

Independent Communications Authority of South Africa (“ICASA”)

Block B, 350 Witch-Hazel Avenue

Eco Point Office Park

Centurion, 0144 South Africa

To the attention of: Ms. Dimakatso Qocha

Sent by e-mail to: hmakola@icasa.org.za; dqocha@icasa.org.za; cnkosi@icasa.org.za

Madrid, 27 January 2021

Subject: Additional questions - Inquiry into Subscription Television Broadcasting Services

1. On 14 January 2021, the Spanish Football League (“*Liga Nacional de Fútbol Profesional*”), hereinafter, “**LaLiga**” received a communication via email from the Independent Communications Authority of South Africa (“**ICASA**”) with regard to the Inquiry into Subscription Television Broadcasting Services (the “**Inquiry**”). In particular, ICASA has requested LaLiga to provide additional information on certain issues canvassed during LaLiga’s presentation and other issues arising from the Authority’s analysis.
2. Within the time frame of 14 days provided by ICASA, LaLiga provides hereunder the information requested.
 - (i) **LaLiga’s suggested definition of premium content. Such definition should highlight key components that it believes should be taken into account by the Authority.**
3. LaLiga has already expressed its concern about the definition of “premium content” used by the Authority in the Draft Findings Document.¹ Its main concerns arise from the flaws

¹ See LaLiga’s written document submitted on 4 October 2019 and LaLiga’s presentation for the public hearings held on 12-15 January 2021.

and mistakes made by the Authority (i) in the assessment of certain case precedents and (ii) the lack of any supporting evidence and/or data to conclude that LaLiga's matches qualify as premium content.

4. First of all, we understand that it is not for LaLiga to identify a precise definition of "premium content" in South Africa but for the Authority to support its findings on solid legal and economic grounds and to show how such findings are applicable to LaLiga's matches. This requires more than just subjectively labelling content targeted for regulation as premium content. As we demonstrated during the presentation, on the Authority's own definition of premium content as set out in the Draft Findings Document, LaLiga matches do not qualify as premium content.
5. On this premise, should LaLiga make any comments on the definition of premium content in South Africa, we are of the view that such definition would include all content capable of building a significant audience. Premium content does not necessarily entail a high acquisition price. There is certain content that has become very popular and it is not expensive to acquire or produce. This is the case of certain TV shows that any market participant can have access to and can build a relevant audience upon. As such content is being developed all the time, defining particular content as premium may not be useful.
6. It should also be noted that, in the sports sphere, there are a few games that are capable of attracting a large audience and that does not mean that either those games or the entire competition should be regarded as premium content. This could be the case of "El Clásico" matches (Real Madrid vs. FC Barcelona) played twice during the soccer season. Regular interest in a competition should be taken into account in a possible "premium content" definition.

(ii) A detailed analysis on how the Authority misinterpreted the cited judgments that led to LaLiga being classified as premium content by the Authority.

7. LaLiga's presentation on 13 January 2021 contained several references to the misinterpretation of the cases cited by the Draft Findings Document and the Discussion Document.² In particular, the Authority identified as relevant cases for its definition of

² See slides 24 to 27 of LaLiga's presentation held on 13 January 2021.

premium content the following: *Newscorp/Telepiu*, *British Interactive Broadcasting/Open* and *Liberty/Ziggo*.³

(a) *Newscorp/Telepiu*

8. The Discussion Document cites a paragraph of this case, underlying that “*premium films and most regular soccer events constitute the essential factor (the “drivers”) that leads consumers to subscribe to a particular payTV/channel/platform*”. Based on this case, the Authority considers that most regular soccer events are a driver-type content that qualifies as “premium content”.

Discussion Document

5.7.14 The following cases and articles shed more light in defining premium content.

- In the *Newscorp/Telepiu*³⁴ case it was held that –
“...*premium films and most regular soccer events constitute the essential factor (“the drivers”) that leads to consumers to subscribe to a particular pay-TV channel/platform. Although other types of contents are also important in order to complement the bouquet of a pay-tv operator, they are not necessarily “driver type” contents.*”

9. However, the Authority has not cited the complete wording of such case. The European Commission did not consider most regular soccer events as premium content. The Authority excluded a key element of the EC Decision in *Newscorp/Telepiu*. The exact wording of the case refers to “*most regular football events **where national teams participate***”.

³ Decision of the European Commission (“EC”) in Case M.2876, *Newscorp/Telepiu*; Case IV/36.539, *British Interactive Broadcasting/Open*; and Case M.7000, *Liberty/Ziggo*. These cases are identified as relevant to support the Authority’s definition of “premium” content in the Draft Findings Document (paragraph 5.8.3 and 5.17.6) and in the Discussion Document (paragraph 5.7.14)

Complete wording

54. Consequently, this type of expensive contents cannot usually be viewed on free TV. In particular, rights to recent premium films and most regular football events where national teams participate (namely the Italian league) tend to be acquired on an exclusive basis by pay-TV operators and constitute the essential factor (the “drivers”) that leads consumers to subscribe to a particular pay-TV channel / platform. Although other types of contents are also important in order to complement the bouquet of a pay-TV, they are not necessarily “driver-type” contents.

10. According to the *Newscorp/Telepiu* case, the interest of national viewers in national sports events is what makes the content more attractive, a driver-type content, and what leads viewers to subscribe to a certain pay TV channel or platform. If the *Newscorp/Telepiu* case was to be considered relevant for the Authority as an example of what premium content is, the Authority should *only* have considered sports events where national teams participate, *not* other foreign competitions, such as LaLiga, that take place outside South Africa and which does not have any direct link in this territory.
11. This conclusion is not unknown to the Authority, since the Discussion Document advocated for a definition of premium content, in the sport field, comprised of three national sporting codes: rugby, cricket and PSL soccer. It did not contain any reference to LaLiga’s matches or any other foreign national league.
12. In addition, the European Commission emphasises in *Newscorp/Telepiu* how certain contents, although included in a bouquet with driver-type content, are not necessarily premium content. This observation is clearly applicable to LaLiga’s matches. LaLiga might have been part of a premium bouquet in South Africa but this does not allow the Authority to simply conclude that any content in a high-end bouquet is premium content. It can be drawn from the *Newscorp/Telepiu* case that LaLiga’s matches should be regarded as non-premium content complementing a subscription TV package.
13. Another intake from this case, according to ICASA, is that premium content can be defined as valuable content. In this regard, we must refer first to the observations made on this document to the definition of “premium content” (paras. 3-6). In a nutshell, LaLiga does not necessarily agree that premium content should have as one of its features the price or value of content. Notwithstanding this, if ICASA opted for assessing “premium

content” on the basis of the rights’ value/pricing terms, LaLiga’s rights have a much lower value than the price paid for the acquisition of other sports competitions in South Africa.⁴

(b) *British Interactive Broadcasting/Open*

14. This case refers to “premium content” as a type of content that will bring important revenues. In other words, a “key sales driver” for broadcasters. According to the EC, this is because premium content is attractive to a large number of viewers who are willing to pay for a TV subscription.
15. If the Authority wishes to apply such reasoning to LaLiga’s matches, it should have first assessed viewing figures of LaLiga’s matches in South Africa. This analysis leads to a simple conclusion: (i) LaLiga does not have a large number of viewers in South Africa compared to other sports events (especially domestic sports); (ii) LaLiga is therefore not a key sales driver to obtain TV subscriptions in South Africa; and (iii) although it might have been included in a high-end bouquet, it is only as a complement to other content on that bouquet. In fact, from 2020, LaLiga’s matches, unlike other sports, were included in a lower price package in Multichoice’s subscription TV services, in the so-called “family” package.

(c) *Liberty/Ziggo*

16. With regard to this case, the EC considers that differences in price and the ability to attract viewers of a certain content are relevant characteristics to differentiate between premium and non-premium content. Reference is also made to the concept of “must-have content” to define premium content. A must-have content would comprise content that, although it has a higher price, it is worth paying because a large audience will pay to watch it. Conversely, when a viewer would not pay to watch certain content if it was offered independently, i.e., not part of a package/bouquet, such content would not qualify as premium.
17. If this analysis of “premium” content was to be accepted, the Authority should have tested, on the one hand, whether LaLiga’s matches are capable of attracting viewers independently, outside of a package. As it was said earlier, the Draft Findings Document does not contain any assessment in this regard in respect of LaLiga’s matches or at all.

⁴ This argument was already made in LaLiga’s presentation on 13 January 2021 (see slide 30) and it is further discussed in the answer to question (v) of this document.

The Authority has not provided any evidence that LaLiga is a driver of subscriptions in South Africa, save for subjectively listing the content as premium. It is important to note that in the EU cases, the EC based its positions on evidence gathered from the market that the content actually met the criteria used to characterise it as a driver of subscriptions. The Authority has not done this.

(iii) Information regarding any measures that have been implemented by LaLiga in its negotiations and subsequent agreements with dominant or monopolist broadcast partners to ensure a balance is struck between consumer welfare and profit maximisation.

18. As briefly explained during LaLiga's presentation on 13 January 2021, LaLiga must comply with certain legal requirements in the commercialisation of the clubs' audiovisual rights at national and international level. Pursuant art. 4.4 and 4.5 of Royal Decree-Law 5/2015, commercialisation of audiovisual rights by LaLiga must comply with certain conditions to ensure that the sale of such rights and subsequent award take place under a public, transparent, competitive and non-discriminatory procedure.
19. In addition, LaLiga must inform the Spanish Competition and Markets Authority ("*Comisión Nacional de los Mercados y la Competencia*", CNMC) of its intention to initiate the commercialisation of LaLiga's rights in any territory (worldwide) and the Authority must adopt a report within the following 30 days with its observations.
20. On general terms, LaLiga carries out a tender process for all entities (not only broadcasters, but intermediaries, OTTs or any other interested party) that may be interested in acquiring the audiovisual rights associated to LaLiga's matches.⁵ Therefore the same terms and conditions apply to any interested party.

(iv) Detailed reasons why the restriction of rights contracts to 3 years was done away with including an indication of whether the restriction had any unintended results in the market.

21. We understand that this question refers to the recent amendment of Royal Decree-Law 5/2015 in Spain, discussed in the course of LaLiga's presentation on 13 January 2021. We explained that this regulation includes a limitation to the duration of exclusive license

⁵ Like most international right holders, LaLiga's matches are marketed in Africa on a pan-regional basis, i.e., as part of a package which comprises several African countries, including South Africa.

agreements signed by LaLiga in relation to the audiovisual rights associated to LaLiga's matches. It should be noted however that this limitation is *only* applicable to contracts at national and EU level, not to other international contracts (in non-EEA countries). In short, legal requirements with regard to the duration of licensing agreements are *not* applicable to international agreements (in non-EEA countries, such as South Africa).

22. When adopted, Royal-Decree Law 5/2015 established that licensing agreements signed by LaLiga should not exceed three years at national and EU level. On 21 April 2020, Royal-Decree Law 5/2015 was amended by Royal Decree-Law 15/2020. This amendment eliminated the duration limit of three years (at national and EU level) and it only left contracts subject to EU competition law rules.
23. As a result, there are no limitations to the duration of license agreements signed by LaLiga, at national and EU level, other than the compliance with EU competition rules. It is worth mentioning again that international agreements (in non-EEA territories) are always excluded from such limitation in the duration of contracts.
24. The amendment introduced by Royal Decree-Law 15/2020 was endorsed by the Spanish Parliament upon request of the Government. On several occasions, LaLiga expressed to the Spanish Government and the Spanish competition authority the need for gaining certain flexibility in the duration of licensing agreements at national and EU level. We believe that amendment of Royal Decree-Law shows that the arguments put forward by LaLiga were welcomed. Those arguments were also presented to this Authority during LaLiga's presentation held on 13 January:
 - ✓ Longer duration of contracts reduces barriers to entry, facilitates the return of investments and, as a result, brings new market players
 - ✓ Longer duration of contracts leads to a wider choice for final consumers
 - ✓ Intense competition of OTTs is a global trend, changing the market's dynamic

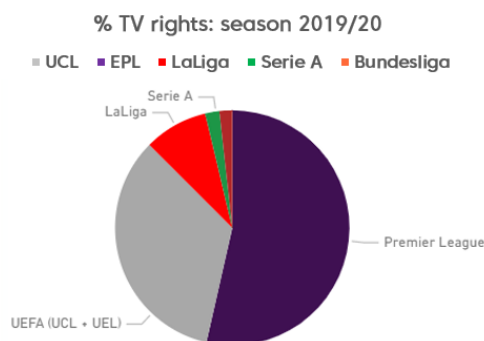
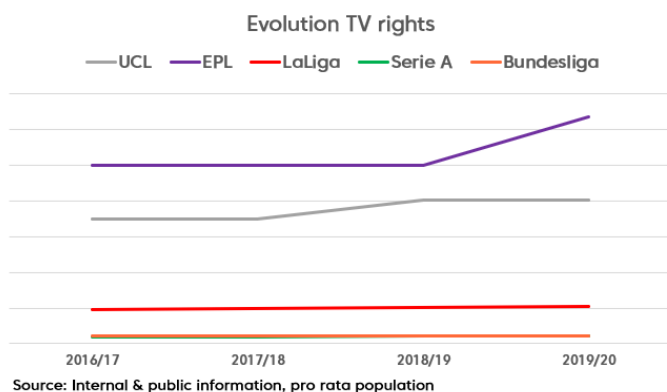
(v) document and/or information which address whether, if premium content is measured from the perspective of the pricing of such content vis-à-vis other content, La Liga would not constitute premium content.

25. Before addressing this question, we would like to insist on the fact that LaLiga does not necessarily agree with the definition of premium content proposed by the Authority. We have expressed our concerns particularly with the use of pricing terms as a factor to

determine whether certain content qualifies as premium content. In this regard, see the answer to question (i) above. That being said, if premium content is measured from the perspective of pricing terms of such content vis-à-vis other content, LaLiga maintains that LaLiga's matches would not constitute premium content.

26. This assertion was supported by sound legal reasoning on the written document submitted on 4 October 2019 and additional evidence was included in LaLiga's presentation, held on 13 January 2021. The evidence already provided during LaLiga's presentation is the only evidence that LaLiga has been able to gather.⁶ We include below the charts of LaLiga's presentation for easier reference:

Looking at football rights' **value** in South Africa...



From 2021/2022 to 2023/2024... LaLiga's rights have decreased in value in Africa

27. On a preliminary note, the best approach to analyse pricing terms at wholesale level would be a comparison of such prices including all sports competitions (national and international) and the most relevant entertainment content broadcast in South Africa. The Draft Findings Document should have included this type of exercise (or a similar one) to support its views and not only vague references.
28. Nonetheless, LaLiga provided this Authority with some insight of pricing terms at wholesale level among EU soccer competitions in South Africa. As it can be drawn from the charts above, there is a significant price dispersion even among EU soccer competitions. The value of LaLiga's rights, together with Bundesliga and Serie A, are drastically lower than other EU competitions. If this exercise had been done with national

⁶ LaLiga has used information publicly available. It has not been possible to gather additional information due to the confidential nature of this type of contractual relationships.



sports competitions and other relevant entertainment content in South Africa, LaLiga's rights would still be located at the bottom of the chart, i.e., its value/pricing terms do not support the Authority's conclusion that LaLiga's matches qualifies as premium content in South Africa.