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EMEDIA INVESTMENTS WRITTEN SUBMISSION

DRAFT SPORT BROADCASTING SERVICES AMENDMENT REGULATION, 2018

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 (‘Draft Sports Regulations’). ICASA gave stakeholders until 15 March 2019 to make written submissions.



4. In this regard, eMedia Investments makes this written submission on the Draft Sports Regulations. Our submission will, *inter alia*, focus on the cost of acquisition of the sports broadcasting rights, the restriction on advertising and the restriction on ownership of teams by broadcasters.

B. INTRODUCTION

5. 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.
6. 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.
7. The coverage of sporting events and competitions by FTA broadcasters (both public and commercial) has amongst others:
 - 7.1. facilitated shared viewing experiences;
 - 7.2. fostered a sense of national identity and social cohesion;
 - 7.3. played a key role in the establishment of sport as a significant part of popular culture; and
 - 7.4. laid a foundation on which the highly commercialised sports industry of today is built.



8. 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. However, eMedia is of the view that the proposed amendments to the Draft Sports Regulations do not go far enough to address the challenges facing FTA broadcasters with respect to access to sport broadcast rights.
9. eMedia Investments also respectfully submits it would have been helpful if ICASA had performed an assessment to determine the impact of the 2010 regulations on the growth and development of the broadcasting industry as a whole.

C. LEGISLATIVE FRAMEWORK

10. 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.
11. 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.
12. 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.



13. 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.

14. 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. THE TELEVISION BROADCASTING SECTOR IN SA

15. It is important to highlight that, in finalising these Regulations, ICASA must consider the following issues that have an impact on the ability of the FTA broadcasters to afford sports broadcast rights in South Africa. These include *inter alia*:

15.1. Multichoice’s enjoyment of exclusive rights in respect of sports content

- 15.1.1. With regard to sports, Multichoice has secured the rights to broadcast live a number of high profile events, including –



- 15.1.1.1. Football - the domestic PSL, English Premier League, LaLiga, Italian, the Union of European Football Associations Champions League, the Federation Internationale de Football Association World Cup and Varsity;
 - 15.1.1.2. Rugby – all SA Test Rugby, Super Rugby, Vodacom Cup, Currie Cup and Varsity Cup;
 - 15.1.1.3. Cricket – SA Test, One Day and 20 Over cricket, Indian Premier League;
 - 15.1.1.4. Motorsports - the Formula One and MotoGP; and
 - 15.1.1.5. Tennis – All Grand Slams
 - 15.1.1.6. Golf – All Masters events
 - 15.1.1.7. Wrestling – Impact Wrestling and WWE
- 15.1.2. 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.”

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)



- 15.1.3. 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.
- 15.1.4. 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 an additional incentive to exclude actual and potential competitors. This is precisely what has occurred in the South African broadcasting sector.
- 15.1.5. This exclusionary conduct occurs, for example, where the dominant party –
- 15.1.5.1. prevents certain content from being aired; or
 - 15.1.5.2. bids for rights that the platform is unable to exploit fully, whether legally, technically or for some other reason.
- 15.1.6. e.tv acquired the rights exclusively from UEFA and WWE to broadcast Champions League football matches and wrestling, respectively. Due to primarily the high costs of acquiring the broadcast rights for the UEFA Champions League and Wrestling, e.tv lost the rights to Supersport.



15.2. Equity Stakes in Teams by Multichoice

- 15.2.1. Creating a conducive regulatory environment and promoting competition for the FTA broadcasters to access sports rights must be at the apex of ICASA's objectives in amending the Sports Regulations.
- 15.2.2. Multichoice is wealthy enough to outbid pay-TV competitors and FTA broadcasters for rights to broadcast sports content. Sports fans want live broadcasts, and according to the Competition Commission, Multichoice owns broadcast rights to most sporting events: the PSL, local soccer league, and SA Rugby Union games. Supersport also owns stakes in local sports teams², which form part of the national sporting events identified by the Independent Communications Authority of South Africa.
- 15.2.3. 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:
 - 15.2.3.1. the abuse of sports TV rights acquisition; and
 - 15.2.3.2. ineffective competition as far as the allocation of sports broadcasting rights is concerned.
- 15.2.4. In this regard, eMedia proposes that the Authority should conduct a study on sports ownership patterns in South Africa and how this impacts on the ability of broadcasters to access the broadcast rights of national sporting events.

² Towards A Policy on Media Transformation And Diversity, August 2016, page 126



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

16. The Draft Sports Regulations seeks to regulate sporting events in the public interest within the Republic of South Africa.
17. 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. In this regard, eMedia Investments submits that in finalising the Sports Regulations, the Authority should, amongst others, consider that:
 - 17.1. All FTA broadcasters in South Africa are governed by public interest mandates and licence conditions;
 - 17.2. 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;
 - 17.2.1. FTA broadcaster's cannot cross subsidize lower priced products;
 - 17.2.2. FTA broadcasters have substantially less financial resources;
 - 17.2.3. It is a known fact that in South Africa sport broadcasting is dominated by pay-TV;
 - 17.2.4. FTA broadcasters cannot afford bidding for sports rights; and
 - 17.2.5. e.tv's only funding model is advertising and will not be able to recoup the high cost of sports rights.



18. Specific comments on the draft regulations

Amendment of regulation 1 of the Regulations

- 18.1. eMedia submits that the definition of National Sporting Events be amended to delete the word “senior”, to have an inclusive definition.

“National Sporting Events means the broadcasting of sporting events that are deemed to be of national interest and include the South African National Teams”.

Amendment of Regulation 2

- 18.2. Regulation 2 amends the list of objectives of the regulation.
- 18.3. In our view, the Draft Sports regulations do not make concrete proposals on the measures to balance between audience and revenue. In this regard, we recommend that objective (e) be amended to read as follows:

[reach a wider audience and to] strike a balance between [audience and revenue] the needs of the public, rights holders, SBS and FTA broadcasters”.

- 18.4. Given the fact that the Draft Sports Regulations focuses on making National Sporting Events available to the majority of the public, we recommend that the objective below be inserted under objective (e):

“(f) ensure affordable access to the broadcast rights to sport events of national interest continue by FTA television broadcasters”.



Amendment of regulation 5: Listed Sporting Events and Codes

- 18.5. The amendment of Regulation 5 introduces three (3) groups of listed sporting events and codes:
- 18.5.1. **Group A:** FTA required to broadcast on full live coverage of the listed national sporting events. FTA further required to inform SBS if it's unable to acquire the rights on non-exclusive basis.
- 18.5.2. **Group B:** Sports events offered to SBS licensee on non-exclusive basis under sub-licensing conditions.
- 18.5.3. **Group C:** FTA and SBS to broadcast at least two minority and development sporting event.
- 18.6. Whist eMedia agrees with the categorisation as far as various listed sporting events for both FTA and SBS, the company is concerned that the draft regulations do not go far enough in addressing the high prohibitive costs of accessing the broadcast rights, in particular by FTA broadcasters.
- 18.7. In order to address the high cost of broadcast rights, eMedia proposes that:
- 18.7.1. the regulation must clearly specify how the sub-licensing conditions would be applied;
- 18.7.2. sub-licensing must be done on cost effective basis taking into account the FTA source of revenue;
- 18.7.3. the Authority to consider setting a sub-licensing framework given the fact that SBS has many revenue streams;
- 18.7.4. Sports bodies to consider unbundling the sports rights for FTA and SBS; and



- 18.7.5. The Authority to consider including a regulation to compel that hoarded sports rights by SBS 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 6: Broadcasting of National Sporting Events

- 18.8. This section applies to all listed events under Group B, which requires that Sports Events be offered to SBS licensee on non-exclusive basis under sub-licensing conditions.
- 18.8.1. This regulation further proposes that a SBS who has acquired or fails to acquire any sports rights in terms of events listed in Group B must inform other broadcast licensees within five (5) days for the opportunity to tender. Again eMedia is not sure as how in practical terms this will be achieved since there is an open window for broadcasters to bid for the rights. This act may in our view contravening the competition Act provisions.
- 18.8.2. Taking into account that SBS has more than one revenue stream, ICASA should consider including a sports sub-licensing framework in the final Regulation, eMedia is of the view that the regulation must clearly specify how the sub-licensing conditions would be applied.

Amendment of regulation 7: Review of the Listed Events

- 18.9. The regulation proposes that the Listed National Events should be reviewed after three (3) years. This provision is not new as it is included in the current regulations. eMedia is concerned that since 2010 ICASA did not review the List of National Events



and not sure what mechanisms the regulator will put in place to ensure that this provision is implemented.

Amendment of regulation 8: Dispute Resolution

18.10. 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.

F. CONCLUSION

19. e.tv thanks ICASA for the opportunity to comment on the Draft Sports Broadcasting Regulations and looks forward to participating in the further stages to be undertaken by the Authority.