some countries is indicative of a response to concerns raised by broadcasters that their playing field is uneven because they have to pay fees and OTTs do not.	Discussed in recommendations in the competition section, and in the next section.
Light touch or self-regulation	United Kingdom, South Africa, Canada and to some extent, Argentina	Light touch content regulation may be appropriate having regard to Articles 33 and 34 of the Constitution and sections 5B, 5C and 46A of KICA.
Is the position settled in law?	Only in the United Kingdom and South Africa	The 2019 and 2023 Bills are pending.

There are several lessons that one can learn from the review of these countries' attitude to the regulation of OTTs; most importantly perhaps, that freedom of speech and expression should not be limited by regulation without serious consideration6, and that any regulation at all should be carefully considered against need and an identified harm.

3.2.5 Recommendations regarding the regulation of OTTs

The OTT market in Kenya is nascent but growing as it is in many countries in the world. Broadcasters in many countries have raised the fact that as they grow so OTTs effectively compete with broadcasters for content and viewers but on an uneven playing field. This is because broadcasters typically pay service licence fees and are obliged to apply for licences, and are in some cases are then subject to local content obligations and content codes. Kenya's Constitution protects freedom of speech and the CA may not tread on this freedom so whether - on the basis of this alone - it is necessary to regulate OTTs, is not a straightforward answer. It its also unclear whether, as a result of the findings in the market review, regulation of OTTs is required. Simply being in a market with linear pay tv broadcasters with sport does not of itself constitute a competition problem.

OTTs in most of the jurisdictions we have considered and in others that are not in the report, are not specifically regulated as OTTs and for a competition reason only. While OTTs are regulated in Nigeria, the Broadcasting Authority is facing a legal challenge on the basis that they are attempting to strangle freedom of speech by forcing licensing and imposing conditions on content.

If OTTs were to be regulated in Kenya - putting aside the reason for regulation for the time being - how should this take place? The 'how' is linked to the 'why' so we cannot make specific recommendations until the Authority decides on the issue that points to a regulatory solution pursuant to the public consultation, but we set out here some suggestions for consideration on the assumption that the option selected has its foundation in a particular issue. These suggestions are ranked in order of the kind of regulation that each envisages – from very light touch, to more firm and formal regulation.

1. Collaborative approach*:* the object would be to ensure that the Authority has oversight over all OTTs entering and operating in Kenya and can monitor the provision of OTT services with a view to determining their impact on consumers and broadcasters, without stifling innovation by introducing a firm regulatory framework, at least for a period of time.

Initially this should be an informal approach. The Authority could invite OTTs to meet it informally to discuss for example, how OTTs find Kenya, any issues they are encountering, and the need to protect Kenyans from inappropriate and harmful content. The Authority could urge OTTs to notify them of changes in the market dynamics and to contribute to a code of conduct for content. Over time the Authority could request information from OTTs to assist it in its determinations, as part of a regulatory impact assessment. This approach could also be taken pending amendments to the KICA if the decision to regulate requires formal implementation. An alternative may be to publish a notice requiring all OTT representatives to meet with representatives of Government, namely the Authority, to discuss issues of mutual interest in relation to consumer protection, but this approach could be ignored unless there is some sort of relationship between the parties which will not be the case if the Authority adopts a formal or very 'legal' stance.

2. **Concurrent jurisdiction agreement:** we recommend that the Authority liaise with the MC and KFPB. Ideally the parties would co-operate in the interests of Kenya, bearing in mind the overriding priority of free speech, and the need to regulate in a proportionate and appropriate manner. We note that section the Cabinet Secretary may issue a policy guideline to the Authority in terms of section 5C of KICA which may address any matter. It is very broad (as described in section 2.1.1 of this Report so perhaps it could direct the Authority and the other entities to co-operate in this regard.
3. **Review of framework for "media" and "content":** to ensure a workable framework for OTTs we recommend a full review of the KICA alongside the Media Council Act and the KFPB Act, in preparation for or pursuant to a wide-ranging concurrent jurisdiction agreement. The review can be undertaken at any time and separately from that step. The review is necessary because these Acts and some of the work by these organisations overlaps to some degree with the Broadcasting Regulations and the KICA and could result in forum-shopping or conflicts in interpretation. An order of precedence should be provided for in the agreement, meaning that – for example – in the event of any interpretation issues in applying the concurrent jurisdiction agreement, the Authority shall make the decision on the approach.
4. **Policy guidelines or regulations to be issued by the Cabinet Secretary:** section 5B of KICA provides for the Cabinet Secretary to publish regulations to assist the Authority in implementing its obligations in relation to freedom of speech and applying any limitations on this as set out in that section, noting that the heading of this section is "Freedom of the Media" (and not freedom of expression). Alternatively, a policy guideline may be issued by the Cabinet Secretary to the Authority in terms of section 5C of KICA on any matter, although it is important to bear in mind that a policy guideline cannot amend a primary law, although it can suggest a way of working or an approach or require the Authority to undertake research or a regulatory impact assessment, for example. This might then have the effect of obtaining information from OTTs, but is a near-formal and more forceful regulatory step.
5. **Regulate by amending the KICA:** this would be a significant change in the legal framework and possibly result in challenge from OTTs and even a threat to withdraw from Kenya, depending on the obligations included in the amendments. One reason for this approach could be the consumer protection responsibilities of the Authority (as above), which would require it to have oversight of this increasingly important sector, with a view to monitoring price, quality of service, and content. Another might be the need to create a level playing field – not to regulate OTTs because of any market power issues, but rather to ensure that

broadcasters and OTTs are treated in a relatively similar way (noting that their delivery mechanisms and business models particularly in the case of social media) are entirely different. The benchmarks may allow for some insight, and further review could take place on country models considered in the training.

The first amendment would be to introduce an appropriate definition or definitions for OTTs (such as online media, streaming video or audio) bearing in mind that if it is too narrow it is likely the Act will need amendment again in the near future.

The powers and duties of the Authority will need to be amended to specifically provide for regulation of this new service. Assuming it's necessary decided that it is necessary to license OTTs then they must be obliged to apply for a licence from the Authority, perhaps to pay a fee that is not dissimilar to the licence fee paid by broadcasters, and to adhere to a code of conduct which would not be dissimilar to the current provisions of (at least) section 46I and section 46K. These are not straightforward amendments. The law would need to impose remedies or penalties for non-compliance. The Authority may want to consider imposing local content obligations, bearing in mind that Netflix, for example, is already creating local content. Other obligations are unclear without having identified the reason for regulation. Amendments to KICA would need to take account of section 5B which itself refers to the Constitutional right of freedom of expression.

The Broadcasting Regulations would need amendment or new regulations specific to OTTs may be needed even if only to expand on the obligations in the law and provide the process for applying for the licence (requirements to qualify, such as financial backing, experience, sources of content, shareholder names and so on). The obligations now set out in the KICA could be given effect in a new (but fairly simply) licence template.

4 Introduction to competition analysis

There are several components to the analysis of competition. The Terms of Reference ("TOR") lists the following:

1. To identify **the relevant markets (sub-markets) within the broadcasting sub-sector**, the number of players that exist and their respective market shares;
2. To identify and review **the impact of Over-the top services (OTTs)** on the broadcasting sub sector, level of adoption of the OTTs, impact of OTTs on competition in the sector and business models of traditional service providers.
3. To establish **the levels and extent of competition in the various broadcasting sub-markets** identified; and identify players with significant market power;
4. Identify the **market barriers**, if any, that prevent or restrict entry, competition and the growth of the players in the era of changing technologies;
5. Provide a proposal on the best ways by which **the identified barriers and factors acting as a hindrance to growth can be considerably minimized or eliminated**;
6. To **establish any anti-competitive behaviour** and evaluate the extent this has helped players entrench dominance in the broadcasting sub-sector;
7. Identify **specific stimulus that can be injected** in order to ensure that there is effective competition, accessibility, affordability and growth.
8. Recommend **the optimal or appropriate and proportionate regulatory response to the competition issues identified** within the existing regulatory and legal framework;
9. Recommend **the best regulatory approaches that may be applied to address the co-existence of OTTs with traditional service providers** in the sector and enhance effective management of competition in the sector, while ensuring the growth of both services; and
10. Recommend any **other relevant intervention(s)** that would go along towards enhancing effective management of competition in the broadcasting subsector in Kenya;

In our study, we have approached this using three stages.

First, we *define the relevant markets*. From this we assess the number of players and market shares in each market.

Second, we *will assess market power and competition*. This is done in two steps. We engage in a screening for markets that appear to be competitive based on (i) barriers to entry (ii) the number of participants and (iii) measures of entry and exit. Then we do a more in-depth analysis on those that appear to have potential competition issues or significant market power. This is done with a view to determining whether companies within the market have significant market power and thereafter identifying whether anti-competitive behaviour is apparent or possible in future (absent regulation).

Third, we identify remedies and interventions to assist.

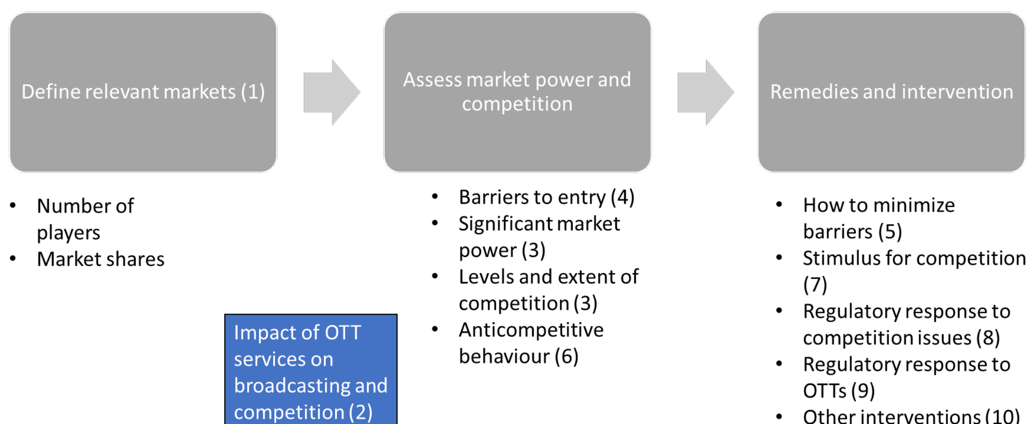

Figure 6: Market study approach

4.1 Market definition

4.1.1 Conceptual approach

Market definition is an analytical tool used for the evaluation of competition within a market and is typically a first step for a competition assessment. Market definition provides a means of analysing which groups of products exert competitive constraints on each other with a view to assessing the extent of competition and market power in that market. This is done by interrogating consumer behaviour, switching and the discipline provided by different firms. This is aligned with the definition of "market" within KICA, which is defined as "*a market in Kenya or a substantial part of Kenya and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers and acquirers, or potential suppliers or acquirers of those goods or services*."

While most goods and services have a range of possible substitutes, with some closer and some further away it is necessary to draw a line for the purposes of assessment. While this is not an exact science, engaging in an analysis which acknowledges the competitive interactions outside of the relevant market can assist.

There are a number of methodologies that may be used for defining markets, namely assessments of (i) observed market characteristics or practical indica (such as industry or customer recognition of a separate subgroup, or product characteristics), (ii) price levels and patterns of price changes, (iii) business models, (iv) evidence of substitution (including in response to changes in price), (v) consumer preferences and views, and (v) the SSNIP test.[69]

The most widely used technique for defining markets is the 'hypothetical monopolist test' or 'SSNIP (Small but Significant Non-transitory Increase in Price) test'. This asks the question whether a hypothetical monopolist with full control over a certain product (say subscription pay TV) would find it profitable to raise prices by a small but significant amount (usually taken to mean 5 – 10%) from the competitive price in a market. It is important to note that the test applies to all suppliers of the product (as if the test were applied only to products by an individual firm, a 5% increase would not be profitable as companies that could profitably increase their prices would have already done so).[70] If the

[69] ICASA. (2019). *Draft findings on the Inquiry into subscription TV broadcasting services*. Available here.
[70] Bishop and Walker. 2010. *The Economics of EC Competition Law: Concepts, Application and Measurement*. Sweet and Maxwell. London. Page 115.

hypothetical monopolist would find it profitable to do so, then subscription pay TV could be defined as a distinct market from other potential substitute services. On the other hand, if the price increase would be unprofitable due to sufficient customers switching to alternative products, a wider set of products will be considered. Similarly, if the price increase would not be profitable because providers of other products could easily step in and provide an alternative, the market would be wider. The same approach can be taken to defining the geographic market.

In defining a market, one should consider the dynamic characteristics of the market such as demand and supply-side substitution, as well as entry and expansion.[71] Market definition needs to take both direct and indirect factors into account and to take a view on likely future rivalry.[72] In markets where products are differentiated in terms of characteristics or quality, it is necessary to assess the degree of substitutability between the various products based on consumers' preferences and behaviour. We note that in differentiated media markets this can be difficult in the absence of data for an econometric analysis. A conservative approach may be to consider the competitive effects using a few different market definitions. A similar approach was taken in a radio merger in South Africa, where the Competition Tribunal considered that there were a range of closer and further substitutes and therefore considered dynamics on a narrower and wider market.[73]

Another consideration is what is termed a 'cellophane fallacy'. In markets in which one or more company has market power, substitution at prevailing prices cannot always identify whether alternatives constrain prices. This is because if a company has sufficient market power and the price of their product is high enough, an increase beyond that point causes users to switch to products that would not ordinarily be substitutes in a more competitive environment (simply because the price is already high). In these markets a deeper analysis of market power and competitive effects forms part of the "*hypothetical monopolist test*" (explained below). Bishop and Walker (2010) recommend using a three step approach of (i) ensuring that definitions are consistent with demand and supply substitutability, (ii) ensuring that the products included in a market are at least substitutes at the prevailing price, and (iii) ensuring that hypothesised market definitions are plausible on the basis of characteristics and uses of the products concerned, including physical characteristics.[74]

Parts of the broadcasting market are two-sided markets, serving both viewers and advertisers, and so defining markets on both sides may be necessary.

We also need to consider the market from a forward-looking perspective as this market will continue to evolve with the advancement of technology.[75] As such, an important part of our inquiry will be understanding the constraints, if any, created by different technologies.

In assessing relevant markets in broadcasting, we consider international precedent to scope candidate markets. However, we will assess the Kenyan market from a first principles approach.

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[71] ICASA. (2010). *A guideline for conducting market reviews*. Available here.

[72] OECD. (2014). *Defining the relevant market in telecommunications.* Available here.

[73] Competition Tribunal of South Africa. (2008). *Primedia Ltd and Others v Competition Commission and Another*. (39/AM/MAY06) [2008] ZACT 30 (9 May 2008). Available here.

[74] Bishop and Walker. (2010). *The Economics of EC Competition Law: Concepts, Application and Measurement*. Sweet and Maxwell. London.

[75] OECD. (2013). *Competition Issues in Television and Broadcasting 2013*. Available here.

4.1.2 Introduction to market definition in Kenyan broadcasting

Various product markets for television broadcasting have been defined in competition precedent and international regulatory practice. These typically include markets within different segments of the value chain.

In the present study, we have focussed on the market segments that are licensed by the Authority and the segments that interact with them. At present the categories of broadcast service licences under section 46(b)(ii) of KICA are (a) FTA radio; (b) FTA television; (c) subscription radio; (d) subscription television; (e) subscription management; (f) any other class of licence as may be determined in accordance with the Regulations; and, separately, signal distribution licences. While we consider all interactions, we focus on the markets regulated by the Authority such as the retail supply of television broadcasting, wholesale distribution and signal distribution. While OTT markets are not licensed or regulated by the Authority we have considered them insofar as they interact with broadcasting markets from a competition perspective.

The competition case precedent typically considers a number of further market delineations. They are:

(a) the type of broadcaster (pay-TV versus FTA);
(b) premium vs basic pay-TV;
(c) the type of premium content (premium sport and film channels); [76]
(d) distribution infrastructure (cable, satellite, digital terrestrial, etc),
(e) linear and non-linear; and
(f) the type of non-linear (pay-per channel, pay-per view, video-on-demand, digital interactive broadcasting).

The 2015 Inquiry in Kenya identified ten markets. In particular, it found that FTA was in a separate market from pay-TV across all layers of the value chain. Furthermore, it also found separate markets by technology (cable, terrestrial, and satellite). It did not consider OTTs to be a relevant market at the time.

The ten markets were as follows:

(a) Content layer: (i) FTA content market and (ii) pay-TV content market.
(b) TV channel/Radio station: (i) FTA radio stations market, (ii) FTA TV channels market, and (iii) pay-TV channels market.
(c) Wholesale distribution: (i) Cable (TV and radio) stations market, (ii) Terrestrial (TV and radio) stations market and (iii) Satellite (TV and radio) stations market.
(d) Retail distribution layer: (i) FTA TV retail and (ii) pay-TV retail.

There are several reasons why these market definitions need to be reconsidered in light of changes in the market.

- First, changes in the type of products offered in the Kenyan market means that there is the potential for a further delineation of the pay-TV market into higher income/premium and mass market/basic.
- Second, the digital migration and entry of low-cost pay-TV options has meant that the interplay between FTA and basic pay-TV needs to be reassessed as is the case in various other jurisdictions.

[76] OECD. (2013). *Competition Issues in Television and Broadcasting 2013*. Available here.

- Third, the increasing popularity of OTT products distributed over the internet including subscription-video-on-demand ("SVOD") products such as Netflix and Amazon Prime requires an assessment of whether these form part of the same or separate markets based on their distribution mechanisms.

While international approaches to the definition of television subscription broadcasting markets provide useful guidance in terms of the kinds of issues which arise and types of analysis which can be used, our analysis is rooted in the Kenyan context since broadcasting markets differ across jurisdictions.

Our approach to market definition involves (i) beginning with retail markets to assess whether they are prospectively competitive. After identifying the relevant retail markets and competition within these markets we (ii) identify the relevant wholesale markets.

5 Retail broadcasting

5.1 Variations in retail offerings

At the retail level, offerings to consumers in Kenya are differentiated in various ways. Some ways in which product categories differ are price point and target market, transmission mechanism and whether it is linear or non-linear. These are considered below.

5.1.1 Price point

In Kenya there are various options available to consumers who wish to watch television.

This includes options that are free to consumers (namely the group of FTA channels available via a DTT decoder since digital migration has taken place). Audience measurement data from 2019 suggested that over 90% of viewers at the time watched FTA channels with the remaining viewers watching pay TV.[77] While these numbers may have changed, it is likely that FTA viewing is still important for a large majority of Kenyans.

Pay bouquets differ. Some are at a price point below KSH 2000, while others are aimed at higher income consumers and can cost up to KSH 9500 as is shown in the graph below.

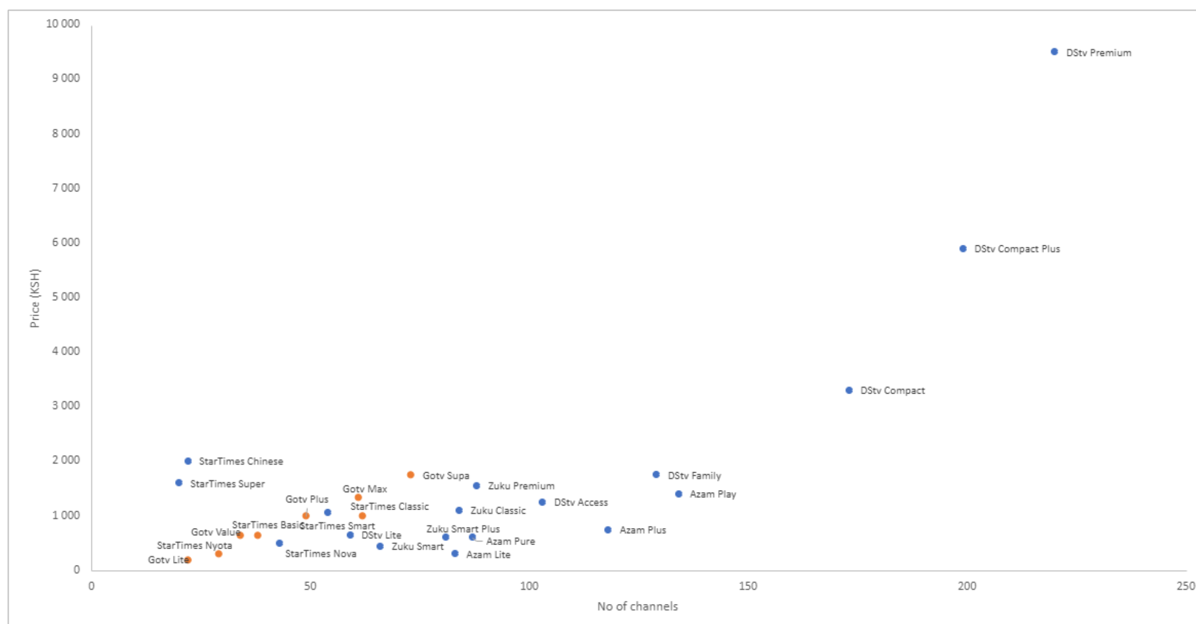

Figure 7: Price (KSH) and number of channels offered per bouquet in Kenya (2023)

Source: Acacia analysis of data from company websites and data submitted by operators

5.1.2 Target market

Stakeholders that we interviewed and engaged with in the industry typically segmented the market into at least two customer segments, namely high end/premium and mass market.

We note that during stakeholder engagements and submissions that the term ‘premium market’ is often used as a shorthand for products designed for higher income consumers. This is typically the same group of products that contain premium live sports (in the Kenyan context this is typically taken

[77] Communications Authority of Kenya. (2020). *Audience measurement and industry trends report for Q1 2019-2020*. Available here.

to include soccer such as the English Premier League and UEFA Champions League). 'Mass market' is a term used for products that are at a lower price point and targeted at a lower middle-income market.

5.1.3 Transmission mechanism and device used

FTA channels are transmitted via DTT and via the internet. While it may be possible to access some FTA on satellite we are not aware of a commercial, licensed entity that provides such packages in Kenya. A subset of channels (typically the most popular) is also available on satellite as part of a pay TV package. Pay TV packages can be transmitted via satellite, digital terrestrial, cable or over the internet. For broadcasts over the internet there is a further differentiation based on the device used (eg. mobile phone or television) and at times the quality (SD, HD).

While estimates differ across studies, recent market research by the Media Council of Kenya estimates that 65% of viewers in Kenya use DTT, 19% use streaming on mobile or devices, 12% use satellite or cable and 4% use a digital app.[78]

5.1.4 Linear or non-linear

Packages can be linear (consumed at the time of broadcast) or non-linear (consumed on demand). In Kenya non-linear offerings are provided through two key mechanisms.

- Firstly, by providers of traditional pay TV who provide their own content on an on-demand basis through a decoder or online. This includes "catch up" offerings.
- Secondly, by on-demand providers (typically OTT) such as Netflix, Showmax and Viusasa. This can occur on a pay-per-view or subscription basis.

Based on the different delineations of the market used historically in Kenya and other countries as well as the offerings in the market in Kenya at present, we start with delineating markets by whether they are FTA or pay, target audience (lower income, mass market pay, higher income), linear or non-linear and type of distribution channel (satellite, DTT, internet and mobile). This provides 24 candidate sub-markets in which there are retail television offerings. We note that FTA is not strictly a retail television offering in the same way that pay TV bouquets are as it is comprised of different channels that are broadcast by different signal distributors, but we group channels available to FTA customers on an FTA decoder as if it is a bouquet for the purposes of analysis.

5.2 Market definition

In order to understand whether these candidate markets are relevant markets for competition purposes it is necessary to understand whether there are products which constrain the products in these markets. Where the competitive dynamics are similar, we may group certain markets together for analysis.

We begin with the narrowest market, which is the market for high end/premium satellite retail pay TV. In considering whether this market is too narrow we consider:

1. Whether it competes with other pay TV offers (namely mass market offerings).
2. Whether it competes with high end/premium bouquets over DTT, cable, internet streaming over TV and mobile streaming.
3. Whether it competes with high end/premium offerings that are on-demand.

[78] Media Council of Kenya. (2022). *State of the Media Report 2022.* Available here.

5.2.1 Do high end/premium bouquets compete with basic bouquets within pay-TV?

At the start it is necessary to expand upon what we mean by high-end/premium bouquets as this could be seen as a slightly subjective term.

In order to understand market definition within retail television we first attempt to describe the market, considering factors such as consumer switching behaviour as well as package characteristics such as differences in prices and content (e.g. general interest versus exclusive and niche content).

As such, we first consider the differentiation between retail pay bouquets. In pay TV in Kenya these offerings are differentiated in various ways including by target market/demographic, quality of offering and price.

The quality of the offering

The quality of the offering includes content-related factors such as (i) variety, (ii) exclusivity and (iii) inclusion of live sports.

Variety

If we consider the graph below we see that certain bouquets have a far wider range of channels available both generally and within specific genres. In particular, while the bulk of bouquets offer less than 150 channels, the three most expensive bouquets (DSTV Premium, DSTV Compact + and DSTV Compact) all offer in excess of 150 channels. In addition, for the three top bouquets there are more of every genre of channel.

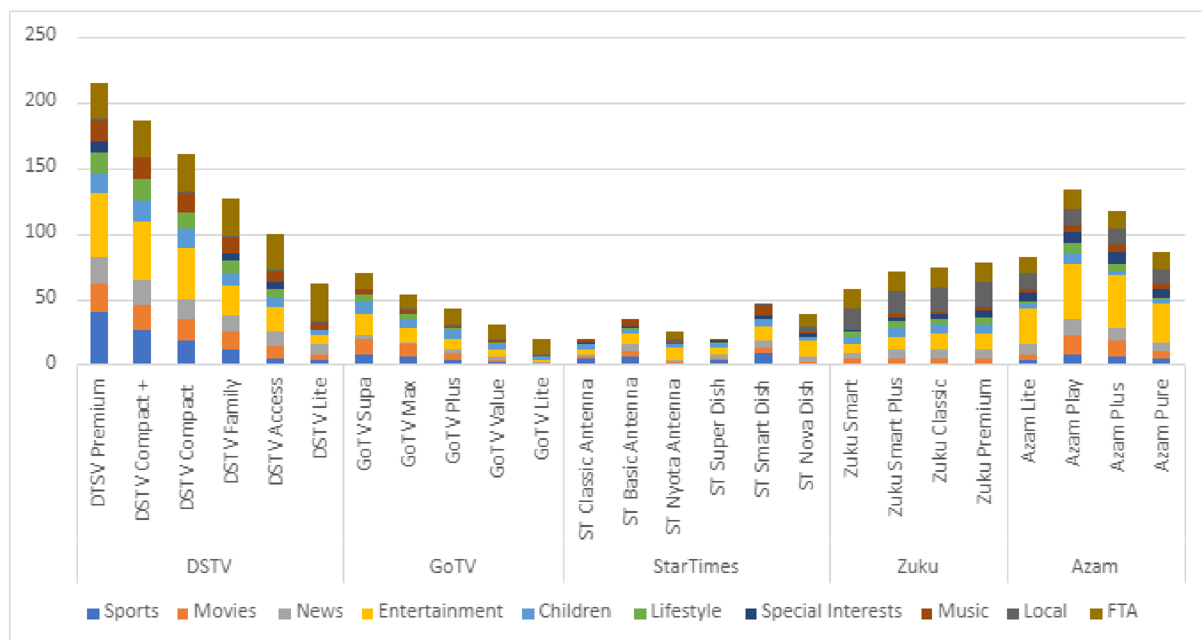

Figure 8: Channels by genre by bouquet (2023)

Source: Acacia analysis

Exclusivity

Some bouquets have exclusive sports content as well as channels that are exclusive (typically considered market leaders within a genre), and recent movies and series. They therefore provide viewers with a differentiated experience that is often non-replicable due to the exclusivity of key content. Furthermore, in the Kenyan context particular bouquets contain popular football content

such as the English Premier League and the UEFA Champions League. Exclusive sports content seems to be an important differentiator for this market.

The premium or high-end bouquets are differentiated from the others in that they show a large number of live sports channels as shown below. [✂]

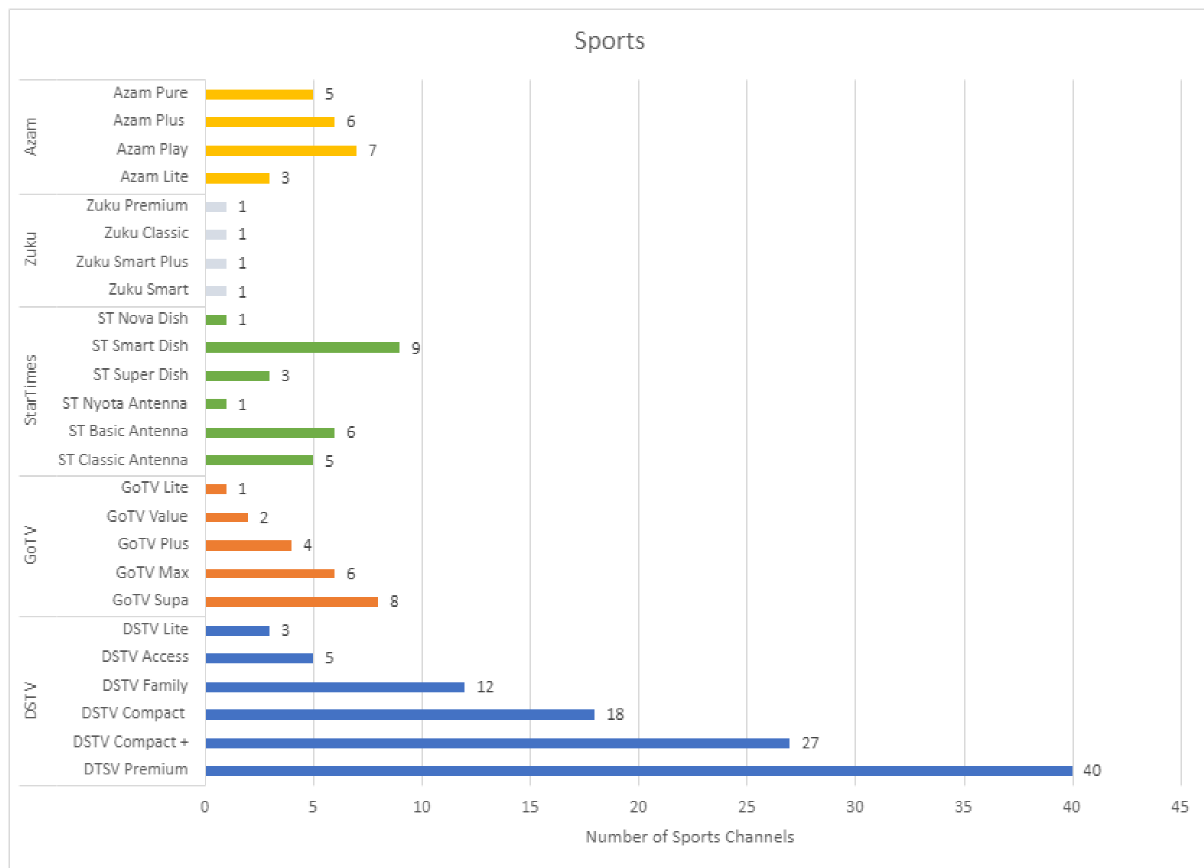

Figure 9: Number of sports channels per bouquet (2023)

Source: Acacia analysis

In various jurisdictions internationally, content that is considered to be "premium" includes sports and movies. While the market dynamics may be different in Kenya, stakeholder interviews as well as data supports the role of sports, and in particular popular football leagues as drivers of high end or premium bouquets.

It can be noted that the top DSTV bouquets, namely DSTV Premium, DSTV Compact + and DSTV Compact include broadcasts of the tournaments of various football leagues (such as the English Premier League, the UEFA Champions League, various country leagues). In addition, some bouquets offer key golf, rugby, tennis and motorsports tournaments among others. The key differentiator between the top three bouquets and those aimed at the mass market is the inclusion of exclusive premium football. [✂][79]

While mass market bundles offered by various bouquets show some sports as well, these tend to be non-exclusive and do not include a range of sports outside of football. (It can be noted a limited

[79] [✂]

amount of football is shown on certain mass market DSTV and GoTV channels, which is also owned by the same group).

The role of live sports is also apparent from market research, which shows [✂].[80]

Price point

Another differentiator between high end or premium bouquets and mass market or basic bouquets is **price point**. Bouquets are highly differentiated and as such prices vary. However, some bouquets (DSTV Premium, DSTV Compact + and DSTV Compact) are priced very differently from their nearest competitor as shown below.

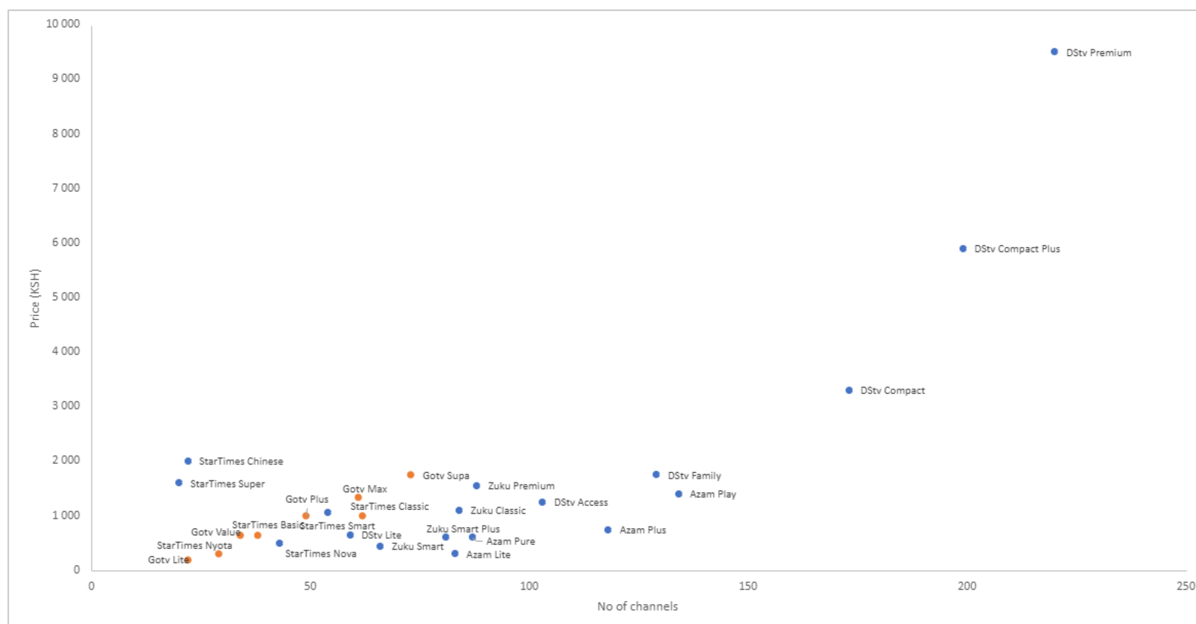

Figure 10: Price (KSH) and number of channels offered per bouquet in Kenya (2023)

Source: Acacia analysis of data from company websites and data submitted by operators

Certain packages for sale in Kenya are priced higher than others by orders of magnitude. As shown below, the difference in prices between the leading bouquets (by number of channels and price) is between 2.1 and 6.8 times the price of their competitors.

Table 6: DSTV high income targeted products as a multiple of competitor products

	DStv Premium	DStv Compact Plus	DStv Compact
StarTimes Super	5.9	3.7	2.1
Zuku Premium	6.1	3.8	2.1
Azam Play	6.8	4.2	2.4

Source: Acacia analysis of price data submitted

Advertising does not provide an ideal measure of whether a channel is premium as reach is also important. However, it can be noted that if you look at advertising prices in Kenya the channels airing sport have a far higher price point than other channels.

[80] Communications Authority of Kenya. (2020). *Audience measurement and industry trends report for Q1 2019-2020*. Available here.

[✂]

Figure 11: [✂] Advertising Spot Rates

As such, within the Kenyan market there appears to be two markets:

1. one that is targeted at a higher income market (referred to in the industry as premium) that contains a large number of channels, exclusivity and live sports, including premium football, and
2. one that is mass market that provides a variety of content but that has more limited exclusive content, and importantly does not have the most popular live sports.

These two sets of candidate markets have some similarities to what is termed "premium" and "basic" markets in European markets, as will be discussed later. In Kenya at present these bouquets are only available on DSTV in their Premium, Compact Plus and Compact (to a slightly lesser extent) bouquets. [✂]. While there may be a delineation within premium for 'premium' and 'mid-market', for the purpose of this study it is not relevant as there are no competitors in the mid-market space, and the analysis of the exclusive sports content is relevant to both the mid-market and upper income bouquets.

Application of hypothetical monopolist test

We start by applying the hypothetical monopolist test to the narrowest candidate market, namely a market for a high end or premium pay TV offering that includes high quality sports, specifically premier league football (such as the EPL and UEFA Champions League and other niche sports and channels). We consider, conceptually, what would occur if a hypothetical monopolist in this market increased their prices by 5-10%. On the demand side we consider whether customers would switch to alternatives. On the supply side, we consider whether suppliers would switch to providing a similar premium offering. It can be noted that this market is one that may be subject to the cellophane fallacy. As such, it is important to consider substitutability at current price levels, practical indica etc.

Demand side: Conceptually, for a customer that wishes to watch football or other niche sports we do not believe that a 5-10% price increase would lead them to switch to competitor bouquets that do not contain this content in sufficient numbers to make the provision of these bouquets infeasible. The fact that customers currently are paying multiples of the nearest competitor bouquet suggests that this is the case in Kenya. This is particularly the case for upper income or niche customers (such as those that watch particular sports such as premium soccer, golf, cricket etc or want particular channels exclusively carried on that bouquet).

Supply side: Conceptually, an increase in the price of a premium bouquet of 5-10% will not lead to competitors switching to provide that product. This is due to structural barriers. As can be seen below, despite the large price differences between the three most expensive DSTV bouquets and the next group of competitors we do not see suppliers switching to provide premium bouquets. This is due to a structural issue in the market that cannot be overcome, namely that that most rights holders sell premium sports content (including football) on an exclusive basis and as such, only one rights holder can have it in a period. As such, while in theory the market can be made up of competing companies that have some rights, overall it is not clear that a credible competitor can arise easily within the Kenyan context where the market is small. It is particularly important to note that in stakeholder engagements, competitors to Multichoice all indicated that rights such as the EPL were currently too

expensive given their existing business model and balance sheets, and that they would not consider entering the premium market.

While most stakeholder engagements and submissions concur that there are two separate markets and that premium and basic bouquets (encompassing mid and mass market offerings) do not compete, one stakeholder argued that they are part of a single differentiated market with a chain of substitution.[81] This means that each product is constrained by the priced product below it and this means that a price increase anywhere in the market would be constrained by responses along the market. While we agree that the market is differentiated we do believe that there are different dynamics for products that have and do not have premium content due to structural differences in the market that constrains competitive entry. This is because purchasers of these products who want live sports cannot be constrained by competitive responses from bouquets that do not contain live sports. Furthermore, indications are that the current pricing is at a premium to offerings without live sports.

As such, we find that the market for high end or premium retail pay TV is in a separate market to that targeted at a mass market.

It should be noted that this finding aligns with international precedent. Both the European Commission ("EC")[82] as well as the UK competition and regulatory authorities[83] have at some point defined a premium pay-TV channel market, which is distinct from basic pay-TV. While the EC has more recently left this question open, it has indicated that basic and premium pay-TV packages are more likely to be complements and so in separate relevant markets.[84] The UK regulatory authority has defined a separate market for retail packages with premium channels.[85] In South Africa, ICASA has defined three separate markets at the retail level, namely basic-tier or entry-level bouquets, mid-level bouquets and high-end bouquets.[86]

5.2.2 Are different mass market bouquets in the same competition market?

Some providers segment their bouquets further (for example, into mass market and entry-level) for internal purposes. Our second line of inquiry is whether mass market bouquets are in the same competition market to entry-level bouquets. This is a slightly different assessment as the market is differentiated and certain subscribers likely want a certain quality and variety of content. However, in the Kenyan market these sub-markets can likely be aggregated for the purpose of analysis. This is because they all have the same competitors and the competitive dynamics are similar. In particular, there is the possibility of supply side substitution as competitors are easily able to offer a more basic or more complex package, as long as it does not contain any exclusive sports content. For the purpose of this analysis, we call this the mass market targeted/basic pay television.

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[81] [✂]

[82] EC. (2015). *Case M.7194 – Liberty Global/Carelio/W&W/De Vijver Media*. Available here.; EC. (2018). *Case M. 8861 - Comcast/Sky*. Available here.; EC. (2018). *Case M. 8665 – Discovery/Scripps*. Available here.; EC. (2015). *Case M.8354 – Fox/Sky*. Available here.; EC. (2018). *Case M.7000 - Liberty Global/Ziggo*. Available here.; EC. (2020). *Case M.9064 - Telia Company/Bonnier Broadcasting Holding*. Available here.

[83] OFT. (2002) *Case No CA98/20/2002 – BskyB investigation: alleged infringement of the Chapter II prohibition*. Available here.; OFT (2003). *Case No. CA98/20/2003 - Sky investigation.* Ofcom. (2008). *Pay TV market Investigations: Annexure 13 – Market definition and market power in pay TV.* Page 5. Available here.

[84] EC. (2018). Case M.7000 - Liberty Global/Ziggo. Available here.

[85] Ofcom. (2008). *Pay TV market Investigations: Annexure 13 – Market definition and market power in pay TV.* Page 5. Available here.

[86] ICASA. (2019). *Draft Findings Document on Inquiry into Subscription Television Broadcasting Services.* Available here.

5.2.3 Does mass market/basic pay TV compete with FTA television?

Once we have delineated a market for premium bouquets and basic pay, the next question is whether basic pay TV competes with FTA television. We find that they are in separate markets.

Basic pay TV bouquets and FTA television interact in various ways.

- Firstly, FTA may constrain basic pay TV. This is because subscribers to basic pay TV would be disincentivised to subscribe if they felt that the offering did not provide an advantage over channels that they could access without payment.
- Secondly, they both compete for viewer attention (or “eyeballs”). FTA can therefore be a constraint on the pricing of basic pay TV as it forces pay TV providers to provide quality content as viewers have FTA as an alternative.
- Thirdly, FTA can compete directly with basic pay TV channels for advertisers in instances in which the latter provides advertising to viewers.
- Fourthly, FTA channels can also be shown as part of a pay TV bouquet, and derive advertising revenue from the additional viewers, and therefore can be an input into a pay TV offering.

Within the Kenyan market, FTA television typically means a group of channels that can be accessed without payment. In Kenya as at June 2023 there are 334 licensed commercial channels and 9 community channels, approximately 199 of which were active in 2023. FTA is broadcast via DTT and covers 91% of the population. While there are a variety of FTA channels available the bulk of viewership is centred on the most popular channels. Besides airing on DTT, the most popular FTA channels are also typically shown on DTT, and pay TV bouquets. For example, DSTV bouquets offer 12 local FTAs (STN TV, KASS TV, Ramogi TV, TV47, Inooro TV, KBC TV, NTV, KTN, Citizen TV, KTN News, K24 and Kameme TV). These channels combined account for over 80% % of the viewers of the top 15 channels.[87]

FTA channels are distributed (i) through FTA signal distribution that can be received by anyone with a set top box or digital television and (ii) through pay TV bouquets. As such there is horizontal competition for viewers between FTA channels and pay TV channels to the extent that they compete for viewers or “eyeballs” of the target population. There is also a vertical relationship between pay TV providers as distributors of FTA channels. Within the Kenyan context, there is also a vertical relationship between the pay TV providers and FTA insofar as pay TV bouquets typically feature the most popular FTA channels. For example, DSTV carries 12 local Kenyan FTA channels. These channels comprise 87% of all FTA viewership.[88] As such it could be argued that the products are complements and that the pay TV channels are an add-on to an FTA offering that is available to consumers.

FTA channels that are available outside of pay TV are provided by channel owners and distributed by signal distributors (including through self-provisioned distribution). However, there is no subscriber management service as there is in pay TV.

Due to digital migration the competitive interplay between free and basic pay TV has increased relative to the interaction historically.

1. *Basic pay TV is cheaper than before:* The digital migration allowed pay TV providers to introduce cheaper options without high entry costs (such as the cost of satellite dish installation). Some stakeholders feel that this has blurred the competition between FTA and pay TV as a broader section of the population is able to access pay TV on DTT for less,

[87] IPSOS. (2023). *IKAT Q1 2023 Audience report for Royal Media Services.*
[88] IPSOS. (2023). *IKAT Q1 2023 Audience report for Royal Media Services.*

increasing the competition for the "eyeballs" of the target population. This is because more customers that were previously FTA viewers have the option of watching pay TV channels at a lower cost than that historically.

2. *Local content:* Historically it was FTA that provided local content. However, local content now appears to be a driver of subscriptions on pay TV. Companies like Multichoice are increasingly creating new local content (for example, through the Maisha Magic channel). At channel level, certain channels are now competing for many of the same pay TV customers as FTA channels.
3. *Advertising*: Subscription broadcasters charge for their subscriptions but also offer advertising on some channels. Therefore, there is an interplay between pay TV and FTA in competing for advertisers for these channels.

However, there are also clear differences. In terms of characteristics the key difference between pay TV and FTA is that FTA is available to all viewers with an upfront purchase of a television set (or decoder where relevant) while pay TV requires payment on a monthly basis. This means that they are different from a subscriber perspective and affordability can be a barrier to subscription. FTA is largely advertiser-driven while pay TV depends on subscriptions that provide additional income. While pay TV television channels have some interplay with FTA, many stakeholders did not feel that FTA provided a serious constraint on pay TV or vice versa.

- Firstly, FTA without a subscription is typically the alternative for those who could not afford to pay subscriptions. For the large proportion of households that have insufficient income to afford pay TV, pay TV stations are not an alternative.
- Secondly, stakeholders in Kenya (such as Royal Media) and felt that they do not compete with FTA due to the vertical relationship between FTA channels and pay TV providers. Many FTA television channels are carried on pay TV platform. As a result, it could be argued that FTA channels are a vertical input into basic pay TV bouquets and further that the products are complements, though they may compete with the pay TV channels provided on bouquets. However, the existence of FTA channels meant that the lower end of the pay TV bouquets needed to be a decent value proposition for customers.

In understanding whether FTA and basic pay TV are in the same market we have to consider their characteristics and well as demand and supply side factors.

Characteristics: In terms of characteristics, there are various differences between pay TV and FTA.

- FTA is available to all viewers with an upfront purchase of a television set (and decoder where relevant) while pay TV requires payment on a monthly basis. Therefore, they are different from a subscriber perspective as one carries a cost and the other doesn't.
- They also have different business models. FTA is largely advertising driven while pay TV has subscriptions that provide additional income. [✂]. Pay TV would typically include more expensive content than FTA.

Demand side: If we apply a hypothetical monopolist test, we see that from a demand side perspective a 5-10% increase in the cost of a basic pay TV package is unlikely to lead consumers to switch to FTA television. Purchasers of pay TV typically are looking for additional content and value. FTA is available at no cost and the fact that basic pay is purchased in Kenya suggests that users see value in it. [✂]. This does not suggest that the two are in the same market.[89] Furthermore, a 5-10% decrease in the quality of basic pay TV would also be unlikely to lead to a large enough number of customers to switch

[89] GoTV Submission, *Annexure G, How are customers watching TV*. MAH Churn Survery Q1 2022.

to pay TV given the demographics of the country and the cost of pay TV. Most pay TV providers that provided submissions or input in stakeholder engagements did not consider FTA to be a constraint but rather a complement.

Supply side: From a supply side the key question is whether a 5-10% increase in the price of pay TV would lead an FTA provider to switch to becoming a pay TV provider. An FTA provider looking to provide basic pay TV would need a different licence, a subscription business model, marketing, broadcast infrastructure or contracts with infrastructure providers, and suitable content to provide a competitive differentiation (among other things). It is unlikely that this would be a response to a 5-10% price increase. A provider of basic pay TV willing to provide FTA has lower barriers to entry if they have a suitable channel to air and will require a licence, content and a signal distribution provider and contract. In the Kenyan context, rights are also typically different (for example, some sports rights have a separate FTA and pay option). In the circumstances, there is no clear supply side substitutability.

The competition and regulatory authorities in the EU and UK have mostly assessed basic pay-TV and FTA in separate relevant markets despite them constraining one another to an extent.[90] There have been some exceptions. For example, in the Sky/ITV merger in the UK, the UK Competition Commission (now the CMA), found based on evidence of switching that FTA constrained pay-TV generally and so defined a broad ‘all TV’ market. Nonetheless, as the market was considered to be highly differentiated, the UK Commission viewed FTA to be a closer substitute to packages with basic channels than packages with both basic and premium channels.[91] ICASA in South Africa has considered the retail distribution of basic-tier subscription television services and FTA television services to be in the separate relevant markets though noting some asymmetric substitution.[92]

FTA channels typically have a high proportion of local content. They compete directly for viewers with a very narrow subset of pay TV channels, namely those that provide local content.

While it is possible that at a channel level, FTA channels may compete for viewers with a subset of basic pay channels to some extent, though it is not clear to what extent they compete for advertisers (as they may attract different advertisers). However, as a package, it appears that the FTA DTT offering does not constrain basic pay TV and they are likely to be in different markets due to their different pricing structures, business models and customer profiles.

In the Kenyan context at present basic pay TV and FTA are in different competition markets.

5.2.4 Do bouquets compete across different platforms?

Another key question is whether bouquets for different target markets across different platforms (DTT, DTH, internet) form part of the same relevant market.

Firstly, do bouquets for the **higher income/premium market compete across platforms**? At this stage these bouquets are only available on DTH and on the internet (through the DSTV Now, and two Showmax offerings). For the purpose of this study the key consideration for premium packages is whether premium offerings on satellite can compete with the premium offerings on the internet.

[90] EC. (2008). *Case M.5121 - News Corp/Premiere*. Available here.; EC. (2007). *Case M.4504 - SFR/Télé2 France*. Available here.; EC. (2010). *Case M.5932 - NewsCorp/BskyB*. Available here.; EC. (2013). *Case M. 6880 - Liberty Global/Virgin Media*. Available here. Ofcom. (2007). *Annex 13 to pay TV market investigation consultation: Market definition and market power in pay TV.* Available here.

[91] UK Competition Commission. (2007). *Acquisition By British Sky Broadcasting Group Plco 17.9 per cent of the Shares In Itv Plc*. Available here.

[92] ICASA. (2019). *Draft Findings Document on Inquiry into Subscription Television Broadcasting Services*. Available here.

However, we believe that similar considerations will apply to cable or DTT and whether these platforms would compete with pay TV content by a licensee over the internet.

Secondly, we need to consider whether **basic bouquets provided on different platforms (DTT, DTH, or over the internet) compete**.

Relevant considerations for this market definition include whether competitive conditions across different distribution technologies are similar (including price, content and quality of reception), whether broadcasters distribute across all types of infrastructure, the geographic footprint of different types of infrastructure, whether customers have preferences for particular distribution modes, whether households access more than one distribution platform, whether customers across different distribution infrastructures overlap, and whether switching between distribution modes is expensive and difficult.

It can be noted that in Kenya there are differences in who can access content over different platforms based on the following.

- Firstly, the initial cost of switching or set-up costs (such as the costs of a decoder, satellite dish etc).
- Secondly, differences in the monthly cost of provision.
- Thirdly, coverage or technical differences.

We believe that the above may differ for customers with disparate income levels and geographic locations.

5.2.5 Competition between platforms

There appears to be competition between the different platforms. We first assess traditional and then consider the internet/OTT.

DTT and DTH platforms for pay TV appear to compete. However, there are slight differences in the customers that access different platforms. The reasons for customer choice between platforms include the following:

1. *Coverage differences:* DTT has a more limited footprint than DTH which means that DTH may be better suited to certain rural and remote areas. Some DTH providers have noted that they are popular in rural areas in which there is limited DTT coverage.
2. *Costs:* DTH has higher installation and decoder costs. For example, the GoTV DTT connection is around KES1999 which includes free subscription for a month compared to a basic DSTV HD bouquet at KES 2999 with a free DSTV Family subscription for a month, which in addition requires a satellite dish and installation of around KSH 2000. There is also more effort required for satellite installation as opposed to DTT box purchases. Similarly, a StarTimes DTT decoder is KES 1199 while their DTH decoder is KSH 1999 plus the cost of the satellite dish.

However, evidence from stakeholder consultations and submissions suggests that the platforms compete directly with each other. All providers named offerings on alternative platforms as competitors to themselves. If we apply the hypothetical monopolist test, we believe that a hypothetical monopolist of DTH which puts a 5-10% increase would likely face sufficient customers switching to an equivalent product on DTT. As such, we believe that bouquets across DTT and DTH are in the same market.

This is aligned with precedent in the EC and UK which found that traditional distribution modes (cable, IPTV, DTT and DTH) all form part of the same market despite there being some differences in ease of switching (switching from cable to IPTV is easier than switching to DTH and DTT). However, we note

that in South Africa, ICASA defined separate markets for different distribution mechanisms namely analogue, satellite, DTT and OTT.[93]

A second question is whether streaming over the internet competes. At present there are differences in access to the internet across income levels.

Higher income consumers are likely to be able to afford and have internet access, fibre and smart televisions. As such, switching from satellite to other platforms including the internet is likely to be possible. This is especially the case for the subset of consumers that have unlimited or uncapped data over fibre.

However, the same is not likely to be true for all mass market consumers. At present, market research suggests that [✂]. While internet-based products may be an alternative for a subset of the population it is not an alternative for a large segment of customers. In particular, it appears that it is not as yet an alternative for a large part of the mass market.

This makes sense if we consider the monthly prices of internet compared to the prices of a mass market subscriptions discussed previously which ranged from KSH 1 500-11 999. In comparison to the mass market offerings which range from KSH 199 to KSH 1 750 this is a substantial additional monthly cost. The addition of even the lowest-priced internet subscription would increase the cost of the most expensive mass market bouquet (DSTV Family or StarTimes Supa) by 85% and make it cost more than the more premium offering on DSTV Compact.

We would argue that for customers that do not have an existing high speed internet connection in the mass market, internet-based options would not be an alternative. However, given the higher levels of internet penetration for higher income households, we believe internet access is more likely to be an alternative for high income/premium bouquets.

For the higher income/premium bouquets, there is therefore likely to be a single market for subscription pay TV regardless of platform. This, however, is dependent on access to high-speed internet.

However, it is not clear whether the internet is always an alternative for mass market customers, though it is likely an alternative for a sizeable subset. [✂].

We conclude that:

1. for the mass market there is a single market for DTT and DTH,
2. there may or may not be a separate market for internet streamed linear pay TV as it constrains a segment of the population
3. for the premium market there is a single market for all technologies (though currently, there is no DTT premium offering).

However, we nonetheless analyse both potential market definitions (including and not including internet-based streaming) in our review of the mass market.

5.2.6 Is mobile streaming in the same market as traditional broadcasting?

As noted, a second means of viewing content over the internet is through use of a mobile phone but a further delineation considered is the quality of the viewing experience. There are various qualities

[93] ICASA (2017). *Discussion Document On The Inquiry Into Subscription Television Services*. Government Gazette 41070.

of viewing that are available in Kenya, including 4K, HD, SD which can be viewed on a television, rather than on mobile devices.

We believe that while there are differences in viewing quality, the only difference that is considerable is that between viewing on a television device and a mobile device. We therefore consider whether mobile streaming is in the same market as television streaming.

The difference between the two is apparent in terms functionality. Differences include (i) the number of people that can view it eg. a television can be watched by multiple people while mobile is typically only viewed by one person, (ii) the size of the screen (television is larger than mobile) and (iii) quality (television is typically clearer than mobile) and mobility (mobile can be viewed from various locations while a television is fixed at a specific location). Based on functionality, they are likely to be in different markets. There are also indications that they might be complementary as customers may stream content on both their mobile phones and televisions. [✂].

The argument for separate markets is also supported by the very different price points of mobile subscription plans, with providers giving a significant discount for the same or similar products on mobile as opposed to television.

Table 7: Comparisons between mobile and standard packages

	Mobile	Standard
Netflix	KES 200	KES 700
Showmax	KES 299	KES 760
Showmax Pro	KES 1050	KES 2100

Source: Company websites and submissions

As shown above it is half the price for the same offering on mobile.

From a demand-side perspective there is limited substitutability for a broad segment of customers. Those with mobile devices but no fixed internet or Smart TV would not switch in response to a 5-10% price increase. Likewise, for those with fibre and who stream using a Smart TV, it is unlikely that a 5-10% increase in the price of streaming and other pay TV options for television would cause sufficient viewers to switch to mobile so as to render such a price increase unprofitable for the hypothetical monopolist (with its different functionality such as a smaller screen size, worse quality and limitation in the number of viewers).

As such, we believe that mobile is in a separate market to streaming on Smart TVs.

5.2.7 Is pay tv linear in the same market as OTT non-linear?

The final question is whether for pay customers the market is for linear pay TV and non-linear paid content or OTTs, is in the same market. As noted previously, OTT products can be accessed over high-speed broadband and over mobile devices.

Submissions have argued that there are a range of ways in which customers change their behaviour in response to the introduction of OTTs. This includes (i) switching from pay TV to OTT (cord cutting), (ii) downgrading pay TV bouquets and adding on an OTT, and (iii) taking up multiple subscriptions.[94]

We believe that for linear mass-market customers or premium customers that do not want live sports, OTT options without live sports or a combination thereof could be an alternative while noting that there is market differentiation. If we consider linear and non-linear products, we believe that for a

[94] [✂]

segment of customers looking for general series, movies and other genres other than news or sports, a switch from linear to non-linear may be appropriate. While we have not uncovered research in a Kenyan context, research in other jurisdictions suggests that this may be the case:

"Households who prefer content for which there is a lack of close substitutes in OTT video subscriptions (e.g., sports and premium channels) are less likely to cut the cord. Conversely, households who spend their time viewing general interest and broadcast channels, which are readily available in OTT video bundles, are more likely to cut the cord."[95]

For linear premium pay tv customers who want live sports we would argue that an OTT option that includes live sports (such as the current Showmax Pro option in Kenya) would be a feasible alternative for viewers on a linear bouquet who require access to live sports. If a hypothetical monopolist of premium live sports raised prices by 5-10%, a switch to a live streaming option may be an alternative for customers that have high speed broadband and smart televisions. We believe that in the Kenyan context, linear pay television and OTTs with live sports are therefore in the same market for high income/premium customers.

In conclusion, we find that:

1. linear pay tv is in the same market with OTT non-linear in Kenya; and
2. premium linear pay tv with sports is in the same market as OTT non-linear with live sport.

This is a departure from international precedent. The regulatory authorities of both the UK (Ofcom)[96] and South Africa (ICASA) have found that OTTs tend to be complementary rather than substitutes for traditional television broadcasting services. The EC has thus far found that OTT does not yet impose a significant constraint on traditional pay-TV services.[97] However, we note that there were no live sport options in those jurisdictions at the time of the judgements.

5.3 Geographic market definition

For the retail supply of pay TV services, authorities typically examine whether platforms are subject to licensing regulations which limit their abilities to provide services elsewhere, whether consumers can easily switch to television services from outside the country, whether there are language barriers to accessing content from other countries, the heterogeneity of retail TV services as well as prices across regions, how TV broadcasters are licensed (on a national or regional basis), whether international broadcasters configure their services in the country to local viewer preferences, and how content licence rights are acquired and TV channels are purchased. The EC has defined this market to be national or limited to the coverage of the supplier's cable network[98] while the UK Competition Commission and ICASA have found the geographic market to be national.[99]

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[95] Malone, JB, Nevo, A, Nolan, Z, Williams,JW. (2021). *Is OTT Video a Substitute for TV? Policy Insights from Cord-Cutting*. The Review of Economics and Statistics 1–31.

[96] Ofcom. (2018). *Media Nations: UK 2018*. Available here.

[97] EC. (2018). *Case M.7000 - Liberty Global/Ziggo*. Available here

[98] EC. (2015). *Case M.7194 – Liberty Global/Carelio/W&W/De Vijver Media*. Available here.; EC. (2017). *Case M.8354 – Fox/Sky*. Available here.; EC. (2018). *Case M. 8861 - Comcast/Sky*. Available here.; EC. (2018). *Case M. 8665 – Discovery/Scripps*. Available here.; EC. (2019). *Case M.8785 - The Walt Disney Company/Twenty-first Century Fox*. Available here; EC. (2020). *Case M.9064 - Telia Company/Bonnier Broadcasting Holding*. Available here.

[99] Competition Commission. (2007). *Acquisition By British Sky Broadcasting Group Plco 17.9 per cent of the Shares In Itv Plc*. Available here.; ICASA. (2019). *Draft Findings Document on Inquiry into Subscription Television Broadcasting Services*. Available here.

From a supply side, in the Kenyan context, pay TV is licensed nationally. Pay TV in Kenya is typically broadcast nationally or even across East Africa (in the case of certain satellite downlinks). From a consumer side, there may be minor differentiations in competitive dynamics across different areas (for example, Azam may be more popular close to Tanzania where it has better brand recognition, and GoTV and Star Antennae may not be available in certain areas).

However, we believe that these differences do not change the overall analysis and conclusions and as such we treat the pay tv market as a national market.

5.4 Conclusion on market definition in retail

We conclude that there are national markets for pay TV as follows:

- Markets split by target audience and price range: there is (i) a market for premium retail pay TV, (ii) a market for mass market pay TV, and (iii) a market for FTA.
- Across platforms: The market for subscription premium retail pay TV competes across platforms, DTT, DTH, internet (noting that in Kenya there is no premium DTT option). The market for mass market retail pay competes across some platforms but the internet is not a good substitute for a segment of households. However, we believe that sufficient households have access such that OTTs provide a constraint. Mobile is in a separate market.
- Linear and non-linear programming are in the same market. In the Kenyan context this also occurs in the premium segment given that there are products that are predominantly non-linear but that include live sports.

<table>
<tr><th colspan="2"></th><th>FTA</th><th colspan="3">Pay</th></tr>
<tr><th colspan="2" rowspan="2"></th><th rowspan="2">Lower income</th><th rowspan="2">Basic/Mass target market</th><th colspan="2">Higher income target market</th></tr>
<tr><th>No live premium sports (eg. EPL) required</th><th>Live premium sports (eg. EPL) required</th></tr>
<tr><td rowspan="4">Linear</td><td>Satellite</td><td></td><td rowspan="3">Market 2 (DSTV Family, Star, Azam)</td><td rowspan="4">Market 2 (DSTV Family etc)</td><td rowspan="4">Market 1 (DSTV Premium, Compact + and Compact)</td></tr>
<tr><td>DTT</td><td>Market 4 (KBC, Citizen etc)</td></tr>
<tr><td>Cable</td><td></td></tr>
<tr><td>FTTH</td><td></td><td></td></tr>
<tr><td></td><td>Mobile</td><td>Market 5 (eg. Citizen TV etc streaming)</td><td>Market 3 (eg. DSTV Family on mobile)</td><td>Market 3 (eg. DSTV on DSTV Now)</td><td>Market 1 (eg DSTV Premium, Compact + and Compact on DSTV Now and Showmax Pro Mobile) Though mobile is separate we aggregated for the purposes of analysis as the dynamics are similar</td></tr>
<tr><td rowspan="3">On-demand</td><td>Satellite</td><td></td><td></td><td></td><td></td></tr>
<tr><td>FTTH</td><td></td><td></td><td>Market 3: Netflix, Showmax</td><td>Market 1 Showmax Pro</td></tr>
<tr><td>Mobile</td><td>Market 5 (YouTube)</td><td>Market 3 (eg. Netflix, Viusasa)</td><td></td><td></td></tr>
</table>

As such we have the following markets in television

1. Television Market 1: Pay TV including OTT for higher income customers (including live sport)
2. Television Market 2: Pay TV including OTT for mass market and those who do not require sport
3. Television Market 3: Mass market mobile
4. Television Market 4: FTA DTT
5. Television Market 5: FTA mobile

5.5 Television Market 1: Premium pay (with live premium sports)

5.5.1 Market players and shares per market

In the market for **premium retail pay TV with sports** there is only one market participant, namely Multichoice. This is the case regardless of whether we consider (i) different platforms and (ii) linear and on-demand TV.

If we use the narrow market definition of traditional pay TV, they provide three bouquets, Premium, Compact+ and Compact on their DTH platform (note that while DSTV internally considers Compact to be mid-market the price point and inclusion of premium sports means that it falls in our categorisation of premium retail pay TV with sports). If we include OTTs, MultiChoice has a further two offerings, namely Showmax Pro and Showmax Pro Plus (with content such as the EPL and UEFA). There are no other competitors in this segment regardless of the definition used. Although we consider mobile to be a separate market, we aggregate for analysis purposes and Multichoice has Showmax Pro Mobile.

As such the market share of MultiChoice in this market is 100%.

5.5.2 Competitive dynamics

We first examine the competitive dynamics in the market for premium linear content across different platforms.

Entry and exit

In order to offer a premium pay TV service with live sports, there are several prerequisites. This includes a licence (for traditional platforms, though not OTT platforms), the capital outlay on broadcasting equipment, and subscriber management systems and services, a brand (which includes developing and marketing the brand) as well as content. While these prerequisites are required for any service, the differentiating factor in this market is the cost of premium sports content.

The barriers to entry for buying sports rights are high. Rights are sold on an exclusive basis by rights holders. While rights are usually resold at regular intervals, they are often sold on a continental basis which limits the ability of companies to purchase it if they are only operating in one market (though they could technically purchase continental rights and sublicense, this brings additional risk and cost). They are also expensive. While Multichoice has not co-operated with the Inquiry in terms of providing the cost of its key rights, media reports suggest that certain international rights are very expensive. For example, EPL rights were sold for 98.6 million GB pounds for 2016-2019[100] with some outlets reporting a cost of 298 million GB pounds. This quantum is prohibitive for most competitors in the Kenyan market. The biggest complaint from stakeholders not in the market is the price of the rights. It is the exclusive nature of sports rights that makes this market one that is difficult to enter. While

[100] Harris, N. (2016). *New year, new TV billions: Premier League rules the world, with foreign sales of games set to hit £1 billion a year in 2016 deals.*Available here. Note that a much higher sum was reported elsewhere, see: My Broadband. 2016. *Here's how much Supersport paid for English Premier League rights.* Available here.

individual rights can be contested, getting a bundle of sufficient rights to establish an attractive sports offering may be more challenging. Historically in Kenya entrants into this market have been able to purchase specific premium rights but have been unable to establish themselves. For example, GTV had purchased EPL rights but subsequently exited the market.

Levels and extent of competition:

There is at present only one provider in the market. However, there may be competition at the margins.

Firstly, there may be competition for customers of premium retail television that do not require sport but require other aspects of the premium bundle. While there is only one provider of premium pay TV with sports in Kenya there is no standalone sports offering and subscribers who require sports can only purchase it through premium bouquets. However, these bouquets may also attract other customers who enjoy other aspects (such as having a variety of content including movies or other niche content). There may be competition for these customers, who may choose between a premium bouquet or downgrading to a cheaper bouquet and supplementing this with OTTs or other offerings. For example, research from Multichoice suggests that [✂[101]].

Secondly, there may be some constraints from bouquets with an more limited sports offering. Various mass market bouquets offer different leagues and types of sport. This is sometimes non-exclusive. It can be noted that the cost of some rights and demand for rights to these more limited offerings is lower than the demand for key international ones a. For example, the Kenyan Premier league rights sold for KES 145 million to Azam.[102] However, this is after both Star Times and Multichoice terminated agreements prematurely suggesting that it is not a key driver of subscriptions.[103] There may be some competition for consumers across these bouquets. However, when it comes to consumers who wish to watch premium sports content there is typically a hard line between the bouquets that have the content and those that do not. For a customer that watches live premium sports there is no competitor bouquet that is a suitable constraint.

At present sports rights are still sold to one bidder per group (FTA and pay), though FTA may have a very limited selection. This, together with barriers to entry, limits the extent to which there is competition in the provision of premium pay TV with live sports and it is unlikely that there will ever be multiple competing providers.

However, it is important to note that there do not appear to be any clear constraints to competition between providers for these sports rights in Kenya for those that have the funding to purchase them. It is a bidding market and the highest bid wins. Different entities have won these rights in the past (such as GTV) but in Kenya have not been able to sustain a commercial offering despite having them. For example, GTV exited the market after liquidating, which appears to have been due to funding issues.[104] Stakeholder engagements and submissions have not unearthed complaints over any explicit anticompetitive strategies or tactics to maintain a monopoly on content by any market participant.

While there are concerns over the price of content this is in part a result of the business model used by rights holders in the upstream market (such as the English Premier League or UEFA) who choose a model of exclusivity that bids up the prices.

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[101] [✂]

[102] The East African (2013). *Kenya football league inks $9m broadcast deal with Tanzania's Azam.* Available here.

[103] Kwalima, D (2017). Available here

[104] The East African. (2009). *GTV Kenya ceases operation*. Available here.

As such, the limitation in competition in this market appears to be as a result of market power upstream in the market for rights which allows rights holders to maintain exclusivity and extract high prices from subscription television companies. This means that there is by construction only one company that has these rights and that due to the lack of affordability other companies do not even enter the bidding contest and instead focus on other ways differentiate themselves.

Forward looking assessment: It is important to note that competition in this market may be on the precipice of change as a result of changes in technology. This is due to two key developments:

1. OTT providers bidding for sports rights
2. Rights owners disintermediating platforms and streaming the content themselves

At present, there is no alternative for viewers in Kenya who wish to watch most sports as is still shown by traditional pay TV broadcasters (or companies with dual offerings. In other parts of the world, however, international streaming companies have slowly been buying up sporting rights, allowing them to stream live sporting events to their subscribers.[105] This is despite challenges relating to low latency, scalability, and broadcast-level picture quality in sports broadcasting, the multi-year nature of rights deals, the high value of sports rights, and the inability to bundle rights.[106] [107]

The table in Annexure A presents a selection of popular sport rights that have been won by large international streaming companies since the first OTT purchased sports rights in Europe in 2017.[108] It can be noted that similar patterns have not emerged in Kenya as yet.

Investment by OTTs are estimated to account for 21% of global sports rights investment in 2023, an increase from 13% in 2022, though at present this lags behind spending on original content (which was 28% of investment, double that of sports at 13%).

Sports streaming service DAZN, the third largest sports rights spender in general, and the highest OTT spender across the five largest sports markets in Europe, accounted for 54% of spend on sports rights by OTT subscription services in 2022 (See Figure 11)[109]. Amazon Prime Video was the second largest OTT subscription spender on sports rights following an exclusive deal with the National Football League.[110] Netflix on the other hand, is emphatic that it does not have plans to stream live sporting events.[111] For key leagues such as the EPL, the last round of sales has been to a mix of traditional pay TV, OTTs (DAZN) as well as traditional companies linked with streaming offerings (eg. NBC, Sky, Supersport, Viaplay).

[105] Ampere analysis. (2023). *Streaming services will spend over $8bn on sports rights in 2023*. Available here. Accessed 26 April 2023.
[106] Ampere analysis. (2022). *Streamers will account for one-fifth of sports rights spend in the big five European markets in 2022.* Available here. Ampere analysis. (2023). *Streaming services will spend over $8bn on sports rights in 2023.* Available here.
[107] Miller, M. (2022). *Sports rights: the new battleground in the streaming wars.* Available here.
[108] Ampere analysis. (2022). *Streamers will account for one-fifth of sports rights spend in the big five European markets in 2022*. Available here.
[109] Ampere analysis. (2023). *Streaming services will spend over $8bn on sports rights in 2023*. Available here
[110] Ibid.
[111] Tech Central. (2022). *Netflix not keen on live sports*. Available here.

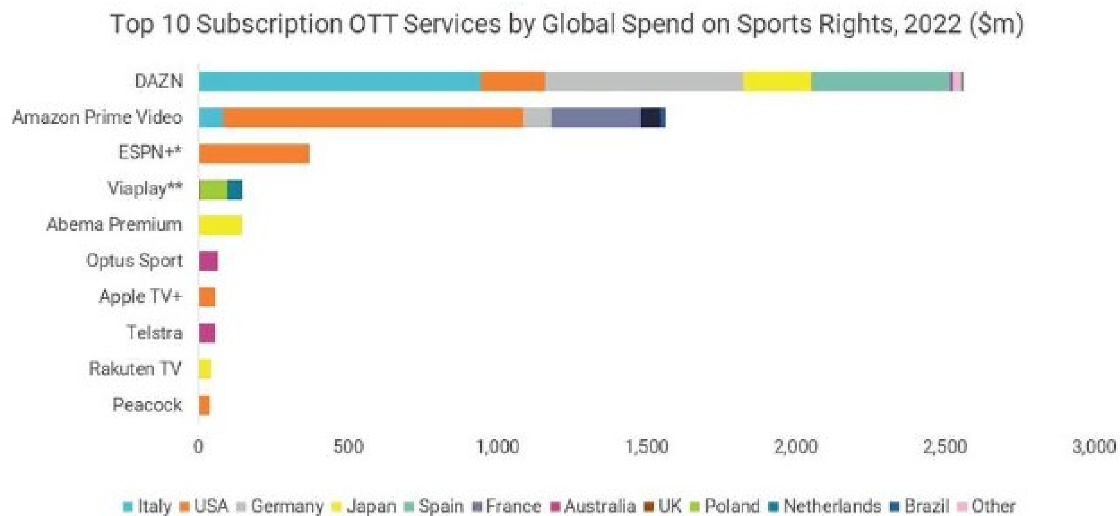

Figure 12: Top 10 International OTT Services by Global Spend on Sports Rights ($ million), 2022

Source: Ampere analysis. (2023, February). Streaming services will spend over $8bn on sports rights in 2023, available here.

There is the possibility that OTT non-linear offerings with live sport could act as a constraint on pay television with live sports as they are in the same market.

The second challenge to the market arises from rights providers streaming their own content, thereby disintermediating platforms.

Rightsholders typically aim to maximise their income by creating scarcity which incentivises competing broadcasters to bid prices up in a bidding model. Going forward, certain rightsholders have indicated that they are considering a shift to direct-to-consumer streaming or models in which they stream to consumers in some countries and sell the rights in others.[112] However, this is not occurring on a significant scale in Kenya as yet. For example, the EPL in 2020 indicated that it was working towards creating what they termed a "Premflix" offering which would stream direct to consumers in certain markets.[113] However, this has not occurred in the 2022-2025 round of sales.[114] At present for rightsholders the shift entails some risk as it entails moving from a model in which there is guaranteed broadcast income based on a few large deals to a model which entails managing millions of subscribers directly and developing the interfaces, subscriber management systems etc to operationalise it. UEFA has, as a result, also considered streaming, but only to smaller markets.[115] While this may occur going forward, it seems less plausible that rightsholders would switch to a new model or an OTT-only model, potentially with a smaller footprint in markets in which they have established viewership and large broadcast deals.

Significant market power: With 100% market share in the relevant market and high barriers to entry (particularly due to scarce and exclusive content), it is clear that Multichoice has significant market power in this market. They have no competitors in this market, and have prices between 2 and 6.8

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[112] Ingle, S. (2020). *Premier League new chief says Netflix-style overseas services is on the cards.* The Guardian. Available here.

[113] Ingle, S. (2020). *Premier League new chief says Netflix-style overseas services is on the cards.* The Guardian. Available here.

[114] Premier League. (2022). *Premier League broadcast deals for 2022-2025 and beyond.* Available here.

[115] Impey, S. (Undated). *Champions League streaming on Uefa.tv an option, says general secretary.* Available here.

times that of those that would be considered competitors (See Table 6) using a broader market definition.

Anticompetitive conduct: There are currently no allegations of anti-competitive conduct in this market that have been brought before the Authority. Stakeholder interviews and submissions did not shed light on anti-competitive conduct at present. We note that there have been allegations of abuses of dominance in the past and that the Competition Authority of Kenya has investigated this market [✂]. From an ex-ante perspective at this stage, while there is evidence of dominance and market power, there is no evidence of anti-competitive conduct at the retail level.

Susceptibility to ex ante regulation: A market is seen as susceptible to ex ante regulation based on what is termed the 3 Criteria: These are the following:

- The presence of high and non-transitory barriers to entry of a structural, legal or regulatory nature.
- The structure does not tend towards effective competition within the relevant time horizon.
- Competition law alone would not adequately address the market failure(s) concerned.

In this market the 3 criteria are met.

- The licensing requirements, and limitation on the availability of premium sports content which is only available on an exclusive basis and therefore confers market power on the recipient, means that there are high and non-transitory barriers to entry into this market (as described earlier).
- The structure does not tend to effective competition during the relevant time horizon as there is no likelihood that premium sports content will be available on anything other than an exclusive basis going forward as contracts have already been signed, or that prices will reduce substantially.
- Finally, competition law alone will not address the market failures concerned. Prior investigations by the competition authorities have not found any contraventions of the Competition Act and have not led to any remedy in the market. Furthermore, in this market there is no evidence of blatant anti-competitive conduct by the dominant firm such as restrictive trade practices or abuse of dominance. However, the structure and features of the market have led to an outcome that is not characteristic of a competitive market.

As such, the market is susceptable to ex ante regulation.

Conclusion: The market for high income/premium pay with live sports is one that is dominated by a single company in Kenya. This is largely through the fact that premium sports rights, which drive a segment of subscriptions, are only available on an exclusive basis and as such the market power is derived from the market power of the upstream rights holders who sell the content on a bidding basis.

5.6 Television market 2: Mass market pay

5.6.1 Market shares and competitors

Kenya has various offerings in the mass market segments. Providers of mass-market offerings include DSTV, GoTV, Star Times, Zuku and Azam. If we use an expanded market definition that includes OTTs it potentially includes Showmax (offerings without live sports), Netflix, Viusasa and the other OTTs. In order to assess market share, and as described in Section 4.1.3, we have considered a few different market definitions.

First, we consider market shares for traditional pay TV by removing the premium subscribers from the DSTV share.

Secondly, while we do not have accurate data to calculate market shares for the broader market including OTTs, we provide a descriptive analysis of market participants.

Thirdly, we consider market shares for a broader market including premium as a robustness check.

5.6.1.1 Market shares for mass market traditional only:

The market for mass market products is one that has more players than the high income/premium market. However, it is still very concentrated with two large players and two smaller players.

Table 8: Estimated market shares for mass market products (June 2022)

	Active subscribers	Market shares
Startimes	[✂]	[✂]%
Multichoice	[✂]	[✂]%
Zuku (Oct 2022)	[✂]	[✂]%
Azam	[✂]	[✂]%
CTN (Q1 figures)	[✂]	[✂]%
Cable One	[✂]	[✂]%
Matruchhaya Cable Network	[✂]	[✂]%
Total	[✂]	[✂]%

Source: Submissions from Multichoice. CA regulatory returns Q4 2022, data submitted by operators. Note that earlier regulatory returns are used to allow for matching of time periods as data on non-premium only depends on bouquet specific data which is only available for earlier time periods.

5.6.1.2 Market shares for mass market traditional with paid OTT and on-demand:

If we consider the market including paid subscriptions for OTTs we find that the market shares per provider overall fall. However, since Showmax has approximately [✂]. While Netflix does not share its subscriber numbers by country and is not a licensee, is likely that Netflix has a similar number of subscribers. As such, the incumbents still have fairly large market shares. One submission estimated that OTTs comprised approximately 30% of the market but this was not substantiated.

This mass market segment contains a range of competitors with differentiated products. Stakeholder engagements suggest that this is a competitive market segment with a range of products at different price points.

Providers typically compete on quality at differing price points as shown in the Table below.

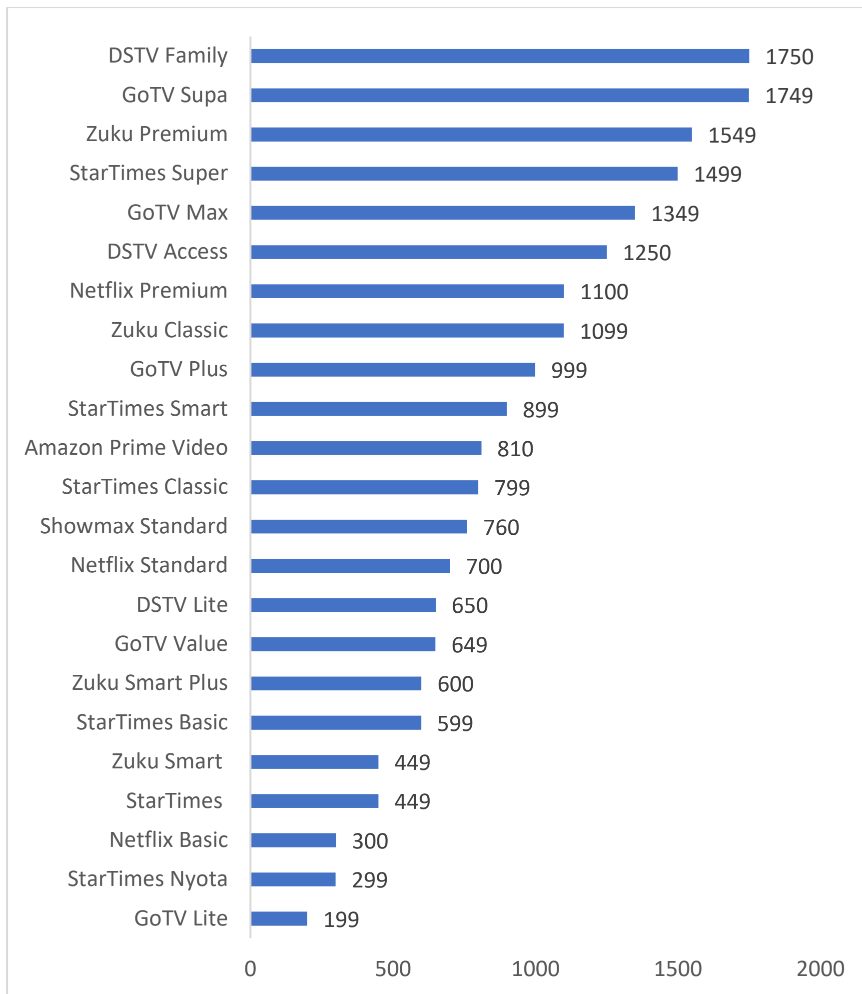

Figure 13: Prices of mass market bouquets

Source: Submissions and provider websites

5.6.2 Competitive dynamics

Entry and exit

The traditional broadcasting market has high barriers to entry including licence requirements, and high startup and operational costs. DTT has additional barriers in having scarce radio frequency spectrum and as such is limited. The regulatory barriers are lower for OTTs as no licence is required. Both types of business require subscriber management services, content, a differentiated product that appeals to consumers in Kenya, and a brand.

The market has seen an increase in competition over time due to a few factors.

- Firstly, digital migration has introduced DTT as a competitor for mass market pay television at a lower price point. This has led to the entry of GoTV and Star Antennae, though it can be noted that these are both companies that were already in the pay TV market and that further entry is not possible due to scarce spectrum.
- Secondly, the introduction of OTTs has brought competition for a segment of viewers through streaming. However, the increase in competitive rivalry has been limited in the last few years as there have been fewer new entrants and not all consumers can afford data or have access to broadband.

Overall, there has been both entry and exit, though this has largely been of OTTs. Successful entry includes Netflix and Showmax in 2016, Viusasa in 2017 and Baze in 2021. It is important to note that the successful OTTs in Kenya in recent years have typically been existing TV operators (eg. Showmax, Viusasa), or international companies with their own content (eg. Netflix, Amazon).

Three early video-on-demand operators have left the Kenyan scene. They include Buni.tv, which launched in 2012 and was sold to Trace TV in 2016,[116] Aflix.tv, which launched in Kenya in 2014 as a pay-per-view service or streaming service for Hollywood content, which does not appear to be operational anymore[117] and Iflix which launched in Kenya in 2017 but was offloaded onto Zimbabwe's Econet in 2018[118] and was subsequently rebranded and then discontinued due to economic hardship in Zimbabwe.[119]

While scale is an issue, several providers have multinational offerings and they are able to leverage off these strengths. Economies of scale may prove a challenge to those entities that have a smaller footprint. It can be noted therefore, that while there is entry, the most successful OTT entrants have all leveraged off their strengths in other markets (product or geographic).

Pricing and quality competition

There appears to be strong competition in the mass market pay tv market segment between different companies and packages. Stakeholder submissions and interviews attest to a highly competitive environment. Most providers have offerings at a range of price points at which they compete with each other. While it is likely there are different sub-markets and segments by income level, the competitive dynamics across these markets are largely similar.

Pricing: In recent years prices have typically fallen or been static in real terms. For example, prices charged by DSTV and GoTV fell until 2019 and have been largely static in real terms thereafter.

[✂]

Figure 14: [✂]

Source: [✂]

Similar patterns are evident for OTTs. In particular, there was a 20-60% decrease in prices offered by Netflix in 2023 (removing the nominal price increase in 2021). Likewise, Showmax prices have been stable, which means in real terms they have declined.

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116 Mulligan, G. (2016). *Buni.tv acquired by France's TRACE TV*. Available here. Accessed 26 April 2023.

117 Mupaso, T. (2022). *Can Aflix compete in Africa's (now cut throat) VOD Space? Here's what we know*. Available here.

118 Russel, J. (2018). *Netflix rival Iflix offloads its Africa business to focus on Asia*. Available here. Accessed 26 April 2023.

119 Paul, E. (2019). *The last straw: Econet Media finally brings an end to Kwese TV*. Available here. Accessed 26 April 2023.

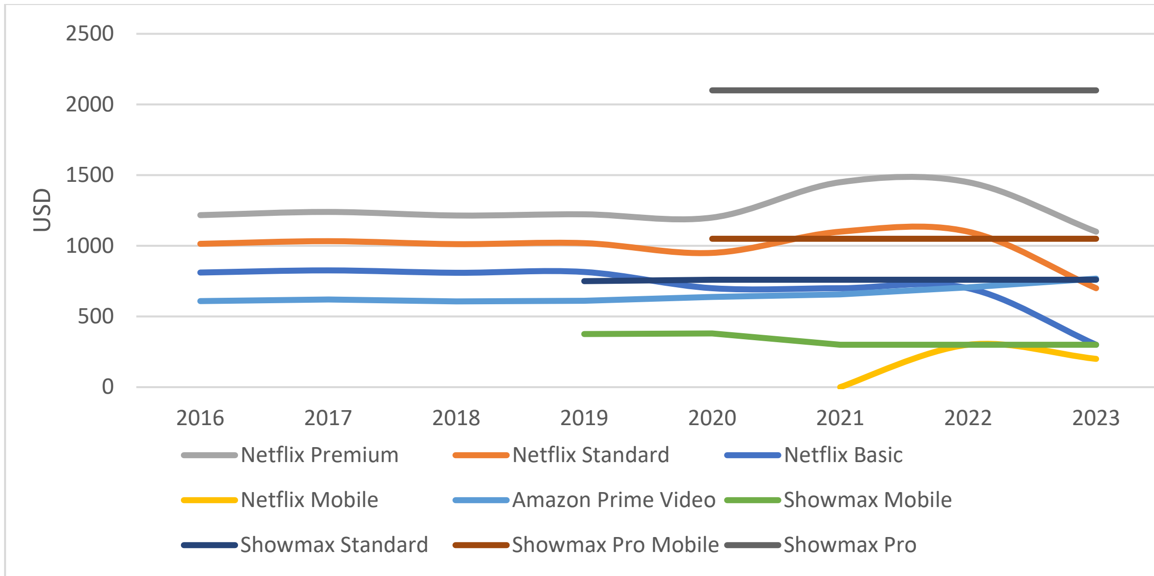
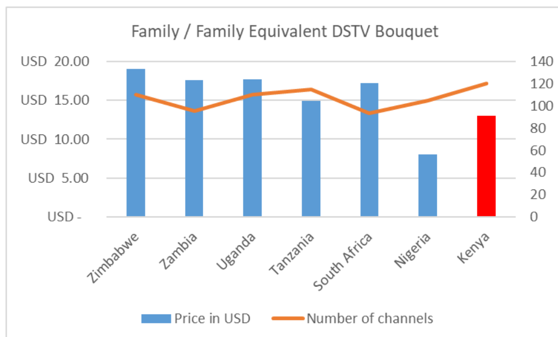
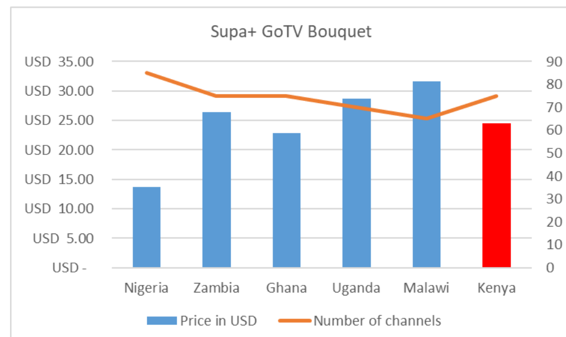
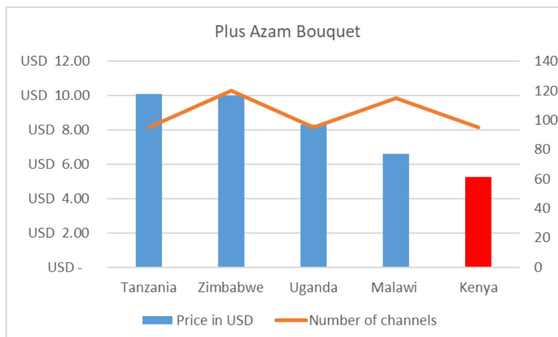


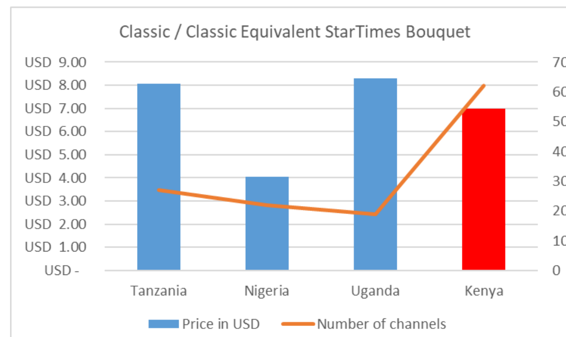
Figure 15: Showmax, Netflix and Amazon Prime Video prices in Kenya (nominal) (2016-2023)

Furthermore, cross-country comparisons of traditional broadcasting providers that operate across countries show that prices in Kenya are not very high compared to other countries on the continent which suggests that pricing power is not unconstrained.









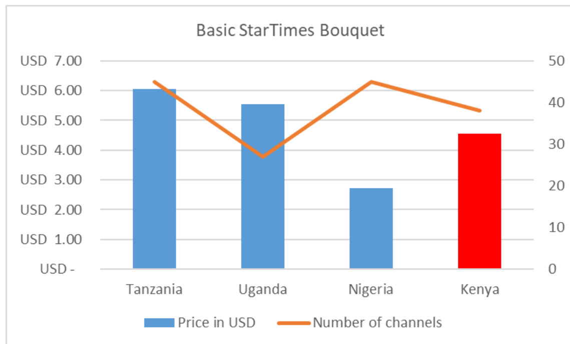


Figure 16: Sample of price comparisons for mass market bouquets

Source: DSTV, GoTV, Azam and StarTimes websites

With respect to OTTs, Figure 16 and Figure 17 below show Netflix in Kenya is the cheapest among the countries shown. The Figures below include a selection of developed and developing countries (not exhaustive), with most developing countries chosen being located in Sub-Saharan Africa, while for Showmax, Kenya's prices are the fourth lowest (after Ghana, Namibia and South Africa).

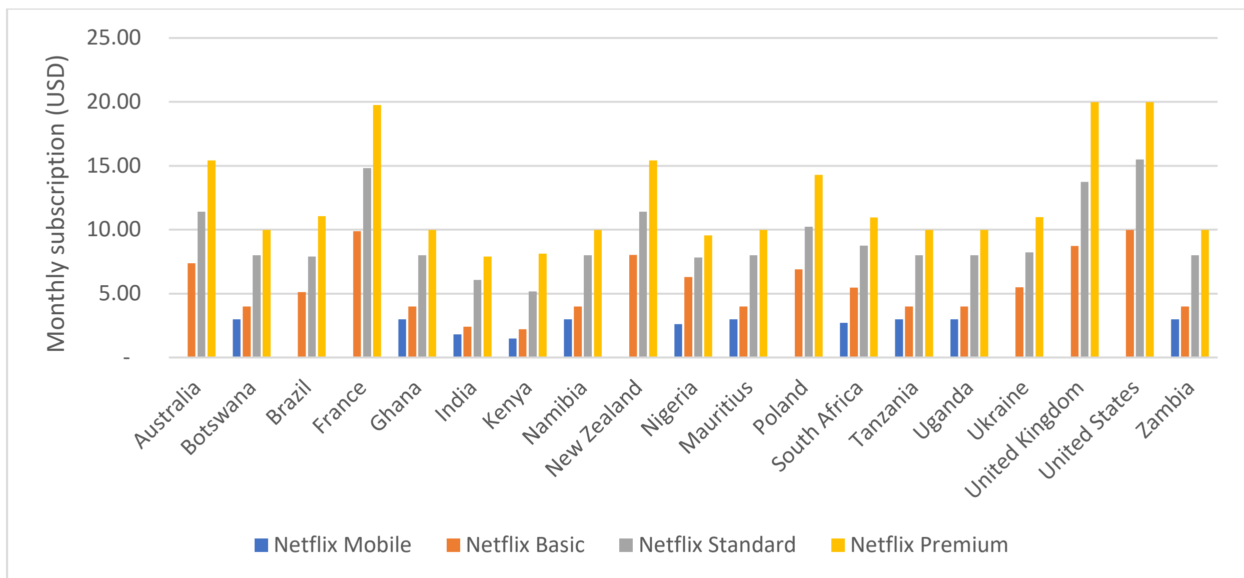


Figure 17: Netflix package prices across different countries, 2023

Source: Netflix website, available at: https://help.netflix.com/en/node/24926/pl *[Accessed 20 April 2023]*

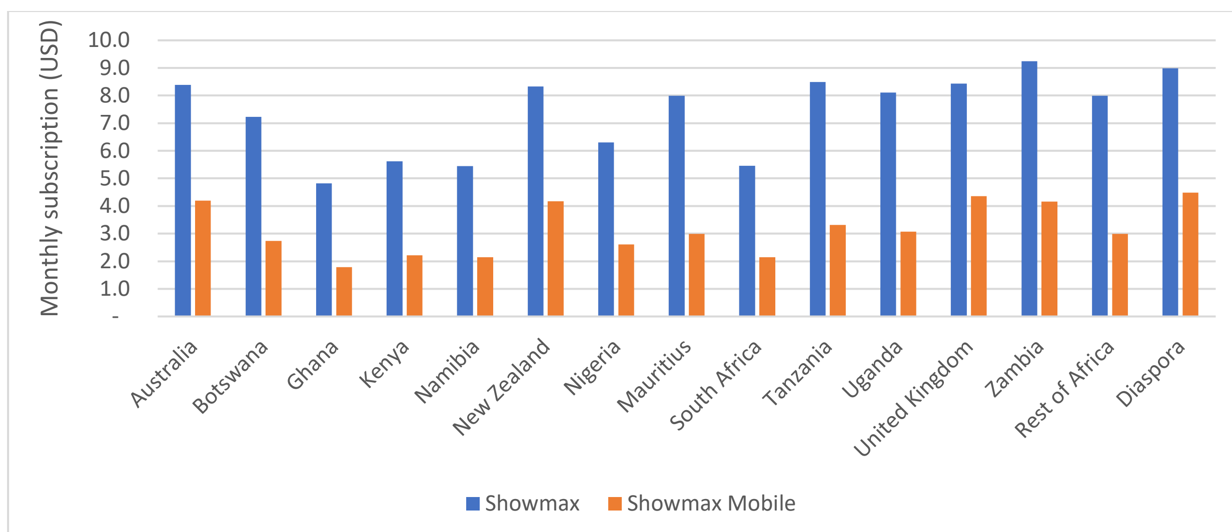


Figure 18: Showmax standard package prices across different countries, 2023

Source: Fifty7Tech Website. Available here.

Innovation: There has been innovation in this market. For example, Netflix offered a free offering to the Kenyan market in 2021 and Showmax provided innovation in the introduction of a mobile offering in 2019.[120]

Numerous stakeholders noted that they are focused on the mass market as it is the segment with the most potential growth.

Anti-competitive actions

There have been no complaints of anticompetitive behaviour in this market from market participants or content providers.

Forward looking assessment

This market segment has also seen increased competition in the last decade, both as a result of digital migration as well as new OTT providers such as Netflix, Showmax and Viusasa. This is across target markets. The entry barriers in this market are lower than premium pay TV as content is not as scarce. As the price of data comes down, the competitive constraints may increase further.

Going forward we think it is likely that the market players will continue to compete with each other. We believe that if there were to be an increase in prices or an exertion of market power in this segment, entry from additional international or local providers is likely.

3 criteria test:

As noted previously the 3 criteria test looks at whether markets are susceptible to ex ante regulation based on the following:

- The presence of high and non-transitory barriers to entry of a structural, legal or regulatory nature.
- The structure does not tend towards effective competition within the relevant time horizon.
- Competition law alone would not adequately address the market failure(s) concerned.

Here, there are barriers to entry as DTT and satellite providers licences are required, infrastructure needs to be set up, subscriber management services and marketing is required. All providers require content. While OTT providers at present may have lower infrastructure costs and do not require

[120] Showmax, Request for Information 26 June 2023, 5.3.

licences, their barrier to entry is currently the cost of broadband to consumers and the impact of this on their potential subscriber base. While these barriers may change over time, it is unlikely that they will be removed in the relevant time horizon of three years.

It is not clear whether the market will tend to effective competition in the relevant time horizon. It does appear that there is fairly strong competition at present from different providers. We also believe based on submissions made to us, that this is likely to increase going forward. As such, we believe that at this stage this market segment is not susceptible to ex ante regulation.

However, given the barriers to entry, the changes in the market and the fact that successful entrants have all leveraged off their success in other markets, this may change in the future. We recommend continued monitoring.

5.7 Television market 3: Mobile mass market pay

At present the market for pay television on mobile phones is one that is fairly new and for which data is not readily available. It has been challenging to collect the required information to engage in a full assessment. However, from the information available there are a variety of mobile subscription offerings in the market. This includes Viusasa, Netflix Mobile which is at a low price point of KES200, and Showmax with its entry-level bouquet of KSH 299. These are at a lower price point than comparable mass market products.

Of the local streaming providers, Baze and Viusasa focus on local content while Airtel TV offers a selection of both local and international channels. Baze provides both video and music on mobile devices for a daily fee of just KES 10 (KES 304 per month), which is on par with the price of Showmax Mobile but higher than Netflix Mobile. Finally, Airtel TV is free and exclusive to Airtel mobile subscribers (prepaid and postpaid).

Table 9: Package price comparisons, 2023

Provider	Package	Characteristics	Price/month (KES)
Netflix[121]	Netflix Mobile	SD, 1 stream, mobile only	200
Baze[122]	Baze without data	SD, 1 stream, mobile only	304
Airtel[123]	Airtel TV	SD, 1 device	Free to subscribers
Showmax[124]	Showmax Mobile	HD, 1 stream, mobile only	299
ViuSasa (2022)[125]	Viusasa Videos	SD, 1 stream	200 (2022)
ViuSasa	KidsViu	SD, 1 stream	150 (2022)

Sources: Various

[121] Muiruri, K. (2023). *Netflix chops subscription prices by 37pc as rivalry up.* Available here. Accessed 20 April 2023.; Netflix website, Available here.

[122] Safaricom. (Undated). *Baze Terms of Use*. Available here. Accessed 20 April 2023.

[123] Airtel. (Undated). *Introducing airtel TV.* Available here. Accessed 20 April 2023.

[124] Showmax. (2021). *How does Showmax work?.* Available here.; Showmax. (Undated). *What is Showmax Pro?.* Available here. Accessed 20 April 2023.

[125] Wanjala, K. (2022). *[Updated] ViuSasa Packages and Rates* 2022. Available here. Accessed 20 April 2023.

Showmax has had a relationship with Safaricom since 2017.[126] Safaricom subscribers can get 1GB or 3GB of data with Showmax Mobile and Showmax Mobile Pro deals respectively.[127]

Many OTT providers are now offering local content. This is relevant as local content is a popular driver for mass market subscriptions. The three local video-on-demand companies (Airtel, Baze, and Viusasa) are focussed on local and regional content while international video-on-demand operators are primarily focussed on international content. However, MultiChoice added Kenyan entertainment and news channels to its Showmax packages in 2020.[128] Furthermore, both Netflix and MultiChoice have been increasingly investing in producing more local content on the continent, including in Kenya.[129]

5.8 Pay TV Conclusions

Pay television in Kenya, as in the rest of the world is undergoing a period of change. There are new platforms that are being used for broadcast, new business models and new entrants. There have been a range of changes in the competitive environment and increased competition from stakeholders that do not use traditional broadcast infrastructure and therefore do not fall under the licensing framework. This has implications (i) for the competitive assessment of existing broadcasters and (ii) for the regulatory framework.

The competitive assessment has yielded the following conclusions:

- In the premium market there is a dominant player with significant market power. However, there is– no evidence of exclusionary issues on an ex ante basis despite the existence of exclusive contracts. While there have been concerns over price our analysis suggests that retail prices have fallen in real terms or stagnated. Furthermore, market power is derived from that held by the content providers (such as the English Premier League) who are charging high prices that drive the retail prices. We do not recommend any intervention in this market at present, given the changes in the market that are occurring. We recommend ongoing monitoring.
- In the mass market there are higher levels of competition than in the premium market with a more companies that are active, though it is still concentrated. While concerns have been raised over access to DTT (which is limited due to scarcity of spectrum), there is substitution from DTH. Any exploitative rise in the price of DTT (or degradation in quality) would lead pay customers to switch to DTH which creates a competitive constraint. Wesee no need for intervention in the market at this stage.

A concern that has arisen is the issue of whether there is a level playing field in terms of regulatory requirements. A company providing the same offering on DTT/DTH and online would be regulated while they would not be if they provided the same offering over telecommunications networks. OTT operators do not pay licence fees, nor do they need to submit regulatory returns. They also may not

[126] Chenze, E. (2017). *Safaricom subscriber? Good,Showmax is offering a Kshs 250 for 3 months subscription: Here's why you should get it.* Available here. Accessed 28 April 2023.
[127] Showmax. (Undated). *What's on Showmax?.* Available here. Accessed 28 April 2023.
[128] Showmax. (2020). *Five Kenyan channels now available to live stream on Showmax*. Available here. Accessed 25 April 2023.
[129] Madu, E. (2021). *Showmax is working on its first Kenyan original.* Available here. Accessed 25 April 2023.; Onyango, C. (2022). *Streaming wars come to Africa*. Available here. Accessed 25 April 2023.; Siele, M. (2023). *Africa's streaming war hinges on local content*. Available here. Accessed 25 April 2023.; Edesa, J. (2023). *Video Streaming Services Target Africa's Market.* Available here. Accessed 25 April 2023.; Nangara, A. (2021). *Netflix spent $175 M on Nigeria, Kenya and South Africa's film industry.* Available here. Accessed 26 April 2023.

be subject to the same laws in terms of content. This leaves the question as to whether the Authority should consider regulating OTT providers.

DTT uses scarce spectrum and there is therefore a strong argument for regulation. For completeness, however, it can be noted that other jurisdictions are tending towards deregulating broadcasting markets when there is maturity in terms of competition (specifically, when competition from OTT increases).

As indicated above, we have found some competitive interplay between pay TV and OTTs. In our opinion, at this stage, there is danger that premature regulation of OTTs will impact on innovation in the market and there is still limited penetration of high-speed broadband which limits the competitive constraint of OTT services. We have not seen any evidence that OTTs are having an anti-competitive effect on the market. Rather they are increasing competition and providing more options for consumers.

The scope of work requires us to consider how to manage the co-existence of OTTs and broadcasters in order to ensure the growth of both. We can find no reason to regulate OTTs at this stage because as indicated earlier, regulation does not exist in a vacuum – it must be directed at achieving a policy or public interest goal that the market cannot achieve itself (such as lower prices, or better quality) or at preventing or addressing harm (such as anti-competitive conduct, or content concerns). A regulatory impact analysis would also be necessary to determine, if regulation is desirable, how best to achieve this. However, it is important to monitor the growth of OTTs in the market and consider their interplay with traditional broadcasting.

5.9 Television market 4: FTA TV

5.9.1 Market shares and operators

There has been a massive increase in the number of FTA television services in Kenya over the last few years, partly as a result of digital migration which allowed for greater capacity for broadcasting, as well as the implementation of local insertion by signal distributors which allows content to be provided on a more localised basis. Operational FTA TV stations have nearly tripled over the last 6 years (see Figure 2). 96% are commercial FTA TV though a small number of community/public television stations have been introduced to the market over the last few years.

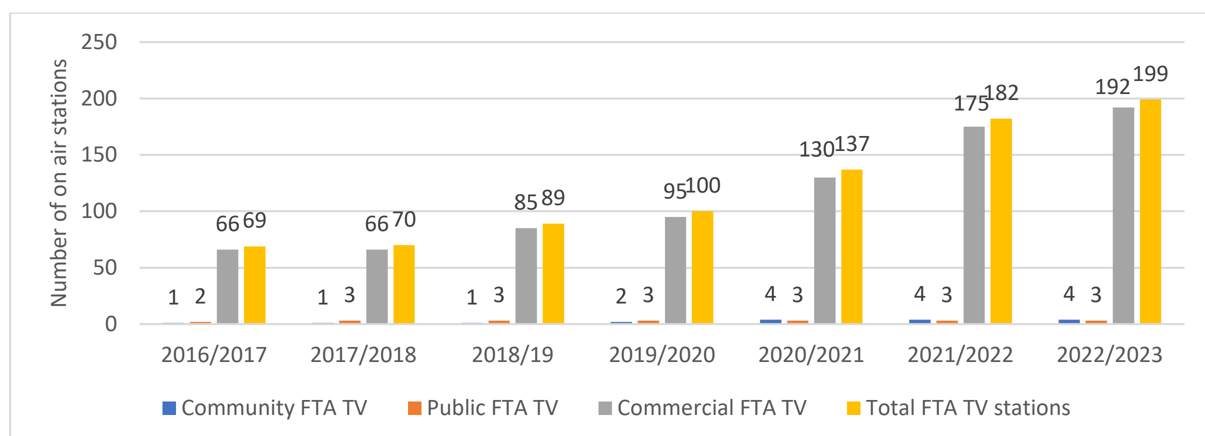


Figure 19: On air FTA TV stations (2015-2022)

Source: Communications Authority of Kenya, Annual report 2021, pg 31. Available here.[130] . Communications Authority of Kenya, Broadcasting Services Report - Quarter 3 FY 2022-2023[1], pg. 7.[131] .

The FTA TV market consists of 334 commercial and 9 community FTA TV stations licensed to broadcast on the DTT platform, covering 91.21%[132] of the Kenyan population. A full list of current commercial FTA stations is included in Appendix B. While this looks like a large and dispersed market, this is deceptive as the key channels are owned by a small number of media houses. These channels are also for the most part available on pay television.

There are two keyways of calculating market share in the context of FTA (which has no subscribers).

Firstly, we can look at **viewership**. As shown below, even if we only consider the 15 largest TV channels by national daily share (which possibly overestimates the market size as it includes pay channels such as Nickelodeon and Maisha Magic) the five large media groups comprise over [✂] of viewership and notably [✂] is held by a single media house, namely Royal Media. This is largely driven by the disproportionate viewership of its flagship channel Citizen TV with around [✂] reach.

[✂]

Figure 20: Aggregation of the top 15 TV channels by media house (Q1 2023)

Source: Royal Media Services submission to the CA. Ipsos (2023), Ipsos Kenya audience survey – IKAT Q1 2023 - Audience performance report for Royal Media Services.[133]

This suggests a highly concentrated FTA market.

However, this could be misleading giving the impact that viewership of a single channel has on these shares. As such, we also consider market shares by **ad spend**. As shown below, this suggests a more balanced market. However, it is still concentrated. Excluding the public broadcaster KBC we find that 78% is comprised of the top four media houses.

Table 10: Shares and market concentration of FTA TV channels by media house based on ad spend (December 2019)

	Market shares
Royal Media Services	30%
Standard Group	21%
Nation Media Group	11%
Mediamax	16%
Kass Media Group	8%
Switch Media	4%
Other	9%
Total	100%

Source: Communications Authority of Kenya and Kenya Audience Research Foundation (KARF) (2020), Audience measurement and industry trends report for Q2 2019-2020. Available here.

[130] For the 2016/17 to 2017/18 period.
[131] For the 2018/19 to 2022/23 period.
[132] Communications Authority of Kenya. (2022). *Broadcasting Baseline Survey Report*. Available here. Fourth Quarter and Financial Year 2022/2023 Sector Statistics Report. Available here.
[133] Startimes (PPP TV) and MultiChoice Kenya (Maisha Magic East). * Not aggregated by media house.

Taking this into account, the market for FTA television channels is moderately concentrated.

5.9.2 Competitive dynamics

The market for FTA television channels is a differentiated market. On the audience side, channels compete by specialising in terms of language and genre.

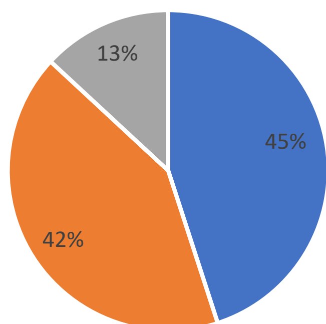


Figure 21: Languages used by TV broadcasters

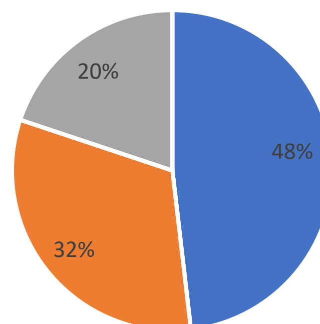


Figure 22: Preferred languages by TV viewers

Source: Communications Authority of Kenya (2022), Baseline survey for broadcasting services in Kenya. Available here.

Table 11: Top channels by content, language, and availability on pay TV

Broadcasters	FTA channels	Local content (%)	Broadcasting language	Available on pay TV
Royal Media Services	Ramogi TV	90%	Luo	Yes
	Citizen TV	70%	English and Swahili	Yes
	Inooro TV	90%	Kikuyu	Yes
Standard Group	KTN Home	45%	English (90%) and Kiswahili (10%)	Yes
	KTN News	95%	English (70%) and Kiswahili (30%)	Yes
	BTV	-	-	No
	KTN Farmers TV	90%	English (90%) and Kiswahili (10%)	No
	KTN Burudani (now BTV)	-	English and Swahili	No
Nation Media Group	NTV	65%	English (76%) and Kiswahili (24%)	Yes
Mediamax	K24	32%	-	Yes
	Kameme TV	68%	Kikuyu	Yes
KBC	KBC channel 1	40%	English, Kiswahili and more	Yes

	Heritage TV	-	-	No
	Y254 TV	63%	-	Yes

However, they compete more directly with each other for advertising spend. On the basis of ad spend, no single provider has market power, namely the ability to compete independently of consumers and competitors.

This is particularly the case given the changes in the market. The FTA market has experienced significant challenges as a result of fragmented channels, pay TV providing more basic bouquets with local channels that compete for advertising, and a fragmentation of audiences and advertisers as a result of the new digital offerings that provide alternatives to a market that has not grown. Our assessment from stakeholder interviews (with both Signal Distributors and FTA providers) and submissions is that FTA channels in Kenya are facing some sustainability challenges and at present are constrained by digital markets as well as pay TV from exerting any market power.

Barriers to entry and expansion:

Financial barriers: There appear to be fairly low barriers to entry in FTA broadcasting. The key requirements are a licence , content, and commercial agreements with a signal distributor. The large number of smaller channels that have entered the market over time supports this. However, the barriers to expansion and financial sustainability appear to be higher. Stakeholders noted that the high cost of equipment (particularly if you are creating local content), carriage fees and frequency fees act as financial barriers to entry.

Vertical integration: Some groups are vertical integrated and have licences for self-provisioning of signal distribution which enable them to manage the costs of signal distribution, while others are reliant on purchasing signal distribution services. However, as self-provisioning licenses do not allow providers to serve third parties, the costs are often not optimised as there is excess capacity. As such, vertical integration may not be beneficial in the current situation.

Cost of local content: Other barriers include the cost of quality original local content which plays an important role in companies' abilities to compete in the market. Furthermore, local content is required. Regulations passed in 2014 require that local content quotas and FTA channel programming constitute at least 40% local content, excluding news and advertising.[134] Local content production can be expensive and often requires a far higher investment than other forms of content. This is because production costs are not split over a larger number of broadcasters as is often the case for content produced internationally and sold into multiple markets whereas local content is produced for a single broadcaster. However, this cost does vary as certain types of content (eg. live studio talk shows) are cheaper than others (eg. movies).

Fragmentation of ad revenue: Ad revenue is likely to be spread across more channels in the future as smaller stations compete for viewership. Furthermore, digital advertising has also created competition for television advertising. Initial stakeholder engagements have raised concerns over the sustainability and financial viability of many of these FTA channels. As such, many media houses have serious concerns over the declining revenues from adverts, particularly as costs remain constant or rising.

[134] Communications Authority of Kenya (2019). *The programming code for broadcasting services in Kenya*. Available here.

Entry and exit:

The market is dynamic and there is a lot of entry and exit from the FTA market. This includes a range of different types of entrants. For example, Radio Africa group attempted to leverage their equipment and popularity in Radio into television and purchased EPL rights for FTA. However, they were unsuccessful at building a successful channel. Submissions from signal distributors suggest that there is a lot of entry and exit.

Switching:

There are no switching costs for customers for FTA and as such there are no barriers to switching.

Overall, the market for FTA in Kenya appears to be competitive. While there is concentration, there are a few groups that constrain each other as well as some minor constraints from pay TV and OTT. However, the key challenge in this market is due to financial sustainability issues due to a changing landscape. This is predominantly due to lower levels of advertising revenue, fragmentation and increased use of alternatives such as the internet by customers both for entertainment (consumer) and for advertising (wholesale). This has led to reduction in revenues, while costs have increased or remained constant, placing pressure on providers. However, this is not specifically related to competition in the market but is rather the effect of a larger evolution in technology and consumer behaviour. As such, we do not recommend intervention in this regard.

5.10 Television market 5: FTA OTTs

There are a range of FTA OTTs that compete in Kenya including international companies such as YouTube as well as streaming options from local FTA companies (meaning that although consumers pay for data, there is unlikely to be a subscription payable to the provider). While there is limited data available, indications from publicly available sources are that this is widespread. For example, data from Similarweb shows that on the Google Play Store there are a range of FTA options that are capable of being downloaded including several video streaming apps such as YouTube Kids. However, it seems more likely that videos are being streamed directly from websites. YouTube is the second most used website in Kenya.[135] Other users may watch videos on social media platforms such as Facebook, Instagram and Tiktok. Stakeholder submissions suggested that the numbers of viewers accessing existing FTA channels via internet platforms were still small relative to those watching them on DTT.

At present, it is likely that FTA OTTs are in a different market to DTT, particularly given the FTA target market which has more limited access to high-speed fibre than the pay television target market and that the FTA target market is more likely to stream using mobile (though it is possible to stream some OTTs through smart tvs). For example [✂]. Viewers of FTA OTTs endure limitations on accessing the internet other than through mobile phones, and there is an impact on functionality if mobile is being utilised. However, factors like the size of screen and the ability for multiple individuals to watch at the same time suggest that viewers prefer FTA OTTs, as there is typically an incremental cost to watching OTTs on mobile in terms of data costs relative to the acquisition of an FTA set top box which is a once off cost.

5.11 FTA TV Conclusions

While there are many FTA channels, there is a moderate level of concentration among the large media groups who produce these channels. FTA faces challenges as a result of a changing digital environment as a result of the loss of consumers to alternative sources of entertainment, but more importantly as

[135] Digital for Africa. (2023). *Top Websites in Kenya*. Available here.

a result of the fragmentation of advertising. This is not a competition issue but a consequence of a technological evolution.

From a competition perspective there are few concerns downstream. Instead, there are concerns related to signal distribution, which is discussed separately below. As such, we do not have any recommendations related to retail FTA television.

6 Wholesale television broadcasting markets

Upstream of the retail markets there are two key inputs to broadcasting. These are as follows:

1. The wholesale provision of broadcasting distribution services.
2. The wholesale provision of content

6.1.1 Broadcasting distribution services

Broadcasting distribution services are an upstream input required for television broadcasting. This can take the form of terrestrial, satellite and potentially over the top (internet-based) distribution. It comprises various stages. For example, for terrestrial distribution there are the following phases:

1. Encoding and compression: Content is compressed and encoded using a standard such as the MPEG4 standard.
2. Multiplexing: Encoded programme strams and assembled and transported
3. Distribution: The multiplexed stream is then distributed to sites. This can be done in various ways including microwave, telecommunications services and satellite.
4. Antennae and site: From the site the signal is fed into the antenna and broadcast.
5. Receiver: Customers receive the broadcast using a receiver such as a set top box or a smart television

Only terrestrial signal distribution is currently licensed in Kenya. There are five companies that currently act as terrestrial signal distributors in Kenya.

Common carrier licensees: Signet Limited and Pan Africa Network Group (Kenya) Co. Ltd ("PANG") hold common carrier broadcasting signal distributor licences.[39] PANG was the first to be awarded with a BSD licence in October 2011 while SIGNET, a subsidiary of KBC, obtained a licence in December 2013 due to delays in its digital infrastructure deployment.

Self-provisioning licensees: Media houses Nation Media Group, Standard Group and Royal Media Services (under the African Digital Network),[40] Lancia and Go have been granted self-provisioning broadcast signal distributor licences.[41] However, it is our understanding that Lancia has exited self-provisioning.

Other pay providers use satellite for distribution, and FTA and pay also use internet-based distribution over telecommunications networks.

Distributors of broadcasting services via satellite or as OTT services do not require licences and satellite broadcasters self-provide or lease their distribution equipment.

In considering the market definition for signal distribution there are various questions:

1. Is distribution for satellite and terrestrial broadcasting and OTTs in the same relevant market or in separate markets?
2. Is self-provisioning in the same market as common carrier services?
3. Are there separate markets for provision of site infrastructure and provision of end-to-end services including multiplexing?

6.1.2 Broadcasting signal distribution by technology

The first question is whether broadcasting signal distribution for different technologies (satellite, terrestrial and internet-based) is in the same market. We consider this using the SSNIP test. If a monopoly provider of broadcasting services using a particular technology (say terrestrial) were to

increase their prices by 5-10% would customers who are retail broadcasters move to an alternative technology (such as satellite)? We would argue that this is not the case in Kenya at present.

This is because at present there are differences on both the demand and the supply side. As discussed previously in section 5.1.3 at this point there are differences in the ability of individuals in Kenya to access different technologies. While DTT requires a decoder and then can be used on a cost-free basis, satellite requires installation (and typically requires a pay TV subscription) and internet streaming-based services require access to high-speed broadband and payment for data used. For the bulk of the population these are in separate markets. As such, if we consider the upstream market, a provider broadcasting on DTT cannot switch to a signal provider utilizing the internet or satellite as they would not be able to reach a significant proportion of their end customers. We therefore find that distribution of services through different technologies are different competition markets at this time, noting that this could change in the future if viewing habits change and the price and availability of high-speed fibre changes.

(i) There are **different levels of downstream access** to technologies with many households (particularly FTA) not being able to access satellite or the internet as an alternative to DTT. FTA is not currently broadcast over satellite. As discussed in the retail section, access to the internet and costs of high-speed broadband limit use of the internet as an alternative for lower income households. For providers wishing to service this segment of the population, it would therefore not be an alternative.

(ii) There are **different licences required and business models** on the supply side. For example, if the price of satellite distribution changed providers would not be able to switch to terrestrial as licences for those services are limited by the availability of spectrum and desirability of issuing more licences).

At present we find that broadcasting signal distribution using different technologies are in different markets. In Kenya there are presently three markets:

1. Upstream market for broadcasting signal distribution using terrestrial.
2. Upstream market for broadcasting signal distribution using satellite.
3. Upstream market for broadcasting signal distribution using the internet (over telecommunications infrastructure).

For the purposes of this study we are focused on terrestrial signal distribution.

6.1.3 Provision of infrastructure and signal distribution

For certain technologies there are arguments that the infrastructure is separate from the distribution service.

For example, within the market for terrestrial signal distribution there are two parts of the value chain that can be categorized as signal distribution, i.e. the provision of signal distribution services including multiplexing and distribution to the site (managed transmission) and the provision of signal distribution infrastructure on sites (facilities). Theoretically, a broadcaster wishing to broadcast from a specific site could either do this through asking for the signal to be distributed by the site owner on their transmitters from the site or could rent space on the site for their own transmitters and have control over the transmission from end to end.

While these segments are vertically integrated in Kenya, in other jurisdictions regulators have in some instances considered these segments to be separate markets. This is because there may be different market dynamics and companies that are able to compete in each segment. ARCEP in France, for example, differentiates between an upstream and downstream market, namely it considers the

hosting of broadcasting equipment on a site and multiplexing to be separate activities.[136] Comreg, in Ireland, found two markets namely, a market for wholesale access to national terrestrial broadcasting transmission services and a market for wholesale access to DTT multiplexing services. The first involves the provision of terrestrial broadcasting transmission services (including distribution) to broadcast operators using towers, masts, transmitters for the purpose of delivering terrestrial broadcasting content to end users. The second consists of the provision of digital terrestrial television (DTT) multiplexing services to downstream DTT broadcasters for the purpose of delivering digital terrestrial broadcasting content to end users (being towers, masts, transmitters etc as well as carriage on a DTT multiplex).[137]

Within the Kenyan market at present these two sub-markets have typically been considered together. We believe that it is likely that they are separate markets in that site infrastructure could be owned by broadcasters, tower companies, mobile network operators or broadcasters and provision made for it to be rented for transmission purposes. However, we do not find this to be central for the purposes of this discussion at present.

6.1.4 Self-provisioning and common carrier signal distribution services

In the Kenyan context another consideration is whether self-provisioning is in the same market as common carrier services.

From a customer perspective, it is possible in very limited instances for a customer of a common carrier to switch to self-provisioning as it will entail building their own infrastructure and applying for a licence. Absent existing infrastructure to leverage on (such as existing radio towers) this is prohibitively expensive. Furthermore, in the Kenyan context, for third parties it is not possible to switch to supply by an existing entity with a self-provisioning licence. For example, independent channels (that are not part of a group with a self-provisioning licence) are only able to use common carrier services as it is not legal for self-provisioning providers to offer services to third parties. As such, in response to a SSNIP increase they would not be able to switch to a self-provisioning licensee. The only company able to switch would be the self-provisioning licensee itself.

Furthermore, from the supply side at present there are barriers to switching from self-provision to common carrier services. This is because there are different licences for each and different licensing requirements. As such, they are currently in separate markets from a supply side perspective as well.

We find that self-provisioning and common carrier signal distribution services are in separate competition markets at present.

6.1.5 Geographic market

The geographic market for each site relates to the area of coverage. A broadcaster who wishes to provide services in an area can only choose between providers with coverage in that area. Within the Kenyan market there are a range of channels that choose local broadcast, or broadcast in particular areas. As such, the geographic markets are typically local.

Measurement of these markets may be complicated by the fact that different companies may have transmitters in different areas that provide coverage over an overlapping catchment. For ease of

[136] ARCEP. (2022). *Decision No. 2022-0931*. Available here. Translated from French to English using Google Translate for Documents.
[137]Commission for Communications Regulation. (2013). *Decision D11/13, Market Review: Broadcasting TransmissionServices in Ireland.* Available here.

reference, we have used counties although that is an imperfect measure as parts of a county may not be covered from a site within that county but rather from a site in an adjacent county.

If we look at Figure 22 below it becomes apparent that in more urban areas there are often two providers with coverage (Signet and PANG), as well as self-provision options and pay options (from GoTV), but in some counties the only option is Signet. These are typically the more sparsely populated regions. Furthermore, there are some areas which do not have coverage at all.

Figure 23: Sites by company

[✂]

Source: CA database from licensee submissions

6.1.6 Competitive dynamics in terrestrial signal distribution

As noted previously, there are five companies that are licensed as signal distributors in Kenya of which four are currently in operation.

Common carrier licensees: Signet Limited and Pan Africa Network Group (Kenya) Co. Ltd ("PANG") hold common carrier broadcasting signal distributor licences.[39]

Self-provisioning licensees: Media houses Nation Media Group, Standard Group and Royal Media Services (under the African Digital Network),[40] Lancia and Go have been granted self-provisioning broadcast signal distributor licences.[41]

Table 12: Number of BSD and self-provisioning BSD sites in Kenya

Licensee name	Number of sites
Signet	[✂]
ADN	[✂]
GoTV	[✂]
PANG	[✂]

Source: Acacia analysis of CA data and and submissions from operators

6.1.6.1 Market dynamics and market shares

Market shares:

Overall, market shares can be measured by usage and capacity.

For common carriers: By number of channels PANG has a [✂] share ([✂] channels) and Signet has a [✂] share ([✂] channels).[138] By number of sites PANG has a [✂] share ([✂] sites) and Signet has a [✂] share ([✂] sites). However, this is an imperfect measure as sites may differ in size and coverage, which in turn may depend on the population density in the area.

However, regardless of the measure used, Signet and PANG currently have a duopoly on common carrier signal distribution and channel providers wishing to air content on DTT only have two options. Companies that have a licence for self-provision (such as ADN, Lancia and Go) have three alternative providers for distribution of their content. So Royal Media for example can choose between ADN, PANG and Signet in the areas in which they all have sites. However, in outlying and rural areas there are often fewer sites and these are predominantly owned by Signet. As a result, the competitive dynamics may differ in built-up areas with up to three alternatives for larger stations and in remote areas there may be only one provider as the population is too sparse to allow for more.

[138] Submission by PANG to Communications Authority of Kenya entitled Questionnair Signal Distribution PANG-Alice, September 2022. Submission by Signet to Competition Authority entitled Signet Data, September 2022.

Table 13: [✂]

[✂]

Source: [✂]

In terms of geographic markets there are areas in which there are different sources of coverage by different providers. However, in 16 counties (which may have different sub-areas) there is only one provider. There is therefore some competition in the market, but it is limited in many geographic areas.

We note that in some of these areas there is the infrastructure for self-provisioning (such as ADN or GoTV).

Table 14: [✂]

[✂]

Source: [✂]

Barriers to entry: There are two key barriers to entry.

- Firstly, a licence is required, and the number of these licences has been limited historically. Companies such as ADN have indicated that they wanted a common carrier licence but were unable to obtain one as there was only one available and this was allocated to PANG.
- Secondly, there are barriers to entry in the form of high infrastructure costs. Site infrastructure such as masts, power supply etc are expensive to construct, protect and maintain. In areas where the population is sparse it is often not economically viable to put up such infrastructure. This is a structural issue that limits entry into the market.

Entry and exit: There has not been entry into the market since 2013 when Signet was licensed.

Anticompetitive actions: There have not been reports of anticompetitive actions by companies in this market.

Price and quality analysis: At present there is a cap on pricing based on maximum prices set by the regulator in 2016.

The prices set were differentiated for Nairobi, Other Cities/towns and Rural areas in Mbits/month at KES [✂], KES [✂] and KES [✂]. Satellite uplink was to be charged at KES [✂] and local insertion per channel at KES [✂] per channel.

However, PANG is currently charging KES [✂] per channel for Limuru and Nairobi, KES [✂] for other urban and KES [✂] for rural. This works out to KES [✂] per Mbps in Limuru and Nairobi, KES [✂] in other cities and KES [✂] which is higher than the regulated price (noting the regulated price does not account for inflation from 2018). This may indicate that existing regulated prices are below cost.

Despite this, evidence suggests that in the market at present there are significant affordability issues on the side of channels and bad debts on the side of the the channel providers. [✂] This suggests that there are issues in the downstream market. Stakeholder engagements suggest that there are a range of channels that are currently not financially viable. This includes but is not limited to church groups that are funded by tithes but do not attract advertising. There are indications that there are a range of non-viable channels that are not able to meet the costs of their distribution.

While there appears to be competition in urban areas, there is less competition in rural areas. In many areas there is a single provider. These sites typically have waiting lists of customers and full utilization of 100%. This suggests capacity constraints at present. In addition, the stakeholders have raised

concerns regarding quality of service in certain areas. This suggests that there are challenges in rural areas at present.

3 Criteria test:

An application of the 3 criteria test shows that this market is susceptible to ex ante regulation. There are high and non-transitory barriers to entry. The market structure does not tend to effective competition during the relevant time horizon as there are likely to only be two market participants for the foreseeable future. Furthermore, the application of competition law is unlikely to address these market failures as this will require evidence of anti-competitive actions while the issues are largely structural.

6.1.7 Conclusion on terrestrial BSD competition

Going forward it is necessary to consider intervention to improve outcomes in this market. Over time various countries have deregulated signal distribution markets due to changes in demand for DTT given the increase in use of viewership over telecommunications networks. However, for those that have not reached this point and have insufficient competition the following interventions can be used:

1. Cost-oriented pricing;
2. Transparency obligations in commercial terms and pricing;
3. Reference offers; and
4. Accounting separation.

At present the pricing is regulated. However, this is not being adhered to by all market participants. Furthermore, it is not clear that there is proper accounting separation or transparency being enforced, or that each licensee has a reference access offer in place. In particular it is not clear that pricing to channels belonging to vertically integrated entities or sister companies are being charged at the same rate as external companies and that this is being reflected in their accounts in a transparent manner.

In particular areas, in some areas PANG has not built out the required infrastructure and as a result there is only one provider. In these areas there is often limited capacity and there have been some quality of service concerns. At the same time there is infrastructure available in the form of masts that is not being used for common carrier purposes.

We therefore recommend that the CA consider steps to promote competition in these areas.

6.1.8 Competitive dynamics of other forms of distribution

In Kenya, providers typically purchase satellite capacity and invest in uplink and downlink equipment. This is usually part of a vertically integrated offering from the pay TV providers. There do not appear to be any independent providers of satellite distribution to households.

Internet connectivity is provided by ISPs and there is no vertical integration between broadcasting content providers and the infrastructure over which broadcasting services are provided. In other countries like South Africa, this is more common.

6.2 Content

This section will discuss the upstream market for content encompassing different types of content such as local, film and series and sports.

Content is a necessary input for broadcasting. It can be sourced from a range of providers as well as produced. In considering a market definition for content it is useful to consider the content value chain.

Content shown on a pay television bouquet was historically shown using linear channels. Each channel can be procured on a standalone basis as an already packaged end product or can be developed by aggregating content.

In order to develop a channel, content in the form of series, movies, matches or other subcomponents are required. This again can either be purchased in the form of short programming such as movies and series or can be created. Creation of content is typically termed 'production'. In the Kenyan context, local production includes live studio shows which are cheaper to produce, as well as series and movies which are more expensive. Content also includes sports content which is typically purchased from the sporting federation or body.

More recently there has been some disruption in the content market as studios that have created their own streaming entities are often choosing to premier their content on their own streaming site before allowing it to be used by external broadcasters (or even cinema). For example, companies like Disney are premiering movies directly on their streaming offering (which is not currently available in Kenya). In addition, the increase in SVOD means that content does not need to be purchased and aggregated into channels, but can be provided in a readily accessible on-demand format.

Internationally, content markets have been deregulated in many countries that previously had some regulation. Fo example, the European Commission deregulated broadcast content in 2007.[139]

We consider each layer of the value chain separately, namely content is considered separately from channel creation. In addition we consider the following:

1. Whether content produced locally is in the same market as content that is licensed;
2. Whether content should be segmented by genre; and
3. Whether content should be segmented by exhibition window.

6.2.1.1 Locally produced vs licensed TV content

The first delineation is between production of local content and licensing of rights of pre-produced international content.

In Kenya there is production of local content by FTA and pay providers as well as OTTs such as Netflix.

FTA channels predominantly use local content. [✂]. Pay providers typically have a far higher share of international content, though they do generally include local FTA channels and may have some local content. For example, DSTV has Maisha Magic East channel which has local content in local languages while Netflix has also recently launched Kenyan productions.

We find that production of local content is in a separate market to licensing other (non-local) content. This is because local content is usually not easily available as pre-produced content, producing content can be more expensive than licensing pre-produced content, the quality of pre-produced content may differ, and it is unlikely that licensors of content can easily switch to producing content as it requires creative and technical expertise and investments in infrastructure. As a mix of content is important, sourcing models may be complementary rather than substitutable. This is in line with precedent in the EC which has consistently found that the production of content is separate from licensing of the broadcasting rights of TV content.[140]

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[139] European Commission. (2007). *2007 EU Telecoms Reform #9: From 18 to 7 regulated markets.* Available here.

[140] EC. (2015). Case M.7194 – Liberty Global/Carelio/W&W/De Vijver Media. Available here; EC. (2019). Case M.8785 - The Walt Disney Company/Twenty-first Century Fox. Available here; EC. (2020). Case M.9064 - Telia Company/Bonnier Broadcasting Holding. Available here; EC. (2020). Case M.9802 – Liberty Global/ DPG Media/JV. Available here.

6.2.1.2 Content type

The production and broadcasting rights for TV content could be segmented by a range of factors. This includes (a) type of TV content (film, sports, other), (b) genre (reality, drama, comedy, etc) (c) exhibition window (SVOD, TVOD, PPV, first pay-TV window, second pay-TV window, FTA, (d) premium and non-premium.

The market for content upstream is driven by downstream preferences. Content providers typically include movie and television studios (such as HBO, Fox, Disney, ABC, M-Net), and sports providers (including clubs, federations, and national societies). Streaming companies have also started creating content (for example Netflix).

From a market definition perspective, within a Kenyan context we would argue that content types (film, sports, children) are in different markets. This is because different types of content are not substitutable from a demand side perspective. For example, someone watching sport would not necessarily be interested in switching to childrens programming. This would mean that a company looking to provide sports content would not have childrens content as an alternative. There may be some interaction however, as some viewers may be interested in general entertainment and therefore willing to consider different genres to achieve that. For this reason, channel creators would consider some general content to be alternatives though for specific types of content such as sports or childrens content the options may be more limited. On the supply side providers would not be able to switch to an alternative if the price rose for all content types, though they may for certain forms of general entertainment. In particular, on both the demand and supply side switching to and from content such as sports would not be possible. However, certain stakeholders in one-on-one meetings suggested that there may be some substitutability on the suppy side in that they could switch the types of content they include in an offering if the overall bundle is still attractive.

We believe it is necessary to consider different types of content separately but where the competitive dynamics are similar, they can potentially be aggregated for analysis. One difference is premium sports content. This is because it is not substitutable on the supply side. For example, if the price of premium content increases, a channel provider cannot substitute an alternative form of content, and furthermore, an adjacent supplier cannot switch to providing that content.

With respect to exhibition window, we find that content in different windows is likely to be in different markets, but note that from engagements with stakeholders that exhibition windows are narrowing, and given the competition from VOD, these categorisations are not as pertinent as shows may premier on VOD prior to being shown at the cinema etc. We do not believe that it is important to define this market for the purposes of this study, however because no concerns have been raised with respect to access to different exhibition windows.

Internationally, the broadcasting rights to TV content has been delineated with respect to (a) type of TV content, (b) exhibition window, (c) scripted and non-scripted (e.g. game shows, reality shows, talent shows) content, and (d) premium and non-premium.[141] The EC found that types of TV content are not substitutable due to differences in costs of acquisition, intended use, preferences of target

[141] EC. (2006). Case M.4353 - Permira/All3Media Group. Available here; EC. (2014). Case M.7360 - 21st Century Fox/Apollo/JV. Available here; EC. (2015). Case M.7194 – Liberty Global/Carelio/W&W/De Vijver Media. Available here; EC. (2015). Case M.8354 – Fox/Sky. Available here; EC. (2016). Case M.7865 – Lov Group Invest/De Agostini/JV. Available here. EC. (2018). Case M. 8861 - Comcast/Sky. Available here; EC. (2018). Case M.7000 -Liberty Global/Ziggo. Available here; EC. (2019). Case M.8785 - The Walt Disney Company/Twenty-first Century Fox. Available here; EC. (2019). Case M.9416 – Bollore Group/M7 Group. Available here; EC. (2020). Case M.9064 - Telia Company/Bonnier Broadcasting Holding. Available here; EC. (2020). Case M.9802 – Liberty Global/ DPG Media/JV. Available here.

audience, and regulatory constraints. They furthermore found that films, sport and other TV content are not substitutable and from a supply-side perspective as switching is not possible without incurring significant additional costs.

The EC has suggested that there are separate markets since content is licensed separately, the same content is often licensed for different exhibition windows, and the terms differed across exhibition windows.

In terms of scripted and non-scripted content, the EC has indicated that differences in audience, types and genre of content, production process and budget mean that scripted and non-scripted content are typically not substitutable.

In terms of premium and non-premium content, the EC found that differences in costs, target audience, and potential revenue suggested they are complementary rather than substitutes.

6.2.2 Market definition for channel supply

The suppliers of content to TV channels are the producers of audio-visual content. Retail TV services acquire channels, which they then aggregate. In Kenya providers procure channels from a range of international and local suppliers. The channels procured can be procured from an associated company (for example, an internationally affiliated company) or an independent provider (such as CNN or Nickelodeon). Similarly to what was found in relation to production of content, demand for channels derives from downstream preferences. Key markets that can be delineated are FTA and Pay TV channels, and basic pay and premium pay channels.

In Kenya, context stakeholders canvassed did not consider pay television channels and FTA channels to be in the same market. As was the case in our review of the market for content, there are potentially sub-markets based on genre and type of channel eg. pay film and pay sports etc.

Historically, EU and UK competition and regulatory authorities mostly placed or considered pay-TV channels (particularly premium pay TV channels) and FTA TV channels in separate markets.[142] Reasons included that certain premium content was exclusively available on pay-TV channels, programmes on FTA channels were not attractive enough to warrant subscriptions, the difference in their financing limits their supply-side substitutability, audiences differ, broadcasting rights are licenced separately, and opinions solicited mostly suggest they are separate (pay-TV subscribers are considered to be immune to price increases).[143]

The EC and UK CMA (previously CC) differentiates between basic and premium pay-TV channels. While the EC left this question open in many older cases[144], it has defined separate basic pay-TV and premium TV markets in more recent cases.[145] This was based on premium pay-TV channels featuring

[142] EC. (2003). Case M.2876 - NewsCorp/Telepiù. Available here; EC. (2007). Case M.4504 - SFR/Télé2 France. Available here; EC. (2010). Case M.5932 - NewsCorp/BskyB, available here; EC. (2013). Case M. 6880 - Liberty Global/Virgin Media, Available here; EC. (2018). Case M. 8665 – Discovery/Scripps. Available here; EC. (2019). Case M.8785 - The Walt Disney Company/Twenty-first Century Fox. Available here.

[143] This question was left open in EC. (2014). Case M.7000 -Liberty Global/Ziggo. Available here; EC. (2011). Case 6369 - HBO/Ziggo/HBO Nederland. Available here.

[144] EC. (2003). Case M.2876 - NewsCorp/Telepiù. Available here; EC. (2010). Case M.5932 - NewsCorp/BskyB, available here; EC. (2014). Case M.7000 -Liberty Global/Ziggo. Available here

[145] EC. (2014). Case M.7000 -Liberty Global/Ziggo. Available here; EC. (2015). Case M.7194 – Liberty Global/Carelio/W&W/De Vijver Media. Available here; EC. (2018). Case M. 8861 - Comcast/Sky. Available here; EC. (2018). Case M. 8665 – Discovery/Scripps. Available here; EC. (2015). Case M.8354 – Fox/Sky. Available here;

premium and more exclusive content (e.g. first window films and popular sports events) for which TV distributors could charge a higher price, basic pay-TV airing older content, there being fewer advertisements on premium pay-TV channels, basic TV channels being included in broader TV packages whereas premium channels usually being offered at an added price as a complement, premium channels attracting a smaller audience, content providers including clauses regarding how premium and basic content should be packaged by distributors, there being high-barriers to entry into premium pay-TV making supply-side substitution difficult, and business models being different (advertising versus revenue share with customers) which also limits supply-side substitution. The UK's CMA has also defined separate markets for premium pay-TV channels in the past.[146]

Ofcom found in its pay-TV statement that premium sports and movies channels are in distinct markets.[147] Some jurisdictions distinguished between types of channels. The UK distinguishes between pay-TV film channels and pay-TV sports channels[148]. The EC did the same in the Liberty Global/Ziggo case since premium pay-tv sports channels cannot be replaced by non-sport premium channels[149]. It has otherwise left the issue of segmentation by genre or thematic content open (e.g. films, sports, news, youth channels).[150]

Based on our discussion on the retail market above, the Kenyan market appears to have separate retail markets for premium (including sport) and mass market content. This flows through to the types of channels in that premium content channels (such as sport channels) are not substitutable and available to different providers, while much of the more general entertainment channels are. As such, we find that it is likely that there are premium channels, basic pay channels, and FTA channels all in separate markets. Furthermore, these are likely to be further segmented by type of content, with sports channels in particular being incapable of substitution for other channels.

The geographic market for television channels is national.

6.2.3 Competitive dynamics for content channel supply

There is insufficient information available to assess market shares for content and channels in Kenya.

The markets for both content and downstream channel supply is vast and there are a range of suppliers.

Most stakeholders that were engaged with noted that content acquisition was not particularly problematic with an exception of sports as there is often an alternative.

However, it can be noted that certain types of channels are sold on an exclusive basis, and often to companies that are commercially related. For example, M-Net and Supersport are sold exclusively to

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EC. (2018). Case M.7000 -Liberty Global/Ziggo. Available here; EC. (2020). Case M.9064 - Telia Company/Bonnier Broadcasting Holding. Available here.

[146] OFT. (2002) *Case No CA98/20/2002 – BskyB investigation: alleged infringement of the Chapter II prohibition*. Available here.; OFT (2003). *Case No. CA98/20/2003 - Sky investigation. Available here.*

[147] Ofcom. (2008). *Pay TV market Investigations: Annexure 13 – Market definition and market power in pay TV.* P5. Available here.

[148] Ofcom. (2008). *Pay TV market Investigations: Annexure 13 – Market definition and market power in pay TV.* P5. Available here.

[149] EC. (2018). Case M.7000 -Liberty Global/Ziggo. Available here

[150] EC. (2003). Case M.2876 - NewsCorp/Telepiù. Available here; EC. (2007). Case M.4504 - SFR/Télé2 France. Available here; EC. (2008). Case M.5121 - News Corp/Premier. Available here; EC. (2010). Case M.5932 - NewsCorp/BskyB, available here; EC. (2015). Case M.7194 – Liberty Global/Carelio/W&W/De Vijver Media. Available here; EC. (2017). Case M.8354 – Fox/Sky. Available here; EC. (2020). Case M.9064 - Telia Company/Bonnier Broadcasting Holding. Available here

Multichoice and GoTV and are not available to other companies. As SuperSport has exclusive rights to most premium sports, the fact that these channels are exclusive means that these events are not available to other providers. Our understanding (as we were not provided with the information requested) is that the Multichoice group also has exclusive rights to the first run of many Hollywood film studios and the majority of sporting rights. [✂].

However, there has been entry into the market with streaming companies such as Netflix and Amazon creating their own original content. This has meant that the role of traditional studios in providing movies and series is changing. As a result, there is significant change in the market for general entertainment, movies and series.

The position differs for sports. In this market, rights owners typically hold market power over high value content (such as high demand sports rights). This means that organisations such as the English Premier League can price in a manner that maximises their profitability. Downstream rightsholders pay high prices for content they deem valuable. While there are arguments that this plays a role in funding sports, certain operators have argued that the solution is to prohibit exclusive arrangements for sports. This would allow all operators to show it at a more affordable price. However, rights owners are likely to baulk at this. In other countries some of the regulatory interventions have been to allow for exclusivity but require that more than one operator is able to purchase the content. However, there has been some discontent from fans who may then need to subscribe to multiple offerings to follow their preferred team.

In certain jurisdictions, sports rightsholders are considering direct supply to audiences. As such, the market is poised for change going forward.

6.2.4 Conclusion on content and channel supply

At present there appears to be a mix of exclusive and non-exclusive content and channels available to broadcasters in Kenya. With the exception of premium sports there appears to be sufficient content available to broadcasters and it does not appear to meet the 3 criteria test. In terms of premium sports there is dominance by the rightsholders (such as the EPL) over the rights to their content, which flows to downstream rightsholders. Furthermore, the entry into content production by OTTs is also changing the dynamics of the content market. However, given the fact that broadcasters have not raised content and channel supply as a concern and it does not appear to be affecting the market, we do not recommend any remedies.

7 Radio

Sound broadcasting in Kenya is only analogue and mostly uses FM with the exception of a few public AM stations in Medium Wave. There are three main types of radio stations, namely public, commercial and community radio stations.[151]

Commercial radio station broadcasts cater to a large, diverse audience and have a wider range of coverage compared to community radio stations that often broadcast to smaller, more specific areas with a lower range of coverage, often along ethnic or linguistic lines. Radio in Kenya is differentiated by area of coverage (national versus regional), the language of broadcast (English, Swahili, other vernacular), as well as the focus of the station in terms of genre. There are several large radio stations that provide national coverage such as Citizen Radio, Inooro FM, Ramogi FM, Mulembe FM, Kiss FM, Classic Radio and Radio Jambo. The remaining stations often have narrower levels of coverage or are community stations which cater to a very specific area or are vernacular radio stations. These are typically available for broadcast in a specific region although they may be available for streaming nationally.

FM radio broadcasting in Kenya has an 87% population coverage and provides a source of information to residents in a range of localities. While radio listenership is traditionally through a radio set or receiver, especially when at a residence, radio content can now also be accessed through a variety of devices, including through a satellite box, online streaming through a mobile phone or computer, a set-top box, a tv set, a mobile phone or a radio device. The prevalence of mobile devices presents an opportunity for broadcasters to deliver radio content through mobile applications and streaming services. This can be done through accessing the sites of the radio stations and streaming directly or by downloading mobile applications that allow access to different radio stations via a mobile phone.

7.1 Product market definition

There are various factors to consider in terms of the radio market definition.

Firstly, whether radio through different devices (radio receiver, satellite, internet) are in the same market. Since radio consumed via satellite must be consumed indoors or on portable television devices, one stakeholder who submitted information about the radio industry did not think it constrains traditional radio much. Another reason why satellite is unlikely to be a feasible substitute for terrestrial radio stations is because listening to the radio over satellite would require that customers purchase a satellite TV package and receiver whereas they can listen to the radio for free over terrestrial networks. The same does not apply to streaming since consumers can listen to the radio through their mobile phones and on laptops and without needing to invest in a satellite package. In fact, we understand that most or all radio stations in Kenya are available for online streaming.

Secondly, we consider whether online music streaming services such as Spotify, Apple, Amazon and YouTube constrain traditional radio.

Recent survey data in Kenya suggests that radio is listened to through different devices. While 57% of listeners in Kenya use a radio, 49% use a mobile phone to listen to the radio[152], which is extraordinarily high. Unlike television, the quality of transmission is not functionally and significantly different if using a mobile device as opposed to a radio receiver. Furthermore, the same survey results show that 79% of radio listeners listen at home, versus 12% in a car and 16% in a Matatu suggesting that the

[151] Comunications Authority of Kenya. (2022). Digital Sound Broadcasting Framework. Available here.
[152] GeoPoll. 2021. Radio, TV and Internet Audience Statistics in Kenya – Q1 2021. Available here.

association between radio listening and driving is relatively weak in Kenya. The one stakeholder submission received about the radio industry suggested that there has been an uptake of online streaming following the proliferation of portable smart devices and broadband infrastructural development, especially among the youth. The impact has been a shrinkage of radio revenues.[153]

Using the hypothetical monopolist test we ask whether if a hypothetical monopolist of radio increased the price of their advertising by 5-10%, users would switch to mobile internet. We think that this is likely to occur for better off consumers, but not for those for whom access to mobile phone data coverage is not good, or who cannot afford data for streaming. However, as evidence suggests that 49% of users listen to the radio on a mobile phone we think realistically there are enough individuals that could switch to make mobile streaming a constraint. As such, there is a strong likelihood that they are in the same market.

This is in contrast to other jurisdictions. For example, the CMA in the UK which has ruled (as recently as 2020) that while digital media (including podcasts and music streaming) does impose some constraint on radio listening and advertising, this was not a significant enough constraint for it to be considered part of the same relevant market. Radio exhibits particular characteristics that differentiate it on both the radio listening side (e.g. listeners can listen to the radio while doing other tasks like driving) and advertising side (e.g. listeners cannot avoid/fast forward through adverts). Nonetheless, the CMA has taken into account these out-of-market constraints in its assessments of the likely competition effects of mergers.[154] The EC has also defined separate online and offline markets[155], and within offline markets, radio advertising is its own relevant market.[156] The Belgian Competition Authority has followed this practice.[157]

The relevant markets for radio can also be differentiated by target market. From an audience perspective, radio stations are differentiated by a range of factors such as language, genre, target market, and coverage. This would suggest fairly narrow markets. The South African Competition authorities have considered radio markets on a narrow basis based on demographics of target audiences and licensing conditions to assess the impact of a merger between stations.[158] However, even if target markets are different, radio stations can be alternatives to each other from the perspective of an advertiser, a view that has been taken by the CMA[159]. The EC has also not defined

[153] GeoPoll. (2021). Radio, TV and Internet Audience Statistics in Kenya – Q1 2021. Available here.

[154] Competition and Markets Authority. (2020). *Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group Limited*.; Competition and Markets Authority. (2015). *Anticipated acquisition by Global Radio Holdings Limited of Juice Holdco Limited* (Case No. ME/6546/15).; Office of Fair Trading. (2014). *Anticipated acquisition by Bauer Radio Limited of TIML Golden Square Limited (Absolute Radio)*.; Office of Fair Trading. (2012). *Completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited* (Case no. ME/5561/12).

[155] European Commission. (2018). *Liberty Global/De Vijver Media and Liberty Global (SBS)/Mediahuis/JV* (Case No. COMP/M.8944).; European Commission. (2018). *Apple/Shazam* (Case no. COMP/M.8788).; European Commission. (2018). *Concast/Sky* (Case No. COMP/M.8861).; European Commission. (2020). *Google/Fitbit* (Case no. COMP/M.9660).; European Commission. (2020). *Liberty Global/DPG Media/JV* (Case No. COMP/M.9802).

[156] European Commission. (2018). *Liberty Global/De Vijver Media and Liberty Global (SBS)/Mediahuis/JV* (Case No. COMP/M.8944).; European Comission. (2018). *Concast/Sky* (Case No. COMP/M.8861).; European Commission. (2020). *Liberty Global/DPG Media/JV* (Case No. COMP/M.9802).

[157] Belgian Competition Authority. (2018). *Mediafin*. Case No. BMA-C/C-07.

[158] South African Competition Tribunal. (2008). *Primedia and Others v Competition Commission and another* (Case No 29/AM/May06); South African Competition Tribunal. (2001). *Remgro/Venfin* (Case No. 54/LM/Jul09).

[159] Competition and Markets Authority. (2020). *Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire*

narrower markets based on demographics. However, the Belgian Competition Authority has in the past further delineated radio advertising markets by language.[160]

The national radio stations are mainly broadcast in Kiswahili (Citizen Radio, Jambo FM, Milele FM, and Radio Maisha)[161] while smaller stations tend to be broadcast in vernacular languages such as Kikuyu and Luo. The stakeholder submission on radio we received suggests that radio stations face strong competition from media houses offering radio services in the same dialects. In February 2019, the audience share of Kiswahili Radio stations was 44%, followed by vernacular radio stations at 31% and then finally English radio stations at 25%.[162] Radio stations are also differentiated by the age group they are popular among. Geopoll Survey evidence from Q1 2021 suggests that NRG Radio, Kiss FM and Hot 96 were the most popular among 15-24 year olds while Radio Maisha, Classic 105, and Radio Jambo were popular amount 25-34 year olds and and Inooro (vernacular stations) followed by Radio Citizen and Radio Jambo were popular among 35+ year olds.[163] While there is evidence of competitive differentiation in Kenya, with different radio stations targeting different language groups and age groups, we aggregate markets for the purpose of analysis.

In Kenya, all radio stations are subject to local content requirements.[164] Public radio stations and commercial radio stations may both purchase commercial radio licences and at the same price (although there is also a non-commercial public radio licence which is considerably cheaper). While the KBC also receives public funding, it also competes for advertising revenue. Based on stakeholder engagements, commercial and public radio stations compete with one another. Therefore, public stations are likely to be in the same market as commercial radio stations.[165] This differs slightly from other jurisdictions. The CMA, for example, has found that commercial, public (the BBC) and community stations are in separate competition markets on the advertising side since public stations cannot receive advertising funds in the UK and since community stations were shown to be a distant competitor for advertising funds. Though, on the listener side, the BBC has been considered to be in the same relevant market as commercial radio stations.[166]

Community radio stations are not-for-profit radio stations for universities, religious groups, charitable/developmental organisations and other non-profit community organisations.[167] They require a different licence to commercial radio stations, which comes at a substantially lower cost that commercial radio licences (< 20% lower)[168] They are required to have community participation in the selection and provision of programmes to be broadcast and a cross-section of the community should

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business of UKRD Group Limited.; Office of Fair Trading. (2012). *Completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited* (Case no. ME/5561/12).

[160] Belgian Competition Authority. (2019). *Telenet Group BVBA/De Vijver Media NV* (Case No. 2019-C/C-116).; Belgian Competition Authority. (2017). *Mediahuis 3.0.* (Case no. 2017-c/C-14).

[161] Classic FM however is broadcast in English.

[162] Statista. (2019). *Distribution of audience share by language in radio stations in Kenya*. Available here.

[163] Geopoll. (2021). *Radio, TV, and Internet Audience Statistics in Kenya – Q1 – 2021*. Available here.

[164] Kenyan Communication Authority. (2022) *Compliance Return Form: Free-toAir TV & FM Radio Broadcasting Service*. Available here.

[165] BBC Monitoring. (2023). *Kenya Media Guide*. Available here.

[166] Competition and Markets Authority. (2020). *Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group Limited*.

[167] Communications Authority of Kenya. (2023). *List of Licences*. Available here.

[168] Communications Authority of Kenya. (2018). *Broadcasting Services Market Structure and Fee Schedule*. Available here.

be able to be represented in management.[169] They must also deal with community issues not normally dealt with by other broadcasting services in the same areas.[170] Despite being not-for-profit, community radio stations are also eligible to receive advertising funding (but only if they also have donor funding). Our view is that community stations are likely to attract relatively low levels of advertising revenue due to their limited coverage[171] and so present limited competitive constraint to commercial and public radio stations. Nothing turns on this opinion as these stations are relatively small from an audience perspective.

7.2 Geographic market definition

The geographic market is likely to be regional given differences in licensing and languages across different locations which mean that the most popular stations differ.

Certain national stations such as Citizen, Jambo, Maisha and Milele are listened to across the country, others are available in a few regions and others are particular to just one region.

While the South African Competition Authorities have defined regional radio station markets[172], the CMA has defined a single UK-wide radio advertising market (taking into account national, regional and local factors in its competitive assessments.[173] This is as the scope of licenses in the UK is not completely determinative of the types of advertisters for which radio stations can compete. First, national radio stations can split transmission, and so transmit different programming and advertising in different locations. Second, regional stations can reduce their rates to attract local advertisers. Third, local stations often carry national advertising. Nonetheless, geographic reach can matter to certain advertisers for example local businesses for whom broadcast location is important or advertisers for whom limiting superfluous advertising spend is important. The EC has considered that the geographic market for radio advertising to be either national or regional along linguistic lines.[174] It is regional to the extent that advertising is sold/purchased on the basis of languages spoken in each region.[175] The Belgian Competition Authority, for example, defined regional radio markets based on language.[176]

Given the above we consider both national and regional market shares.

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[169] Ngugi, P and Kinyua, C. (2014). *The Concept and Philosophy of Community Radio Stations in the Kenyan Context*. Journal of Mass Communication & Journalism. Available here.
[170] Communications Authority of Kenya. (2022). *Digital Sound Broadcasting Framework*. Available here.
[171] Busolo, D and Ngigi, S. (2016). *Assessing Sustainability of Rural Community Radio in Kenya: A Case of Radio Mangelete*. New Media and Mass Communication Vol.54. Available here.
[172] South African Competition Tribunal. (2008). *Primedia and Others v Competition Commission and another* (Case No 29/AM/May06).; South African Competition Tribunal. (2001). *Remgro/Venfin* (Case No. 54/LM/Jul09).
[173] Competition and Markets Authority. (2020). *Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group Limited*.; Competition and Markets Authority. (2015). *Anticipated acquisition by Global Radio Holdings Limited of Juice Holdco Limited* (Case No. ME/6546/15).; Office of Fair Trading. (2012). *Completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited* (Case no. ME/5561/12).
[174] European Commission. (1996). *Bertelsmann/CLT* (Case No. COMP M.779).; European Commission. (2016). *Verizon/Yahoo* (Case No. COMP/M. 8180).; European Commission. (2020). *Liberty Global/DPG Media* (Case no. COMP/M9802).
[175] European Commission. (2020). *Liberty Global/DPG Media* (Case no. COMP/M9802).
[176] Belgian Competition Authority. (2017). *Mediahuis 3.0.* (Case no. 2017-c/C-14).; Belgian Competition Authority. (2018). *Mediafin* (Case No. BKA-C/C-07).

7.3 Market shares and participants

There are a large number of radio stations on air in Kenya. In Appendix C, we show tables with the differentiation of radio stations by coverage and language.

The number of on-air stations grew from 179 radio stations in 2017/18 to 228 in December 2022.[177] Most of these are commercial. A fair proportion can be attributed to an increase in community FM radio stations (180) and about 50 are community radio stations. There was one increase in the number of both commercial and community radio stations over the last five years. In 2021/22, commercial stations (including public) increased from 144 and community stations from 39 stations. As a result of more and a broader range of stations targeting particular demographics, spending on radio advertising has increased overall.[178] . The CA issued 42 community FM radio licences in 2020, dipping to 28 in 2021 (possibly as a result of COVID restrictions) and rising to 63 in 2022. The Authority also issued 131 commercial FM radio licences in 2020, rising to 180 in 2022. Spending on radio advertising has increased, which has been attributed to the broader range of stations targeting specific demographics.[179]

From estimates of daily reach (% of unique individuals tuned into a station per day) the largest radio station in the country is Citizen Radio, accounting for one fifth of the country's radio daily listeners. It is followed by Jambo FM, Inooro, Radio Maisha and Milele FM (Ipsos 2023). All but Inooro are national radio stations. The top three radio stations account for 38% and the top five accounted for 51% of the country's listeners. Apart from the other 10 radio stations shown in the figure below, there is a long tail of radio stations with listener shares of at most 1%.

[✂]

Figure 24: **National Daily Share of listeners (Q1-2023)**

Source: Royal Media Group Submissions. Document: Ipsos_IKAT_Audience Survey_RMS_Q1_23 V1

Several radio stations in Kenya are owned by larger media groups with Royal Media, Radio Africa Group, Maxx Media Network and the Standard Media Group. Many of these media groups own more than one radio station and account for significant shares of daily radio listeners. National market shares of radio stations by media house ownership are shown below. The table shows that Royal Media accounts for 41% of daily listeners, which puts it just beyond the threshold for dominance in Kenya (40%). This has changed from pre-2012 when no single media group had a share of more than 40%.[180]

Table 15: National Market Shares based on daily shares of listeners

Media Group	Station Name	National Market Share	Total Market Share by Media Group
Royal Media	Citizen Radio	[✂]%	[✂]%
	Inooro FM	[✂]%	
	Ramogi FM	[✂]%	
	Musyi FM	[✂]%	
	Egesa FM	[✂]%	

[177] Communications Authority of Kenya. (2023). *Broadcasting Services Report: Q2 2022/2023*.
[178] Mbogo, S. (2023). *Kenya's radio scene gets busy*. Available here.
[179] Mbogo, S. (2023). *Kenya's radio scene gets busy*. Available here.
[180] Analysys Mason. (2012). *Competition Study on the Broadcasting Industry*.

	Chamegi FM	[✂]%	
Radio Africa Group	Jambo FM	[✂]%	[✂]%
	Classic FM	[✂]%	
Media Max Network	Milele FM	[✂]%	[✂]%
	Kameme Radio	[✂]%	
	Msenangu FM	[✂]%	
Standard Media Group	Radio Maisha	[✂]%	[✂]%
Kass Media Group	Kass FM	[✂]%	[✂]%
Radio Kaya	Kaya FM	[✂]%	[✂]%
Neural Digital Broadcasting	Nam lolwe FM	[✂]%	[✂]%
Others	Others	[✂]%	[✂]%

Source: Royal Media Group Submissions. Document: Ipsos_IKAT_Audience Survey_RMS_Q1_23 V1

Based on the CAK's ad spend data of the highest spend radio stations in Kenya in the second half iof 2019 (see the figure below), Royal Media accounted for more than 37% of total advertising spend in the country. It attracted significantly more advertising spending than the Media groups owning radio stations with the next highest ad spend namely Kass, Media Max, and Standard.

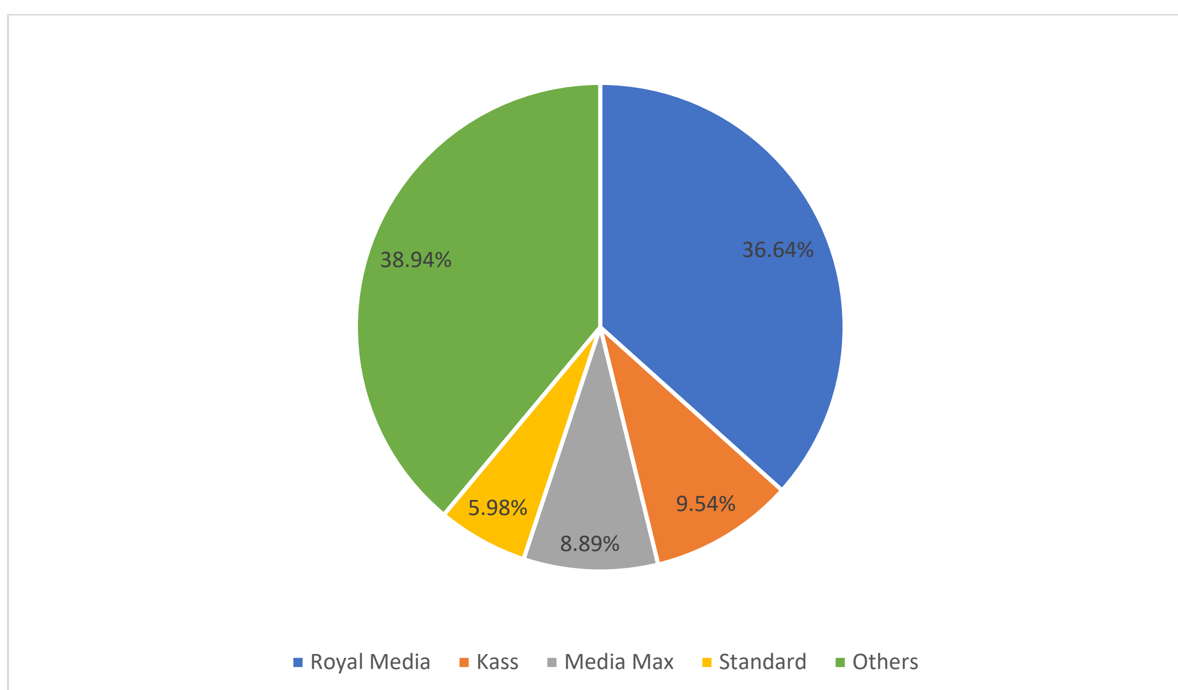

Figure 25: Radio Ad spend per Media Group (July-December 2019)

Sources: Communications Authority of Kenya. Audience measurement and industry trends report: Q1 2019-2020; Communications Authority of Kenya. Audience measurement and industry trends report: Q2 2019-2020.

Market shares of each station by region are shown in Appendix C.

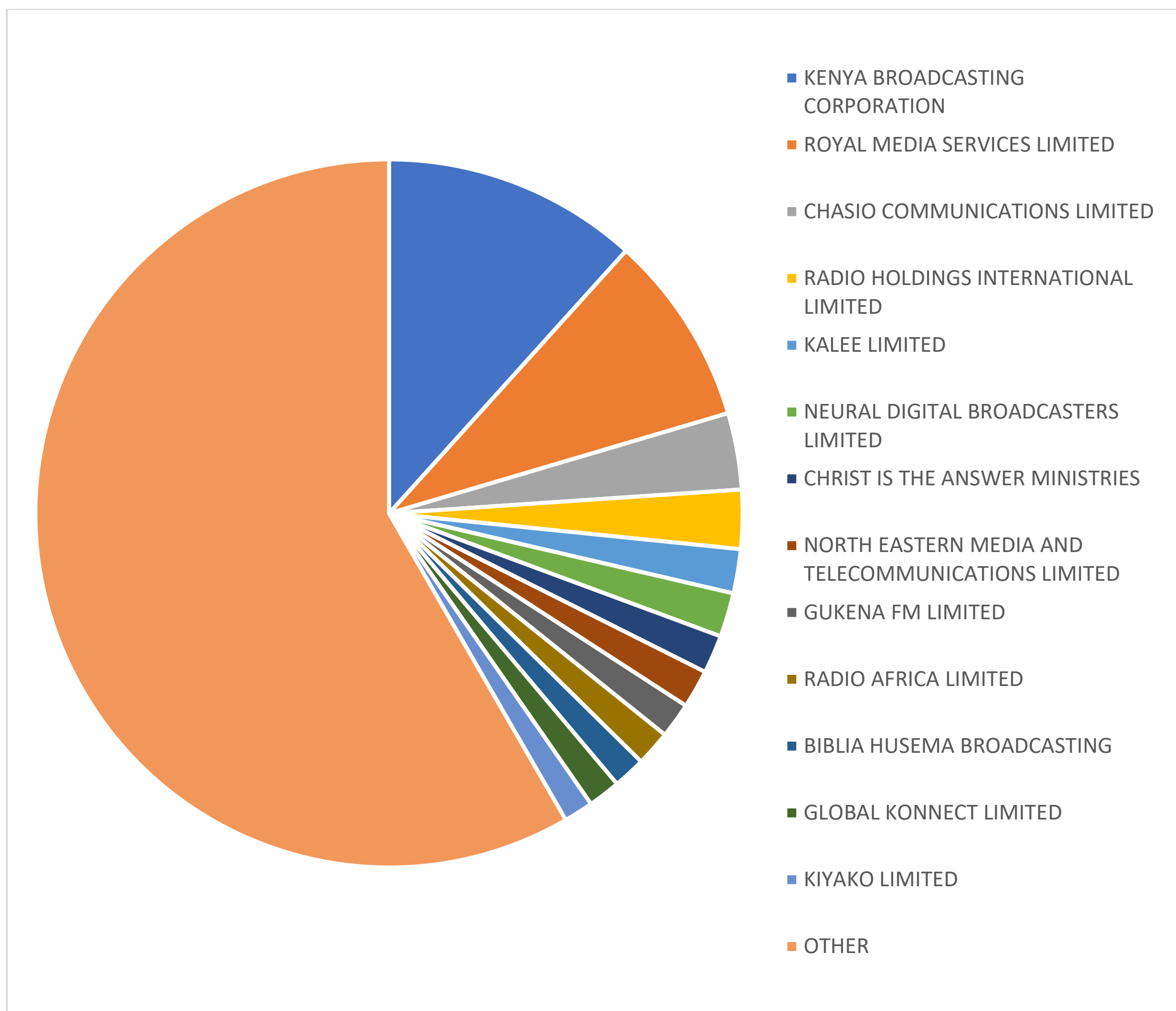

Figure 26: Spectrum assignment market shares by group

Source: CA data

There are a wide range of radio stations that are allocated spectrum. However, there are a more limited number of groups that are popular in each region.

Citizen Radio is popular across the country. It is the most popular radio station in five regions (Nairobi, Western, Upper Easter, North Eastern and North Western) and features among the top three radio stations in all other regions except for the Rift region. Other national radio stations which feature among the top three stations are Jambo FM and Milele FM while Radio Maisha never features among the top three. Local or regional radio stations occupy the top position in the Central, Rift, South Nyanza, Lake, Lower Eastern and Coast regions. Chamegi FM and Kass FM have significant shares in the Rift valley, Inooro and Kameme are popular in the Central region, and Egesa, Ramagi, Musyi, and Kalya are the top stations in the South Nyanza, Lake, Lower Eastern Regions and Coast respectively. In terms of media groups, Royal Media Group, which owns Citizen Radio among other radio stations, accounts for the most audience members across all the regions with the exception of Nairobi, where it is the second largest media group after the Radio Africa Group (owns Jambo FM and Classic FM). Royal Media's share exceeds 40% in five regions, namely the Central, South Nyanza, Lake, Lower Eastern and North Eastern regions. For the remaining regions with the exception of the North Western region, the two largest media groups make up 50% or more of radio audiences. Media Max is the second largest media group in radio in 4 regions, KBC in 3 regions, and Radio Africa Group in 2 regions.

Table 16: Summary of daily audience shares by region (Q1-2023)

[✂]

Source: Royal Media Group Submissions. Document: Ipsos_IKAT_Audience Survey_RMS_Q1_23 V1

7.4 Competitive dynamics

There are a large number of both commercial and community stations in the country, and these have been increasing in recent years. However, certain media groups control most of the radio segment. Royal Media has the highest audience and ad spend market shares nationally. Royal Media is the largest Media Group in all but one region based on daily audiences, although it only passes the dominance threshold in five of eleven regions. Based on stakeholder engagements, older radio stations tend to dominate.

There are barriers to entry in radio. This includes start-up costs, access to spectrum, obtaining a licence. in terms of start-up costs but they do not appear to be prohibitive.

While stakeholders noted that the start-ups costs associated with commercial radio stations are relatively high, particularly in rural areas and require strong technical expertise, this is contradicted by the many licenses applied for and granted. This suggests that barriers to entry are not prohibitively high. It can cost between Ksh 700 000 and 2.5 million (excluding the cost of forming and registering a community group) to start a community station and Ksh3 million to start a small commercial station which includes the costs of company registration, broadcasting equipment, and staff.[181]

Based on engagements with industry participants, the highest barrier to commercial radio is the availability of frequency spectrum, with FM frequency allocations close to saturation and over 2000 pending requests for licensing.[182] However, the Communications Authority is in the process of piloting the use of digital sound broadcasting (DSB), which will help address the limited amount of FM broadcasting frequencies available.[183] It is anticipated that this will lower the costs facing broadcasters due to shared signal distribution infrastructure.[184]

While the radio registration process has been simplified significantly, licenses still take more than 120 days and 51.8% perceived the process of obtaining a licence to be difficult.[185]

7.5 Content

Radio stations in Kenya mostly create their own content, with exceptions being live sport, music, etc.

A Media Council of Kenya Survey, 72% of mentions on radio content were on local content in 2021.[186] This is partly a feature of the nature of radio broadcasting (they typically broadcast their own content) but may also be due to all radio stations being subject to local content rules (40% of broadcasting must be local content).[187]

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[181] Media Council of Kenya. (2020). *Media Sector Legislative Review*. Available here.
[182] Communications Authority of Kenya. (2022). *Digital Sound Broadcasting Framework*. Available here.
[183] Abuya, K. (2023). *Kenya to fix FM transmission limitations with new technology*. Techcabal. Available here.
[184] Communications Authority of Kenya. (2022). *Digital Sound Broadcasting Framework*. Available here.
[185] Communications Authority of Kenya. (2022*) Broadcasting Baseline Survey Report*.
[186] Media Council of Kenya. (2021). *State of the Media Report Survey 2021*. Available here.
[187] Global Trade Alert. (2016). *Kenya: The introduction of a local content requirement for TV broadcasting*. Available here.

Based on the results of the survey, the main category of foreign content consumed is sports followed by entertainment.[188] The Standard Group recently won the exclusive analogue and digital radio broadcast rights for live commentaries of the English Premier League ("EPL") from 2022/23-2024/25, a right that was previously held by the Radio Africa Group (which owns Radio Jambo).[189] Other radio stations will need to approach The Standard Group to sub-license the rights from them.

7.6 Radio signal distribution

Radio is predominantly transmitted through analogue, satellite and the internet. However, as mentioned above, there will potentially be a move towards digital sound broadcasting, which we understand can assist in addressing FM frequency allocation problems as well as lower the costs to broadcasters.[190]

We understand that many radio station broadcasters self-supply radio transmission (e.g. Royal Media, Standard, Radio Africa). This is particularly true for those that have existing masts. This is more of a barrier for companies that do not have their own high sites. Based on the baseline broadcasting survey, the high cost of establishing transmitter sites and operation was the most limiting constraint to meet broadcasters' services provision obligations and targets followed by expensive and unavailable equipment/devices.[191]

An alternative is to rent space on a mast and use your own transmitters. For example, companies such as ATC offers towers for radio.[192] In fact, it has a multi-tenant format, which allows each site to accommodate many service providers. This provides radio broadcasters with the opportunity to partner with ATC, and even mobile operators such as Safaricom, to expand their coverage especially in remote areas of Kenya.[193]

7.7 Conclusion, remedies and way forward

While the market for radio is dispersed and differentiated there is some concentration in terms of overall market share and a few groups that comprise the bulk of ad revenue. While there are some barriers to entry (such as challenges related to scarcity of frequency), in practice it does not appear to be prohibitive and few concerns have been raised with respect to this market during the course of the inquiry, with the exception of the exclusivity of EPL broadcasting rights which appears to be a newer phenomenon in Kenya. However, going forward it seems likely that the market is also facing disruption from streaming and online radio and that this may increase in the future.

At present we do not believe that this market is susceptible to ex ante regulation at present and recommend monitoring.

8 Conclusions on market study

In conclusion, in the competition market study we identified the following markets:

[188] Media Council of Kenya. (2021). *State of the Media Report Survey 2021*. Available here.
[189] Radio Jambo website. (2017). *Radio Africa signs deal to air EPL matches live and free!*. Available here.
[190] Communications Authority of Kenya. (2022). *Digital Sound Broadcasting Framework*. Available here.
[191] Communications Authority of Kenya. (2022) *Broadcasting Baseline Survey Report*.
[192] ATC Kenya website. Available here.
[193] Communications Authority of Kenya. (2022) *Broadcasting Baseline Survey Report*.

Table 17: Summary of markets in competition study

	Retail / Wholesale	Detailed Markets
Television	Retail	Pay TV and OTT for high income customers (including live sport)
		Pay TV and OTT for mass market and those who do not require sport
		Pay TV and OTT mobile for Mass market
		FTA DTT
		FTA Mobile
	Wholesale	Broadcasting signal distribution services over satellite
		Broadcasting signal distribution over DTT - managed transmission (note self-provisioning not in market)
		Broadcasting signal distribution over DTT- facilities
		Broadcasting signal distribution over the internet
		Locally produced content
		Pre-produced international content
		Sports content
Radio	Retail	Radio transmission
	Wholesale	Terrestrial signal distribution

Within these markets we found the following met the three criteria for ex ante regulation:

- Pay TV and OTT for high income customers (including live sport)
- Broadcasting signal distribution over DTT - managed transmission and facilities
- Sports content

Table 18: Summary of recommendations on competition study

Market	3 Criteria	Summary	Recommendation
TV1: Pay TV and OTTs for higher income customers (packages including premium live sport)	✓	• No evidence of exclusionary issues on an ex ante basis despite the existence of exclusive contracts. • Retail prices have fallen in real terms or static. • Market power is derived from that held by the content providers (such as the English Premier League) who are charging high prices that drive the retail prices.	No intervention recommended at present given market dynamics and no complaints. Recommend ongoing monitoring of pricing and potential competition.
TV2: Pay TV and OTTs for mass market and those who do not require sport	×	• Higher levels of competition than in the premium market.	No intervention recommended at present.
TV3: Pay TV and OTT mass market mobile	×	• Moderate concentration and a challenging environment due to loss of customers due to technological evolution.	No intervention recommended at present.

Market	3 Criteria	Summary	Recommendation
TV4 and TV5: FTA DTT and FTA mobile	×	• Large groups that constrain each other • Fragmentation in ad revenue impacting on finances • No competition issues identified	No intervention recommended at present.
OTTs (pay and FTA)	×	• OTTs cannot be regulated within the current regulatory framework. • Danger that premature regulation of OTTs will impact on innovation in the market • Limited penetration of high-speed broadband which limits the competitive constraint of OTT services.	No intervention. Recommend ongoing monitoring.
Terrestrial BSD	✓	Currently concerns over quality of service from some market participants. Slow roll out in certain areas and inadequate investment.	Continue to monitor previous conditions including pricing, reference offer, accounting separation and transparency. Given inadequate competition in certain areas consider allowing for new competition.
Content	✓ (premium sport)	For premium sport dominance by the rightsholders (such as the EPL) over the rights to their content, flows to downstream rightsholders. However, the entry into content production and purchase by OTTs is also changing the dynamics of the content market. Other broadcasters have not raised content and channel supply as a concern and it does not appear to be affecting the market	No intervention recommended at present.
Radio	×	There is differentiation in the market. No major competition concerns raised. Disruption from mobile.	No interventions recommended at present.

9 Signal distribution costing study

As discussed previously in the competition assessment, signal distribution is a key input into broadcasting. However, it is subject to high barriers to entry,

The market for signal distribution has been subject to regulatory intervention specifically as to price and access, due to concerns over the lack of competition in signal distribution and its resultant impact on the price of access to platforms and the cost to channel providers.

Key interventions included the following:

- **2013:** Terrestrial signal distribution: On the 16th of December 2013, the Authority released the first Determination on Cost-Based Terrestrial Digital Broadcasting Signal Distribution Tariffs. This determination enabled signal distributors to "achieve a reasonable rate of return on their investments without overcharging content service providers that may materially impact consumers through a lack of access to the digital platforms".[42] Since this determination, analogue television transmission has been shut off and a programming code has been developed.
- **2016:** BSD tariff review: In 2016, the BSD tariffs were reviewed to account for the migration from analogue to digital. Determination No. 2 of 2016 stated that the signal distribution market in Kenya is uncompetitive.[43] The Communication Authority found that the wholesale market was characterized as a duopoly. This fact, alongside scarce spectrum availability, allowed these two distributors to price significantly above relevant costs causing financial harm to commercial TV broadcasters. On this basis the Authority intervened to set prices based on a LRAIC+ model. The Authority further imposed a reference access offer ("RAO") on the licensees that required non-discrimination principles to be upheld in negotiations and a framework for infrastructure-sharing.[44]

The prices set were differentiated for Nairobi, Other Cities/towns and Rural areas in Mbits/month at KES 93 411, KES 39 074 and KES 34 352. Satellite uplink was charged at KES 234 594 and local insertion per channel at KES 1 597 per channel.

The digital migration process was beneficial to broadcasters, enabling the number of broadcasters to increase significantly over time.[45] However, questions have been raised by stakeholders as to the pricing of signal distribution and the sustainability of the channels that utilize signal distribution, particularly in the context of digitalization of media as well as the cost of providing signal distribution and whether the current structure allows for the BSDs to cover their costs and improve their technology and coverage.

9.1 Current costs and pricing structure of signal distribution in Kenya.

At present the following fees are charged:

Signet: Signet charges KES [✂] per channel (KES [✂] per Mbps) in Nairobi and Limuru and charges per channel KES [✂] (KES [✂] per Mbps) for all other sites.

PANG: PANG charges the following:

- Limuru and Nairobi: KSH [✂] per channel (KES [✂] per Mbps)
- Mombasa/Nakuru/Kisumu/Eldorat/Nyeri/Kisii/Meru/Webuye/Malindi/Nyahururu/Machakos/Naivasha/Embu/Kitui/Murang'a/Nanyuki/Migori: KSH [✂] per channel (KES [✂] per Mbps).
- Kericho/ Narok/ Kapenguria/Garissa/ Bomet: KSH [✂] per channel (KES [✂] per Mbps).

Table 19: Prices for BSD per Mbps

	2016 Determination: price for 2018	2018 price (with inflation 2023)	PANG price submitted (Mbps)	Signet price submitted (Mbps)
Cost for Nairobi	93 411.00	118 366.90	[✂]	[✂]
Cost for other towns	39 074.00	49 513.09	[✂]	[✂]
Cost for rural	34 352.00	43 529.55	[✂]	[✂]

Source: 2016 Determination, Submissions from operators, own calculations

9.2 International experiences in regulation

Internationally signal distribution is price regulated in a number of jurisdictions. While broadcasting transmission was removed from the list of markets to be regulated on an ex ante basis in 2007 by the European Commission, a number of countries within the EC still regulate broadcasting transmission. This includes ARCEP in France who recently did a review and COMREG who ran a review in 2020[194]

- Tariffs in Ireland have recently been assessed and reduced from €244.61 per kilobit down to €204.86 per kilobit from 1 January 2023.
- Ofcom in the UK removed regulation from Arqiva in 2016 following a merger which was approved subject to several behavioural undertakings which rendered regulation unneccesary. [195]
- Anacom in Portugal had applied to the EC to engage in regulation of this market but the EC cautioned against this, with findings including that they had insufficiently considered that the prices were cost-oriented, underestimates competition from other broadcast delivery platforms[196] and was subsequently withdrawn.

As such, there are a range of approaches that have been taken. However, for markets in which competition is lacking, pricing has typically been regulated on a cost-oriented basis.

9.3 Methodology

We a model of a hypothetically efficient Our model is a hybrid model that utilises bottom-up modelling of a hypothetical operator using data provided by operators and best assumptions. The outcomes are calibrated against top-down information provided by the operators. In the absence of appropriate information from the operators' best estimates are used. We have developed a range of cost estimates based on various different data sources and scenarios.

In developing our model we consider the following:

- Network architecture and network elements

[194] European Commission. (2021). *Case IE/2021/2293: Wholesale market for broadcasting transmission services in Ireland: Commission comments pursuant to Article 32(3) of Directive (EU) 2018/1972.* Available here.

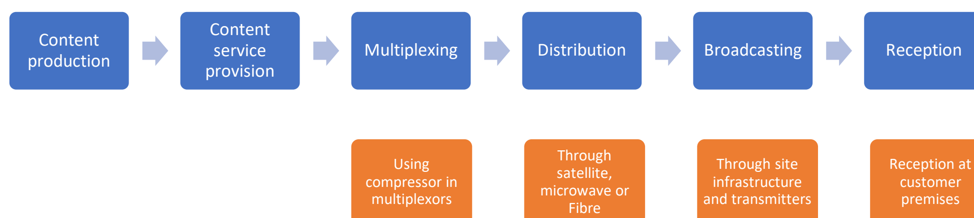
[195] Ofcom. (2016). *Broadcasting Transmission Services: a review of the market*. Available here.

[196] European Commission. (2015). *Commission Decision concerning Case PT/2015/1817: Wholesale broadcasting market for the delivery of broadcast content to end-users in Portugal. Opening of Phase II investigation pursuant to Article 7 and pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC.* Available here.

- Capital costs for the network elements based on a modern equivalent asset basis where available
- Operations and maintenance costs for infrastructure based on operator information and reasonable assumptions where required.
- Common cost attribution for both Capital Expenditure (CAPEX) and Operating Expenditure (OPEX) based plausible assumptions
- Robust generic/aggregate and site-specific model for recovery of efficient investments costs from customers based on plausible assumptions about capacity
- Charges for channel provision

9.3.1 Assumptions

The DTT Value chain involves the following components:



Content is generated and/or aggregated by a broadcasting provider. These providers then have two options. Firstly, they can purchase managed transmission services from one of two operators, PANG and Signet. Secondly, if they have a self-provisioning licence, they can self-provide these services. We are modelling the first option, namely the managed broadcasting transmission services.

Assumptions made in the model are as follows:

1. We assume an operator with 1 site (with a relay site) in Nairobi, 17 rural and 18 other city sites (this is in line with Signets footprint). The current model utilizes the definitions currently in use by the CA and operators for BSD pricing.
2. We assume that the capacity of a site in Mbps is 120 for Nairobi, 80 for Urban and 40 for Rural. This is based on equipment design provided by stakeholders.
3. We assume a utilization of 0.89 based on the average utilization across all sites.
4. These assumptions can all be changed within the model in the Tab titled "Assumptions toggle".
5. We assume that there is sharing of certain equipment in rural areas and other cities (eg. civils, power, masts).
6. For costs we take into account the costs submitted by operators and make reasonable assumptions where necessary.
7. To annualize capital costs we used a tilted annuity approach.

9.3.2 WACC

A weighted average cost of capital (WACC) for broadcasting in Kenya is needed in order to provide a return on assets, so as to identify the annualised costs of capital (sometimes referred to as CAPEX):[7]

The WACC, in turn, can be represented as follows:

$$WACC = E \times K_e + (D \times K_d)(1-t)$$

where:

K_e is the cost of equity, typically determined using the Capital Asset Pricing Method (CAPM) model, explained below

K_d is the cost of debt, which sometimes uses the firms' actual cost of debt, which includes a premium over the risk-free rate applied to debt (often government treasury bonds)

E is the proportion of equity in the firms' capital structure (or the market value of equity)

D is the proportion of debt in the firms' capital structure (or the market value of debt)

t is the rate of tax

In our model we adjust this to use a Nominal Pre-tax WACC.

The CAPM model, in turn, defined as follows:

$$K_e = r_f + \beta \times (Em - r_f)$$

where:

r_f is the risk-free rate applied to debt (often government treasury bonds)

β is the risk of the company relative to the market

$Em - r_f$ f is the market risk premium (the premium over risk-free returns)

There can be risk premia applied where investments in new technologies are. The present model, however, does not concern risky investments in new technologies but rather rates applying to broadcast services, which have established business models and do not involve substantial risks.

Table 20: Model assumptions

Input	Assumption	Source
Asset beta (unlevered beta)	0.5	Assumption in line with previous model
Equity risk premium	5.94%	Estimate for Kenya from Damodaran Equity Risk Premia 2023 Edition
Company tax rate	30% for resident companies	Kenya Revenue Authority
Risk-free rate (10-year government bond)	15.3%	Kenya Central Bank 364 Day Treasury Bill as at 19 October
Proportion of debt	50%	Assumption
Proportion of equity	50%	Assumption

Based on the above assumptions we calculate a nominal pretax WACC of 19.18%. It can be noted that this is higher than the 15.42% used in the previous process and the value used in the MTR costing study of 2022. However, we believe that it is plausible given the risk in the industry at present in comparison to telecommunications.

9.3.3 Volumes

Volumes have been calculated based on a hypothetical operator based on the volume capacity estimated for the quotes for a new site. This is adjusted to exclude four must carry stations (which need to be effectively subsidized from the remainder of channels as well as and utilization).

	Nairobi	**Urban**	**Rural**	**Total**
Sites	1(+relay)	18	17	36.00

Capacity per site	160	80	40	
Total capacity per category	154	1332	578	2064
Utilisation assumed	0.8	0.8	0.8	
Total capacity used per site (excluding must carry and with utilisation)	123.2	59.2	27.2	
Total capacity used per category	123.2	1065.6	462.4	1651.2

9.3.4 Costs of multiplexing (head end costs):

The head end uses various elements including encoders, multiplexers, switches, LCD monitors and routers. In order to estimate the capital costs of the head end we utilized quotations obtained by Signet for a new head end. While this does not include the cost of buildings and power supply we understand that head ends are typically situated within buildings used for other aspects of signal distribution and therefore we believe that it would be covered by the general rental and operating costs.

We use a tilted annuity approach to annualize the CAPEX spend. A tilted annuity recovers the assets purchase price and financing cost over the life of the assets. It is termed "tilted" as it is used where the cost trend of an asset varies over time so that the replacement cost may increase (or decrease) and accommodates this. Submissions from operators show that some costs have a constant trend while others are increasing. As such, we have incorporated a tilt into the return. A tilted annuity provides a fairly flat cost recovery profile.

We use the following formula to annualise costs:

$$\text{Annualised cost} = \frac{\text{Investment value} \times (r-p) \times ((1+r)^N)}{((1+r)^N)-((1+p)^N))}$$

Where r is the return, p is the tilt, and N is the period of depreciation.

To this we add the OPEX costs associated with the head end.

The multiplexing cost is distributed across volumes to get a Mbsp split per operator. It is therefore driven by the estimated head end cost as well as volumes.

9.3.5 Site costs (per type of region)

Different site types have different costs. As such we estimate three types of sites, namely, the cost of a site like Nairobi/Limuru, Urban and Rural sites. Furthermore, we note that while Signet only has one transmitter per site, PANG has 2 or 3 transmitters on some sites. As a result we have chosen to model a hypothetical operator that matches the specifications of the sites that have been costed. This provides three site scenarios.

In our model costs are used to build separate bottom-up costing models for the 3 types of site (rural, other cities/urban and Nairobi). As noted previously, we assume an operator with one site in Nairobi, 17 rural and 18 other city sites (this is in line with Signets footprint). As noted in our volume section, we assume that the capacity of a site in Mbps is 120 for Nairobi, 80 for Urban and 40 for Rural.

These are then annualized to get an annual cost incorporating a return and depreciation. This is based on data provided on a modern equivalent asset basis by Signet. However, it is also sense checked against cost data submitted by PANG.

For CAPEX we include all CAPEX associated with sites. Like the head end we use a tilted annuity approach to get an annualized cost that incorporates a return.

Based on submissions from providers based on the quote of a new site we include the following:

- Transmitters
- Combiners
- Feeder cable
- Antenna
- Dummy load & Dehydrator
- UPS
- AVR
- Isolation Transformer
- Mast
- Civil work
- Air conditioning
- Monitoring system
- Local insertion
- Control management system
- Generator and Changeover system

To this we add OPEX costs based on three estimates, that of PANG, Signet and an average of the two. This is distributed on the basis of volumes of our hypothetical operator to get a cost per Mbps.

Table 21: Per site type costs per Mbps for modelled site costs and volumes

	Per Mbps per month (KES)
Nairobi	[✂]
Other Cities	[✂]
Rural	[✂]

This was sense checked against scenarios using Signet data, and using PANG inputs with Signet quotations for sites.

9.3.6 Satellite costs

Costs include:

- Satellite uplink equipment
- Satellite downlink equipment
- Satellite rentals and OPEX

For CAPEX we use use a tilted annuity approach as above. However, as not all channels utilize satellite costs this is split according to the the number of channels that the transponder has capacity for. OPEX and satellite rental costs are also split across these channels. These costs are per channel rather than per Mbps.

Table 22: Satellite costs per channel (KES)

Satellite	PANG data	Signet data
Uplink by Channel	[✂]	[✂]
Downlink by channel by Site	[✂]	[✂]

9.3.7 OPEX

OPEX estimates are based on data provided by the operators. We have created scenarios using various OPEX estimates including PANG, Signet and an average between the estimates provided by Signet and PANG. We note that where there are inefficiencies this model potentially includes these inefficient costs.

Table 23: OPEX estimates

	SIGNET	PANG (excl Ku rental)
Total OPEX estimate (KES)	[✂]	[✂]
Total Volume (Mbps)	[✂]	[✂]
OPEX per Mbps per year (KES)	[✂]	[✂]
OPEX per Mbps per month (KES)	[✂]	[✂]

9.4 Model results

Based on the modelling exercise we find the following estimated cost of per Mbps for our hypothetical operator by adding the CAPEX for a modelled site, the OPEX estimates and the Head-end cost:

Table 24: Transmission costs per Mbps for hypothetical operator

Model	*Total CAPEX plus ave Signet and Pang OPEX per mbps (KES)*	*Total CAPEX plus PANG OPEX per Mbps (KES)*	*Total CAPEX plus Signet OPEX per Mbps (KES)*
Nairobi	[✂]	[✂]	[✂]
Other Cities	[✂]	[✂]	[✂]
Rural	[✂]	[✂]	[✂]

It is unsurprising that costs in rural areas are higher. This is because much of the equipment is the same, while volumes are lower. Absent sharing, this is an expected outcome.

In this estimate the cost we estimate for Nairobi is KES [✂] less than what is being charged by PANG in Nairobi and KES [✂] than what Signet is charging in Nairobi. In contrast it is KES [✂] and KES [✂] more than is being charged in other cities and rural areas by PANG and KES [✂] and KES 99 823 [✂] is being charged in other cities and rural areas by Signet. It is likely that rural sites are currently being subsidised by the profits being made in Nairobi where volumes are higher.

We also did additional checks using different configurations and PANG and Signet inputs.

Table 25: PANG applying Signet equipment costs

PANG	*Total CAPEX plus ave Signet and Pang OPEX per mbps*	*Total CAPEX plus PANG OPEX per Mbps*
Nairobi	[✂]	[✂]
Other Cities	[✂]	[✂]
Rural	[✂]	[✂]

This is largely driven by the fact that PANG has higher volumes. It may be misleading as it uses a different equipment configuration.

Table 26: Signet Transmission costs per Mbps

SIGNET	*Total CAPEX plus ave Signet and Pang OPEX per mbps*	*Cost using Signet estimate (KES)*
Nairobi	[✂]	[✂]
Other Cities	[✂]	[✂]
Rural	[✂]	[✂]

This is result is largely driven by Signets very low volumes in other cities at this stage.

We note that these costs are significantly higher than the previous costs set in the Determination of 2016. However, we note that this is likely driven by a range of factors. This includes

(i) Infrastructure sharing: different assumptions regarding infrastructure sharing by the two companies have been modelled. . In particular, we have noted which elements are typically shared in the Kenyan environment (namely, masts, civils and power). We assume that active equipment is separate across different sites.

(ii) Number of sites: The previous model used all 72 sites for a single operator. We have used a number based on actual sites built at present by Signet. The modelled operator therefore has 36 sites (not including relay sites), namely 1 in Nairobi, 18 in other cities and 17 in rural areas. (We note that PANG has 24 currently).

(iii) Furthermore, there are differences in other macro variables, for example, there has been depreciation in the KES and an increase in interest rates.

While estimates from PANG data in the model appears lower this is driven by the fact that their volumes are high, yet the equipment used appears to have less transmitters than PANG does in practice and is therefore not an accurate reflection of capital costs.

An exercise done by PANG estimates the cost to be KES [✂] per channel which is KES [✂] per Mbps. This is higher than our cost estimates.

We note that both PANG and Signet appear to be struggling financially and that artificially low regulated prices may not create a sustainable environment for signal distribution in Kenya. In

particular, very low rural tariffs may not be incentivizing infrastructure build out into rural areas as it does not currently cover the costs.

9.5 Tariff determination

After modelling the costs per site the next step is to calculate the revenue requirements for the hypothetical efficient operator. The total revenue required to cover the costs of the sites and head-end modelled is KES 2 021 247 173.23 annually. Principles of tariff determination for this project are revenue neutrality and maintaining a similar tariff structure to that previously used. As such we have calibrated the revenue to the following prices:

- Nairobi/Limuru: KES 127 030.12
- Other Cities: KES 97 715.49
- Rural: KES 68 400.84

9.6 Conclusions and recommendations on BSD

The costing exercise had several challenges. In particular there were significant challenges in obtaining and verifying the information to use as inputs into the prices setting process. While annual financial statements are provided they are often aggregated and include costs and equipment that is not related. Furthermore, providers use the same infrastructure for broadcasting their own as well as the provision to third parties without clear rules for how allocation is done. This could potentially advantage their own channels in relation to others. As such, the requirement for accounting separation or at least requiring all downstream activities to be recorded as arms-length transactions is important to getting the correct data and market incentives. It is unclear that previous recommendations made relating to accounting separation and non-discrimination are being monitored and adhered to.

Based on best available information and the above exercise we therefore recommend increasing the price cap or transmission and satellite uplink. The recommended tariff structure is

	Rate per mbps (KES)
Nairobi	127 030.13
Other city	97 715.49
Rural	68 400.84

We have not separately modelled the costs of local insertion as we understand that the equipment for local insertion is included in the overall equipment costs. These prices can be increased based on inflation and should be re-assessed in 3 years.

Increase in competition: We believe that the feasibility of expanding competition should be considered, particularly if there is potential for increased capacity and competition in rural and outlying areas and where there is existing equipment.

Accounting separation and transparency: In order to ensure that there is no cross-subsidisation between own channels (Starsat pay and KBC channels) and services for 3rd parties it is necessary that (i) accounting separation is enforced and (ii) separate accounts are submitted to the regulator for

the Signal distribution to 3rd parties and that prices charged to internal channels are clearly marked and charged at an equivalent cost to that charged to 3rd party channels.

10 Conclusions, recommendations and the way forward

Broadcasting in Kenya, as in the rest of the world is undergoing a period of change. There are new platforms that are being used for broadcast (such as DTT), new business models and new entrants. There have been a range of changes in the competitive environment and increased competition from stakeholders that do not use traditional broadcast infrastructure and therefore do not fall under the licensing framework (for example, OTT and on-demand providers). This has implications (i) for the competitive assessment of existing broadcasters and (ii) for future amendments to the regulatory framework.

Retail Pay TV

The competitive assessment of pay tv has yielded the following conclusions:

- In the **premium market** (for pay television including premium live sports, such as the EPL and Champions League) there there is a dominant player with significant market power, namely Multichoice. This market is susceptible to ex ante competition on the basis fo the 3 criteria. However, there is no evidence of exclusionary issues on an ex ante basis despite the existence of exclusive contracts. While there have been concerns over price our analysis suggests that retail prices have fallen in real terms or stagnated. Furthermore, market power is derived from that held by the content providers (such as the English Premier League) who are charging high prices that drive the retail prices. We do not recommend any intervention in this market at present, given the changes in the market that are occurring. We recommend monitoring.
- In the **mass market** there are higher levels of competition than in the premium market with a more companies that are active, though it is still concentrated. While concerns have been raised over access to DTT (which is limited due to scarcity of spectrum), there is substitution from DTH. Any exploitative rise in the price of DTT (or degradation in quality) would lead pay customers to switch to DTH which creates a competitive constraint. We see no need for intervention in the market at this stage and the market does not currently meet the 3 criteria.

We have found some competitive interplay between traditional broadcasting and OTTs. A concern that has arisen is the issue of whether there is a level playing field in terms of regulatory requirements. OTT operators do not pay licence fees, nor do they require to submit regulatory returns. They also may not be subject to the same laws in terms of content. In our opinion, at this stage, there is danger that premature regulation of OTTs will impact on innovation in the market. In addition, the Authority is limited by KICA in terms of the extent to which it can regulated OTTs in the current legislative framework. However, it is important that the Authority is able to accurately understand the market and has correct information. As such, a “light touch” approach of requiring OTTs that meet certain revenue/subscriber thresholds to notify the authority that they are operating and providing data such as prices and subscriber numbers would be helpful. The regulatory section has a range of options that could be used for this purpose.

Retail FTA TV

While there are many FTA channels, there is a moderate level of concentration among the large media groups who produce these channels. FTA faces challenges as a result of a changing digital environment as a result of the loss of consumers to alternative sources of entertainment, but more importantly as a result of the fragmentation of advertising. This is not a competition issue but a consequence of a technological evolution.

From a competition perspective there are few concerns downstream. Instead, there are concerns related to signal distribution, which is discussed separately below. As such, we do not have any recommendations related to retail FTA television.

Wholesale signal distribution

At present the market is highly concentrated and meets the 3 criteria for ex ante regulation. Current determinations regulate pricing. However, competition may be artificially limited due to regulatory requirements. Going forward there is little reason not to expand competition in the market. Where there is existing infrastructure it seems appropriate to allow new entry, even if it is from existing self-provisioning licensees. This is particularly pertinent as much of the equipment purchased in terms of the digital migration has now been depreciated. As such we recommend that a path is opened for increased competition for common carrier licenses, particularly if there is existing equipment, as there there may be competitive benefits. Furthermore, in some areas PANG has not built out the required infrastructure and as a result there is only one provider where there is infrastructure available for two that has already been built.

In terms of price regulation we note that there appear to be challenges in monitoring prices set and in exercises to set prices as will be discussed later.

Wholesale content and channel supply

At present there appears to be a mix of exclusive and non-exclusive content and channels available to broadcasters in Kenya. With an exception of premium sports there appears to be sufficient content available to broadcasters and it does not appear to meet the 3 criteria. In terms of premium sports there is dominance by the rightsholders (such as the EPL) over the rights to their content, which flows to downstream rightsholders. Furthermore, the entry into content production by OTTs is also changing the dyamics of the content market. However, given the fact that broadcasters have not raised content and channel supply as a concern and it does not appear to be affecting the market we do not recommend any remedies.

Radio

While the market for radio is dispersed and differentiated there is some concentration in terms of overall market share and a few groups that comprise the bulk of ad revenue. While there are some barriers to entry, in practice it does not appear to be prohibitive and no concerns have been raised with respect to this market during the course of the inquiry, with the exception of the exclusivity of EPL broadcasting rights which appears to be a newer phenomenon in Kenya. However, going forward it seems likely that the market is also facing distruption from streaming and online radio and that this may increase in the future. At present we do not believe that this market is susceptible to ex ante regulation at present and recommend monitoring.

Broadcasting signal distribution

Based on best available information and the above exercise we therefore recommend increasing the price cap or transmission and satellite uplink. The costs of provision using a market related WACC and modern equivalent assets are as follows: Nairobi KES [✂], Other Cities is KES [✂] and Rural is KES [✂] while satellite uplink KES [✂]. While this is higher than the current regulated cost largely due to the different assumptions relating to infrastructure sharing, in setting a new price cap we recommend that this is taken into account.

Further recommendations relate to competition and rules to prevent cross-subsidisation. Firstly, we believe that in addition, in areas in which there is potential competition licencing of new competitors

should be considered. This will increase competition in those areas and provide a constraint on price increases. Secondly, in order to ensure that there is no cross-subsidisation between own channels (Starsat pay and KBC channels) and services for 3rd parties it is necessary that accounting separation is enforced and that separate accounts are submitted to the regulator for the signal distribution to 3rd parties and that prices charged to internal channels are clearly marked and charged at an equivalent cost to that charged to 3rd party channels.

Appendix A

Table 27: Sporting rights won by large streaming companies, 2017-2023

Streaming company	Sporting rights	Date	Jurisdiction	Exclusivity
DAZN	UEFA Champions League[197]	2024/5-2026/7	Germany	No
	UEFA Champion's League, Europa League and Super Cup[198]	2020/1-2022/3	Canada	Yes
	UEFA Nations League, European Qualifiers, and international friendlies[199]	2022-2028	Canada	Yes
	FIFA World Cup Semi-finals and finals[200]	2022	Spain	Yes
	Premier League	2019/20-2024/5	Spain	Yes
	AFC[201]	2021-2028	Japan	Yes
	FA Cup[202]	2018/19-2023/4	Austria, Germany, Switzerland	Yes
	La Liga[203]	2016-2025/26	Austria, Germany,	Yes
	Bundesliga[204]	2021/2-2024/5	Germany	Yes
	Six Nations Rugby[205]	2022-2024	Canada	Yes
	IPL Cricket[206]	2023	UK, Ireland	No
Amazon Prime Video	ATP[207]	2019-2023	UK	Yes
	WTA Tennis[208]	2020-2024	UK and Ireland	Yes
	US Open Tennis[209]	2018-2022	UK	Yes
	Autumn Nations Rugby series[210]	2020-2022	UK	Yes
	20 Premier League matches[211]	2019-2021	UK	Yes
	11 Bundesliga matches[212]	2019-2020	Germany and Austria	No
	National Football League's Thursday Night Football[213]	2017-2021	United States	No
	National Football League's Thursday Night Football [214]	2024-2028	United States	Yes
	UEFA Champions League top fixtures on Wednesdays[215]	2021-2026	Italy, Germany, UK (from 2024)	No
Apple TV[216]	Major League Baseball's Friday Night Baseball	2023-2029	US + 8 others countries[217]	Yes
	Major League Soccer	2023-2032	Worldwide	Yes
Google / YouTube[218]	National Football League's Sunday Ticket	2023-2029	United States	Yes
	Major League Baseball	2019-2022	182 countries	Yes
Disney's ESPN+ (Streaming version of ESPN)[219]	Formula 1 rights 18 races	2018-2025	United States, English and Spanish	Yes
	National Hockey League	2022-2028	United States	Yes
	ICC cricket	2024-2027	India	Yes
NBC's Peacock[220]	Winter Olympic Games	2022	United States	Yes
	Major League Baseball Sunday morning games	2022--2023	United States	Yes
	FIFA World Cup	2022	United States, Spanish-language	Yes
	Premier League 175 matches	2022/3-2028/9	United States	Yes
HBO Max / Discovery +[221]	U.S Soccer Federation +20 matches	2022-2029	English-language United States	Yes
	National Hockey League	2021/2-2027/8	United States	Both
	UEFA Champions League	2021-2024	Mexico	Yes
	UEFA Champions League	2021-2024	Brazil	No
Viacom's Paramount Plus[222]	UEFA Champions League	2019/20-2030	United States	Yes
	Europa League	2019/20-2030	United States	Yes
	Premier League	2022/23-2024/5	Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama	Yes

[197] Ross, M. (2022). *Amazon and DAZN retain Champions League rights packages in Germany*. Available here. Accessed 24 April 2023.
[198] Bassam, T. (Undated). *DAZN launches 'Redzone-style' Champions League service.* Available here. Accessed 24 April 2023.
[199] Reja, A. (2022). *DAZN Canada secures exclusive media rights to UEFA competitions.* Available here. Accessed 24 April 2022.
[200] Impey, S. (Undated). *DAZN adds Club World Cup rights in Spain*. Available here. Accessed 24 April 2023.
[201] AFC News. (2021). *AFC announces rights partnership with DAZN in Japan*. Available here. Accessed 24 April 2023.
[202] Sport Business. (2018). *DAZN secures FA Cup rights in DACH region*. Available here. Accessed 24 April 2023.
[203] Hunt, H. (2021). *DAZN retains LaLiga rights in Germany and Austria.* Available here. Accessed 24 April 2023.
[204] Saleh T. (2022). *Sky Deutschland to launch combined Bundesliga package with DAZN*. Available here. Accessed 24 April 2023.
[205] Cunningham, E. (2021). DAZN Canada to cover Six Nations through 2024, Autumn Series through 2022. Available here. Accessed 24 April 2023.
[206] DAZN news. (2023). *DAZN to Broadcast IPL in the UK and Ireland*. Available here. Accessed 24 April 2023.
[207] Richardson, J. (2023). *Sky Sports ATP and WTA deal not yet confirmed*. Available here. Accessed 21 April 2023.
[208] Women's Tennis Authority. (2019). *Amazon wins exclusive rights to WTA in four-year deal, Prime Video to be the home for tennis in the UK and Ireland.* Available here. Accessed 21 April 2023.
[209] Fry, A. (2022). *Sky Sports secured US Open UK rights after eight-year gap*. Available here. Accessed 24 April 2023.; Wilkes. (2022). *Sky Sports regains US Open tennis rights in five-year deal*. Available here. Accessed 21 April 2023.
[210] Cameron,I. (2021). *Amazon Prime to broadcast majority of Autumn Internationals*. Available here. Accessed 21 April 2023.
[211] Sweney, M. (2018). *Amazon Breaks Premier League hold of Sky and BT with Prime streaming deal*. Available here. Accessed 21 April 2023.
[212] Sportsbusiness. (2020). *Amazon extends Bundesliga rights for remainder of season*. Available here. Accessed 24 April 2023.
[213] Reuters. (2021). *NFL reaches long-term media deals with Amazon, Disney and others*. Available here. Accessed 21 April 2023.; Sweney, M. (2017). *Amazon outbids Sky to win exclusive ATP tour tennis rights*. Available here. Accessed 21 April 2023.
[214] Sweney, M. (2017). *Amazon outbids Sky to win exclusive ATP tour tennis rights*. Available here. Accessed 21 April 2023.; Amazon (Updated October 2023). *See the 'Thursday Night Football' schedule for the 2023 NFL season on Prime Video.* Available here. Accessed 21 April 2023.
[215] Fry, A. (2023). *Amazon Prime Video renews UEFA Champions League in Italy*. Available here. Accessed 21 April 2023.
[216] Abarinova, M. (2022). *Apple, Amazon, YouTube hit streaming home runs in 2022*. Available here. Accessed 24 April 2023.
[217] United States, Canada, Australia, Brazil, Japan, Mexico, Puerto Rico, South Korea, and the United Kingdom
[218] Abarinova, M. (2022). *Apple, Amazon, YouTube hit streaming home runs in 2022*. Available here. Accessed 24 April 2023.
[219] Abarinova, M. (2022). *Apple, Amazon, YouTube hit streaming home runs in 2022*. Available here. Accessed 24 April 2023.
[220] Ibid
[221] Ibid
[222] Laporte, N. (2021). *Why Paramount Plus is betting on sports to get you to subscribe to another streaming service*. Available here. Accessed 24 April 2023.

Streaming company	Sporting rights	Date	Jurisdiction	Exclusivity
	Premier League	2022/23-2024/5	Belize, Dominican Republic	No
	National Football League Sunday afternoon games	2023-2033	United States	Yes
	IPL (Viacom 18)[223]	2023-2027	India	Yes

[223] Brzeski,P. (2022). *Viacom18 nabs streaming rights to India's Premier Leage Cricket for $2.6b, Disney takes TV rights for $3 billion.* Available here. Accessed 24 April 2023.

Appendix B FTA Channels

Table 28: FTA Channels (PANG, Startimes)

Aviation TV	Ukombozi TV	Nyumba iitu TV
Baite TV	VBBN TV	All time TV
El-Shaddai TV	Mount Zion TV	mashariki
Bunge TV	Agano TV	Yawheh
Citizen TV	Ngumbau TV	Muugi TV
Deliverance TV	MOF TV	Rapha TV
Destiny Voices TV	JBN TV	Urejesho TV
EDU TV	SOP TV	Massa TV
France 24 TV	MojaOne TV	Ithanga TV
GBS TV	Raia TV	Shekinah Glory TV
Getembe TV	Ezra TV	Conqueror TV
HCK TV	Faith Today TV	GBN TV
HOPE TV	GoodWill TV	ARK TV
Humble touch TV	Maajabu TV	Pinnacle Embassy TV
Inooro TV	Undugu TV	Restoration TV
Judah TV	UTV	Winner TV
K24 TV	Weega TV	Fire TV
Kamba TV	Weru TV	WaveTime TV
Kameme TV	Y-254	JCM TV
KBC 1	Nuru TV	Nabii TV
KINGDOM TV	Favour of God TV	KA TV
Kirk TV	Jambu TV	Uncommon Glory TV
KTN Home TV	Voice of Victory TV	Elevate TV
KTN News TV	Breakthrough TV	Swahili TV
KU TV	CM TV	MTN TV
Lookup TV	JCC TV	SOA TV
MBCI TV	His Grace TV	Zoe TV
Mizpah TV	Morning Cloud TV	
MUMO TV	Empire TV	
Mutongoi TV	Agape Love TV	
Mwangaza TV	kiheo TV	
NTV	IC TV	
Oracle TV	YOUNIB TV	
Riverside TV	Repower TV	
Sasa TV	Njata TV	
Senate TV	Prayercave TV	
Signs TV	Muthingi TV	
Star Africa TV	UNC TV	
Testimony TV	Ramogi TV	
Thstone TV	JCDH TV	
TRUTH TV	Githima TV	
TV 47	Freedom TV	

Source: PANG, Startimes Submissions – September 2023, filename: Questionnaire signal distribution-PANG_Alice.xlsx

Table 29: FTA Channels (SIGNET)

KBC	CAPUCHIN TV	Kameme FM	Eternal Word TV
West TV	WERU TV	Milele FM	Muugi TV
BHB TV	EMBU UVORO TV	Emoo FM	Kairos TV
TV Magharibi	TAWALA TV	Mayain FM	Voice Of Victory TV
Gikuyu TV	FAMILY TV	Meru FM	Ikengi TV
Meru TV	SHIFU TV	Osiepe FM	Shakaal TV
Tandao TV	NAMBA ONE	Msenangu FM	Helicopter TV
Pendo TV	HCL TV	Ghetto FM	Humble Touch TV
VOV Tv	KASS TV	Stewards TV	GMM TV
NURU TV	TUMAINI TV	Namlolwe TV	MyConnect TV
Western Nyota TV	EDUCHANNEL	Mamlaka TV	Balozi TV
Al-Huda Tv	AKILI TV	Utana TV	Kameme TV
Faith TV	AVIATION TV	Githima TV	Redeemers Voice TV
Nyota TV	GOSHEN WONDERS TV	Prophetic TV	Medal Of Praise TV
Maisha TV	PILLAR TV	Synagogue TV	Tinker TV
Farmers TV	Airmobi TV	World Evangelist TV	Homeboyz TV
Ongatet TV	PPP TV	Oyominto TV	GTN TV
One Accord TV	Heaven Bound TV	Doxa TV	Engako TV
Horizon TV	Breaking the Limit TV	Mzalendo TV	Clergy TV
Royal TV	GABRIEL TIMES TV	Ndizi TV	Courage TV
JCDH TV	Shekinah TV	Freedom TV	KTN Home
Ebru TV	Fuma TV	Embassy TV	KTN NEWS
Mwendani TV	Getembe TV	Weega TV	KUNAMU TV
Morning Cloud TV	Shiloh TV	Tuliza TV	EGTM TV
Baite TV	Theophilus TV	Sawa TV	
Star Africa TV	Imani TV	Xavier TV	
SAYARE TV	EBN TV	Jesus at Work TV	
REVIVAL TV	Mizpah TV	Shem TV	

Source: KBC-SIGNET Submissions, filename: SIGNET Data.xlsx

Appendix C Radio stations

Table 30: Radio Stations owned by Royal Media Services[224]

Radio Station	Language of Presentation	Areas of Coverage
Citizen Radio	Kiswahili	National
Inooro FM	Kikuyu	National
Ramogi FM	Luo	National
Hot 96 FM	English	Nairobi, Nakuru, Eldoret, Nyeri, Kisumu and Kisii
Bahari FM	Kiswahili, Taita, Firiama and Digo	Mombasa, South Coast – Kwale, Ukanda, North Coast, Mtwapa, Kilifi and Malindi
Egesa FM	Ekegusii	Kisii and Nyamira
Mulembe FM	Luhya	National
Musyi FM	Kamba	Nairobi and greater lower eastern Kenya region
Muuga FM	Kimeru	Nairobi, Thika, Murang'a, Meru, Ukambani and Timau
Chamgei FM	Kalenjin	Nairobi, North Rift, South Rift, Nakuru and Baringo
Wimwaro FM	Embu	Embu, Mbeere, Chuka, Tharaka, Kirinyaga and parts of Ukambani
Sulwe FM	Bukusu	Bungoma and Trans-Nzoia
Vuuka FM	Maragoli	Maragoli

Source: See: https://www.royalmedia.co.ke/radio/

Table 31: Radio Stations owned by Media Max Network[225]

Radio Station	Language of Presentation	Areas of Coverage
Milele FM	Swahili	Kapenguria, Taita Taveta, Nakuru, Nyeri, Webuye, Kisii, Mombasa, Narok, Kisumu, Nyahururu, Meru, Eldoret, Kibwezi, Nairobi, Limuru, Kericho
Kameme FM	Kikuyu	Nairobi, Malindi, Nyeri, Nakuru, Eldoret, Meru, Mombasa, Vria, Naivasha, Molo, Nyahururu, Muranga, Narok, Kisumu, Webuye
Mayian FM	Maa	Southern Kenya, Kajido, Narok, Sambura, Laikipia and Ilchamu
Emoo FM	Swahili, English	Eldoret
Msenangu FM	Mijikenda	Kenyan Coastal Region
Meru FM	Kimiiru	Meru, Nyambene Hill, Mombasa, Malindi, Kitui, Nairobi, Machakos and Mbwa Hill

Source: https://mediamaxnetwork.co.ke/brands.html

[224] See: https://www.royalmedia.co.ke/

[225] See: https://mediamaxnetwork.co.ke/

Table 32: Radio Stations owned by Radio Africa Group[226]

Radio Station	Language of Presentation	Areas of Coverage
Kiss FM	English	National
Classic Radio	English	National
East FM	Hindi	Mombasa, Kisumu and Nairobi
Gukena FM	Kikuyu	Nairobi, Nakuru and Mount Kenya
Radio Jambo	Kiswahili	National

Source: https://ke.opera.news/ke/en/entertainment/5152641aed363727fdf7c832887c0ef6

Table 33: Radio Stations owned by Standard Group[227]

Radio Station	Language of Presentation	Areas of Coverage
Spice FM	Bangla, English	Mombasa, Nakuru and Eldoret
Radio Maisha	Swahili	Marsabit, Garissa, Kericho, Kisii, Lodwar, Webuye, Eldoret, Narok, Nairobi, Nakuru, Mombasa, Meru, Kisumu, Nyeri, Malindi and Taita Taveta, Voi, Vuria Hill
Vybez Radio	English	Nyeri, Mombasa, Nairobi, Meru and Eldoret

Source: See: https://www.standardmedia.co.ke/corporate/our-brands

Table 34: Radio Station owned by Nation Media Group[228]

Radio Station		Language of Presentation	Areas of Coverage
Nation FM	English	Meru, Nairobi, Nakuru, Mombasa, Eldoret and Nyeri	

Source: See: https://www.nationmedia.com/brands/?sortby=country

Table 35: Radio Stations owned by Waumini Communications[229]

Radio Station	Language of Presentation	Areas of Coverage
Waumini Radio	English and Kiswahili	Nairobi

Source: See: https://www.radiowaumini.org/

Table 36: Radio Station owned by Capital Media Group[230]

Radio Station	Language of Presentation	Areas of Coverage
Capital FM	English	Central Kenya, Rift Valley region, coastal region and eastern Kenya

Source: See: https://www.capitalfm.co.ke/listenlive/

Table 37: Radio Station owned by Kenya Broadcasting Corporation[231]

Radio Station	Language of Presentation	Areas of Coverage
Radio Taifa	English	Eastern, central and coastal Kenya regions
English Service	English	Rift Valley region, coastal, central and eastern Kenya
Pwani FM	Swahili	Coastal region

[226] See: https://erp.radioafricagroup.co.ke/page/homepage
[227] See: https://www.standardmedia.co.ke/corporate/
[228] See: https://www.nationmedia.com/
[229] See: https://kccb.or.ke/index.php/commission-for-social-comminications/
[230] See: https://www.capitalfm.co.ke/news/
[231] See: https://www.kbc.co.ke/

Coro FM	Kikuyu	Nairobi, Nakuru, Mount Kenya Region
Iftiin FM	Somali	Mombasa, Garissa and Nairobi
Mayienga FM	Luo	Siaya, Migori, Kisumu, Homabay, Busia, Kakamega, Bungoma, Kericho, Eldoret
Minto FM	Kisii	Kisii
Kitwek FM	Kalenjin	Rift Valley and parts of Nyanza Province
Mwatu FM	Kamba	Koudougou
Ingo FM	Luhya	Western Kenya
Mwago FM	Meru	Eastern and Coastal Kenya region
Nosim FM	Maasai	Rift Valley region

Source: See: https://www.kbc.co.ke/radio

Table 38: Market shares of radio stations by region (%)

Station Name	National Market Share	Nairobi	Central	Rift	Western	South Nyanza	Lake	Lower Eastern	Upper Eastern	Coast	North Eastern	North Western
Athiani FM								2.03				
Baraka FM					1.11					1.99		
BHB												7.90
Biblia Husema												2.76
Marsabit FM		0.87										2.84
Hope FM		0.87						0.69				
Radio Vuna						1.61						
Mbaitu FM								6.00				
Kalya					1.55					18.92		
Tuliza FM									1.45			
Central FM			1.07	12.86								
Jesus is Lord				0.58								
Kass FM	3.25			20.71								
Coro FM			2.20						0.71			
Ghetto FM								0.41				
Ghetto Radio 89.5 FM								1.00				
Ingo					2.84							
KBC English Radio			0.72		0.71	2.11		1.08			8.02	11.60
KBC North Eastern/Somali												1.73
Mayienga FM							4.75					
Mwatu FM								0.67				
Pwani FM										3.73		
Radio Minto						6.98						
Radio Somalia (Iftiin)											2.81	
Radio Taifa					1.10	3.10	0.56			0.90	11.02	5.56

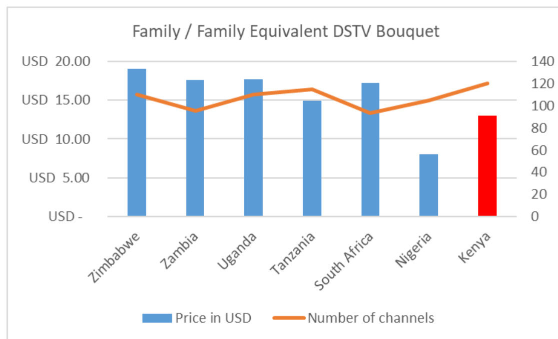
Station Name	National Market Share	Nairobi	Central	Rift	Western	South Nyanza	Lake	Lower Eastern	Upper Eastern	Coast	North Eastern	North Western
Sauti ya Pwani										0.79		
Community FM											0.45	
Radio Waumini		1.45										
Emoo FM				2.08								
Kameme Radio	4.14	2.85	17.59	0.51				0.79	8.81			
Meru FM									6.05			
Milele FM	6.04	5.15	2.87	4.57	13.54	4.08	4.55	7.52	4.64	6.36	3.26	2.34
Msenangu FM	1.39									16.02		
Milambo FM						0.27	0.62					
Nation FM / 96.3									1.33			
Nam lolwe FM	1.57				2.29		9.87					
Star FM (Somalia/Borana/Kiswahili)											1.40	
NRG Radio / Energy		1.35	2.24					0.63				
Others	21.00	13.51	5.34	9.94	6.11	1.87	5.36	8.68	11.30	6.45	5.97	12.98
Others 1						0.58						
Classic FM	2.69	11.90	2.55		1.22		1.29	0.81	9.61	1.29	4.24	
Gukena FM			1.26									
Jambo FM	10.59	18.80	8.93	8.34	21.68	3.40	10.13	6.59	6.05	6.58	6.39	6.92
Kiss FM				1.65			0.95			0.83		
Kiss FM		5.26	1.51			0.58						
Kaya FM	1.68										0.90	
Angel Maria FM									1.57			
Mikayi FM							0.37					
MBCI Radio 89.5 FM												2.93
Bahari FM										8.22		
Chamegi FM	2.39		0.63	22.02						2.86		
Citizen Radio	19.83	18.01	13.88	1.72	29.23	28.68	13.34	16.94	15.29	16.42	38.31	17.01
Egesa FM	2.57	0.83				38.39						
Hot 96 FM				0.63								
Inooro FM	7.75	7.44	35.94	1.18					6.40		2.88	
Mulembe FM					5.07		0.90					
Musyi FM	3.99			4.14				39.99				

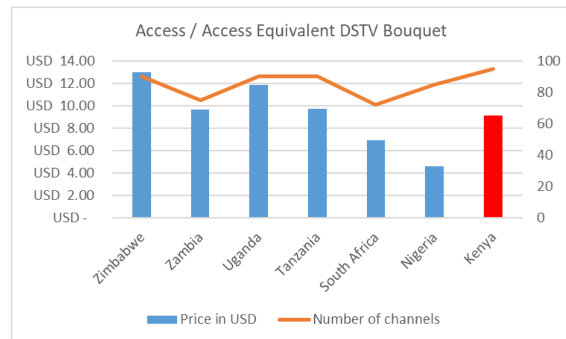
Station Name	National Market Share	Nairobi	Central	Rift	Western	South Nyanza	Lake	Lower Eastern	Upper Eastern	Coast	North Eastern	North Western
Muuga FM									9.05			
Ramogi FM	4.64	3.19			1.65	3.94	32.98					2.21
Sulwe FM					2.18		1.70					
Wimwaro FM									8.71			
Kisima Radio						0.48						
Sidai FM				2.14								2.82
Radio Maata												4.24
Radio Maisha	6.49	7.13	2.84	6.93	7.60	3.55	9.84	6.15	6.78	8.33	6.79	7.90
Vybez Radio		1.39									1.07	
Gaya										0.29		
Tugwatane kihanja FM							2.78					
Turkana FM											0.97	8.23
Wajir Community Radio											5.53	
Weru FM									2.27			
West FM					2.12							

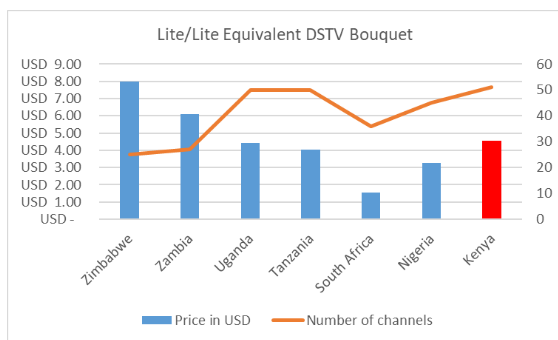
Source: Ipsos Kenya Audience Survey IKAT Q1 2023

Appendix D

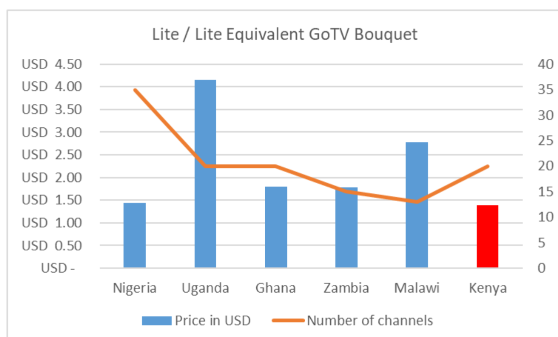
D.1 DSTV Bouquets

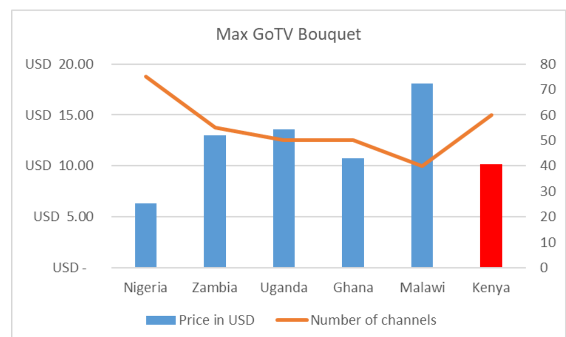


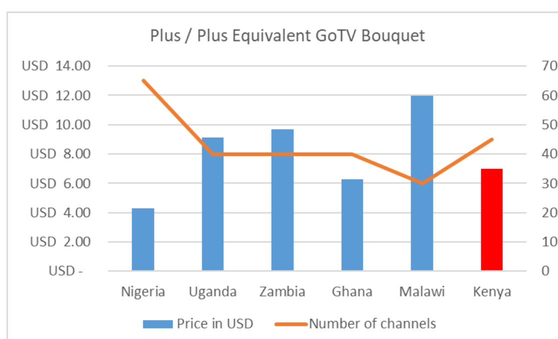


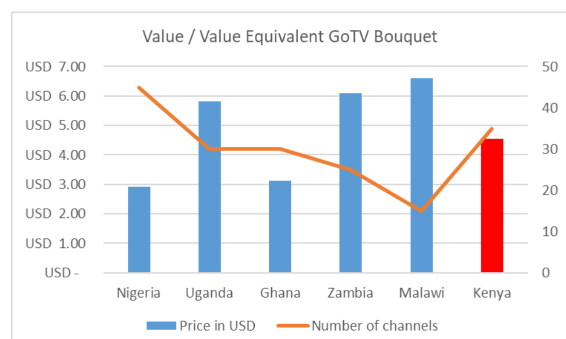


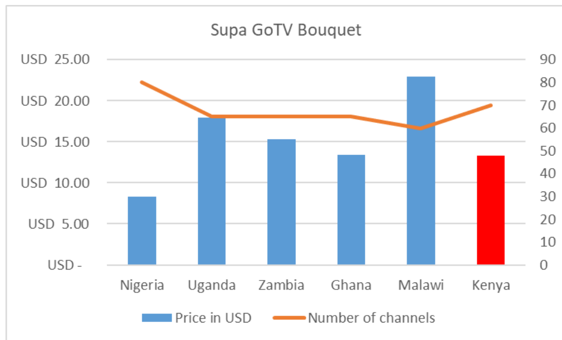
D.2 GoTV Bouquets

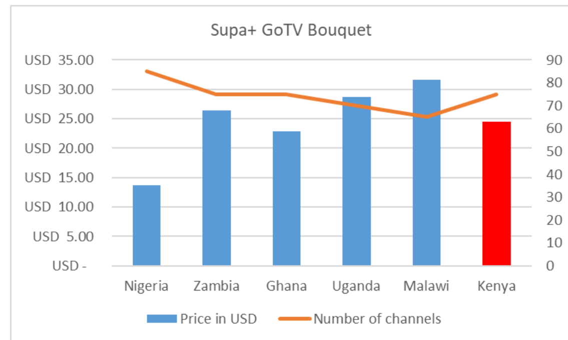




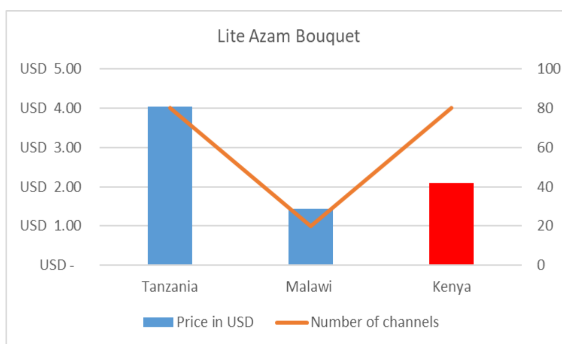


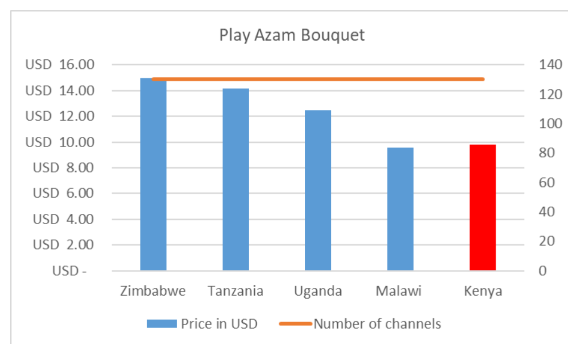


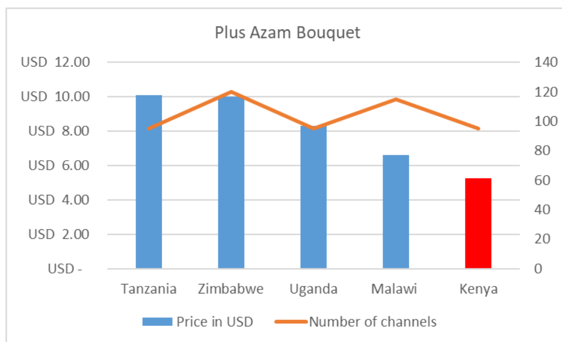


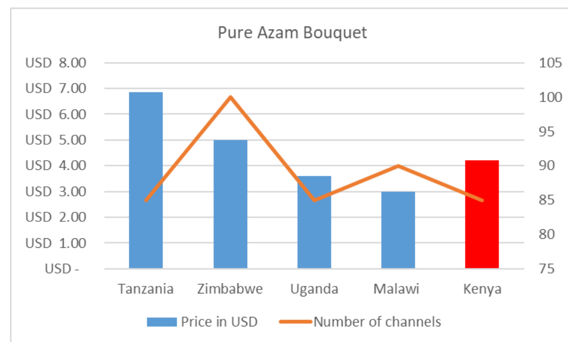


D.3 Azam Bouquets

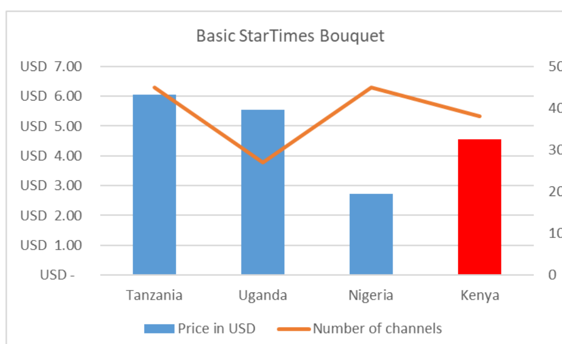


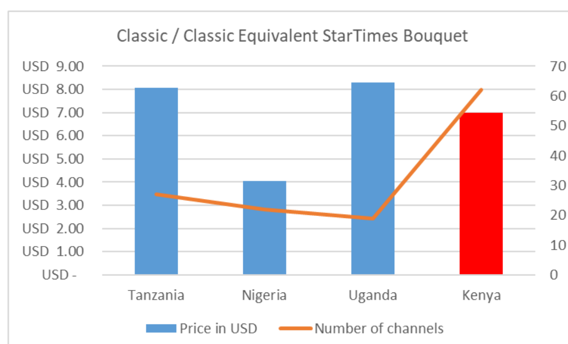


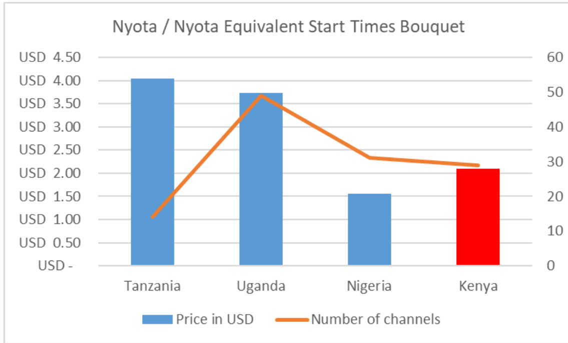




D.4 StarTimes Bouquets



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Price in USD
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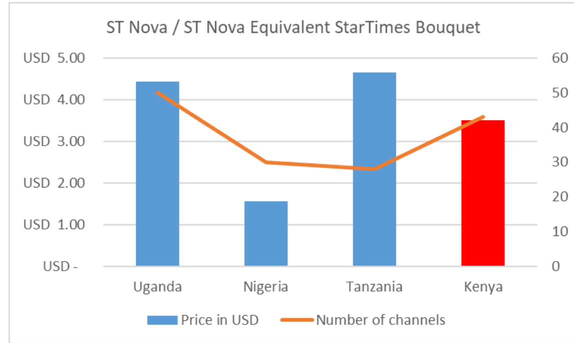
ST Nova / ST Nova Equivalent StarTimes Bouquet
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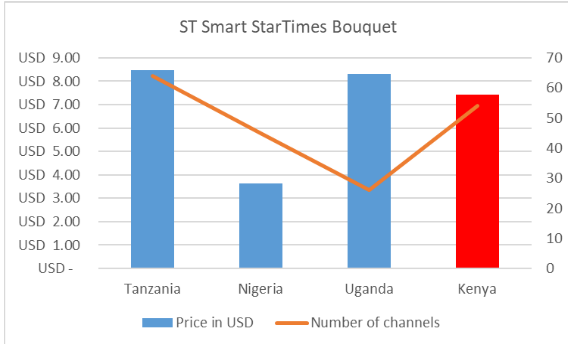
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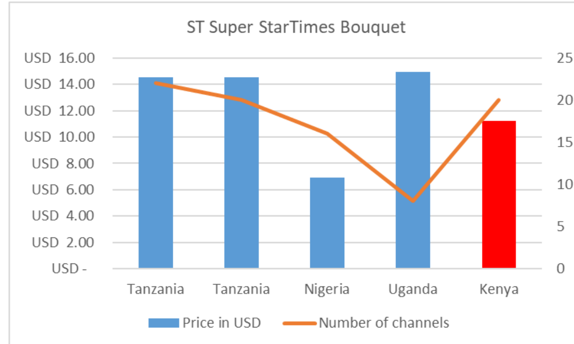
ST Super StarTimes Bouquet
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Appendix E Relevant definitions

“broadcaster” means any legal or natural person who composes or packages or distributes 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;

“broadcasting” means unidirectional conveyance of sounds or television programmes, whether encrypted or not by radio or other means of telecommunications, for reception by the public;

“broadcasting service” means any service which consists of the broadcasting of television or sound broadcasting programs to the public, sections of the public or subscribers to such a service;

“broadcasting signal distribution” means 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;

“community” includes a geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest;

“community broadcasting service” means a broadcasting service which meets all the following requirements—

(a) is fully controlled by a non-profit entity and carried on for nonprofitable purposes;

(b) serves a particular community;

(c) encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and

(d) may be funded by donations, grants, sponsorships or membership fees, or by any combination of the aforementioned;

“encryption” means a method transforming signals in a systematic way so that the signal would be unintelligible without a suitable receiving apparatus;

“free-to-air service” means a service which is broadcast without encryption and capable of being received by conventional broadcasting receiving apparatus;

“**media**” means broadcast, electronic and other types of media but does not include print and book publishing;

"**Media Council**" means the Media Council of Kenya established under the Media Council Act;

“private broadcaster” means a person licensed by the Commission under this Act to provide commercial broadcast services;

“programme” means sound, vision or a combination of both, intended to inform, educate or entertain, but does not include text or data;

“public broadcaster” means the Kenya Broadcasting Corporation established by the Kenya Broadcasting Corporation Act (Cap. 221);

“public broadcasting services” means broadcasting services of the public broadcaster;

“subscription management service” means a service which consists of the provision of support services to a subscription broadcasting service which support services may include, but not limited to,

subscriber management support, subscription fee collection, call centres, sales and marketing, and technical and installation support"

Appendix F Country reviews in full

F.1 The United Kingdom

The United Kingdom ("UK"), has been concerned with whether to regulate OTTs (particularly video on demand services), recognising the regulatory differences and the potential impact it has on competition between traditional broadcasters and OTT providers. There has been a particular focus on regulating content to ensure audience protection.

A first step was to engage in a consultation on regulating video on demand (VoD). This consultation was focused on "*considering whether UK audiences viewing TV-like on-demand programme content should receive the same or similar level of protections as if they were watching traditional television; and whether video-on-demand services not currently regulated by Ofcom and which target UK audiences should be brought within UK jurisdiction"*.[232]

The consultation noted the value that services provide to the UK stating *"Services such as Netflix and Amazon Prime Video provide huge value to UK audiences, and in many cases significant, and growing, contributions to the UK economy. However, these services are regulated far less robustly than traditional broadcast television stations, particularly in relation to the regulation of content standards and audience protection. Some services, including Netflix and Apple TV+, are not regulated in the UK at all. Alongside potentially putting audiences at risk, this also creates a potential competitive disadvantage between UK broadcasters and their internationally-funded online counterparts*."[233]

The document observed that *"…they are not subject to Ofcom's Broadcasting Code, which includes enhanced protections to audiences from harmful and offensive material. VoD services apply a range of audience protection tools, including password-protected accounts, pin codes, content warnings and age verification. However, these tools are not standardised across services and can lack familiar, trustworthy signposting and guidance, which can cause some concern and confusion, as well as potential for harm to users. The government is minded to align better the rules between VoD services that provide a TV-like experience and 'traditional' linear TV, ensuring UK audiences receive a similar level of protection no matter how they want to watch television. Not all VoD providers deliver a TV-like experience like mainstream services such as Netflix where viewers watch programming interchangeably with traditional linear services, therefore any regulatory change will need to be proportionate, to ensure freedom of expression is not undermined."*

Ultimately the government decided on a light touch approach to regulation with the development of a code akin to the existing "Broadcasting Code." It also requires notification (though not licensing).

Ofcom, the regulatory authority for telecommunications and broadcasting in the UK, has since published two relevant Guidance notes.

Firstly, it published a Guidance note for "on-demand programme services" ("ODPS") including video-on-demand services. These also include TV catch-up and online film services. Under the Communications Act, 2003 ("Act"), section 386A, "A service or a 'dissociable section' of a service will be an ODPS if:

(a) its principal purpose is the provision of programmes with or without sounds which consist of moving or still images, or of legible text, or of a combination of those things;

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[232] Government response to the consultation on audience protection standards on video-on-demand services - GOV.UK (www.gov.uk)

[233] Audience protection standards on Video-on-Demand Services - GOV.UK (www.gov.uk)

(b) access to it is on-demand; there is a person who has editorial responsibility for it;

(c) it is made available by that person for use by members of the public;

(d) that person's head office is in the UK; and

(e) editorial decisions about the service are taken in the UK,

meaning that the criteria are cumulative.

ODPS must ensure that:

- "specially restricted material" (which has been or would be classified in the R18 category by the British Board of Film Classification ("BBFC"), or material which might seriously impair the physical, mental or moral development of under-18s, is made available in a way which secures that under-18s will not normally see or hear it; and "prohibited material" (which would be refused a classification by the BBFC) does not appear;
- they do not contain any material likely to incite hatred based on race, sex, religion or nationality; and
- they comply with rules about product placement and sponsorship.

In 2021, Ofcom published guidance notes on the regulation of these services[234], recognizing the influence of the EU's 2018 Audio-Visual Media Services Directive[235] and the UK's 2020 Audiovisual Media Services Directive Regulation transposing the Directive[236], on their decision. It also distinguished between an ODPS and a video-sharing platform, noting that "The level of control that an online provider exercises over video content available on their service (see paragraphs 3.25 to 3.36 [of the Guidance]) is a key factor in assessing whether the service falls to be regulated as an ODPS under Part 4A of the Act or a video-sharing platform ("VSP") under Part 4B of the Act.

VSPs are defined as "a type of online video service which allow users to upload and share videos with the public" [237] and:

(a) the provision of videos to members of the public is the principal purpose of the service or of a dissociable section of the service; or

(b) the provision of videos to members of the public is an essential functionality of the service.

The service or dissociable section of a service must also meet all of the following criteria, as set out in section 368S(2) of the Act:

- it is provided by means of an electronic communications network;
- it is provided on a commercial basis;
- the person providing it does not have general control over what videos are available on it, but does have general control over the manner in which videos are organised on it (which includes being organised automatically or by way of algorithms, in particular by displaying, tagging and sequencing); and
- that person has the required connection with the United Kingdom.

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[234] Guidance notes: On-demand programme services – who needs to notify to Ofcom?

[235] EUR-Lex - 32018L1808 - EN - EUR-Lex (europa.eu)

[236] The Audiovisual Media Services Regulations 2020 (legislation.gov.uk)

[237] Ofcom's video-sharing platform framework: a guide for industry - Ofcom

In this context, a 'provider' or 'VSP provider' refers to the person who provides the relevant VSP service and includes a body of persons corporate or unincorporated VSPs are required to have appropriate measures to protect:

- all users from videos that are likely to incite violence or hatred against particular groups;
- all users from videos which include content which would be considered a criminal offence under laws relating to terrorism;
- child sexual abuse material; and racism and xenophobia;
- under-18s from videos containing pornography, extreme content and other material which might impair their physical, mental or moral development.
- Advertising standards must also be upheld.

While licensing was not required, from 2021, VSPs must notify Ofcom that they intend to operate in the UK[238].

The following diagram provides a helpful view of how to categorise service providers in the UK as either ODPSs or VSPs:

[238] Guidance notes: Video-sharing platforms – who needs to notify to Ofcom?

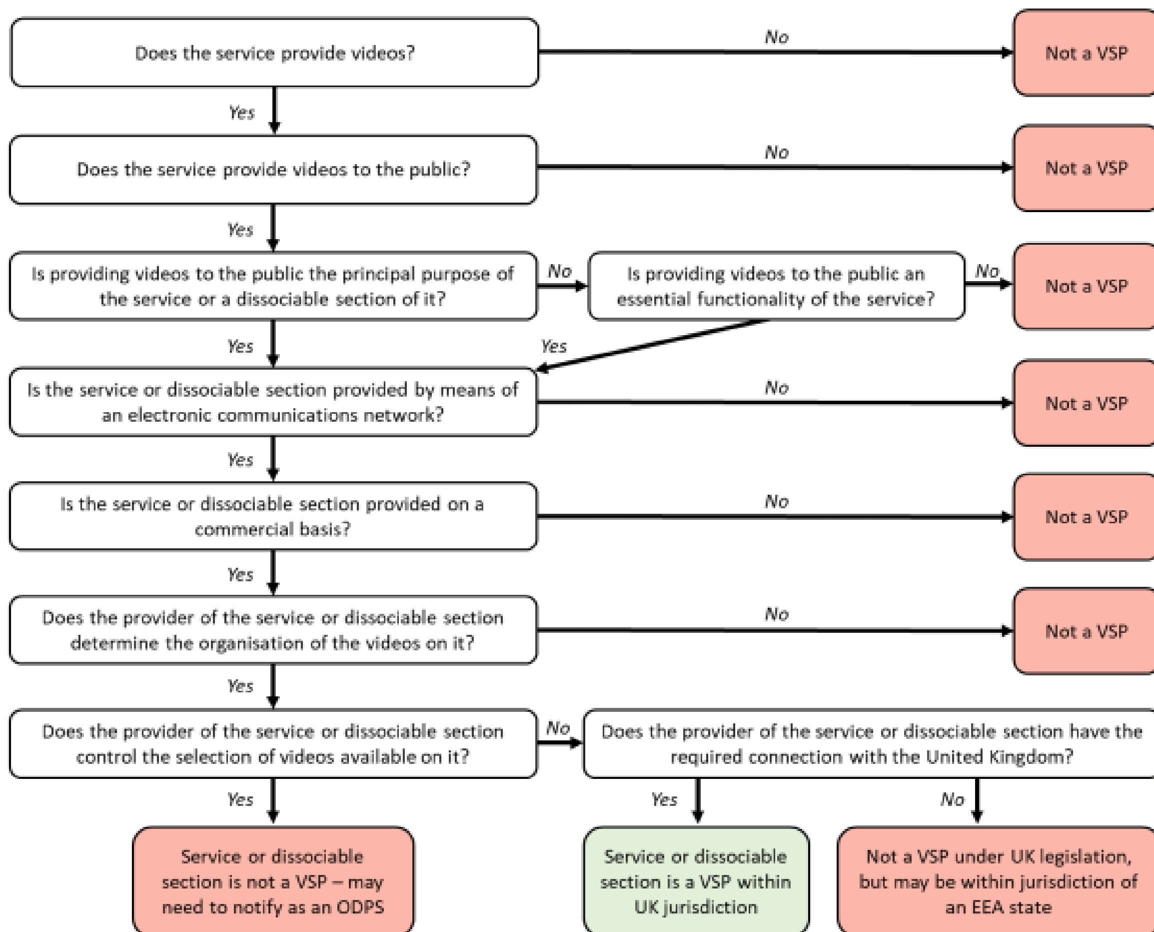

Figure 27: VSP criteria assessment process

Source: Ofcom. (2021). Video-sharing platforms: who neds to notify to Ofcom?. Available here. Page 7.

As such, Ofcom requires notification of operation as a ODPS or a VSP. Furthermore, there are obligations on the type of content they can share.

F.2 Nigeria

Between 2019 and 2021, Nigeria's National Assembly debated and held public hearings on a number of Bills (the "Bills"), which amongst other objectives sought to provide a framework for the regulation of OTTs, particularly pertaining to the broadcasting industry in Nigeria.

These Bills included:

1. HB 332: A Bill to amend the National Broadcasting Commission (NBC) Act (the "NBC Act Amendment Bill"); and
2. HB.514: A Bill to repeal the National Film and Video Censors Board [NFVCB] Act and Enact the National Film and Video Censorship, Classification and Exhibition Regulatory Commission Act (2019) (the "NFVCCERC Bill").

Neither of the Bills passed[239]. However, in February 2022, the then Minister of Information and Culture attempted to resubmit the NBC Act Amendment Bill to empower the NBC to regulate social media, internet broadcasting, and fix tariffs for pay TV services, among other functions. Again, the Bill failed to pass.

In 2021, the Nigerian Communications Commission defined OTTs as "…services "carried over the networks, delivering value to customers. These over-the-top services include services such as Internet Protocol (IP) Telephony, live streaming and other social media applications." In a paper[240] published in 2017, the NCC examined the regulatory approach to OTTs in different countries and concluded that more work would need to be done.

The initial approach to the regulation of OTTs in Nigeria was, in 2016, to focus primarily on social media, and to consider the impact of content transmitted across electronic communications networks.[241] In contrast to the position adopted by the NCC, the National Broadcasting Commission ("NBC") published a directive requiring all "online broadcast services" and social media platforms to apply for a broadcasting licence on the basis that it was empowered to regulate "radio and television stations including cable television services, direct satellite broadcast and any other medium of broadcasting".[242]

The Nigerian Broadcasting Code, 2016 was amended in 2020 to define "broadcasting" as transmission of programmes whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of a receiving apparatus" and "broadcasting service" is defined as "any service which consists of the unidirectional transmission and distribution to television and/or sound broadcasting material by cable or wireless means from anywhere in Nigeria for reception by the public". In addition, international broadcasters that transmit signals into Nigeria are required to "take cognisance of Nigeria's broadcast laws and the international principle of reciprocity".[243] In other words, it appears that all OTTs are regarded as 'broadcasters'.

The 2020 amendments to the Code were also aimed at prohibiting the acquisition of exclusive rights to cover sports events, and declaring that local 'broadcasters' should be permitted to sub-license these rights. According to Netflix, Amazon, and pay TV channels, iROKOtv and Africa Magic the new code "makes exclusivity illegal, compels content sub-licensing and aims to regulate the prices at which content is sub-licensed" which stated would lead them to reconsider investment in Nigeria.[244] In February 2023, the NBC urged foreign broadcasters which transmitted signals into Nigeria to apply for licences, and also "*called on the Internet Protocol Television (IPTV) and other broadcast stations streaming online, to register with the commission to avoid disconnection and prosecution*."

In August 2021 the amendment to the Code was challenged in court by the Media Rights Agenda[245] on the basis that NBC's attempt to regulate and license social media platforms constitutes a violation

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[239] Tribune Online. (2021). *NBC, NPC Act Amendment Bills: Not to be.* Available here.
[240] Nigerian Communications Commission. (Undated). *An overview of provision of the over-the-top (OTT) services*. Available here.
[241] Okonji, E. (2016). *NCC Explains OTT Technology Regulation*. This Day. Available here.
[242] Section 2(1)(d) of the Nigerian Broadcasting Commission Act, 2004.
[243] Paragraph 2.12.8 of the Amendment Code.
[244] Vanguard. (2020). *NBC Code: Netflix, Amazong, iROKOtv, Africa Magic may end investment in Nigeria.* Available here. https://newlive.vanguardngr.com/2020/06/nbc-code-netflix-amazon-irokotv-africa-magic-may-end-investment-in-nigeria/
[245] Media Career Development Network. (2021). *NBC sued over regulation, licensing of social media.* Available here.

of its right to freedom of expression under Section 39 of the Constitution; Article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9), Laws of the Federation of Nigeria, 2004; Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of the Universal Declaration of Human Rights (UDHR) as well as a breach of Nigeria's treaty obligations by virtue of its being a signatory to the international legal instruments; as well as various other declarations. In May 2023, a court overturned various fines imposed on social media platforms by the NBC in terms of the Code.[246] A few days later, the NBC announced its intention to appeal the finding.[247]

The regulatory position in Nigeria is therefore somewhat confused at present and is still being challenged.

F.3 South Africa

In 2016, the South African Parliament held hearings into the role of and reason for regulation of OTT players. South African MNOs in particular argued that *"they contend with certain domestic regulatory requirements that the international OTT service providers do not face, including universal service and access regulations, tariff regulations, taxation, and-the focus of this article - heavier-touch regulation in respect of the sharing of customer data".*[248] Hitting back, representatives of international OTT service providers argued that MNOs and OTT service providers are in a symbiotic relationship, and that OTT service providers should not be burdened with the same "*cumbersome*" regulations that the South African MNOs carry."

Towards the end of 2020, the Department of Communications and Digital Technologies published a White Paper – a draft policy on Audio and Audio-Visual Content Services.[249] This draft policy grappled with the idea of convergence and new technology trends and how it – the draft policy argued – was already changing the broadcasting environment. The draft proposed to create a category of audio-visual services of which the traditional broadcasting services would form a sub-set.[250] The draft also proposed to change the definitions of various terms associated with broadcasting, to "distinguish between broadcasting services (linear) and non-linear services in graduated fashion and create a level playing field between competing services by imposing regulations and public interest obligations on licensees".

The approach proposed was to consist of 3 categories of licence, aimed at the type of platform across which OTTs were supplied, but also at the revenue earned by each platform (with reference to global size and the impact of this on the South African entity). The policy also contemplated 3 categories of service – broadcasting, on-demand content services, and video-sharing platform services. The on-demand content services would be assessed having regard to whether they could be said to compete with broadcasting services and whether their revenue exceeded the threshold to be set by

[246] Nnochiri, I. (2023). *NBC lacks power to impose fines on broadcast stations*. Available here.
[247] Onyedika-Ugoeze, A.N. (2023). *NBC plans to appeal Court judgement that forbase it from fining broadcast stations.* Available here.
[248] Parliamentary Monitoring Group (PMG). (2016). *Over-the-Top (OTT) policy and regulatory options Meeting Summary*. 26 January. Cape Town: Portfolio Committee on Telecommunications and Postal Services, Parliament of South Africa. Available here and here.
[249] Government Gazette No. 43797. (2020). *Draft White Paper: Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa.* Available here.
[250] Clause 3.2.1 of the draft policy.

Government. The video-sharing platform service could be exempted provided that content would be subject to a code of conduct.[251]

No further steps have been taken in relation to the policy or any of the proposals in it. However, in May 2021, Parliament held further hearings, this time specifically into the possible regulation of Netflix.[252] The parties agreed that Netflix would be subject to certain rulings by the Film and Publications Board ("FPB")[253] which is created by the Film and Publications Act, 1996[254]. The FPB had already entered into an arrangement with Netflix in 2020[255] which also claimed to regulate "streaming services such as Netflix and Showmax, cinema houses including Nu-Metro and Ster-Kinekor, gaming companies such as Konami and Capcom, as well as Apple TV and Google." The Independent Communications Authority of South Africa ("ICASA") which regulates broadcasting, electronic communications and postal services, does not have authority to regulate "content", despite regulating "broadcasting" and "broadcasting services".

Under the Film and Publications Amendment Regulations, 2022[256] Netflix (and other OTTs providing content services) must self-regulate within the guidelines of the Board, to classify and rated their content specifically to protect children being exposed to content that could be harmful, and must submit their ratings to the Board.

The Regulations rely on, among others, the following definitions:

(a) "commercial online distributor" means a distributor in relation to films, games and publications which are distributed for commercial purposes using the internet (there is no definition of a "non-commercial online distributor" but this term is used in the Regulations);

(b) "commercial purposes" means to sell or hire, offer to sell or hire, or cause to be sold or hire, in exchange for commercial consideration;

(c) "home-entertainment format" means a film intended for viewing in private, through any electronic, mechanical or other device;

(d) "internet" means the Internet as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); and

(e) "rating" means the allocation of an appropriate age restriction on a film, game or publication to – (a) provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care; and (b) protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

Part IV of the Regulations is headed "Accreditation of commercial online distributors' classification system" which largely relates to the classification in South Africa of any foreign or international classification. Part V is headed "Submission of online content for classification" and relates to the

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[251] Clause 3.4 of the draft policy.
[252] Broadcast Media Africa. (2021). *South Africa: Govt Proposes Content Regulations to Netflix.* Available here.
[253] Film and Publication Board. (Undated). *About Us*. Available here.
[254] The objects of the Act are "Regulate the creation, production, possession, and distribution of certain publications and certain films by means of classification, the imposition of age restrictions, and giving of consumer advice; And make exploitative use of children in pornographic publications, films, or on the internet punishable."
[255] Hlalethwa, Z. (2020). *Netflix surrendurs to the Film and Publication Board.* The Mail & Guardian. Available here.
[256] Government Gazette No. 11484. (2022). *Film and Publications Amendment Regulations, 2022.* Available here.

classification of films, games and "publications", which are published online. Under Part VI, online distributors may apply to self-classify content, and the FBP may undertake monitoring. Part 11 requires internet service providers to register with the FPB, and must "indicate in the application form all measures, or steps taken or put in place to ensure that children are not exposed to child pornography and pornography".

Other chapters deal with the procedure for classification and exemption, appeals and take-down orders, and importantly, with complaints.

The focus of regulation in South Africa is therefore also, at present, limited to the nature of the content distributed by OTTs, and not on the licensing of them by ICASA as either broadcasters or electronic communications network or service providers. The arguments raised by regarding the unfair advantage that OTTs competing with it have because they are not regulated in the same way, have to date, not been considered in the regulatory framework.

F.4 Canada

The genesis of the move to regulate OTTs in Canada can be summed up by this statement, published in 2020 by the Canadian Heritage Minister, "*One system for our traditional broadcasters and a separate system for online broadcasters simply doesn't work…This outdated regulatory framework is not only unfair for our Canadian businesses, it threatens Canadian jobs and it undermines our ability to tell our own Canadian stories*." The press noted that in their view, the reason Bill C-10 (a Bill to introduce OTT regulation) matters to both domestic and foreign OTT services is money, specifically lots and lots of money for Canadian content producers.[257]

The Bill made it clear that it would also apply to the Internet and that "online undertakings" would be considered to be a distinct class of broadcasting undertaking. "online undertaking" was defined as an undertaking *for the transmission or retransmission of programs over the Internet to the public by means of broadcasting receiving apparatus*. However, users of social media services uploading material to be shared with other users which were not affiliated with the service provider, would not be subject to broadcasting regulation. Online undertakings were to be excluded from licensing (although registration would be required) and instead of imposing obligations through licences, the Commission was to be given power to make orders imposing conditions on activities of "broadcasting undertakings". This power would include conditions about the proportion of programmes that had to be Canadian. The Commission was also given regulation-making and order-making power to require persons carrying on broadcasting undertakings to make payments to support the Canadian broadcasting system.[258] Numerous other provisions dealt with seizures, reporting and investigations.

However, in 2021 the Bill stalled. Its full name – the Broadcast Modernisation Act – was rejected by the Senate, whose view was that the Bill would encroach on freedom of expression. This view was not held specifically in relation to OTTs, but in relation to the possible regulation of user-generated content. Government representatives noted that the approach to legislation was to remain platform-agnostic and technology-agnostic, however the Bill did propose to regulate platforms allowing the

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[257] Careless, J. (2020). *Canada moves to regulate OTT, Charge Netflix, and other OTT service millions*. StreamingMedia. Available here.

[258] Government of Canada. (2020). *Bill C-10: An Act to amend the Broadcasting Act and to make consequential amendments to other Acts 2020*. Available here.

distribution of OTTs,[259] which confused the issue significantly. Furthermore, concerns were raised about the failure of the Bill to explicitly protect content uploaded on social media which, it was felt, could have serious implications for freedom of speech.

In 2019 and 2020 when the Bill was first introduced, the major and most familiar OTT players were Netflix, Amazon and Disney +. In 2023 in Canada, this number has grown, along with the size of the players. Subscription OTT services, led by Netflix, account for most of the growth in video viewership although YouTube has the largest viewership.[260]

In May 2023, the Canadian Radio-Television and Telecommunications Commission (CRTC) launched new public consultations about aspects of regulating online services that echo those in the failed Bill[261]:

- what contributions online services will need to make to support the Canadian broadcasting system – the system is likely to recognize different models and propose different contributions
- which online streaming services need to be registered and which services will be exempted (the proposal is that streaming services with annual revenues under $10 million not be required to register, and that registration would not apply to individual Canadians or creators of user-generated content)
- basic conditions of service to be imposed on certain streaming services

In the meantime, Bill C-11 passed in April 2023, making amendments to the Broadcasting Act which now include the regulation of online streaming services that provide their programming to the public,[262] but not user-generated content. The amendments to this Act therefore provide that CRTC may make certain orders and decisions and introduce certain regulations, but they must consult before doing so. The Canadian regulatory system provides for a gradual introduction of changes to a regulatory framework, in the case of broadcasting, the amendments will be implemented across 3 phases.[263]

The development of this Act has been mired in political controversy for years – making it a somewhat complex matter to report on. Over 67 hours of witness testimony was presented to the Senate to assist in their consideration of the Bill, the longest ever. In summary, online streaming services are regulated in Canada in a light-touch manner, with specific attention being paid to the manner in which they will, in future, contribute to the development and funding of Canadian programming.

F.5 Argentina

As far back as 2015, telecoms operators and particularly cable television operators in Argentina have been calling for the regulation of OTTs, claiming they (the licensees) are limited in the provision of services, whereas OTTs do not have to invest in fixed infrastructure (like they do) but can provide

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[259] Smith, D. (2021). *What Fate Ahead for Bill C-10?* Centre for International Governance Innovation. Available here.

[260] Briggs, P. (2021). *Subscription OTT services help push Canadian viewership to 28 Million.* Insider Intelligence. Available here.

[261] Government of Canada. (2023). *CRTC launches consultations to modernize broadcasting system*. Available here.

[262] Government of Canada. 1991. *Broadcasting Act 1991 S.C.* Available here.

[263] Aiello, R. *What is Bill C-11? Everything you need to know*. CTV News. Available here. Accessed 14 September 2023.

whatever services they want to over any platform. In addition, concerns have been expressed about the obligations on the OTT providers, many of which are foreign, to provide local content and to pay tax in Argentina.

The uptake of OTTs in Argentina is significant[264]:

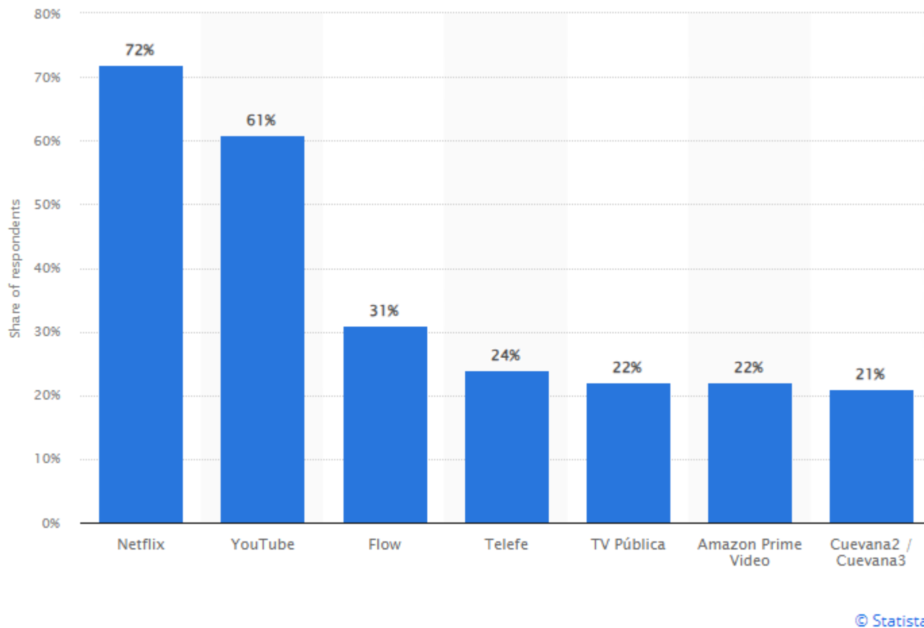

Figure 28: Uptake of OTT in Argentina

Two operators in Argentina have, since 2019, launched their own streaming services – Claro[265], and Movistar[266]. These services will, presumably, not be subject to the taxes whereas the local content obligations (see below) will apply.

In 2019, the then President proposed a law to enable the national regulatory authority, ENACOM, to require OTTs to incorporate a percentage of local content into their offerings either in the catalogue (or bouquet) or in terms of prominence in scheduling. In the same year, Bill 709S/19, called the "Short Content Law" (Ley Corta de Contenidos), was tabled in March 2019. This Bill would have amended Argentina's audiovisual and telecommunications laws, including new provisions to require Video-on-Demand (VOD) and Subscription Video-on-Demand (SVOD) providers to ensure that at least 10 % of their catalogues are national productions. This was not passed although the Chamber of Independent Television Producers (CAPIT) was in favour of the Bill, because the Argentine Internet Chamber (CABASE) among others, was opposed to it on the grounds that it was contrary to the promotion of technological development and discouraged investment.[267]

[264] Guttman, A. (2023). *Leading video streaming services in Argentina 2021*. Statista. Available here.
[265] Bertran, A. (2020). *Claro launches new 'Claro Streaming' in Argentina, Paraguay and Uruguay*. NextTV International. Available here.
[266] Bertran, A. (2019). *Movistar to launch Movistar Play in Argentina*. Nextv News. Available here.
[267] TMG Telecom. (2021). *Trends and issues in online video regulation in the Americas*. Available here.

Approaching it from a different angle, in October 2020, the Argentine Congress passed the Law 27.570106 modifying Law 27.506, entitled "Promotion of the Knowledge Economy." The new law promoted different digital and technological activities through tax incentives, subject to their development in Argentine territory and compliance with the criteria defined by the law. This was enforced further by Presidential Decree 1034/2020, as well as Resolution 4/2021 passed by the Ministry of Productive Development. This could potentially benefit online producers if they are in fact regulated, by offering tax incentives in relation to design, pre-production, and post-production across a wide range of audiovisual content provided local content requirements are in place.

From June 2018, VAT of 21% has been levied on digital services including online services such as Netflix, Amazon Video, and Apple TV. Foreign OTT providers making services available to end users located in Argentina are affected and although the online providers themselves are not required to pay the VAT, intermediaries, such as credit card companies, are designated to act as collection agents.

Other financial burdens apply to OTT providers providing services from outside Argentina in terms of Decree 99/2019 on the Law of Social Solidarity and Productive Reactivation in the Framework of Public Emergency. This decree provides for a "*temporary 5-year tax for an Inclusive and Supportive Argentina (PAIS)*" which is an 8% tax on each transaction charged to online services provided from abroad to end users located in Argentina. The services include audiovisual content (e.g., streaming) that involves access to and/or downloading of images, text, information, video, music, and games. Credit card companies must collect the tax from end users and remit it to the government.

In a regional survey of the regulation of the internet, the perception of the Internet seems to have changed - going from being considered a democratizing tool to being perceived in many cases as a "growing threat"[268], with ENACOM blocking access to several websites and apps, often without offering an explanation (as recently as 2023).[269]

This may be one of the reasons why Argentinians have been actively seeking VPNs that allow them to connect to American Netflix services[270]. Netflix Argentina makes fewer services available and the content is more limited, but Netflix itself prohibits using a different VPN for access.

F.6 MENA

In this section we consider the OTT market in the Middle East and North Africa (MENA) as it is growing substantially, and demonstrates the general position in regulation in this region. With over 516 million internet users in the region (higher per capita than global internet penetration), and year-over-year growth between 2.9% and 4.0% through 2026, more and more of the population will be online, according to eMarketer[271]. It's not just the marketing journals and firms that are predicting massive

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[268] Del Campo, A. (2018). *Internet regulation and its impact on freedom of expression in Latin America.* Center for Studies on Freedom of Expression and Access to Information (CELE) of the Universidad de Palermo for the Legislative Observatory. Available here.

[269] ENACOM. (Undated). *Website blocking*. Available here. Accessed 6 October 2023.

[270] Urban VPN. (Undated). *Argentina VPN – stay anonymous with FREE Argentinian IP Addresses*. Available here. Accessed 14 September 2023.

[271] Brightcove Marketing. (Undated). *MENA's OTT opportunity and why 2022 is the year to seize it*. Available here. Accessed 14 September 2023.

growth, but research and advisory firms like PwC are also excited about the prospect of more digital services in the region.

PwC's 2020 report notes, "*Digital revenue is expected to make up 42% of total entertainment and media revenue in MENA in 2020, up from 37% last year, and then to grow steadily to reach 46% of revenues by 2024. Globally, digital spending will account for the majority of revenue for the first time this year, reaching 51% of total revenue... OTT video revenues are expected to grow by 12.3% CAGR between 2019 and 2024, spurred by greater choice on both regional and international OTT video platforms. This also means OTT video services taking share from the pay-TV market, which is forecast to grow by just 0.6% in the same period.*"[272] PwC's advice to governments and regulators in the region is to tread lightly, to allow forms of self-regulation, to focus on whether or not content is appropriate, and incentivizing digital infrastructure rollouts to connect more consumers. In some cases, regulators may want to give thought to local content preservation and growth.

Analysys Mason, an international consultancy, advises telcos to partner with OTTs as they forecast that OTTs will put pressure on MNO revenue from their own video propositions. They also believe "*that traditional pay-TV and OTT video services will largely co-exist over the next 5 years in the Middle East and North Africa…[2] OTT video services will thrive in countries where consumers have large disposable incomes and where the broadband penetration is high (such as Qatar and the UAE).*"[273] Analysys Mason included the results of a study of the takeup of online video services in the region, by country, in 2019, and the result ("the Analysys Mason report") is shown below:

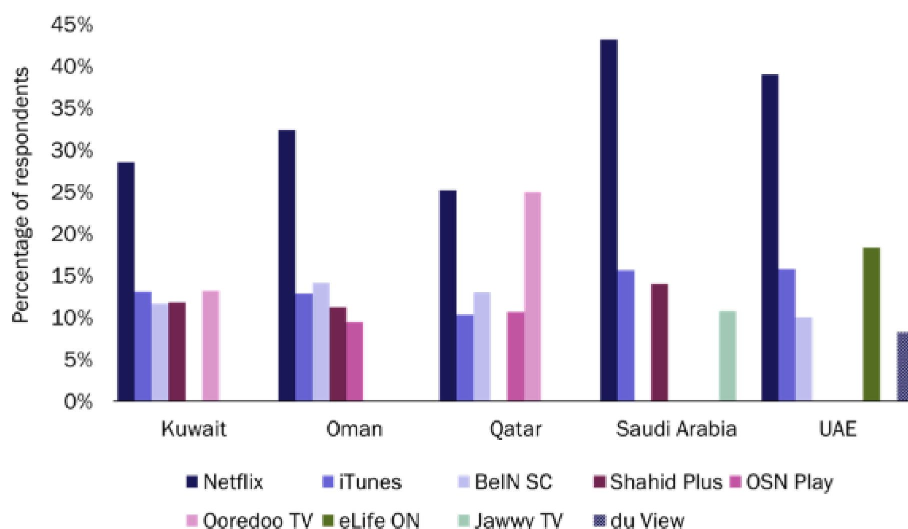

Figure 29: Takeup of online video services in the region, by country, in 2019

Source: Figure 3 of Analysys Mason report, 2020

F.7 So how do regulatory authorities in MENA deal with OTTs?

In a 2015 ITU publication[274], the "world of OTTs" was characterized as:

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[272] PwC. (2020). *MENA Entertainment and Media Outlook 2020-2024*. Available here.
[273] Analysys Mason. (2020). *Operators in the Middle East should partner with OTT players*. Available here.
[274] ITU. (2017). *OTT and related online services in Arab Region*. Available here.

- No Regulation (own policy/rules)
- No service license required
- No intercompany obligations
- Disruptive models (free, freemium, Ad based etc)
- The World as Market Place
- Scalable investment (no obligation of availability)
- Limited direct employment

In the same report and in the same year, the resulting obligations on regulatory authorities were summarized as:

- Protect our citizens' interests
- Provide incentives for the industry
- Attend to national-level needs and issues
- Create and sustain investor confidence
- Remain mindful of future needs of the consumers and the industry.

In 2020 and just as COVID began to take its toll, telecoms regulators in Oman and the UAE banned the voice and video calling features of most OTT communications apps, while regulators in other countries in the Gulf Co-operation Council (Bahrain, Kuwait, Qatar and Saudi Arabia) were gradually allowing more OTT apps to be used, including WhatsApp. Operators in Oman and the UAE enforced the ban while partnering with third-party OTT service providers, such as BOTIM, to offer app-to-app calling tariffs (in the UAE) and OTT apps for making international calls (such as Ooredoo Talk in Oman). However, these apps required customers to be connected to their operator's mobile or Wi-Fi network.[275]

In late November 2022, E-vision, a subsidiary of e& (previously Etisalat), announced the launch of a single consolidated OTT service including film and TV content without the need to subscribe to each OTT separately. The consolidated streaming service describes itself as "the largest and most trusted content aggregator in the UAE.

In Oman, the same is true. However, from the advertising of VPNs, it would seem that censorship remains a feature of most MENA countries: "*Whether you live in Oman or are planning to visit anytime soon, we strongly recommend getting yourself one of the best VPN services on the market. Like many of its neighboring countries, the Sultanate of Oman is a dangerous place to be online. Let's see why.*

Similarly to other governments across the Arabian Peninsula, authorities actively censor online content deemed illegal or offensive to both the regime and local religious beliefs. Many VoIP (Voice over Internet Protocol) apps like Skype, WhatsApp and Viber are blocked, too. This means that an Oman VPN is necessary to be able to keep up with family and friends during your stay. A Virtual Private Network is security software that spoofs your real IP location to make you appear on the other side of the world in no time. At the same time, it encrypts all the data leaving your device to boost your online anonymity. That's also essential as authorities might monitor connections on the lookout of illegal content. Tourists can even benefit from a VPN for Oman to watch all their favorite TV series and sport matches as they would be at home. All you need to do is connect to a server based in your home country to bypass geo-restrictions on streaming platforms."

[275] Analysys Mason. (2020). COVID-19: *Operators in the UAE should prepare for a gradual lift of the ban on VOIP apps after the crisis*. Available here.

In Oman, censorship is implemented under the Law on the Censorship of Artistic Works (Royal Decree 65/97). This framework effectively censors all audio, visual and audiovisual artistic works including movies, and it seems likely that streaming would fall under this law. A person may not display or perform an artistic work without a licence from the Ministry of Information which is empowered to censor a work in order to protect "public order, public morals and state interests". [276] This attitude has come under fire, more recently because the practice of censorship is not widely publicized and the lack of transparency regarding the practice of content monitoring and the reasons for numerous take-down notices has been criticized.[277]

The same can be said of the UAE. The TDRA is the regulatory authority in the UAE. It states that its purpose is to regulate, but with conditions: "*When regulating the Telecommunications sector, TDRA carefully analyses the need for regulation. In an otherwise functional market, very little regulation is necessary to ensure appropriate consumer rights and fair competition as most markets will ensure such factors via a natural selection of the best/most competitive services/products. However, due to the nature of the telecommunication market; the unusually high cost of establishing the required infrastructure and the appropriate allocation of scarce resources the market forces doesn´t work on its own. Therefore, there is a need to regulate the Telecommunications Sector in order to ensure the supply, the prices, quality of service and consumer rights.*

When TDRA - with the co-operation of the industry - identifies areas that need to be regulated in order to correct a competitive imbalance TDRA will consult with the relevant stakeholders, take their point of views into consideration when finalizing a regulatory instrument. Further to maintaining close dialog with the industry TDRA will investigating the need for regulation investigate best practices in other jurisdictions. TDRA will only regulate where appropriate and will where market forces are sufficient de-regulate and let the market regulate itself."

There is no specific OTT regulation in place by the TDRA that we could find, but it is possible that other laws and regulations prohibit certain types of content regardless of platform, for religious reasons.

The TDRA (the regulatory authority) is tasked with implementation of the Internet Access Management Regulatory Policy ("IAM Regulatory Policy") and must co-ordinate with the Media Regulatory Office and the licensed internet service providers ("ISPs") in the UAE. The policy contains various categories which must be considered by ISPs to ensure the security of the internet and to protect end users from "harmful websites" meaning those that contain material that is contrary to the religious and ethical values of the UAE.

TDRA monitors content made available to users in the UAE in order to notify website operators of any breach (including a potential breach). Licensees are required to block online content if requested to do so by the TDRA. Content in the following categories is restricted under the IAM Regulatory Policy as well as other prohibitions not covered here, under the Federal Law No.15 for 1980 Concerning Publications and Publishing:[278]

1. bypassing blocked content
3. pornography, nudity and vice
4. impersonation, fraud and phishing
5. insult, slander and defamation

[276] Al-Farsi, M. (2023). Banned Barbie: *Censorship law in Oman*. Decree Blog. Available here.
[277] Campbell, E., Spandana, S. (2021). *Content moderation trends in the MENA region: censorship, discrimination by design, and linguistic challenges*. Middle East Institute. Available here.
[278] UAE Government. (Undated). *Media regulation*. The Official Portal of the UAE Government. Available here. Accessed 14 September 2023.

6. invasion of privacy
7. offences against the UAE and the public order
8. supporting criminal acts and skills
9. drugs
10. medical and pharmaceutical practices in violation of the laws
11. infringement of intellectual property rights
12. discrimination, racism and contempt of religion
13. viruses and malicious programs
14. promotion of or trading in prohibited commodities and services
15. illegal communication services
16. gambling
17. terrorism
18. prohibited top level domains
19. illegal activities
20. any content prohibited upon order from judicial authorities, or in accordance with the law279.

A 2009 Regulation on Voice-over-Internet-Protocols (VOIP) requires any provider to be licensed, and to comply with strict technical protocols.

In summary, while OTTs themselves do not appear to be subject to telecoms or broadcasting regulation in these MENA countries, they are subject to content restrictions and some censorship.

[279] UAE Government. (Undated). *Media* Regulation. The Official Portal of the UAE Government. Available here.