African Media Entertainment Limited

Registration Number: 1926/008797/06
Unit Block A – Oxford Office Park, No. 5, 8th Street, Houghton
PO Box 3014, Houghton, 2041
Republic of South Africa
Tel: 010 590 4554

ICASA
Attention: Gladys Malefo
350 Witch-Hazel Avenue
Eco Point Office Park
Eco Park
Centurion
By email: rarc@icasa.org.za; mkgatshe@icasa.org.za

1 June 2022

Dear Sirs

RESPONSE TO FINDINGS DOCUMENT ON THE REVIEW OF THE INDEPENDENT BROADCASTING AUTHORITY (ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIP) REGULATIONS, 1999 AND DRAFT REGULATIONS REGARDING ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIPS 2022

Africa Media Entertainment Limited ("AME") is a listed company and the shareholder in a number of commercial sound broadcasting licensees. It is an active member of the media industry. The subject matter of these draft Regulations and the reasons given for them, which we assume are contained within the Findings Document on the Review of the IBA (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999 ("Findings Document"), are of great importance to the future of sound broadcasting and therefore also to AME.

We note that ICASA states in paragraph 9.1 of the Findings Document, that this document is not published for consultation. However, in order for us to situate our comments on the draft Regulations in context, we first make some observations on the Findings Document since ICASA acknowledges that this is published "…*to inform stakeholders on the Authority's findings from the input received after the publication of the Discussion Document*."

1. Introductory remarks

1.1 We note that paragraph 4.1 of the Findings Document states, "*The Authority finds that stakeholders are of the view that the Audio and Audio-Visual Draft White Paper is relevant to the review of the Regulations. Particularly, the draft white paper suggests that an inquiry be conducted prior to the review of the Regulations*", however, we are not commenting here on the Audio and Audio-Visual Draft White Paper, as this is a document which emanates from the office of the Minister and not ICASA. It is furthermore primarily a policy paper, as indicated by the reference to "White Paper", rather than a regulation.

1.2 We do agree, however, that ICASA must take policy into account when preparing regulations and to the extent that ICASA has not done so, we highly recommend that ICASA ensure that all regulations are aligned to national policy objectives and goals, when they are in final form.

1.2.1 We note that Multichoice Africa submits, which submission is repeated in paragraph 5.3 of the Findings Document, that, *"5.3 …. the review must consider the realities of the audio-visual environment and advertising in a digital on-line context.[15] It proposes that the Authority should make forward-looking regulations that could be easily applied to all audio-visual services, both linear and non-linear, to avoid ICASA having to repeat this review once the legislation is amended to apply to on-demand services. Accordingly, the outcome of this review of the Advertising Regulations should be future proof.[16]"*

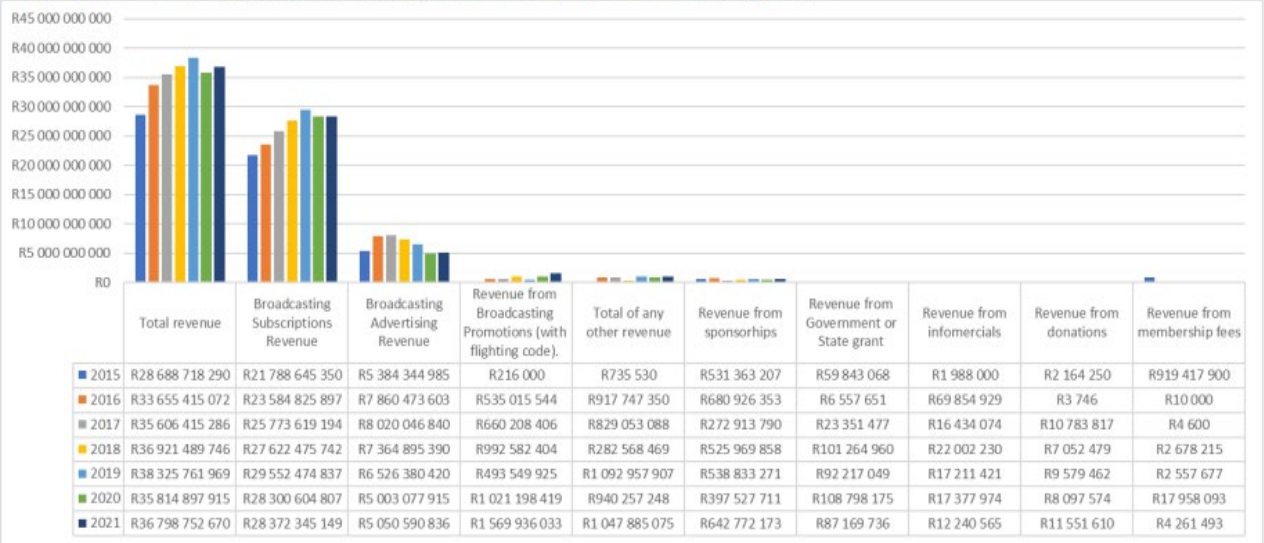
1.2.2 This is an impossible task at present, given that the White Paper is not yet in final form. The Regulations can therefore only deal with the matters in front of ICASA and unless ICASA has had input from the Minister regarding the timing of the publication of the final White Paper, ICASA cannot put its obligations on hold and neither can it anticipate what the final White Paper or any theoretical amendments to legislation might say.

1.2.3 We therefore agree entirely with ICASA's statements at paragraphs 5.13.3, 5.13.4 and 6.4.3 of the Findings Document.

1.3 Advertising and sponsorship revenue are the lifeblood of commercial radio. The increase in the number of community and commercial stations and the number of subscribers now paying to watch television like DStv, as well as the attraction of the free-to-air SABC stations, means that traditional media's advertising revenue remains under pressure. In 2022, ICASA published the ICT Sector Report. In graph 39[1], shown below, the downward trend in advertising revenue is shown clearly:

[1] Page 54.

Graph 39: TV and Radio broadcasting revenues for the 12-month period



	Total revenue	Broadcasting Subscriptions Revenue	Broadcasting Advertising Revenue	Revenue from Broadcasting Promotions (with flighting code).	Total of any other revenue	Revenue from sponsorhips	Revenue from Government or State grant	Revenue from infomercials	Revenue from donations	Revenue from membership fees
2015	R28 688 718 290	R21 788 645 350	R5 384 344 985	R216 000	R735 530	R531 363 207	R59 843 068	R1 988 000	R2 164 250	R919 417 900
2016	R33 655 415 072	R23 584 825 897	R7 860 473 603	R535 015 544	R917 747 350	R680 926 353	R6 557 651	R69 854 929	R3 746	R10 000
2017	R35 606 415 286	R25 773 619 194	R8 020 046 840	R660 208 406	R829 053 088	R272 913 790	R23 351 477	R16 434 074	R10 783 817	R4 600
2018	R36 921 489 746	R27 622 475 742	R7 364 895 390	R992 582 404	R282 568 469	R525 969 858	R101 264 960	R22 002 230	R7 052 479	R2 678 215
2019	R38 325 761 969	R29 552 474 837	R6 526 380 420	R493 549 925	R1 092 957 907	R538 833 271	R92 217 049	R17 211 421	R9 579 462	R2 557 677
2020	R35 814 897 915	R28 300 604 807	R5 003 077 915	R1 021 198 419	R940 257 248	R397 527 711	R108 798 175	R17 377 974	R8 097 574	R17 958 093
2021	R36 798 752 670	R28 372 345 149	R5 050 590 836	R1 569 936 033	R1 047 885 075	R642 772 173	R87 169 736	R12 240 565	R11 551 610	R4 261 493

*Source: ICASA Broadcasters Questionnaire, December 2015 - 2021 (*data includes TV & radio broadcasting*)*

1.3.1 According to the Broadcasting Research Council's Annual Financial Statements for the year ended 31 March 2020, levy collections which are theoretically 1% of revenue (excluding subscriptions) are indicative of the fact that two-thirds of all ad spend is on TV and less than one-third is on radio.[2] When seeking to regulate advertising and sponsorship in the context of commercial radio broadcasting, it is important that ICASA bear this in mind, as both commercial and community sound broadcasters are competing for less than 33% of the total share of advertising revenue.

1.3.2 We also note that MultiChoice Africa has suggested that ICASA take account of the way in which "market realities" have changed. We agree with this statement, although we note that MultiChoice Africa makes it in an entirely self-serving context, in order to preserve for itself advertising revenues that it argues are now diverted to over-the-top ("OTT") services. It is, however, a fact that the Regulations were first published in 1999, when the world of devices and technology was not what it is today.

1.3.3 We support the statement at paragraph 7.6 of the Findings Document in which "…*MultiChoice refers the Authority to the European AVMS Directive 2010 whose aim was to protect consumers from excessive advertising and set rule[s] to ensure such. As a result, television advertising, teleshopping and sponsorship has been updated in line with the market realities. MultiChoice is further of the view that the Authority's regulations should be in line with the market realities*."[3] That is to say, we support

[2] Page 15 (page 67 of the BRC Annual Report for the period 1 April 2019 to 31 March 2021), AFS 2020.

regulatory intervention that might be needed to protect consumers from excessive advertising, particularly in the context of television broadcasting. In this regard, we have made submissions on the definition of the word "**advertisement**" to ensure that all forms of advertising including infomercials and promotional spots, sponsorships and product placements are properly defined to be "advertisements". This is because it is currently possible for subscription television broadcasters to use the definition of "advertisement" to exclude some of these items and so to increase the amount of advertising above the regulated threshold.

1.3.4 However, the statement by MultiChoice Africa in paragraph 8.1.3 of the Findings Document that, "*MultiChoice submits that the Regulations have been in force for over 20 years, and they are not based on the current environment driven by digital advertising. They are based on a world which bears no resemblance to the current digital advertising environment*"[39] is frankly ludicrous. It suggests that advertising somehow places itself in a 'digital advertising environment'. Advertisers pay for time on various platforms and that is what they get. MultiChoice Africa has provided absolutely no concrete evidence, statistics, or other inputs in its submission to ICASA that might support this statement, nor does it define what it means by "digital advertising".

1.3.5 It should, in our view, remain the case that television broadcasters that also earn revenue from subscriptions be restricted in the amount of advertising revenue that they can earn, and that simply referring to "digital advertising" is hardly supportive of an argument that enables MultiChoice to increase its revenue when it is already the largest television broadcaster in South Africa by revenue which MultiChoice Africa seems to be saying, as quoted in paragraph 8.1.4 of the Findings Document. We agree with the views expressed by eMedia at paragraph 8.4.2 of the Findings Document.

1.3.6 Somewhat confusingly, in paragraph 8.24.7.1 ICASA states that, "*The Authority's finding is that stakeholders are of the view that the advertisement revenue is earned from advertising, sponsorship, infomercials and product placement. The revenue is determined by the advertiser's ability to spend which is influenced by market forces including target market, platform, and demographics amongst others*". It is obvious that in commercial sound broadcasting revenue is earned from advertising and sponsorship, but not from infomercials and product placement which by their nature, are only relevant to television broadcasting. However, we do not understand what is meant by the statement that the amount of revenue earned by a broadcaster is

determined by the "*advertiser's ability to spend*" which ability is somehow within ICASA's power to determine.

1.3.7 An advertiser will have a budget which will be affected by the macro- and micro-economics of the market in general, but this is not influenced by the target market, platform or demographics. These 3 characteristics are the factors which affect how much advertisers may spend with a particular broadcasting licensee. The difference is important to understand because it is here where ICASA can have an impact, for example, in ensuring that subscription television broadcasters do not earn more revenue from advertising and sponsorships (or infomercials and product placements) than they do from subscriptions.

1.3.8 As we will explain in our comments on the draft Regulations, this area is one that ICASA should focus on. The definition of "*advertisement*" should incorporate sponsorship, infomercials, commercial features, and product placement so that it is clear that no television subscription broadcaster can earn revenue from infomercials and product placement other than where those are for its own self-promotion, and this should be distinguished from revenue earned from advertisements and sponsorships to ensure that subscription broadcasters cannot and do not evade the restriction on advertising that exists for subscription broadcasters.

1.3.9 To the extent that stakeholders may wish to distinguish "digital" from the current television broadcasting environment, ICASA should note that digital migration of analogue television and the existing services provided by DStv means that both are or will be "digital" in nature and that ICASA therefore has jurisdiction over these services. We agree with ICASA's position in paragraph 8.26.4.3. However, to the extent that things are changing in the market place and with the rise of online media, it is all the more important that ICASA encourage responsible innovation by commercial radio broadcasters, to increase their revenue.

1.4 MultiChoice Africa's submission on programme sponsorships says (as quoted in the Findings Document, paragraph 8.2.7), "*MultiChoice states that although it is a significant source of funding, programme sponsorship does not pose a threat to editorial control over programming. Broadcasters and producers have processes in place to ensure that the editorial integrity of programmes is not undermined when it is sponsored*.[56]"

1.4.1 Whilst it is important to have "processes in place", if a particular sponsor offers sponsorship for a particular programme we find it difficult to believe that a broadcaster would turn that down – regardless of its processes. Editorial integrity means little in the

face of economic imperatives. Therefore, it is appropriate that ICASA continue to monitor and regulate the placement of sponsorships in relation to programmes to ensure that the audience is an appropriate one. MultiChoice Africa has given no examples of how its processes might work in this regard, for example, how it might choose sponsorship to suit a particular audience in relation to a particular programme.

1.4.2 However, we have no difficulty with the definition of "programme sponsorship" proposed by MultiChoice (paragraph 8.2.9 of the Findings Document). We note that ICASA says, "*Indirect funding and the financing of the transmission of a broadcast programme is considered programme sponsorship as it is intended to promote the sponsor's own or another person's name, trademark, image, activities or product*", but unless the brand of the indirect funder or person paying for transmission is also broadcast, then it cannot be considered to be promoted.

1.5 Paragraph 2.5.4 of the Findings Document states that ICASA has considered "*relevant legislation*" in preparing the Findings Document and presumably therefore, the draft Regulations. However, ICASA does not say what this is. This is, in our view, a material omission. Without knowing what else ICASA has considered – aside from submissions by interested parties – it is difficult to determine if ICASA has considered relevant, related, or even alternative ways of dealing with the subject matter.

1.5.1 ICASA does not mention any international papers or sources so we must assume ICASA has not considered any, despite a reference to "benchmarking" or "internal desktop research" in paragraphs 2.5.1, 8.1.11.2, 8.20.5.2 and 8.21.6 of the Findings Document. This is also unfortunate. Although South Africa has its own market for broadcasting services and its own advertising industry, there are doubtless similarities in the issues that both are facing worldwide and it is always helpful to look elsewhere for potentially helpful approaches to equivalent problems. If ICASA has considered international sources, then it should indicate which these are, as it is relevant to its decision in the paragraphs referred to above.

1.5.2 In paragraph 8.21.6, ICASA says, *"The Authority's position is that lessons taken from benchmarking on advertising, infomercials, programme sponsorship and product placement regulations should take into consideration the local conditions such as the impact of online media on traditional broadcasters, local market forces and revenue trends."* We agree, but what are those lessons? To simply refer to statements made by respondents in the consultation phase (e.g. 'the impact of online media on traditional broadcasters') is not helpful – what does ICASA consider the impact to be and why

does it consider this impact to be different in South Africa from the benchmarks it refers to?

1.6 Section 55 of the ECA provides that broadcasting service licensees must adhere to the "Code" which is a general reference to the rules developed by an advertising authority (formerly the ASASA). Oddly, however, the CCC, an internal committee of ICASA, is empowered under subsection (2) to hear complaints concerning alleged breaches of this Code despite the fact that its enforcement is entrusted to another authority. The CCC's jurisdiction can surely only derive from the fact that a licensee has not adhered to subsection (1) of section 55, which refers to "*advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships*" meaning ICASA, rather than any infractions of a Code that ICASA is not authorised to administer.

1.6.1 It is AME's view that despite the provisions of subsections (1) and (3), ICASA's jurisdiction is limited to enforcing its own regulations and therefore the jurisdiction of the CCC must be similarly limited. We note that Multichoice Africa has a similar view. It is likely that this question will have to be determined by an amendment to the ECA, or by a court. Our comments in this regard are therefore limited to considering only ICASA's jurisdiction under the ECA, and its powers to make and enforce regulations. This is also the case because we do not have sight of the "MOU" to which ICASA refers in paragraph 3.10.2 of the Findings Document.

1.6.2 We also note that section 55(1) refers to "scheduling" of advertisements, infomercials and programme sponsorships, rather than regulating the content of these advertisements, infomercials and sponsorships. This is a relevant distinction to bear in mind, and one which ICASA recognises in paragraphs 3.10.2, 4.4.2, and 8.22.8.3 of the Findings Document.

1.6.3 However, ICASA does appear to extend its own jurisdiction despite this acknowledgement. ICASA says in paragraph 8.28.9.2, "*The Authority's position is that the Advertising Regulations are still relevant hence a need to be reviewed and updated in the public interest for the protection of consumers and children. The Authority believes that the Regulations are not stringent, they strike a balance for public interest and viability of broadcasters."* We will highlight the areas in the draft Regulations where we believe ICASA has gone further with the powers it gives itself, than the wording of section 55 allows, namely to "scheduling".

1.7 Finally, we see that several of the written submissions in response to the Discussion Document on the same topic suggested that advertising be de-regulated. With the move to 'light touch'

regulation and the increase in competition for advertising revenue, this seems to us to be a very sensible approach. We explain why this is in more detail as we examine the draft Regulations below.

2. Comments on the draft Regulations

2.1 In line with our comments above in paragraph 1.3.7, we do not agree with the definition of "**advertisement**" which appears to ignore the commercial nature of certain types of what we consider to amount to advertising, in that they attract revenue for broadcasters (specifically television broadcasters).

2.1.1 We propose that clauses 1.2.2 and 1.2.3 of the draft Regulation be amended as shown below in line with paragraph 2.1:

"1.2 **"advertisement"** means any material broadcast, in visual and/or audio form, for which a broadcasting service licensee receives a consideration, in cash or otherwise, and which promotes the interests of any person, product or service other than the broadcaster itself, provided that:

"1.2.2 spot commercials, public service announcements for which a broadcaster receives a consideration, any material that would constitute an infomercial, ~~and that part of~~ sponsorship ~~packages which is constituted by spot commercials, and commercial features~~ and product placements shall be regarded as being advertisements; but

"1.2.2 public service announcements in respect of which the broadcaster does not receive any consideration, ~~supply agreements, infomercials exceeding two minutes in duration,~~ branded filler material which receives no consideration and is of a public service nature, sponsorships ~~elements~~ which form part of in-programme material, ~~presenters' credits~~ and ~~(in relation to competitions and~~ self-promotions or in-programme competitions, ~~branded promotional spots and self-promotion promos~~ continuity announcements, and station identification shall not be regarded as being advertisements;"

2.1.2 **Please note that other amendments have been made to this definition to reflect our comments below and for ease of reference, we have attached this definition as an Annexure to the submission.**

2.2 The definition of "**Advertising Standards Authority of South Africa**" does not require definition since it is defined in primary legislation at section 1 of the ECA, but also because it no longer exists. To the extent that such an entity no longer exists, practise is to accept the entity's legal replacement.

2.3 The definition of "**branded filler**" is at odds with the way in which it is used in the definition of "**advertisement**".

2.3.1 In the latter, the term is further defined as "*branded filler material which receives no consideration [and] is of a public service nature"* whereas the definition of "branded filler" is "…*means a visual and/or audio announcement transmitted by a broadcasting service licensee and aimed at imparting knowledge the* ***dissemination of which*** *is in the public interest,* ***regardless of whether such announcement has the effect of promoting the interests of a commercial entity***".

2.3.2 In the first case the term defines the item as being in the public interest, while in the second, it is the "dissemination" of it which is in the public interest.

2.3.3 More importantly as far as we are concerned, is that in the first case, the item has no commercial value, but in the second case, it may well have commercial value since it may have the effect of "*promoting the interests of a commercial entity*". It seems to us that leaving the two conflicting provisions as is will result in confusion, and ultimately, it is more likely that a branded filler will have commercial value, than not. We say this because of the use of the word "branded". For example, if 947, a Gauteng-based commercial sound broadcaster, were to broadcast a branded filler for its sister station, 702, the two entities cannot be considered as "self-promoting" as each station has its own advertisers, brand, character, and format, and as a result, its own listener base. They are in competition with each other. Therefore, even if 947 refers to a news story which was reported on by 702 which may be of interest to the public, it should still be treated as an advertisement for 702.

2.3.4 Furthermore, we are unable to find any use of this term in any other jurisdiction in the same way or at all, and it is not a term that we use. For clarity we ask that ICASA give an example, but we also propose the amendment of the definition of "branded filler" in clause 1.5 of the draft Regulations as follows in order to bring it within the ambit of the definition of "advertisement" and its resulting impact on revenue:

"**"branded filler**" means a visual and/or audio announcement transmitted by a broadcasting service licensee and aimed at imparting knowledge ~~the dissemination of~~

~~which is in the public interest, regardless of whether such announcement~~ which also has the effect of promoting the interests of a commercial entity".

2.4 The same can be said of the definition and use of "**branded promotional spot**".

2.4.1 In the definition of this term, it is clear that the term is intended to constitute an "advertisement", because it says, *""**branded promotional spot**" means a promotional announcement transmitted by a "broadcasting service licensee regarding a forthcoming programme or regarding a channel or station and which mentions or refers to an advertiser or a commercial entity"*. The underlined portion clearly indicates that the message is for a commercial purpose, or put another way, will be placed in return for payment, therefore constituting revenue for the broadcaster.

2.4.2 In the definition of "advertisement", the term is used subject to a specific exclusion from the definition of "advertisement". Clause 2.2 of the draft Regulation states, "…*presenters' credits and (in relation to competitions and self-promotions) programme competitions, **branded promotional spots** and self-promotion promos **shall not be regarded as being advertisements**".*

2.4.3 A regulation must clear in its terms to avoid confusion in its implementation. For this reason, and because a branded promotional spot clearly results in revenue-generation for the broadcaster, in our view, it must also be treated as an advertisement.

2.4.4 Our suggested amendment to the definition of "advertisement" in paragraph 2.1 takes this into account.

2.5 The reason for a definition of "commercial feature" is unclear. It says, *""**commercial feature**" means a stand-alone feature, unrelated to a programme, and which may take the form of (but is not limited to) a commercial competition, advertising feature or advertising programme which is primarily intended to promote the interests of one or more persons, product, service, or sponsor, regardless of duration, and excludes any programme competition;"*

2.5.1 We do not see any difference between the meaning of this term and the meaning of the word "advertisement"; both result in revenue streams for the broadcaster, and the term "commercial feature" is included in the amended definition of "advertisement" in paragraph 2.1 above.

2.5.2 We suggest this term be omitted from the definition of "advertisement". Our suggested amendment to the definition of "advertisement" takes this into account, and the definition of "commercial feature" can therefore be deleted.

2.6 ICASA purports to redefine "news" in its proposed amendments to the Standard Terms and Conditions Regulations, published on 16 March 2022, to remove the reference to "current

affairs". Separately, this draft Regulation contains a definition of "current affairs programme" as follows, "*" **current affairs programme** " means programming that is not a news bulletin, which focuses on and includes comment on and interpretation and analysis of issues of immediate social, political or economic relevance and matters of international, national, regional and local significance".*

2.6.1 ICASA also proposes to amend the definition of "news" in this draft Regulation to exclude "current affairs". This is confusing – the only distinction between the two phrases is the use of the word "programme" in this draft Regulation.

2.6.2 In our view, "news" can mean new information, especially about recent events; or noteworthy information and in particular, information not previously known, and in our research, "news" includes current affairs. We do not understand why ICASA would seek to distinguish it from "news". Our recommendation in relation to the amendments to the Standard Terms Regulations is to continue to include "current affairs" in the definition of "news". Therefore, we recommend the same in relation to the definition of "news" in this draft Regulation, for consistency i.e. retain the reference to "current affairs" in the definition of "news".

2.6.3 We do not believe a definition of "current affairs programme" is at all necessary and ICASA does not explain why it is, and we therefore recommend that it be deleted from this draft Regulation.

2.7 The definition of "**performance period**" comes from the South African Local Music Regulations, 2016, and is intended to be the period during which the mandated amount of local music must be played by broadcasting licensees. It has no place in this Regulation and we recommend it be deleted.

2.8 The objective of this draft Regulation is to address the scheduling of advertisements by broadcasting licensees. With this in mind, we do not understand why it is necessary to have a definition of *""**presenters' credits**"* which means *"any acknowledgement of the provision of hair products, clothing, accessories, make-up or other goods or services to a production company or BSL by a third party".*

2.8.1 First, the definition refers to "a production company" which is not subject to regulation under the ECA by ICASA and this reference should be deleted.

2.8.2 Second, as far as we are concerned, the use of products provided by third parties is almost invariably going to require acknowledgement by the broadcaster of the source of those products, which amounts to advertising. This will have the effect of a revenue-

equivalent for the broadcaster, and should therefore constitute part of the definition of "advertisement".

2.8.3 We have made the necessary amendment to the definition of "advertisement" in paragraph 2.1 above.

2.9 The definition of "**product placement**" states that it is not an advertisement. We cannot understand on what basis this can be distinguished from an advertisement – it is a presentation of a product designed to promote the commercial interests of the source of that produce, which will invariably result in revenue for the broadcaster. It must therefore form part of the definition of "advertisement" and we have amended this definition accordingly (see paragraph 2.1 above). The definition of "product placement" should be amended as follows,

""**product placement**" means the depiction of, or a reference to, a product or service in material ~~(other than an advertisement)~~ broadcast, in visual and/or audio form, in respect of which the BSL and/or the producer of the material concerned receives payment or other consideration, and which promotes the interests of any person, product or service".

2.10 It is unclear to us why, in the context of section 55 of the ECA, it is necessary to refer to a "**public service announcement**", but to the extent that ICASA believes that it is, we have the same response as that made in relation to the draft amendments proposed to the Standard Terms and Conditions Regulations, published in March 2022. A quick scan of internet resources suggests that a useful definition could be, "*a message in the public interest disseminated without charge, with the objective of raising awareness of, and changing public attitudes and behavior towards, a social issue*". If ICASA is minded to include reference to "disasters" and "grave danger" it could do so, but it is not necessary since a traffic incident could have no impact on anyone's safety, but still require motorists to avoid the area, and thus constitute subject matter for a "public service announcement". Why would a definition out of step with the more regularly used or commonly understood definitions be used?

2.11 The definition of "**self-promotion promo**" seems completely unnecessary in this form, specifically as it refers to being broadcast, which is obvious in the circumstances. Anything which is made available by a broadcaster that is purely about its own programmes or offerings and has absolutely no independent commercial value to a third party, could constitute self-promotion and does not need then to also be referred to as a "promo". In our view this is unnecessary. However, if ICASA is intent on keeping this term, we recommend it be amended as follows,

""**self-promotion** ~~promo~~" means a<u>n</u> ~~promotional~~ announcement ~~transmitted~~ by a broadcaster concerning itself or its programmes which is of no value to a third party"~~ and which focuses on~~

~~a forthcoming programme to be transmitted by that broadcaster, or on the broadcaster itself or one of its channels~~

2.12 We suggest the definition of "**programme competition**" be clarified by the insertion of the word "in", so that the term reads "in-programme competition". This ensures that the competition must be related directly to the programme in order to fall outside the definition of "advertisement". We have made the necessary amendment to the definition of "advertisement" in paragraph 2.1 above.

2.13 The drafting in relation to "**sponsorship element**" leaves us confused.

2.13.1 Why is it necessary to have the word "element" linked to "sponsorship"? The definition of "advertisement" as it stands in the draft Regulation already deals with "sponsorship". There is no other definition of "sponsorship". We recommend that ICASA deletes the word "element".

2.13.2 Furthermore, all sponsorships have commercial elements to them or they would not be necessary, and all sponsorships are offered by third parties in order to promote their own commercial interests by associating themselves with a product, programme, team (in the case of sport) or licensee.

2.13.3 Only in-programme sponsorships such as branding at rugby stadiums which is visible during televised matches, should not be considered to be sponsorship that benefits the broadcaster commercially in the sense that the broadcaster will be paying the stadium for that sponsorship, rather than earning the revenue from the sponsorship itself.

2.13.4 We have amended the definition of "sponsorship" and "advertisement" and the relevant sub-regulation accordingly.

2.14 **Regulation 2**: there is a fundamental drafting error in this regulation, namely that it applies only to those entities that hold both a television AND a sound broadcasting licence. We suggest you rephrase as follows:

"These regulations are binding on every BSL ~~who provides a television broadcasting service and a sound broadcasting service~~."

2.15 **Regulation 3.1**: this sub-regulation repeats the provisions of section 55 and should be deleted, regulations need not repeat primary law.

2.16 **Regulation 4.1**: we can find no useful reason to include this sub-regulation. It constitutes "fluff" which is not recommended in regulatory drafting, and should be deleted. The language and terms of the regulation should speak for themselves. Adding in a provision that explains how ICASA will interpret the regulation and terminology simply confuses the reader. We recommend this sub-regulation be deleted in its entirety.

2.17 **Regulation 4.2**: we recommend this be amended to clarify that only those elements included in the definition of "advertisement" will be treated as "advertisements". Our suggestion is the following:

"Any BSL who transmits an in-programme competition or other advertisement or ~~a branded promotional spot~~, ~~branded filler material, a~~ self-promotion ~~promo or a sponsorship element in the form of the on-air depiction of, or referral to, any brand, product or name,~~ must ensure that ~~the~~ its primary purpose of the ~~broadcast~~ is to promote the BSL or the programme concerned, rather than the commercial interests of any person including the BSL ~~the person, product or service referred to in the course of such transmission~~.

2.18 **Regulation 4.3**: for consistency, we recommend that the wording of this sub-regulation be included in the definition of "advertisement". Please see the amendment to the definition of "advertisement" in paragraph 2.1 above.

2.19 **Regulation 6.10:** ICASA has not explained why the proposed wording in this sub-regulation is preferable to the wording "with compliments of" or "brought to you by". We can think of no reason from a regulatory point of view, why ICASA ought to be able to dictate the language that might be used to describe a sponsored programme and suggest that the second sentence of this sub-regulation be deleted.

2.20 **Regulation 7:** AME is concerned that ICASA has given no reason for the considerable fine and penalty it proposes for the contravention of these regulations. In fact, it is not clear to us on what basis ICASA determines the amount of any fine and the nature of any penalty in relation to any of its regulations. This is a fundamental aspect of ICASA's powers and duties and should be explained. We urge ICASA to issue an explanatory note or guidelines detailing how it arrives at penalties and fines for regulations, given the nature of each regulation or a group of regulations.

2.21 Finally, it is noteworthy that despite the obligations on ICASA under section 55 in relation to "scheduling" of advertisements, the scheduling provisions contained in the draft Regulations are very limited.

2.21.1 In other countries, on-demand services such as DStv Catch-Up are significantly more constrained as to the amount of advertising they can carry, and we consider this to be entirely appropriate given that they are earning subscription revenue.

2.21.2 We believe it would also be appropriate to limit the amount of advertising by public sound broadcasters, given how many there are, and that they are also funded by taxpayers.

2.21.3 We have also noted the consultation undertaken by OFCOM (UK)[3] in relation to cross-promotion by large television groups, such as MultiChoice Africa. Although at present there is no constraint on the amount of self-promotion permitted to DStv and SuperSport, we consider that this should be reviewed as MultiChoice Africa now also offers YouTube, Netflix, Showmax, and Catch-Up as well as movies. Cross-promotional advertisements even on a self-promotion basis on the largest subscription television broadcasting group in South Africa on any measure, may allow further entrenchment of that licensee's dominant position. The OFCOM inquiry is two decades old, which indicates how much competition there was at that time, compared to the present time. This is in stark contrast to the position in South Africa.

Kindly note that AME would like the opportunity to make a presentation should ICASA wish to hold oral hearings.

Yours faithfully

D M Tiltmann
Chief Executive Officer

[3] Advertising and promotions - Ofcom (accessed on 14 May 2022)

ANNEXURE: PROPOSED AMENDMENTS TO DEFINITION OF "ADVERTISEMENT"

MARKED UP VERSION:

"1.2 **"advertisement"** means any material broadcast, in visual and/or audio form, for which a broadcasting service licensee receives a consideration, in cash or otherwise, and which promotes the interests of any person, product or service other than the broadcaster itself, provided that:

"1.2.2 spot commercials, public service announcements for which a broadcaster receives a consideration, any material that would constitute an infomercial, ~~and that part of~~ sponsorship ~~packages which is constituted by spot commercials, and commercial features~~ and product placements shall be regarded as being advertisements; but

"1.2.2 public service announcements in respect of which the broadcaster does not receive any consideration, ~~supply agreements, infomercials exceeding two minutes in duration,~~ branded filler material which receives no consideration and is of a public service nature, sponsorships ~~elements~~ which form part of in-programme material, ~~presenters' credits~~ and ~~(in relation to competitions and~~ self-promotions or in-programme competitions, ~~branded promotional spots and self-promotion promos~~ continuity announcements, and station identification shall not be regarded as being advertisements"

CLEAN VERSION:

"1.2 **"advertisement"** means any material broadcast, in visual and/or audio form, for which a broadcasting service licensee receives a consideration, in cash or otherwise, and which promotes the interests of any person, product or service other than the broadcaster itself, provided that:

"1.2.2 spot commercials, public service announcements for which a broadcaster receives a consideration, any material that would constitute an infomercial, sponsorship and product placements shall be regarded as being advertisements; but

"1.2.2 public service announcements in respect of which the broadcaster does not receive any consideration, branded filler material which receives no consideration and is of a public service nature, sponsorships which form part of in-programme material, and self-promotions or in-programme competitions, continuity announcements, and station identification shall not be regarded as being advertisements"