Competition Study – the broadcasting industry in Kenya
Dissemination Workshop

March 2012
Contents

Project scope

Framework

Assessment of competition

Proposed measures
## Project Scope

### Objectives of Competition Study

<table>
<thead>
<tr>
<th>Study Objectives</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Identify the various markets within Kenyan broadcasting industry, including the number and demographic of players</td>
</tr>
<tr>
<td>• Establish the levels and extent of competition in the various broadcasting markets identified</td>
</tr>
<tr>
<td>• Identify the market barriers, if any, that prevent competition and the growth of the players</td>
</tr>
<tr>
<td>• Evaluate the effectiveness of the broadcast spectrum allocation to, and use by, broadcasters and suggest appropriate remedial interventions</td>
</tr>
<tr>
<td>• Evaluate the extent of dominance and establish potential anticompetitive behaviour in the broadcasting market in general and specific market segments in Kenya</td>
</tr>
<tr>
<td>• Review the effectiveness of the existing legal and regulatory framework in supporting a robust competition policy for the broadcasting sector;</td>
</tr>
<tr>
<td>• Provide a proposal on the best ways by which the identified barriers and factors hindering growth can be eliminated; and</td>
</tr>
<tr>
<td>• Identify possible regulatory areas of concern and recommend how they can be addressed.</td>
</tr>
</tbody>
</table>

## Summary of assessment framework

Kenyan TV supply chain
Various players operate across different levels of the supply chain

Content Layer
- Kenyan in-house production
  Major players: KBC, DSTV
- Kenyan external production
  Example Players: Vivid Features, Sound & Picture Works, Dreamcatcher, Big Ideas Entertainment, Homeboyz
- Foreign Production
  Major players: East Africa TV, BBC, CNN
- IPR holders
  Major players: English Premier League, Confederation of African Football

Channel Layer
- Public television
  KBC Channel 1
- Community television
- Commercial television
  Example players: KBC (Channel 2), KTN, Nation TV, Family TV, Citizen TV, Sayare TV, Channel 42, K24, DStv/CTN/Zuku (multiple channels), East Africa TV, Radio Africa Holdings, M-Net

Wholesale Distribution Layer
- Satellite operators
  Major players: Multi-choice, Intelsat, SES S.A.
- Cable operators
  Major players: Zuku TV
- Analogue terrestrial
  Major player: KBC
- Digital terrestrial
  Major players: KBC (Signet), Pan African Network Group
- Telecoms data networks
  Players: mobile operators

Retail Distribution Layer
- Free-to-air
  Digital terrestrial TV
  Major players: KBC (Channel I and II, KTN, Nation TV, Citizen TV, Family TV)
- Subscription
  Satellite TV
  Major players: DStv, Zuku TV
  Cable TV
  Major player: Zuku TV
  Digital terrestrial TV
  Example players: Smart TV, Gotv (DStv)
  IPTV & Mobile
  Major players: Safaricom

Consumers

Policy & Regulatory Authorities
- CCK
- Competition Authority
- Ministry of Information & ICT
- Kenya Film Commission

Subscription management services
Kenyan Radio Supply chain
Key broadcasters in Kenya have radio and TV activities

Advertisers

Content Layer

- Kenyan in-house production
  Example players: KBC
- Kenyan external production
  Example players: Dreamcatcher
- Foreign Production
  Example players: BBC
- IPR holders
  Example players: Sports rights holders

Radio Station Layer

- Public radio
  Major player: KBC (multiple channels including KBC General Service, KBC National Service, Luo, Coro)
- Community radio
  Example players: Radio Mang’elete, Koch FM
- Commercial radio
  Example players: KBC Metro, Nation Radio, Kiss FM, Citizen radio, Capital FM, Family FM, Inooro, Jambo Radio

Distribution Layer

- Analogue terrestrial
  Major players: KBC
- Telecoms networks
  Major players: Zain, Jamii Telecom, Safaricom

Policy & Regulatory Authorities

- CCK
- Competition Authority
- Ministry of Information & ICT

Listeners
Data Collection

We have interviewed and collected data from the following

Information/ Data Sources

1. Interviews with stakeholders
2. Data questionnaires
3. Desk-based Research
4. Information from the CCK/ other Kenyan regulatory authorities

<table>
<thead>
<tr>
<th>S. No.</th>
<th>List of stakeholders</th>
<th>Date of Interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Competition Authority</td>
<td>11 October</td>
</tr>
<tr>
<td>2.</td>
<td>Ministry of Information and Communications</td>
<td>12 October</td>
</tr>
<tr>
<td>3.</td>
<td>Dream Catcher Productions</td>
<td>26 October</td>
</tr>
<tr>
<td>4.</td>
<td>Safaricom</td>
<td>27 October</td>
</tr>
<tr>
<td>5.</td>
<td>Digital Mobile TV</td>
<td>27 October</td>
</tr>
<tr>
<td>6.</td>
<td>Nation Media Group</td>
<td>28 October</td>
</tr>
<tr>
<td>7.</td>
<td>Multichoice Kenya Limited</td>
<td>31 October</td>
</tr>
<tr>
<td>8.</td>
<td>Radio Mangelete</td>
<td>1 November</td>
</tr>
<tr>
<td>9.</td>
<td>Radio Africa</td>
<td>1 November</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. No.</th>
<th>List of stakeholders</th>
<th>Date of Interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.</td>
<td>Kenya Broadcasting Corporation-Signet</td>
<td>2 November</td>
</tr>
<tr>
<td>11.</td>
<td>Zuku/Wananchi Group</td>
<td>3 November</td>
</tr>
<tr>
<td>12.</td>
<td>Koch FM</td>
<td>3 November</td>
</tr>
<tr>
<td>13.</td>
<td>Kenya Television Network</td>
<td>4 November</td>
</tr>
<tr>
<td>14.</td>
<td>Royal Media Services</td>
<td>7 November</td>
</tr>
<tr>
<td>15.</td>
<td>Scanad</td>
<td>7 November</td>
</tr>
<tr>
<td>16.</td>
<td>Smart TV</td>
<td>7 November</td>
</tr>
<tr>
<td>17.</td>
<td>Star FM</td>
<td>17 November</td>
</tr>
</tbody>
</table>
Market definition: summary
Ten markets are identified along the broadcast supply chain

In line with standard methodologies in competition analysis, markets have been identified by considering demand and supply-side substitution between services, as well as homogeneity of competitive conditions as appropriate.
Key issues investigated
Focus issues of competition study

Content Layer
- Broadcaster-producer terms of trade

Channel Layer
- Spectrum allocations
- Cross-ownership

Wholesale Distribution Layer
- Access to digital terrestrial signal distribution

Retail Distribution Layer
- Platform access to particular content

KBC public service and commercial activities

Competition and regulatory framework

Consumers
Framework for deciding on prioritisation of regulatory measures

The framework is consistent with international precedent

1. Potential competition issue identified
   - Market with ineffective competition?
   - Single or collective market dominance?
   - Abuse of dominance?
   - Anti-competitive agreement?
   - Legal barriers?

2. Barriers to entry
   - High and non-transitory barriers to entry?
   - Efficiencies which offset competition distortion?

3. Tendency towards effective competition
   - Prospectively competitive market?

4. Sufficiency of competition law
   - Risk of market tilting?
   - Difficulty to address non-competitive behaviour

5. How to intervene?
   - At which level of the supply chain?
   - What type of remedy? (behavioural, structural, amendments to legislation/policy)

A set of regulatory measures that may be appropriate to address distortions in particular markets, subject to further investigation.
Free to air radio market
There are over one hundred radio stations in Kenya

- There is moderate concentration in the radio sector at the Group level
- There are five main radio groups, with no player having a market share above 35-40%
- There is also a long tail of independent radio stations with shares below 5%
- At the regional level, approximately 8-12 radio stations are listened at; 3-5 national stations are typically available by region, together with a number of regional stations
- Four national stations broadcast in Kiswahili (Radio Citizen, KBC Kiswahili, Milele, Q FM) while some of the regional stations broadcast in vernacular languages. Listeners have a choice of at least a number of radio stations
- Each radio Group negotiates a significant share of its revenue via between one and three advertising agencies, indicating that the radio Groups face countervailing power
- Our interviews indicated that the radio advertising market is fiercely competitive

<table>
<thead>
<tr>
<th>Radio stations by region</th>
<th>Nairobi</th>
<th>Central</th>
<th>Lake</th>
<th>Western</th>
<th>Rift</th>
<th>Coast</th>
</tr>
</thead>
<tbody>
<tr>
<td>No stations with active listening</td>
<td>12</td>
<td>8</td>
<td>10</td>
<td>9</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>No national stations</td>
<td>5</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>No regional stations</td>
<td>7</td>
<td>5</td>
<td>5</td>
<td>4</td>
<td>7</td>
<td>7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>No stations with active listening</th>
<th>Lower Eastern</th>
<th>Upper Eastern</th>
<th>South Nyanza</th>
<th>South Rift</th>
<th>North Western</th>
<th>North Eastern</th>
</tr>
</thead>
<tbody>
<tr>
<td>No national stations</td>
<td>12</td>
<td>13</td>
<td>8</td>
<td>10</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td>No regional stations</td>
<td>4</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>No regional stations</td>
<td>8</td>
<td>8</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>6</td>
</tr>
</tbody>
</table>

Source: Synovate
Spectrum allocation: radio
There is currently some allocated radio spectrum which is not on air

Frequency allocation to radio broadcasters

<table>
<thead>
<tr>
<th>Frequency Operator</th>
<th>% Spectrum Allocated</th>
<th>% Spectrum used</th>
<th>% Average Share of Listening</th>
<th>Ratio of share of listening to share of frequencies used for own service</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal Media Services</td>
<td>15%</td>
<td>21%</td>
<td>34%</td>
<td>1.67</td>
</tr>
<tr>
<td>Radio Africa</td>
<td>6%</td>
<td>13%</td>
<td>6%</td>
<td>0.47</td>
</tr>
<tr>
<td>Kenya Broadcasting Corporation</td>
<td>20%</td>
<td>10%</td>
<td>18%</td>
<td>1.71</td>
</tr>
<tr>
<td>Nation Media Group</td>
<td>2%</td>
<td>5%</td>
<td>6%</td>
<td>1.34</td>
</tr>
<tr>
<td>Digitopia</td>
<td>4%</td>
<td>4%</td>
<td>2%</td>
<td>0.49</td>
</tr>
<tr>
<td>Kalee Ltd</td>
<td>1%</td>
<td>2%</td>
<td>3%</td>
<td>1.31</td>
</tr>
<tr>
<td>Others</td>
<td>52%</td>
<td>45%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- A total of 436 frequencies are allocated
- 129 frequencies, or 30% of the total spectrum allocation in Kenya, are not currently on-air
- The current use of the spectrum may not be fully efficient, as there is demand for spectrum from other broadcasters
- Although different factors drive listening share, importantly content, it appears that those radio broadcasting groups with higher listening shares also have access to a higher share of frequencies

Source: CCK, Synovate, Deloitte analysis

Conclusion: the free to air radio market is effectively competitive at present, although spectrum use should be considered
Free to air TV market
The market is competitive

TV broadcasters, shares of advertising revenue

- The period between 1997 and 2005 saw an influx in the number of television stations licensed and launched in Kenya.
- There are fifteen FTA TV channels on-air in Kenya. The largest broadcasters by viewing and revenue share are: Citizen TV, NTV, KTN and KBC.
- The free to air TV market is concentrated, most notably in terms of viewing share.
- TV broadcasters in Kenya face countervailing power from the advertising agencies, which is expected to put pressure on their ability to attempt to raise advertising rates above competitive levels.
- With the roll-out of the DTT platform there will be increased capacity available reducing barriers to entry to launch new channels.

Share of broadcaster advertising revenue negotiated through particular agency

<table>
<thead>
<tr>
<th>Agency</th>
<th>Citizen TV</th>
<th>KTN TV</th>
<th>NTV</th>
<th>KBC TV</th>
<th>KISS TV</th>
<th>K24</th>
<th>E AFRICA</th>
<th>CLASSIC TV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scan</td>
<td>69%</td>
<td>76%</td>
<td>78%</td>
<td>77%</td>
<td>58%</td>
<td>72%</td>
<td>60%</td>
<td></td>
</tr>
<tr>
<td>Ogilvy</td>
<td>11%</td>
<td>11%</td>
<td>7%</td>
<td>12%</td>
<td>1%</td>
<td>27%</td>
<td>11%</td>
<td></td>
</tr>
<tr>
<td>Young</td>
<td>11%</td>
<td>4%</td>
<td>7%</td>
<td>8%</td>
<td>4%</td>
<td>0%</td>
<td>1%</td>
<td>11%</td>
</tr>
<tr>
<td>Other</td>
<td>9%</td>
<td>9%</td>
<td>7%</td>
<td>4%</td>
<td>40%</td>
<td>0%</td>
<td>18%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
</tbody>
</table>

Source: Synovate
Spectrum allocation: TV
While there are some allocated TV frequencies not on air, promotion of competition should focus on DTT

<table>
<thead>
<tr>
<th>Frequency Operator</th>
<th>Television station</th>
<th>% Spectrum Allocated</th>
<th>% Spectrum for own use</th>
<th>Average Share of Viewing</th>
<th>Ratio viewing share to spectrum used</th>
</tr>
</thead>
<tbody>
<tr>
<td>KBC</td>
<td>KBC Channel 1</td>
<td>44%</td>
<td>25%</td>
<td>13%</td>
<td>0.52</td>
</tr>
<tr>
<td>Royal Media Services</td>
<td>Citizen TV</td>
<td>10%</td>
<td>13%</td>
<td>47%</td>
<td>3.42</td>
</tr>
<tr>
<td>KTN Baraza Ltd</td>
<td>KTN</td>
<td>8%</td>
<td>11%</td>
<td>12%</td>
<td>1.09</td>
</tr>
<tr>
<td>Nation Media Group</td>
<td>NTV</td>
<td>6%</td>
<td>10%</td>
<td>14%</td>
<td>1.40</td>
</tr>
<tr>
<td>Stellavision</td>
<td>K24</td>
<td>5%</td>
<td>8%</td>
<td>1%</td>
<td>0.13</td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td>27%</td>
<td>33%</td>
<td>13%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

Source: CCK, Synovate, Deloitte analysis

- The level of concentration of analogue TV spectrum holdings is high
- ‘Partnerships’ and ‘joint ventures’ have led to less concentration in share of spectrum used than in spectrum allocation
- 25 frequencies, or 23% of the total spectrum allocation in Kenya, are not currently on-air; accordingly the current use of the spectrum may not be fully efficient
- Higher TV viewing shares are not necessarily being driven by higher number of frequencies
- The move to DTT, and Kenya’s spectrum efficiency in DTT, brings substantial opportunities for increased competition between channels and between retail platforms

Conclusion: the free to air TV market is effectively competitive at present, although spectrum use should be considered
## Spectrum allocation: recommendations

### Radio

- CCK to review status of the spectrum that is not in use.
- CCK to consult with licence holders concerning the plans for utilising spectrum holdings.
- Licence holders who do not intend to utilise spectrum should be required to return spectrum following due legal process.
- Operators to be allowed to apply for any frequencies which become available through this process. Such allocation to be done through a transparent process to be made public before operators are required to express interest.
- Existing holders of radio spectrum frequencies may obtain these frequencies only up to a 25% share of radio spectrum holdings in total (including existing and new frequencies).
- At the next licence renewal stage, radio stations to be requested to explain their proposed use of the frequency, by reference to business plans.
- Operators could be allowed to trade allocated frequencies during their licence period.

### Television

- CCK to review status of the spectrum that is not in use.
- CCK to consult with licence holders concerning the plans for utilising spectrum holdings.
- Licence holders who do not intend to utilise spectrum should be required to return spectrum following due legal process.
- The CCK should also clarify to the industry through a published document the total number of multiplexes that can be accommodated in the DTT spectrum available, and the number of frequencies to be used by each multiplex/licensee.
Digital Terrestrial Signal Distribution

One signal distribution operator currently available, a second licensed

- Digital terrestrial, cable, satellite are complements rather than substitutes for broadcasters
- Digital Terrestrial Signal Distribution a market of its own

- Signet currently only Digital Terrestrial Signal Distribution operator
- A second signal distributor (Pan-African) licensed in October 2011, network under deployment

- Significant investments are required to roll-out a transmission network. There are 59 designated sites for nation-wide transmission

- KBC operates KBC channels / radio stations and Signet network
- Pan-African Star Times Group currently broadcasts channels through Signet

- Countervailing power may be limited as platforms are complementary for channels
- Expected to further decrease as Digital Terrestrial take-up increases

- Lack of transparency on how to obtain access
- Alleged preferential treatment

Conclusion: market not effectively competitive at present
Digital Terrestrial Signal Distribution: recommendations
A number of measures may be introduced

### Obligations

- **Obligation to provide access to capacity and specific network facilities as required:** this is consistent with the obligations permissible under the KICR (Fair Competition and Equality of Treatment) 2010, first paragraph; and
- **Obligation of transparency:** this is consistent with the obligations permissible under the KICR (Fair Competition and Equality of Treatment) 2010, third, fourth and fifth paragraphs.
- **Obligation of non-discrimination** could be imposed. This is consistent with the obligations permissible under the KICR (Fair Competition and Equality of Treatment) 2010, second paragraph. This involves in practice that
  - similar conditions are applied in similar circumstances, and that
  - broadcasters are provided with facilities and information under the same conditions and of the same quality as it provides for its own services or those of its affiliates or subsidiaries.

### Implementation

- **Requirement to publish a Reference Offer,** excluding pricing terms, and including such information as total capacity available; number and location of sites; other network specifications.
- **A template for submission of an application for capacity** should be prepared by the signal distributor and approved by the CCK. This template should be used by all broadcasters seeking to obtain capacity on the signal distributor network.
- **A formal procedure for the signal distributor to respond to the Applicant** should be put in place. This should include such issues as
  - timeframe for assessment of the application and response;
  - a template with the information to be provided by signal distributor to justify the decision to grant capacity under particular terms

The signal distributor should also notify the CCK of any requests for access, with copy to the applicant, and of its decision and reasoning.

- **Further licences granted to differentiate between transmission and multiplexing.**
- **CCK to conduct a market review** once the second network has been fully rolled out.
Pay TV

There is increasing competition but the market is still concentrated

Pay TV packages and monthly subscription costs (KSH)

- Multichoice has been the main player in the Pay TV market for a number of years.
- Competition in the Kenyan Pay TV market is increasing; Wananchi has successfully entered the market; Other recent new entrants, Star TV and My TV, may introduce further competition.
- Competition is developing currently at the lower end and middle of the Pay TV market making Pay TV more affordable for Kenyans, and suggesting that there is untapped demand at that end of the market.
- There appears to be significant scope for the size of the Pay TV market to grow, and accordingly for new entrants to expand their market share.
- If some subscribers choose Pay TV provider on the basis of availability of particular sports content, those customers would be harder for competitors to tap into as some sports content is sold on an exclusive basis. This group may be a proportion of customers on the DSTV Premium package, but the proportion is unknown as this package also contains other content.
## Pay TV

There is increasing competition but the market is still concentrated

<table>
<thead>
<tr>
<th>Market shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Concentration in the Kenyan Pay TV market remains high but decreasing</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Barriers to entry, switching costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>• There are barriers to entry into the Pay TV market, such as the need to invest to obtain a sufficiently attractive range of content and subsidise STBs.</td>
</tr>
<tr>
<td>• Switching costs for customers include STB equipment and installation costs, but cancellation is easier than in other international Pay TV markets</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Vertical Integration</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Multichoice/Wananchi are vertically integrated across content aggregation and Pay TV retail platform. Multichoice holds some content in exclusivity, which together with other content, may allow it to reach certain premium customers that may not be available to alternative Pay TV operators.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Countervailing Buyer Power</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The countervailing power of individual channels is generally low but it is expected to increase as new Pay TV services develop.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prices</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Prices of Pay TV appear higher than in some other selected developing countries.</td>
</tr>
</tbody>
</table>

**Conclusion:** Competition in Pay TV is increasing, but the Pay TV market is not effectively competitive at the present time
Pay TV: recommendations
Development of competition to be observed before possible measures

During the next 2 years

- CCK to monitor the development of competition in retail Pay TV
- CCK to set out how it proposes to regulate if effective competition in Pay TV fails to develop during that time

If competition fails to develop in the timeframe

- Option 3 may be introduced, provided that third parties present robust consumer evidence that a substantial number of households choose Pay TV provider based on availability of EPL

<table>
<thead>
<tr>
<th>Option 1 – Prevent sale of EPL on exclusive basis at wholesale level</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Increased access</td>
<td>No exclusivity may discourage investment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Option 2 – Rights to be sold separately for Kenya (unbundling)</th>
<th>Lower barriers for new operator to bid</th>
<th>Less stringent remedy available</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Increased competition for rights, may increase price</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Does not guarantee platform-neutral access</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Nigeria example failed</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Option 3 – Winner of EPL rights to make channels containing EPL available through 3rd party platforms</th>
<th>Focus on increasing access by consumers</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Consumer benefit from rights buyer’s CBP</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Winner of EPL rights can earn wholesale revenues</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Precedent in UK, France, Italy</td>
<td></td>
</tr>
</tbody>
</table>
Competition and regulatory framework: recommendations

Issues identified

• Concurrent powers between CCK and Competition Authority: Absence of a procedure for defining which body will investigate a behaviour or incident

• Differing thresholds for dominance and definition of the offence of ‘abuse of dominance’. Risk that differing conclusions could be reached by the different authorities.

Recommendations

• Issuance of a Memorandum of Understanding by the CCK and the Competition Authority that addresses:
  • Case allocation between the authorities, principles and procedures
  • Primacy of competition or regulatory rules
  • That coordination between the regulatory bodies will ensure that the risk of double jeopardy will be eliminated.

• In the long-term, the statutory instruments should be amended and aligned to eliminate such differences.

• In the short- to medium-term, the CCK should provide as high a level of transparency on the application of the criteria that could enable operators with 25%-50% market shares to be found not to be dominant. Such guidance would expand on the criteria set out in the Act.
## Competition and regulatory framework: recommendations

<table>
<thead>
<tr>
<th>Issues identified</th>
<th>Recommendations</th>
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<tbody>
<tr>
<td><strong>Ex ante vs ex post:</strong> Need for guidance regarding when the CCK intends to apply ex ante vs ex post intervention</td>
<td>• For cases that fall to the CCK to be examined, the CCK should seek to provide transparency to stakeholders about the principles that it will apply when determining whether to apply its (ex ante) regulatory powers or its (ex post) competition powers, as well as providing clarity over which set of rules take precedence.</td>
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<td><strong>Consumer protection:</strong> KICA does not have an explicit link between the purpose of competition and consumer protection</td>
<td>• The CCK should provide clarity to the marketplace that ex ante regulation would be applied when ex post competition law provisions would not adequately resolve the concerns in an effective and timely manner.</td>
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<td>• The CCK should be explicit in its decisions and guidance documents on the criteria that it is applying in making that trade-off between innovation/investment and competition</td>
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## Terms of Trade: recommendations

### Observations on market

- Kenyan broadcasters have a range of sources from where they can acquire content. Kenyan broadcasters currently broadcast content purchased nationally and internationally.
- There are at least 10 main Kenyan producers, but also individual free-lance producers.
- The key Kenyan broadcasters – RMG, KTN, NTV, KBC – also produce content in-house.
- Broadcasters have a degree of buyer power vis a vis local producers as broadcasters have more options open to them.
- Interviews suggested that producers hold no clear rights to the content they produce.

### Terms of Trade between broadcasters and producers

- Broadcasters could be requested to draw up terms of trade so as to give clarity to the independent sector as to how they propose to enter into commercial relations.
- The terms of trade should cover such issues as:
  - The maximum length during which the broadcaster will hold rights to the content, and conditions for renegotiation.
  - Number of broadcasts included within the initial fee paid by the broadcaster for content;
  - The channels on which the broadcaster is able to use the programme;
  - Ownership of international rights and ancillary (DVD, books, etc) rights.
<table>
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<th>KBC, separation of public and commercial</th>
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- KBC public-service and commercial activities are separated financially, in line with international best practice
- Implementation of a transparent system of accounts that separate public service and commercial activities, allowing review of the separate revenues and costs, including allocation of common costs
- A requirement that transactions between public-service and commercial arms should be carried out at market prices