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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**NOTICE 635 OF 2020****DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2020**

The Independent Communications Authority of South Africa (“**ICASA**” or “**the Authority**”) hereby declares its intention to amend the Sport Broadcasting Services Regulations, 2010 in accordance with the provisions of section 4 (3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000 (“**ICASA Act**”), as amended and section 60(1) and (2) of the Electronic Communications Act No. 36 of 2005 (“**the ECA**”), as amended.

The Authority hereby invites interested parties to make written representations on the draft Sports Broadcasting Services Amendment Regulations, 2020 set out herein (“**Draft Regulations**”).

A copy of the Draft Regulations will be made available on the Authority’s website at <http://www.icasa.org.za> or can be sent via email upon request by any individual or can be collected from ICASA Library No. 350 Witch-Hazel Avenue, Eco Point Office Park, Centurion between 09h00 and 16h00, Monday to Friday.

Written representations must be submitted to the Authority by no later than 16h00 on 15 December 2020 by post, hand delivery or electronically and marked specifically for the attention of: **Ms. Violet Molete**.

Delivery address: Block B, 350 Witch-Hazel Avenue, Eco Point Office Park, Centurion; or by email at vmolete@icasa.org.za and pcokie@icasa.org.za; or by facsimile at: 012 568 3716.

Telephonic enquiries should be directed to 012 568 3715 between 10h00 and 16h00, from Monday to Friday.

Written representations received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library.

When a person submits information to the Authority, such person may request that specific information be treated as confidential information in terms of section 4D of the ICASA Act. The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential.

The Authority may determine that such specific information or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be granted an opportunity to withdraw such representations or portion(s) thereof.

Persons submitting written representations are further invited to indicate, as part of their representations, whether they require an opportunity to make oral presentations.



Dr. Keabetswe Modimoeng
Chairperson

Date: 03/11/2020

SCHEDULE

1. Definitions

In these Regulations “the Regulations” means the Sport Broadcasting Services Regulations, 2010 as published under Government Notice No. R. 275 in Government Gazette No. 33079 of 7 April 2010.

2. Amendment of regulation 1 of the Regulations

Regulation 1 of the Regulations is hereby amended –

- (a) by the substitution for the definition of “Act” of the following definition:
“**Act**” means the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended”;
- (b) by the insertion after the definition of “Act” of the following definition:
“**broadcasting service licensee**” means a person to whom a broadcasting service licence has been granted in terms of the Act”
- (c) by the substitution for the definition of “Confederation sporting event” of the following definition: “**Confederation sporting event**” means an official sporting event arranged by a recognised international sport governing body that administers a particular sport which involves two or more National Federations and does not include friendly games”;
- (d) By the insertion after the definition of “Confederation sporting event” of the following definition: “**COSAFA**” means Council of Southern Africa Football Associations”;
- (e) “**National Federation**” means a national governing body of a code of sport or recreational activity in the Republic recognised by the relevant international controlling body as the only authority for the administration and control of the relative code of sport or recreational activity in the Republic;

- (f) By substitution of “National Sporting Event” by the following definition: “**National Sporting Event**’ means a sporting event that is deemed to be of national interest and includes the South African Senior National Team or National Sporting Representative.”
- (g) By the insertion after the definition of “National Sporting Event” of the following definition: “**National Sporting Representative**” means any individual representing South Africa in a confederation sporting event;
- (h) By substitution of “National Team” by the following definition: “**Senior National Team**” means the highest-ranking team in a specific sporting age group; and
- (i) By insertion of the following definition after the definition of “Senior National Team” “**TAFISA**” means The Association for International Sports for All.

3. AMENDMENT OF REGULATION 2

Regulation 2 of the Regulations is hereby amended by the substitution for sub-regulation (a) of the following sub-regulation:

- “(a) Regulate the broadcasting of national sporting events, as identified in the public interest, within the Republic”.

4. AMENDMENT OF REGULATION 4

Regulation 4 of the Regulations is hereby amended-

- (a) by the substitution for sub-regulation 1(a) of the following sub-regulation:
 - (a) “a confederation sporting event involving a senior national team or a national sporting representative”;

5. AMENDMENT OF REGULATION 5

Regulation 5 of the Regulations is hereby amended by the substitution for regulation 5 of the following regulation:

“LISTED NATIONAL SPORTING EVENTS

- (1) The following National Sporting Events may be broadcast live, delayed-live or delayed by free-to-air Broadcasting Service Licensees:
- a) Summer Olympic Games;
 - b) Paralympics;
 - c) Federation Internationale de Football Association (FIFA) World Cup;
 - d) Federation Internationale de Football Association (FIFA) Women’s World Cup
 - e) Africa Cup of Nations
 - f) Rugby World Cup;
 - g) International Cricket Council (ICC) World Cup;
 - h) International Cricket Council (ICC) T20 Cricket World Championships;
 - i) Netball World Cup;
 - j) Commonwealth Games;
 - k) International Amateur Athletic Federation (IAAF) World Athletics Championships;
 - l) Super Rugby;
 - m) All Africa Games;
 - n) Council of Southern Africa Football Associations (COSAFA) Cup;
 - o) Confederation of African Football (CAF) Champions League;
 - p) Confederation of African Football (CAF) Confederations Cup;
 - q) MTN 8;
 - r) Telkom Knockout;
 - s) Nedbank Cup;
 - t) Currie Cup;
 - u) The Association For International Sport for All (TAFISA) World Sport for All Games

6. AMENDMENT OF REGULATION 6

Regulation 6 of the Regulations is hereby amended-

(a) by the substitution for sub-regulation 6 (4) by the following sub-regulation:

“6(4) Consistent with regulation 6(3), the actual time periods or scheduling of advertisements of national sporting events shall be determined by the parties in their commercial agreement on fair, open and non-discriminatory terms.”

7. AMENDMENT OF REGULATION 7

Regulation 7 of the Regulations is hereby amended by the substitution for regulation 7 of the following regulation:

“7. REVIEW OF LISTED EVENTS

(1) A national sporting event may be removed from or added to the list subject to one or more of the following conditions:

- (a) following the publication, on such date as determined by the Authority, of the current list for public comment
- (b) An application by an interested stakeholder, with reasons provided in support of such application, to the Authority to add or remove a national sporting event;
- (c) Following a review of the Regulations in terms of section 4 of the Act;

(2) The application contemplated in 7(1)(b), to add or remove a national sporting event, shall be subjected to a public process;

(3) Consistent with section 60 (1) of the Act, any changes to the criteria used in the listing of national sports events and the list itself shall be effected after consultation with the Ministers.”

8. AMENDMENT OF REGULATION 8

Regulation 8 of the Regulations is hereby amended by-

- (a) the insertion of sub-regulation (3A) after sub-regulation (3):
“(3A) A broadcasting service licensee entering into a commercial agreement in terms of these Regulations may report any unresolved dispute and/or non-compliance with regulation 8(1) and 8(2) to the Authority.”

- (b) by the substitution of sub-regulation 4 by the following sub-regulation:
“(4) The Authority shall refer any failure to comply with regulation 8 (1) and 8 (2) or any unresolved dispute as contemplated in sub-regulation 3(A) to the CCC.”

9. AMENDMENT OF REGULATION 9

Regulation 9 of the Regulations is hereby amended as follows:

- (a) Substitution of sub-regulation 1 with the following sub-regulation:
“(1) a free-to-air broadcasting service licensee and subscription broadcasting service licensee must keep records of all national sporting events broadcast by such licensee. These records must include -”

- (b) Deletion of the word “and” in regulation 9 (1)(b).

- (c) Insertion of regulation 9 (1) (b A) as set out hereunder “(b A) full particulars of all listed national sporting events acquired but not broadcast by free-to-air broadcasting services licensees; and”

10. AMENDMENT OF REGULATION 10

Regulation 10 of the Regulations is hereby amended by the substitution for regulation 10 of the following regulation:

“10” PENALTIES

- (1) A broadcasting service licensee that contravenes or fails to comply with the provisions of these Regulations shall be referred to the CCC.

- (2) A broadcasting service licensee is guilty of an offence if that person contravenes any of the following regulations:
 - (a) Regulation 6(1);
 - (b) Regulation 6(2);
 - (c) Regulation 6(3);
 - (d) Regulation 6(4);
 - (e) Regulation 8(1);
 - (f) Regulation 8(2);
 - (g) Regulation 9(1); or
 - (h) Regulation 9(2).

- (3) A broadcasting service licensee found to have committed an offence as contemplated in sub-regulation (2) above is liable to a fine not exceeding one million rand (R 1 000 000.00)."

11. SHORT TITLE AND COMMENCEMENT

These Regulations are called the Draft Sports Broadcasting Services Amendment Regulations, 2020 and shall come into force upon publication in the Government Gazette.



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

EXPLANATORY MEMO

ACKNOWLEDGEMENTS

The Authority thanks the following organisations and individuals who made written submissions:

1. BMi Sport Info
2. Boxing South Africa
3. Cell C Ltd
4. Commonwealth Games Federation
5. Competition Commission
6. Confederation Africaine de Football (CAF)
7. Cricket South Africa
8. Department of Sports and Recreation
9. E-TV
10. Federation Internationale de Football Association (FIFA)
11. Golden Gloves (Pty) Ltd
12. International Cricket Council
13. International Olympic Committee
14. International Paralympic Committee
15. Kwesé Free TV
16. Lagardère Sports and Entertainment
17. M-Net
18. Media Monitoring Africa and SOS Coalition
19. MultiChoice (Pty) Ltd
20. My Players (Pty) Ltd (South African Rugby Players' Association)
21. National Association of Broadcasters
22. National Heritage Council of South Africa
23. National Soccer League trading as the Premier Soccer League
24. Netball South Africa
25. Rugby World Cup Limited
26. Sanda Mgedezi
27. SANZAAR
28. South African Broadcasting Corporation
29. South African Cricketers' Association and Cricket South Africa
30. South African Football Association
31. South African Football Players Union
32. South African Hockey Association

33. South African Rugby Union
34. South African Sports Confederation and Olympic Committee
35. South African Women and Sport Federation
36. South African Youth Council
37. Tenox Management Consulting Inc.
38. University of Cape Town: Jeremy D Griffiths-Evans
39. Victoria University of Wellington, New Zealand and University of South Africa:
Bronwyn E Howell and Petrus E Potgieter

1. INTRODUCTION

- 1.1 The Authority acts in accordance with the empowering framework established by the Constitution of the Republic of South Africa¹, the Broadcasting Act², the Independent Communications Authority of South Africa Act (“**the ICASA Act**”)³ and the Electronic Communications Act (“**ECA**”)⁴.
- 1.2 The Authority is specifically empowered by the provisions of section 60 read with section 4 of the ECA to regulate, *inter alia*, the broadcasting of national sporting events. Section 60(1) of the ECA provides that:
- “Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority”.*
- 1.3 Pursuant to the above framework, the Authority promulgated the Sports Broadcasting Services Regulations, 2010 (“**the 2010 Regulations**”)⁵.
- 1.4 This explanatory memorandum need to be read in conjunction with the 2010 Sports Broadcasting Regulation and the new 2020 draft regulations (“**the 2020 Regulations**”).
- 1.5 Where a clause or part thereof is not amended, or the amendment is merely to effect editorial changes, an explanation is not provided.
- 1.6 On or about 14 December 2018, the Independent Communications Authority of South Africa (“**the Authority**” or “**ICASA**”) initiated a process to review and amend the 2010 Regulations by publishing the initial version of draft Sports Broadcasting Services Regulations (“**2018 Draft Regulations**”)⁶.

¹ 1996.

² Act 4 of 1999.

³ Act 13 of 2000.

⁴ Act 36 of 2005.

⁵ Preceded by the Sports Broadcasting Rights Regulations, 2003.

⁶ Government Gazette No. 42115 volume 1388.

- 1.7 Pursuant to the publication of the Draft Regulations, the Authority received written representations from 39 different stakeholders (both juristic entities and private individuals). Subsequent thereto, the Authority conducted public hearings on 27 to 31 May 2019.
- 1.8 Upon finalizing the above process, the Authority requested various stakeholders to provide additional or supplementary information and/or documents for purposes of its analysis. In this regard, it received supplementary information from SARU, MMA/SOS, MultiChoice and the SABC, among others.
- 1.9 The Authority has considered the additional information provided and representations (both written and oral) made in relation to the 2018 Draft Regulations and hereby publishes Draft Regulations which have been amended pursuant to the information and representations received during the process as well as the Authority's analysis thereof ("**amended Draft Regulations**").

2. BACKGROUND

- 2.1 South Africa is a country which is characterized by inequalities which play a role in, *inter alia*, how television is accessed by people and the nature of the services available to individuals. For instance, research has shown that despite the overall 82.2% television penetration in South Africa, only 12.61%ⁱ is for subscription television services. Accordingly, programmes aired on Free-to-air broadcasts (on both radio and television) are available to a much wider audience than programmes broadcast on other platforms including subscription services. ⁷
- 2.2 Notwithstanding the existence of the 2010 Regulations, the Authority has observed a trend whereby national sporting events are mostly broadcast live on Subscription television, resulting in the majority of South Africans being unable to access such events on a live basis due to affordability of such service.
- 2.3 A case in point is the 2019 Rugby World Cup whereby the rights were bought by a subscription broadcasting licensee leaving the majority of South Africans excluded

⁷ Stats SA, 2018. South Africa Television households.

from accessing the National team's participation in the World Cup, apart from the final match which was broadcast after public outcry.⁸

- 2.4 Nevertheless, the Authority is keenly aware that the sports industry relies on the sale of broadcasting rights as the biggest source of their revenue. Sporting bodies that submitted representations contended that the best commercial offers for their rights were often made by subscription broadcasters. This situation contributes to the majority of South Africans being denied access to sports of national interest.
- 2.5 In light of the above considerations, the Authority has in the amended Draft Regulations sought to give effect to the provisions of section 60 of the ECA whilst considering the competing concerns of the financial sustainability of broadcasters and ensuring increased access to national sporting events is provided to most of the South African population.

3. THE PROCESS

- 3.1 During the process of developing the 2018 Draft Regulations, the Authority undertook a fact finding exercise by conducting internal desktop research and holding one on one meetings with broadcasters (SABC, ETV, Kwesé and Multichoice), sports bodies (SAFA, PSL, Netball SA, Boxing SA, SARU and Athletics SA amongst others), the Department of Sport and Recreation ("**DoS**") and the Department of Communications ("**DoC**") to obtain their views on the existing framework established in terms of the 2010 Sports Broadcasting Services Regulations. Officials of the Authority also travelled to Ghana and the United Kingdom to conduct benchmarking studies in order to supplement the internal desktop research which had previously been conducted in relation to this process and to learn more about their sporting rights acquisition and regulatory frameworks.
- 3.2 Subsequent to the process outlined above, the Authority published the 2018 Draft Regulations on 14 December 2018 for comment by stakeholders on issues arising therefrom. Pursuant to the publication thereof, 39 submissions were received from a wide variety of stakeholders. Public hearings were then held from 27 to 31 May

⁸ <https://www.sport24.co.za/Rugby/Rugbyworldcup2019/millions-of-South-Africans-face-rwc-blackout-20190616>.

2019. During these hearings, the Authority requested additional information from several stakeholders. The additional information was received on 4 August 2019.

- 3.3 After considering the submissions, additional information received and embarking on the international benchmarking study, the Authority decided to revise the 2018 Draft Regulations. As such, the Authority deemed it necessary to publish a second draft for comment. The Authority shall make a determination regarding whether to conduct public hearings once it has considered representations received pursuant to the amended Draft Regulations.

4. PROPOSED DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS 2020

4.1 Regulation 2: Amendment of regulation 1 of the 2010 Regulations

The definitions contained in the 2010 Regulations are amended as follows:

- The definition of “Act” is amended by addition of the words “as amended” to take into account the subsequent amendments to the Act;
- The definition of “Confederation sporting event” is amended to effect editorial changes;
- A definition for “COSAFA” is inserted to refer to the Council of Southern Africa Football Associations;
- A definition of “TAFISA” is inserted to refer to the Association for International Sport for All.
- A definition for “National Sporting Representative” is inserted to mean any individual representing South Africa in a confederation sporting event. This definition was derived from the definition of the terms “Olympian” and “Paralympian” in the SASCOG Constitution⁹. The term *National Sporting Representative* was chosen to incorporate all athletes as well as sporting events in one definition.
- A definition of “National Federation” as contemplated in terms of section 1 of the National Sport and Recreation Act, 110 of 1998 is inserted for ease of reference;

- A definition for “Senior” is inserted to mean the highest-ranking team in a specific sporting age group.

4.2 Regulation 3: Amendment of regulation 2 of the 2010 Regulations

Regulation 2 (a) is amended to align the object of the Regulations with section 60(1) of the ECA and section 2 of the ICASA Act, by the addition of the words “*as identified in the public interest*”.

The proposed insertion is to bring the wording of regulation 2(a) in line with the provisions of section 60(1) of the ECA.

4.3 Regulation 4: Amendment of regulation 4 of the 2010 Regulations

Regulation 4(1)(a) of the 2010 Regulations is amended to substitute the term “an individual” with “a national sporting representative” in relation to a confederation sporting event. A national sporting representative means any individual representing South Africa in a confederation sporting event.

4.4 Regulation 5: Amendment of regulation 5 of the 2010 Regulations

Regulation 5 of the 2010 Regulations is amended to insert TAFISA and Netball World Cup and to delete “International Boxing Federations” from the list.

4.5 Regulation 6: amendment of regulation 6 of the 2010 Regulations

The Authority has taken into account representations regarding advertising of sub-licensed national sporting events and has sought to address this by the amendment of regulation 6(4) to insert wording which requires the parties to conclude their commercial agreement regarding the actual time periods and scheduling of advertisements of national sporting events on fair, open and non-discriminatory terms.

4.6 Regulation 7: Amendment of regulation 7 of the 2010 Regulations

Regulation 7 of the 2010 Regulations is substituted in its entirety. The Authority has extended the period for review of the list of national sporting events to every five years

instead of the previous four-year period. Furthermore, the Authority has introduced wording to the effect that the list of sporting events may also be reviewed as and when the Authority determines.

4.7 Regulation 8: Amendment of regulation 8 of the 2010 Regulations

Regulation 8 of the 2010 Regulations is amended to insert a new provision empowering broadcasting service licensee entering into a sports broadcasting commercial agreement in terms of these Regulations to report any unresolved dispute and/ or non-compliance with regulation 8(1) and 8(2) to the Authority. This provision provides an avenue for licensees to redress their dispute on an expedited basis by the Authority.

4.8 Regulation 9: amendment of regulation 9 of the 2010 Regulations

Regulation 9 is amended to effect editorial changes and introduces a requirement for licensees to keep records which include full particulars of all listed national sporting events acquired but not broadcast by free-to-air broadcasting services licensees. This amendment is intended to address representations made regarding the acquisition by free-to-air broadcasters of rights to sporting events which are then not broadcast.

4.9 Regulation 10: Amendment of regulation 10 of the 2010 Regulations

Regulation 10 of the 2010 Regulations is amended to ensure alignment with sections 17(E) and (H) of the ICASA Act.

5. CONCLUSIONS

The Authority has considered the submissions of the various stakeholders and conducted further deliberations and research in relation to the plethora of issues raised. Pursuant to the above process, the Authority arrived at the following conclusions:

- 5.1 Stakeholders made submissions to the effect that in many cases they are only able to acquire the rights to various sporting events on a sub-licensing basis. However, when engaging in negotiations for such rights, the conditions imposed by subscription broadcasting service licensees in relation to scheduling of the event and/or advertising are often stringent or detrimental to the commercial interests of free-to-air broadcasting service licensees. Pursuant to the above submissions, the

Authority has introduced a requirement that the actual time periods or scheduling of advertisements of national sporting events shall be determined by the contracting licensees in their commercial agreement(s) on fair, open and non-discriminatory terms.

- 5.2 The Authority has decided after consultation and further deliberations to increase the applicable fines for contraventions of the Regulations once promulgated.
- 5.3 Whilst the Authority continues to advocate for the promotion of minority and developmental sports, it is aware of the concerns raised by various stakeholders regarding the previous iteration of the Draft Regulations (i.e. the 2018 Draft Regulations). Following further consideration, the Authority has removed the developmental sports from the current iteration of the Draft Regulations as they do not fall within the ambit of section 60(1) of the ECA.

ⁱ StatsSA,2018. South African television households.

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