



e.tv (Pty) Ltd
Telephone: +27 11 537 9300 • Fax: +27 11 537 9310
Physical address: 5 Summit Road • Dunkeld West • 2196 • Johannesburg
Postal address: Private Bag X9944 • Sandton • 2146 • Johannesburg
Reg. No: 1997/012816/07

EMEDIA INVESTMENTS WRITTEN SUBMISSION

DRAFT SPORT BROADCASTING SERVICES AMENDMENT REGULATION, 2020

A. BACKGROUND

1. Pursuant to Section 60 of the Electronic Communications Act, No. 36 of 2005 as amended (“**ECA**”), the Independent Communications Authority of South Africa (“**ICASA**”) prescribed the Sport Broadcasting Services Regulations in 2010. In particular, Section (60)(1) of the ECA makes provision that *Subscription Broadcasting Services (SBS) may not acquire exclusive rights that prevent or hinder the Free-to-Air (FTA) 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.*
2. This section allows for the acquisition of broadcast rights to listed sporting events by either pay-tv or free-to-air broadcasters, but not to be broadcast exclusively on pay-tv, unless there is no interest in providing coverage of an event from a free-to-air broadcaster.
3. On 14 December 2018, ICASA published in the Government Gazette, the Draft Sports Broadcasting Services Amendment Regulations, 2018 (“2018 Draft Regulations”).



4. eMedia made written submissions on the 2018 Draft Regulations and also participated in the oral hearings held by the Authority.
5. On 5 November 2020, ICASA published in the Government Gazette, the Draft Sports Broadcasting Services Amendment Regulations, 2020 (“2020 Draft Regulations”).
6. At the outset we wish to thank the Authority for the time it took to consider our previous submissions and for allowing us to make this written submission on the 2020 Draft Regulations.

B. INTRODUCTION

7. Sport plays a key and critical role in nation building and social cohesion thereby making a contribution to the attainment of the National Development Plan (NDP) objectives and Outcome 14 as outlined in the Government’s Medium Term Strategic Framework, 2014 – 2019. It brings together people from all races irrespective of their social and economic circumstances.
8. Sport is appreciated by millions of people across the globe for their entertainment. Over the years, television (TV) has played a vital role in the development of sports in general, driven by licence acquisition fees. In this regard, Sports Organisations and TV broadcasters have built a synergetic relationship that has allowed them to further their public and/or commercial interests.
9. The coverage of sporting events and competitions by FTA broadcasters (both public and commercial) has amongst others:
 - 9.1. facilitated shared viewing experiences;
 - 9.2. fostered a sense of national identity and social cohesion;



- 9.3. played a key role in the establishment of sport as a significant part of popular culture;
and
- 9.4. laid a foundation on which the highly commercialised sports industry of today is built.
10. Thus the role of FTA broadcasters in covering sporting events cannot be undermined. eMedia Investments broadly welcomes the approach adopted by the Authority to make sports of national interest available to the majority of South African citizens.
11. However, eMedia Investments also respectfully submits it would have been helpful if ICASA had prior to amending the regulations-
 - 11.1. Conducted a regulatory impact assessment on the effectiveness of the current regulations; and
 - 11.2. Concluded its inquiry into Subscription Television Broadcasting Services which is currently underway.

C. LEGISLATIVE FRAMEWORK

12. The primary object of the Independent Communications Authority of South Africa Act No. 13 of 2000 ("**ICASA Act**") as amended, is to establish an independent authority which is to, amongst others, regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution.
13. There are two important pieces of legislation namely the Broadcasting Act No 4 of 1999 ("**Broadcasting Act**") and the ECA that regulates broadcasting activities in the Republic.



14. The object, as provided for in section 2 of the Broadcasting Act, is to establish and develop a broadcasting policy in SA in the public interest and for that purpose to-
- (h) ensure fair competition in the broadcast sector.*
15. The object of the ECA is to provide for the regulation of electronic communications in South Africa in the public interest and for the purpose to amongst other things:
- (f) Promote competition within the ICT sector.*
- (g) Promote the environment of open, fair, and no-discriminatory access to broadcasting services, electronic communication networks and to electronic communication services.*
- (z) Promote stability in the ICT sector.*
16. For the purposes of this submission, Section (60) (1) of the ECA provides that Subscription Broadcasting Services (“**SBS**”) 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.

D. APPROACHES TO SPORTSREGULATION

17. We submit that in order for the Authority to give effect to its objective to regulate sporting events in the public interest, it needs to create regulations that:
- 17.1. Guarantee the public right to information and preservation of free access to major national or international sporting events; and



17.2. Balance the commercial priorities of broadcasters and sports organisations with the wider sociocultural citizens gain from free to air sport broadcasting.

18. We note from the various written submissions and oral presentations made on the 2018 Regulations that there has been a shift in favour of commercial interests of dominant pay-tv broadcasters and sporting bodies seeking to maximise their income from the sale of broadcast rights.

19. The result of this shift is that citizens often face either the loss of access to TV coverage of key sporting events and competitions and/or rising fees from pay TV services.

20. In finalising the 2020 Regulations, we submit that ICASA must:

20.1. Resist the pressure from subscription television service licences and sporting bodies to undermine the Authority's approach to provide access to major sporting events; and

20.2. Tackle market power of pay television sports channel owners and delivery platforms through the application of relevant competition law.

E. SPORTS BROADCASTING IN SA

21. It is important to highlight that, in finalising these 2020 Regulations, ICASA must consider the following issues which has an impact on the ability of the FTA broadcasters to afford sports broadcast rights in South Africa. These include *inter alia*, the need to level the playing field; the terms and conditions of acquiring broadcast sports rights; broadcast rights are prohibitive and international approaches to sports broadcasting regulations.



22. The existence of structural and legal impediments in the South African sports market has resulted in an uneven playing field between free to air broadcasters and subscription television services.
23. In this regard, the Authority should be reminded of the following:
 - 23.1. FTA broadcasters are governed by public interest mandates and specific licence conditions. They are dependent on advertising revenue and has less financial resources compared to pay television broadcasters. As a result, free to air broadcasters are unable to compete for sports broadcasting rights to their huge cost.
 - 23.2. SBS have access to multiple revenue streams, including subscription fees, advertising, sponsorship and sub-licensing. As a result, SBS dominate sports broadcasting in South Africa.
24. As a result of the above, Multichoice enjoys exclusive rights in respect of sports content and has secured the rights to broadcast live a number of high profile events, including –
 - 24.1. Football - the domestic PSL, English Premier League, LaLiga, Italian, the Union of European Football Associations Champions League, the Fédération Internationale de Football Association World Cup and Varsity;
 - 24.2. Rugby – all SA Test Rugby, Super Rugby, Vodacom Cup, Currie Cup and Varsity Cup;
 - 24.3. Cricket – SA Test, One Day and 20 Over cricket, Indian Premier League;
 - 24.4. Motorsports - the Formula One and MotoGP; and
 - 24.5. Tennis – All Grand Slams
 - 24.6. Golf – All Masters events



24.7. Wrestling –WWE

25. Premium content, which is ordinarily licensed by rights holders on an exclusive basis, is generally understood to be the main driver of increased pay-TV subscriptions. This is explained in a 2008 report issued by the UK Office of Communications (“Ofcom”):¹

“Our focus in this document is on that content which is likely to be most effective in driving pay TV subscriptions. This content must have two characteristics: a significant appeal to a broad audience, and limited availability via free-to-air TV channels. Content which has a broad appeal, but which is widely available free-to-air ... is unlikely to drive pay TV subscriptions, since consumers are unlikely to pay a significant premium to watch programmes similar to those which they can already watch for free. We identify two types of content which combine broad audience appeal with a high degree of exclusivity to pay TV: live top-flight sports and first-run Hollywood movies.”

26. Where there is only one substantial platform of premium content, that platform will have reduced incentives to compete and innovate. This is the case in South Africa with SuperSport in respect of premium sport content. Moreover, where there is not already a plurality of channels actively competing to present similar content types, a dominant platform will perceive an additional benefit from maintaining the status quo, and excluding an actual or potential rival platform. Absent regulatory intervention, this will result in the dominant platform negotiating a more restrictive contract than might have been negotiated by one of several other channels negotiating for similar content.

27. Such high concentration results in less competition for sports and premium movie content rights, and less competition in regard to other factors such as presentation, price, quality and service levels. Moreover, such high concentration provides the dominant channel with

¹ “Pay TV second consultation: access to premium content”, 30 September 2008 (available at http://stakeholders.ofcom.org.uk/binaries/consultations/second_paytv/summary/condoc.pdf), paragraph 3.1, page 28 (footnote omitted). In its report, Ofcom defined “top-flight sports” to include “international matches or matches from the top national sports leagues”, and “first-run movies” as “movies that are being shown for the first time on TV” (at footnote 8)



an additional incentive to exclude actual and potential competitors. This is precisely what has occurred in the South African broadcasting sector.

28. This exclusionary conduct occurs, for example, where the dominant party –

28.1. prevents certain content from being aired; or

28.2. bids for rights that the platform is unable to exploit fully, whether legally, technically or for some other reason.

29. A further factor is the equity stakes that Multichoice holds in many national sports teams.

In this regard, Supersport has interest in the following teams: Western Province Cricket; Titans Cricket; KZN Cricket; the Free State Cheetahs; the Sharks; Supersport United Football Club

30. It is our view that by Supersport having an equity stake in domestic teams and/or franchises participating in the domestic league may, amongst others, lead to:

30.1. the abuse of sports TV rights acquisition; and

30.2. ineffective competition as far as the allocation of sports broadcasting rights is concerned.

31. In this regard, eMedia proposes that the Authority should conduct a study on sports ownership patterns in South Africa.



F. E.TV'S SPECIFIC SUBMISSION ON THE 2020 DRAFT REGULATIONS

32. The 2020 Draft Regulations seeks to regulate sporting events in the public interest within the Republic of South Africa.
33. eMedia Investments is of the view that there are structural and legal impediments in the market in South Africa where it is evident that there is unfairness as far as the cost of sport broadcast rights.
34. eMedia Investments submits that in finalising the Sports Regulations, the Authority should, amongst others, consider that:
 - 34.1. All FTA broadcasters in South Africa are governed by public interest mandates and licence conditions;
 - 34.2. FTA broadcasters, in particular e.tv, are mainly dependent on advertising revenue, whilst Subscription Broadcasting Services (SBS) has multiple revenue streams namely subscription fees, advertising, sponsorships and sub-licensing fees;
 - 34.2.1. FTA broadcaster's cannot cross subsidize lower priced products;
 - 34.2.2. FTA broadcasters have substantially less financial resources;
 - 34.2.3. It is a known fact that in South Africa sport broadcasting is dominated by pay-TV; and
 - 34.2.4. FTA broadcasters cannot afford bidding for sports rights.



35. Specific comments on the draft regulations

Amendment of regulation 5: Listed Sporting Events and Codes

- 35.1. The amendment of Regulation 5 specifies the listed sporting events and states that "The following National Sporting Events may be broadcast live, delayed-live or delayed by free-to-air Broadcasting Service Licensees" (our emphasis):
- 35.2. eMedia is concerned that the 2020 Regulation does not go far enough in addressing the high prohibitive costs of accessing the broadcast rights by FTA broadcasters.
- 35.3. In order to address the high cost of broadcast rights, eMedia proposes that the Authority consider including a regulation to compel that hoarded sports rights by pay-tv broadcasters should be made available to FTA broadcasters on a cost effective basis. Since FTA broadcasters cannot afford the substantial license fees paid by Multichoice, we propose that sharing the hoarded rights will benefit pay TV as well as free-to-air, whilst not exposing FTA operators to undue and reckless financial risk.

Amendment of regulation 7: Review of the Listed Events

- 35.4. eMedia is concerned that the process for adding or removing a national sporting event may take a long time and may be unduly delayed. eMedia suggests a more flexible approach should be adopted.



Amendment of regulation 8: Dispute Resolution

35.5. eMedia supports the strengthening of regulation 8, which empowers the broadcasting service licensee entering into commercial agreements to report any unresolved dispute and/or non-compliance to ICASA.

Amendment of regulation 9: Monitoring

35.6. eMedia is concerned that the amendment to Regulation 9 by the insertion of regulation 9 (1)(bA) only covers sporting events broadcast by FTA broadcasters. eMedia submits that the regulation should be extended to require all SBS broadcasters to also provide full particulars of national sporting events acquired but not broadcast.

G. CONCLUSION

36. eMedia thanks ICASA for the opportunity to comment on the Draft Sports Broadcasting Regulations and looks forward to participating in any oral hearings to be undertaken by the Authority.