



By email only

To: vmolete@icasa.org.za

CC: pcokie@icasa.org.za

Independent Communications Authority of South Africa (ICASA)
Block B, 350 Witch-Hazel Avenue
Eco Point Office Park,
Centurion

For the attention of: Violet Molete

Zurich, 14 March 2019

Public consultation on the draft Sports Broadcasting Services Amendment Regulations 2018

Dear Violet Molete

We write to you with regard to the consultation on the draft Sports Broadcasting Services Amendment Regulations (the "**Draft Regulations**").

On behalf of the Fédération Internationale de Football Association (FIFA), we would like to thank you for the opportunity to present our views on the Draft Regulations. FIFA acknowledges the importance of public consultation procedures in shaping broadcasting policy around the world and, in this case, the future broadcasting policy in the Republic of South Africa. We therefore hope that our views can contribute to the decision-making process of the Independent Communication Authority of South Africa (ICASA) resulting in a balanced approach between the exploitation of media rights by rights holders and the designation of events of major importance to society.

Prior to the merits of our contribution, we would like to take the opportunity to provide you with some information on FIFA including an overview of our general policy on the broadcasting of our events.

FIFA's objectives as football's world governing body and in accordance with its Statutes are:

- to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes;
- to organise its own international competitions;
- to draw up regulations and provisions and ensure their enforcement;

- to control every type of Association Football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game;
- to use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless of gender or age;
- to promote the development of women's football and the full participation of women at all levels of football governance;
- to promote integrity, ethics and fair play with a view to preventing all methods or practices, such as corruption, doping or match manipulation, which might jeopardise the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.

FIFA is able to discharge its statutory duties by relying, as a primary source of revenue, on the sale of television broadcasting, marketing and licensing rights, which accounted for 86% of the overall revenue generated in the 2017 financial year¹ and were mainly related to the FIFA World Cup™. Over the full four-year cycle 2015-2018, 83% of FIFA's revenues were directly linked to the FIFA World Cup™.²

Consequently, it is primarily the revenues generated from the FIFA World Cup™ that allow FIFA to implement and pursue its extensive development and social programmes around the world. In the 2015-2018 financial cycle, 81% of FIFA's overall expenditure were direct investments into football. This includes the categories 'Competition & Events' (48% of total expenses), 'Development & Education' (31%) and 'Football Governance' (2%).³

From 2015 to 2018, FIFA invested a total of USD 1.67 billion in Development & Education. USD 1.079 billion was dedicated to the FIFA Forward Football Development Programme, which was launched in 2016 to replace the Financial Assistance Programme and other football development projects by increasing fourfold the entitlements compared to the previous cycle. In 2018, the FIFA Congress decided to increase the investment in FIFA Forward for the 2019-2022 cycle to USD 1.746 billion⁴, which translates into an investment of USD 6,000,000 per member association for this four-year cycle to support operational needs and development projects.

For the long-term development of football, FIFA has also committed USD 100 million to the Football for Schools Programme, in particular to help boys and girls in primary schools to play football and to promote important values and life-skills. Together with investments in the Technical Development Programme, the Refereeing Assistance Programme, women's football promotion, sustainability, the FIFA Foundation, education, audit and financial education, medicine and science and other programmes, a total of USD 1.456 billion was contributed to football development and education programmes.⁵

It is important to note that the commercial exploitation of media rights is of paramount importance for the sustainable financing of sport in general, as well as for the persistence of the financial redistribution and solidarity mechanisms within the sport itself.

¹ FIFA Financial Report 2017, page 25.

² FIFA Financial Report 2018, page 34. The FIFA Financial Report 2018 will be published after an approval of the FIFA Council (next meeting on 15 March 2019).

³ FIFA Financial Report 2018, pages 18 and 21.

⁴ <https://www.fifa.com/development/fifa-forward-programme/index.html>

⁵ From 2015-2018, FIFA Financial Report 2018, page 18.

At the same time, FIFA already has a long and notable record of ensuring free-to-air coverage of the FIFA World Cup™ in the Republic of South Africa, including all 64 matches of the 2010 and 2014 editions of the FIFA World Cup™ as well as the substantial majority of the 2018 FIFA World Cup™. Furthermore, FIFA requires certain free-to-air coverage of all its other tournaments in territories where a local team is involved. Thus, in FIFA's opinion the goal of legislation to establish public access to sporting events of major importance to society can be reached without resorting to far-reaching regulation – FIFA already remains committed to making a wide range of matches publicly available by means of free-to-air.

Having thoroughly analysed the Draft Regulations there are several aspects on which we would like to seek clarification:

- The Draft Regulations introduce a new definition of *“National Sporting Events”*, being *“the broadcasting of sporting events that are deemed to be of national interest and include the South African National Senior Team”*.
 - We are unsure why the definition is limited to the “broadcasting of” the relevant National Sporting Event. The defined term itself implies that the definition should refer to a specific type of event and not the concept of it having to be broadcast. Surely the question of whether an event is a National Sporting Event is not linked to whether it is “broadcast”?
 - We note that there already exists a definition of a “national sporting event” in the current Regulations. We are unsure how, if at all, the existing definition works together with the proposed conflicting definition of the same name.
 - We note that the proposed definition of “National Sporting Event” (being an event of national interest **and** which includes the South African National Senior Team) is used in the proposed text of 5.1. Are we to assume therefore that, with respect to Group A events (listed in 5.1.1), such events are only listed **to the extent that** the South African National Senior Team qualifies for such?
- The Draft Regulations introduce a new definition of *“Sports of National Interest”* being those events which *“do not necessarily involve the Senior National Team but appeal to the majority of the South African populace”*.
 - We are unsure of the proposed purpose of this definition as it is not used in the Draft Regulations? We kindly ask for clarity on why such a definition has been introduced and whether such could, in any event, apply to those sports listed in 5.1.1 as comprising Group A?
 - How does ICASA propose to determine whether a sport *“appeals to the majority of the South African populace”*? For example, there are good reasons to maintain that not all FIFA World Cup matches, in which the South African team is not involved, are of truly “national interest”.

- The Draft Regulations, in 5.1.1, appear to limit the criteria by which Group A national sporting events are to be listed. Under the current Regulations, such criteria extends to any of Regulation 4(1)(a), 4(1)(b) **or** 4(1)(c). Under the Draft Regulations, such criteria is limited to **4(1)(a) only**.
 - Are we therefore to understand that, unless the terms of 4(1)(a) are satisfied (i.e. the sporting event represents a confederation sporting event involving a national team or a national sporting representative) then Group A events (being those listed under 5.1.1) will not be listed at all?
 - By way of a practical example, if an edition of the FIFA World Cup™ does not involve national team participation from South Africa (i.e. not satisfying the criteria under 4(1)(a)), then is it the deliberate intention of the Draft Regulations that the FIFA World Cup™ will not be listed at all?
- When referring to the listing of National Sporting Events in 5.1, how are we to reconcile the term “*Compulsory*” with the qualifying language in 5.1.1 that states, “*Subject to the criteria provided in 4(1)(a)...*”? Are we to understand that it is only ‘compulsory’ to list those events in 5.1.1 to the extent that they satisfy the conditions of 4(1)(a)? If so, the term ‘compulsory’ in 5.1 is somewhat misleading.
- The Draft Regulations propose that National Sporting Events which are listed “*must be broadcast on full live coverage on Free-to-air*”.
 - With reference to **Group A only** - how are we to understand the term “*full*” in this context? Are we to understand that such applies only to the “*full*” South Africa matches / participation or the “*full*” event as a whole?
 - We note that the FIFA World Cup™ is grouped together with the Summer Olympic Games, Commonwealth Games and ICC Cricket World Cup (amongst others). The Draft Regulations provide no guidance as to the scope of listing on a per event basis such that it appears to be foreseen that each of the aforementioned events be listed in the same manner. With such in mind, it should be noted that each of the aforementioned events are structured entirely differently such that the only equitable blanket solution would be to limit the effect of listing to South Africa matches / participation and not to the events as a whole. By way of a practical example, a single South African participant in the Olympic long jump, should not lead to the entire Summer Olympic Games being deemed to be of national importance (and therefore subject to mandatory free to air coverage). Similarly, South African participation in between 3-7 matches of the FIFA World Cup™, should not result in the full 64-80 match schedule being listed for mandatory free to air coverage.
 - The term “*Free-to-air*” (as used in Regulation 5.1.1) is not defined in the Draft Regulations. Whilst there is a definition of “*Free-to-air broadcasting service licensee*”, such a definition would not appear to be a term that is either limited to television broadcasters or even subject to a minimum level of reach and/or coverage. With such in mind, are we to assume that one could discharge their obligation to broadcast listed

content on a “Free-to-air” basis by placing such listed content on a digital platform (e.g. the rights holder’s own broadcast channels) that (as per the definition of “Free-to-air broadcasting service licensee”) provides “at all times, a broadcasting service capable of being received without payment of a subscription fee”? In this same context, we request clarity on what constitutes “at all times”? If a subscription service were to unencrypt a channel for a period of time such that it was receivable without a charge, arguably such a channel would be “at all times” available without charge – i.e. “at all times” during the window in question. If not, how exactly does ICASA interpret “at all times”?

- Draft Regulations require in 5.1.2 that *“if the Free-to-air licensee cannot acquire the above sporting rights, the Free-to-air Licensee must inform subscription service broadcasters, to allow an opportunity for the latter to bid for the rights on a non-exclusive basis.”*
 - Are we to understand from such that language that, with respect to listed content, a rights holder is obliged to approach the free-to-air market before the subscription market so that the former has a first right of purchase? If so, what are the rules and regulations that govern such an arrangement? For example:
 - for how long must a rights holder negotiate with the free-to-air market in order to discharge its obligation?
 - must a rights holder wait for the free-to-air negotiations to conclude/break down before approaching subscription broadcasters?
 - when exactly must such free-to-air negotiations take place? If listing is to be linked directly to the team composition of the sporting event (i.e. whether or not the South Africa team is participating), then seemingly one may need to wait until they know whether their event is listed in order to know whether/to what extent they need to offer a first right of purchase to the free-to-air market. In the case of the FIFA World Cup™, it may not be clear whether/to what extent it is listed until shortly before the FIFA World Cup™. Such directly affects the commercial strategy of all parties.
 - in this context, we would like to point out that it is important that sports rights holders enjoy enough flexibility and a reasonable bargaining situation in the market to reach various objectives, including distribution, financial objectives and development of the sport. This may include the possibility that FIFA places Pay media rights in advance of settling on a free-to-air solution for the country, which has often been standard (and satisfactory) practice to date.
 - To the extent that the free-to-air market fails to acquire listed content, the rights holder is permitted to sell the listed content to the subscription market, albeit only on a non-exclusive basis.
 - We assume that such is meant to be interpreted as “non-exclusive with the free-to-air market” although such is not clear in the Draft Regulations.

- Since the Draft Regulations mandate (in 5.1.1) that Group A listed content “*must be broadcast on full live coverage on free-to-air*”, how does ICASA anticipate the free-to-air market to respond knowing that, should they be unable to find a deal with the rights holder directly, local legislation obliges the subscription market to grant the free-to-air market a sub-license? The Draft Regulations serve to remove any need for a commercial discussion to take place and empower the free-to-air market to hold the subscription market to ransom.
- The Draft Regulations do not anticipate a scenario whereby the subscription market and the free-to-air market fail to agree upon the terms of a sub-licence. Are we to assume therefore that, in the absence of an equitable commercial arrangement, the free-to-air market can rely upon the provisions of 5.1.1 to force the subscription market into a mandatory licence on terms that it unilaterally dictates?
- The Draft Regulations serve to oblige the subscription market to share acquired listed content with the free-to-air market. The Draft Regulations do not anticipate a scenario where the rights holder fails to find an equitable commercial arrangement with either the free-to-air market or the subscription market. In such circumstances, does a rights holder find itself obligated to grant a mandatory licence to the free-to-air market?

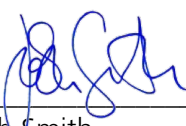
Against this background, it is also important to note that across the world the success of FIFA Member Associations national teams is often correlated to the revenue its local leagues and Football Associations can generate. FIFA believes that the Draft Regulations, which serve to reduce competition and therefore licence fees, are therefore potentially detrimental to South African football’s presence on the world stage, and counter to its potential for producing the matches of national interest it seeks to protect.

Furthermore, we politely query whether the existing free-to-air market in the Republic of South Africa even has the capacity to broadcast the sheer volume of sports content to which the Draft Regulations relate. We kindly ask that you consider such a practicality as well as the substantial production investment that the free-to-air market would need to make to accommodate the Draft Regulations.

As a concluding remark, we would like to thank you for considering our response and questions raised in the context of your consultation procedure and remain available to discuss any elements of our answer in further detail should you deem appropriate. We do not however anticipate needing to make oral presentations although we would be happy to do so if ICASA so requested.

Yours sincerely

**FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION**



Josh Smith
Director, TV Services