

Tying, bundling or packaging of pay television channels: who benefits – the consumer, service provider or programme content provider?

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Abstract

In South Africa, pay television has been dominated by one broadcaster until the recent launch of TopTV. Thus, competition in this market sector was non-existent. Currently, television channels are sold as a bundle or package from which subscribers can choose. However, subscribers cannot choose any other channels except for the bundles or packages available. Currently consumers face the addition of new television channels to their bundles or packages which affect their subscription fees. Further, new television channels are being added to existing bundles regardless of whether subscribers want those channels or not. Therefore, consumers are deprived of their right of choice and the benefits of free and fair competition. Therefore the availability of a pay-per-channel subscription model and the ability to select channels of choice are important in order to address issues of costs, quality programming, offensive programmes and the addition of new television channels.

INTRODUCTION

Regulation of the broadcasting industry

In South Africa, the broadcasting industry is regulated by a governing body called ICASA (Independent Communications Authority of South Africa). This body was established in terms of the Independent Communications Authority of South Africa Act 64 of 2000 as amended.¹ In regulating the industry, ICASA must do so in the public interest and ensure fairness and

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¹ Section 3 of ICASA Act 64 of 2000.

diversity of views representing South African society. The body must perform its functions in terms of statute,² including the Broadcasting Act 4 of 1999 and the Electronic Communications Act 36 of 2005 (EC Act) as amended. These statutes require ICASA to promote competition, reasonable prices, choice and quality in broadcasting, and the information and communications technology (ICT) industry.³ Competition must be promoted in the light of the Competition Act 89 of 1998 as amended.⁴

Competition law

The main purpose of competition law is to control or regulate a market so as to promote competition within that market.⁵ The Competition Act 89 of 1998 as amended (Competition Act) is the principal legislation through which competition in different markets is regulated and maintained. To achieve its objectives and purpose,⁶ the Competition Act prohibits certain conduct or practices as being anti-competitive or contravening competition law. Anti-competitive conduct or practices are either *per se* prohibited,⁷ or prohibited subject to the rule of reason.⁸ Practices prohibited *per se*, refer to those practices which cannot be validated by a justification, whilst practices prohibited subject to the rule of reason may be justified and will then not contravene competition law principles.

In this article, I shall analyse the practices of pay television broadcasters in South Africa, and assess whether these practices comply with or fall foul of the Competition Act, in particular section 8(d)(iii). I shall also consider whether these practices limit competition amongst programme content providers and benefit or advantage consumers.

Section 8(d)(iii) of the Competition Act

In terms of section 8(d)(iii) of the Competition Act, a dominant firm may not sell goods or services to a purchaser on condition that other goods or services unrelated to the object of the contract are purchased. It may also not force a purchaser to accept a condition that is not related to the object of the

² Section 4 of ICASA Act 64 of 2000.

³ Sections 13 and 67 of EC Act 36 of 2005 and ss 2 and 3 of the Broadcasting Act 4 of 1999.

⁴ Section 66 of EC Act 36 of 2005.

⁵ Martin Brassey, John Campbell, Robert Leigh, Charles Simkins, David Unterhalter & Jerome Wilson *Competition law* (1ed 2002) at 1.

⁶ See BR Rutherford 'An overview of the new Competition Act' (1999) 11 *SA Merc LJ* 300, on the objectives of the Competition Act 89 of 1998.

⁷ Brassey *et al* n 5 at 139–140.

⁸ *Ibid.*

contract.⁹ Although such conduct is not prohibited *per se*, it is subject to analysis in terms of the rule of reason.¹⁰ This type of abuse is generally referred to as ‘tying’ (other terms include bundling, joint distribution, third line forcing, and integration).¹¹ Tying refers to a situation where one product can only be purchased if another unrelated product is purchased.¹² Bundling refers to selling products as a pair, or making products available only as a bundle.¹³ Many modern firms opt for bundling or tying to promote efficiency, for example buying a cellular phone and a sim card (you cannot use one item or product without the other), or as a cost saving measure.¹⁴

In *Sappi Fine Papers (Pty) Ltd and The Competition Commission*,¹⁵ it was held that in order to prove contravention of section 8(d)(iii), it must be alleged that the transgressor is a dominant firm in the market as defined in section 7 of the Competition Act. If not dominant, a firm will not have market power to impose tying conditions over its customers. It must further be established that the transgressor made the sale of the goods or services conditional upon the purchaser buying goods or services unrelated to the object of the contract; or forced the purchaser to accept a condition not related to the object of the contract. A dominant firm which is proved to have contravened section 8(d)(iii) may defend its conduct. However, if it is also a monopoly, to defend the contravention of section 8(d)(iii) successfully, such a firm must show extensive pro-competitive gains which outweigh the effect of its monopoly status. This is because a would-be purchaser has

⁹ For a full discussion of s 8(d) of the Competition Act 89 of 1998 as amended see Philip Sutherland & Katherine Kemp *Competition law of South Africa* (2000) at 7–69, Brassey *et al* n 5 above at 197–223.

¹⁰ Section 8(d) of the Competition Act and *Sappi Fine Papers (Pty) Ltd and The Competition Commission* case no 62/CR/Nov01 at 12 par 40 to 41.

¹¹ Sutherland *et al* n 9 above at 7–69 and Jean Tirole ‘The analysis of tying cases: a primer’ (2005) 1 *Competition Policy International* 1 at 6.

¹² *Ibid.* The tying product (the product which the consumer needs/wants – in demand product) is only available to the purchaser if the purchaser buys the tied product (the product not necessarily needed by the purchaser – a product with less demand in the market). In the case of the issue under discussion, a less demanded channel is bundled and sold at the expense of an in demand channel.

¹³ Tirole n 11 above. For an example of bundling, all or nothing, see *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979). Section 8(d)(iii) has the same effect as art 82(d) of the EC Treaty.

¹⁴ In this case the alleged costs saving will only materialise if a consumer needs the bundle; see also US Department of Justice and Federal Trade Commission *Antitrust enforcement and intellectual property rights: promoting innovation and competition* 2007 at 103.

¹⁵ *Sappi Fine Papers (Pty) Ltd and The Competition Commission* at par 34.

literally no choice but to use the monopolist's product and so accept any condition imposed in a contract of sale.¹⁶

The pro-competitive gains versus the anti-competitive effects of the prohibited conduct on competition

Some economists are of the view that tying or bundling yield pro-competitive gains as opposed to being anti-competitive.¹⁷ This statement holds true for consumers who need the products as a bundle; but it is doubtful where a consumer needs only one product within that bundle or package.¹⁸ Therefore, bundling does not always yield benefits to consumers, especially if it leads to elimination of competition amongst suppliers.

Not all tie-ins are abusive, as the conduct may still be justified by a dominant firm under the rule of reason or balancing test.¹⁹ Often tie-ins may increase efficiency in quality and safety, production and distribution, and may result in cost savings which accrue to the consumer. Tie-ins may also be anti-competitive, for example where a firm is not merely dominant but also enjoys a monopoly. However, although bundling has both advantages and disadvantages, a consumer's right to choose should not be reduced by what a firm perceives as a benefit for consumers. This should remain a decision for the consumer alone.

PRODUCTS AND SERVICES OFFERED BY PAY-TELEVISION BROADCASTERS

Multichoice

Multichoice is the leading pay television broadcaster in South Africa. Until TopTv's recent launch,²⁰ it was the only pay television broadcaster. Multichoice combines entertainment programming available from television programme content providers across the globe, to provide a television viewing experience to subscribers.²¹ It has a combination of national and international channels broadcast to over 2, 6 million subscribers in forty-one

¹⁶ *Id* at par 43.

¹⁷ See David Evans & Michael Salinger 'Why do firms bundle and tie? Evidence from competitive markets and implications for tying law' 22 *Yale J On Reg.* 37 (2005), US Department of Justice and Federal Trade Commission n 14 above at 103 accessible at: <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

¹⁸ In this instance, a consumer would be paying more than what he would have paid.

¹⁹ Brassey *et al* n 5 above at 213.

²⁰ See www.toptv.co.za.

²¹ See www.dstv.co.za.

countries across Africa.²² National channels included are SABC channels, e-tv and M-Net channels. It extends its services to other parts of Africa. Services are provided through a number of companies, namely: Digital Satellite Television (DSTV), Electronics Media Networks (M-Net), Digital Satellite Television Mobile (DSTV Mobile), Supersport and Oracle.

In its operations, DSTV offers the public or consumers a variety of bundled or packaged television channels which it broadcasts through digital satellite. Consumers cannot purchase or subscribe to any combination of channels other than those in the listed packages, namely:²³

Figure 1: *Packages offered by Multichoice (bundling) current as in March 2010*

Products	Channels	Audio	Interactive	Radio	Subscription per month
DSTV Premium	89	41	3	29	R499
DSTV Compact	37	11	3	29	R219
DSTV Select 1	16	5	3	29	R148
DSTV Select 2	16	5	3	29	R148
DSTV Easy View	14	1	3	29	R20
DSTV Portuguesa	8	1	3	29	R237
DSTV Indian North	14	1	3	29	R237
DSTV Indian South	11	1	3	29	R179,70

²² See www.mnet.co.za.

²³ See www.dstv.com.

Figure 2: Packages offered by Multichoice (bundling) current as in May 2010

Products	Channels	Audio	Interactive	Radio	Subscription per month
DSTV Premium	90	41	3	29	R529
DSTV Compact	44	12	3	29	R232
DSTV Select 1	34	11	3	29	R148
DSTV Select 2	32	11	3	29	R148
DSTV Lite	25	11	-	29	R99
DSTV Easy View	14	1	3	29	R20
DSTV Portuguesa	8	1	3	29	R251,20
DSTV Indian North				9	R20
DSTV Indian South	11	1	3	29	R190,50

TopTV

TopTV is the newly established pay television officially launched in May 2010.²⁴ It offers a number of packages with international and national programme content or channels for subscribers or consumers. Consumers can purchase any of the packages they can afford. Although TopTV has brought competition to the broadcasting industry, its methodology of selling television channels is similar to that of its competitor and does not change or restructure operations in the industry. The only pressure exerted by TopTV in the pay television industry is the introduction of a cheaper bouquet. However, whether the bouquet has channels of interest to subscribers is a

²⁴ See www.toptv.co.za.

different matter which can only be addressed by a pay per channel mode of subscription.

Figure 3: *Packages offered by TopTV (bundling) current as in May 2010*

Product	Variety	Kids and Music	Entertainment and Knowledge	Ultimate Movies	Monthly Subscription
Channels	24	13	11	6	
	X				R99
	X	X			R159
	X		X		R159
	X	X	X		189
	X	X		X	R219
	X		X	X	R219
	X	X	X	X	R249

US CONSIDERATIONS ON BUNDLING

In the US, the Federal Communications Commission (FCC) has issued reports on the issue of bundling television channels over a number of years. The FCC Report²⁵ (First Report) showed that although paying per channel would allow consumers to pay for what they want to watch, the majority of consumers would not see a reduction in costs.²⁶ It recommended that policies be formulated to enhance consumer choice, foster competition, and provide for tools to enable consumers to prevent objectionable programming from entering their homes.²⁷ A report on the regulation of indecency (‘Indecency report’) found that a pay per channel model was required for various reasons, in particular because it would allow consumers to regulate indecent and offensive programme content, an issues that was of concern to many consumers.²⁸ The indecency report supported a pay per channel mode of

²⁵ Federal Communications Commission, Media Bureau *Report on the Packaging and Sale of Video Programming Services to the Public* 18 November 2004 (The First Report).

²⁶ *Id* at 6.

²⁷ *Id* at 7.

²⁸ See Lili Levi ‘The First Report: FCC’s Regulation of Indecency’ August 6, 2007 (Indecency Report), for more information on regulation of offensive and indecent programme content accessible at SSRN available at: <http://ssrn.com/abstract=1023822>.

subscription. Further, consumers required a pay per channel model for other reasons which they viewed as more important, including actual increased costs, the right to choose, and quality.²⁹ In summary, the First Report did not support a pay per channel subscription model. FCC chair Michael Powell, commented as follows on this report in the Media Bureau Report:³⁰

We remain committed to our long-standing policy goals of making communications and media technologies available to all Americans at affordable rates and fostering diversity in our nation's media. Many Americans are frustrated with year after year increases in their pay-television bills and we will continue to address those concerns through the recommendations provided in this report and other avenues available to the Commission.

In a further report the fairness and accuracy of the First report was assessed.³¹ In terms of this report, the First Report had failed to provide a balanced view of the consequences of implementing a pay per channel subscription model. The further report also showed that:

- (1) Pure à la carte [*pay per channel subscription model*]³² can yield lower prices for consumers compared with bundling, while generating sufficient revenue to cover network costs;
- (2) Pure bundles can preclude customers from purchasing programming that they would purchase under an à la carte regime;
- (3) Bundling may cause minority or niche programming not to be produced;
- (4) Bundling may cause less preferred networks to be carried instead of networks that are more strongly preferred by a smaller group of consumers;
- and
- (5) Bundling may cause a network to be carried even though its cost exceeds its value to consumers.³³

This report was supported by a panel of peer reviewers who considered it fair and scientifically well founded.³⁴ However, it was also criticised by an

²⁹ Peer review of December 21, 2005 draft *Further Report on the Packaging and Sale of Video Programming Services to the Public* (Further Report) available at www.fcc.gov and see Levi The Indecency Report n 28 above.

³⁰ News Media Information 19 November 2004, (The Chairman was referring to recommendations as stated in the first report) www.fcc.gov.

³¹ See Further Report n 29 above.

³² *À la carte* refers to pay per channel subscription model, my words in italics.

³³ Further Report n 29 above..

³⁴ The Office of Management and Budget requires that the government information be subject to peer review, see <http://www.whitehouse.gov/omb/management/> and www.fcc.gov on the peer review of the draft report of a further report.

economic and consulting firm which supported the First Report.³⁵ None of the reports which discussed the issue of pay per channel was supported unanimously by stakeholders. A poll conducted by the Consumer Union and Concerned Women for America³⁶ showed that less than one-third of Americans were satisfied with the bundling system, while more than two-thirds preferred to choose their own programmes and channels.

Cable pay television broadcasters have increased prices by more than ninety per cent since 1995.³⁷ This is because more channels are being added to the various bundles.³⁸ Interestingly, companies which refuse to offer a pay per channel subscription model in the US, are providing their channels on a pay per channel basis in other countries outside the US.

A US decision illustrates the general advantages and disadvantages of bundling. In *Broadcast Music Inc v Columbia Broadcasting System Inc*,³⁹ CBS instituted an action alleging that BMI's and ASCAP's conduct was in contravention of the Sherman Act. BMI and ASCAP are non-profit organisations which collect fees on behalf of copyright owners (artists and authors) who are affiliated to them. This affiliation enabled BMI and ASCAP to acquire non-exclusive rights to the musical compositions of the copyright owners. In conducting its business, BMI and ASCAP had an 'all or nothing' approach to television broadcasters or users who wanted to use these musical compositions. They would only grant a blanket licence to users, who in turn had to pay a fixed amount or percentage for use of musical compositions. The Second Circuit ruled in favour of CBS and held that the blanket licence system was *per se* a violation prohibited by the Sherman Act.⁴⁰

On appeal, the Court of Appeals reversed the Second Circuit's decision and held that it had erred in holding that blanket licensing constituted illegal price fixing *per se* prohibited by the Sherman Act. In this sentence, *per se* refers to outright and 'in itself'. It remanded the case for review under the

³⁵ Jeffrey A Eisenach & Richard E Ludwick *FCC's Further Report on a la Carte Pricing of Cable Television* 7 March 2006 accessible at www.capanalysis.com.

³⁶ <http://www.hearushow.org/cablesatellite/5/> for more information on the organisations see www.cwfa.org and www.consumerunion.org

³⁷ John McCain & Kevin Martin 'Make cable a la carte' *Los Angeles Times* 25 May 2006.

³⁸ *Ibid.*

³⁹ *Broadcast Music Inc v Columbia Broadcasting System Inc* n 13 above.

⁴⁰ *Id* at 6–7.

rule of reason.⁴¹ The court stated further that BMI and ASCAP did not have exclusive rights to the musical compositions; CBS and other broadcasters were free to negotiate with copyright owners individually for licencing; and finally that blanket licences offered benefits to both buyers and sellers and were not there merely to stifle competition.⁴² So, in this instance bundling was generally advantageous as it facilitated licence procurements and payment.

This case differs from the conduct under discussion because the sellers of music compositions did not hold the exclusive rights to them, while pay television broadcasters have exclusive rights to certain programme content or channels.⁴³ Further, the reason for bundling is not merely about saving costs to benefit consumers, but includes issues of licencing, monitoring, and integrated sales. However, this case touches on the present issue as in both instances the content is sold as a bundle ('all or nothing approach'). So, in both instances, consumers are not given the opportunity to choose what they wish to buy.

AN ANALYSIS OF PAY TELEVISION IN SOUTH AFRICA

A dominant firm is prohibited from bundling or packaging its products unless it can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act. Since pay television broadcasters in countries including Canada,⁴⁴ Hong Kong,⁴⁵ China,⁴⁶ and Australia⁴⁷ can provide pay per channel or pay per programme, it should also

⁴¹ In a dissenting judgment, Justice Stevens agreed with the Court of Appeals decision that a blanket licence is not price fixing prohibited per se under the Sherman Act. However, he did not agree with the decision to remand the matter for review under the rule of reason. Justice Stevens stated that there was sufficient evidence before the Court of Appeals to enable adjudication of the matter under the rule of reason. He stated that the all or nothing approach violates the Sherman Act because it was the only method of licensing music compositions. Similarly, the bundle or nothing approach offered by pay television broadcasters will fall foul of the competition laws of South Africa. Further, consumers will not be able to get exclusive channels other than subscribing to a specific broadcaster.

⁴² *Broadcast Music Inc v Columbia Broadcasting System Inc* n 13 above at 20.

⁴³ Multichoice has exclusive rights pertaining to Mnet and Supersport content (in-house produced channels or programmes).

⁴⁴ See www.channelcanada.com.

⁴⁵ See www.nowtv.com.hk.

⁴⁶ See www.cntv.cn for more information on the development of the telecommunications sector in China see Sylvia M Kierkegaard & Grace Li (eds) 'Challenges of opportunity: 3G rollout in China in the economic downturn' in *Legal discourse in cyberlaw and trade* (2009) 186.

⁴⁷ www.wintv.com.au.

be technologically possible for a country like South Africa to provide such services. In the USA, the only pro-competitive gain raised by pay-television broadcasters to avert the introduction of a pay per channel subscription model was that bundling actually saved costs for consumers. In contrast, in South Africa to date, there has been only one pay television broadcaster and so no competition. The single television broadcaster offered bundles rather than a pay per channel option because of established practices in the industry and monetary benefits linked to bundling and packaging. Further, the entry of TopTV into the market of pay television broadcasters will not have much impact as it adopts similar business model (ie packaging and bundling). Packaging or bundling usually generates anti-competitive results especially if the number of competing firms is small.⁴⁸ For example, in the broadcasting industry, it is not necessary for programme content providers who can get their channels broadcast and sold as a bundle, to produce quality programming, or even to compete with other programme content providers. One of the reasons which drove the FCC and the American public to raise concerns over the bundling and packaging of channels was the constant increase in subscription fees.⁴⁹ This is also an annual problem for South Africans.⁵⁰ Although such increases are accompanied by the provision of additional channels, consumers do not have the opportunity to choose or opt out of these additional channels. ICASA has so far not acted on competitive regulation and broadcasting, in particular the practice of bundling and packaging of pay television channels. However, the competition authorities are free to recommend the restructuring of the broadcasting industry as they made similar recommendations to ICASA regarding the telecommunications industry.⁵¹

South Africa is a developing country with forty per cent of households earning an average salary of around R50 000 per annum.⁵² For consumers earning such a salary, bundling will not necessarily yield benefits, in

⁴⁸ Andrew N Kleit 'Ascap versus BMI (versus CBS): modeling competition between and bundling by performance rights organizations' *Economic Enquiry* 38 (2000) 579 at 589.

⁴⁹ News Media Information 19 November 2004 www.fcc.gov.

⁵⁰ See Figures 1 and 2 comparatively for early 2010 prices and mid 2010 prices for difference in increases and packages.

⁵¹ The Competition Authorities has recommended that ICASA review the inter-connection charges which are charged between mobile cellular phones operators; see also 'ICASA Approves the Revised Interconnection Agreement Submitted by Vodacom, Cell C and MTN', which can be accessed at:

<http://www.icasa.org.za/Corporate/MediaReleases/tabid/280/Default.aspx> and Thabiso Machiko 'Competition Commission targets cellular operators', accessible at: <http://www.busrep.co.za/index.php?fSectionId=552&fArticleId=3334381>

⁵² GN 755 in GG 32420, 20 July 2009 at 24.

particular if they do not subscribe to the large package of channels. These consumers will probably be better off paying for the few channels they can afford rather than subscribing to the cheapest package with no or few channels that interest them. They will also be in a position to choose which television channels they want to receive or watch.⁵³

CONCLUSION AND RECOMMENDATIONS

Figures 1, 2 and 3 above show the number of channels per package created by pay-television broadcasters. Consumers can purchase only the listed packages. Further, annual increases linked to certain channels or programmes affect consumers adversely and eventually make specific packages unaffordable. Yet consumers cannot create their own affordable package or bundle. The position is even worse if consumers subscribe to a package when they need only fifty per cent of the available channels.

As illustrated above, a pay per channel subscription model will enable consumers to avoid objectionable or indecent programme content or channels; ensure quality programme content; and foster competition. Currently, newly introduced channels are included in existing packages at increased cost to consumers. Recently, consumers had to vote against a proposed new channel which they felt was indecent.⁵⁴ Further, such channel would have increased costs of subscription. A pay per channel option would have made this exercise unnecessary because consumers would have exercised their right of choice by not subscribing to an adult channel. In South Africa bundling and packaging is the only model for selling television channels to consumers. In Canada, digital subscribers enjoy the benefits of a pay per channel subscription model. They are also afforded further savings when buying or creating their own bundle of channels, for example a five-pack, ten-pack or fifteen-pack channel. Although bundling and packaging can, to a certain extent, benefit consumers, it should not be the only model by which television channels are sold. Consumers should be given the opportunity to choose their own channels and pay for what they want to watch. I think that other methods of selling television channels, like the practice in Canada or the pay per channel model used by NowTV in Hong Kong, should be considered for South Africa. This will enable consumers to

⁵³ Bundling has given DSTV problems when they tried to add a pornographic channel to the packages. Subscribers criticised the idea, with more than 41 000 people voting against the idea; and eventually DSTV decided not to continue with the idea, see 'DSTV porn battle continues', accessible at:
<http://mybroadband.co.za/news/telecoms/11721.html>.

⁵⁴ *Ibid.*

subscribe to or buy channels of their choice, and eventually competition between programme content providers will be enhanced.

ICASA should ensure that the public get the benefits of fair competition and the right of choice as envisaged in the EC Act and the Competition Act. ICASA must also ensure that broadcasters are not forced by programme content providers or suppliers, through, for example supply agreements, to sell television channels as a bundle.