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**COMMISSION FINDS THAT THE AGREEMENT BETWEEN SABC AND MULTICHOICE ENABLED MULTICHOICE TO INFLUENCE THE STRATEGIC DIRECTION OF THE SABC**

On Friday, 09 November 2018, the Competition Commission (the Commission) filed a report with the Competition Tribunal (the Tribunal) in which it found that the South African Broadcasting Corporation (SABC) Limited (SABC) and MultiChoice (Proprietary) Limited (MultiChoice) implemented a merger transaction, without notifying the Commission, in contravention of the Competition Act.

This is pursuant to a judgement and order delivered by the Constitutional Court in the case of *S.O.S. Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* [2018] ZACC 37.

On 28 September 2018 the Constitutional Court granted the Commission the right to exercise its non-coercive and coercive investigative powers in investigating whether or not the Commercial and Master Channel Distribution Agreement (“the Agreement”) concluded between the SABC and MultiChoice on 3 July 2013 constitutes a notifiable merger transaction and ordered the Commission to file a report on the matter to the Tribunal within 30 days.

In February 2015, Caxton and CTP Publishers and Printers Limited, the S.O.S Support Public Broadcasting Coalition, and the Media Monitoring Project Benefit Trust, bypassed the Commission and made an application directly to the Tribunal for an order compelling the SABC and MultiChoice to notify the Agreement to the Commission. The Tribunal dismissed the application on the basis of the evidence that was before it at that time. In a subsequent appeal, in June 2016, the Competition Appeal Court (CAC) also found that on the basis of the evidence that had been provided to the Tribunal, it could not conclude that the Agreement fell within the definition of a merger in terms of section 12 of the Competition Act.

However, the CAC found that since this matter concerns a public broadcaster and is a matter of public interest, the CAC ordered the SABC and MultiChoice to provide further documents to the Commission and directed the Commission to file a report with the Tribunal recommending whether or not the Agreement gives rise to a notifiable merger transaction.

The Commission found that the documents which were provided to it by the SABC and MultiChoice were not sufficient to enable the Commission to perform its court mandated task. As a result, the Commission sought to interview various executives and officials of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the Agreement. This was opposed by the SABC and MultiChoice, and the question whether the Commission could conduct these interviews was ultimately resolved by the Constitutional Court in favour of the Commission.

Following the judgement of the Constitutional Court, the Commission interviewed under oath various executives and officials of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the Agreement. The Commission also assessed and analysed the documentary evidence which had been provided to it by the SABC and MultiChoice pursuant to the June 2016 order of the CAC.

The Commission found that, on the basis of evidence provided to it, the undertaking made by the SABC to MultiChoice in terms of the Agreement not to encrypt its Free to Air Channels influenced the SABC's policy on the encryption of the SABC's Free to Air Channels in contravention of section 13A of the Competition Act. Failure to seek regulatory approval of a merger transaction before it is implemented constitutes a contravention of this section.

Essentially, in terms of the Agreement, the SABC undertook to MultiChoice, which presently enjoys a dominant position in the pay TV market, that all channel signals in respect of the SABC's Free to Air Channels as transmitted by the SABC on its Digital Terrestrial Television (DTT) platform shall "be broadcast or transmitted by or on behalf of the SABC, unencrypted and without any conditional access system and shall always be available and receivable by M-Net DTT Set-Top Boxes distributed in South Africa throughout the term, without requiring anything other than the installation of an M-Net DTT Set-Top Box."

In its report, the Commission found, on the evidence provided to it, that MultiChoice, through the Agreement, influenced the SABC's position on the encryption of its Free to Air Channels, as the SABC's position had vacillated at different times between supporting Set Top Box control (including encryption) and not supporting Set Top Box Control.

In the Agreement however, the SABC, categorically and unequivocally undertook in favour of MultiChoice not to encrypt all its channel signals in respect of its Free to Air Channels transmitted on its DTT platform. The Commission found that the encryption of SABC's Free to Air Channels including Set Top Box Control would have, *inter alia*, enabled the entry of new entrants into the market and that the Agreement had the effect of protecting MultiChoice's dominance in the Pay TV market.

In terms of the Competition Act, the ability by one company to materially influence the policy of another company through various legal instruments including an agreement constitutes a notifiable merger transaction which must first be approved by competition authorities before it is implemented.

The reason why the Competition Act requires that such agreements should first be scrutinised by the competition authorities before they are implemented is because they could have a significant impact on the competitive process and raise significant public interest issues, which ought to be investigated by competition authorities. In this case, the SABC and MultiChoice failed to seek prior approval of the Commission before implementing the Agreement.

The Commission has recommended to the Tribunal that it should call upon the SABC and MultiChoice to file the Agreement as a merger, and that the Commission will exercise its rights in terms of the Act to initiate proceedings in the Tribunal against the SABC and MultiChoice as it has found that the Agreement has been implemented without the necessary regulatory approval of the competition authorities in contravention of section 13A of the Competition Act.

The Commission also found that a second aspect of the Agreement, which was also the subject to the Commission's investigation, relating to the licensing by the SABC to MultiChoice of its Entertainment Channel did not constitute a merger transaction on account of the fact that, *inter alia*, the SABC had the final say on what went into the channel and certain clauses in the Agreement were amended before the launch of the Entertainment Channel in 2015.

The Commission's recommendation to the Tribunal is not determinative and the Tribunal will in due course make a final determination on the matter. The Commission will request the Tribunal to convene a pre-hearing as soon as possible to issue directives on the matter.

**Detailed background to the matter is attached**

**[ENDS]**

**Issued by:**

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