



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. Violet Molete

Sent by e-mail to: vmolete@icasa.org.za; subscriptioninquiry@icasa.org.za

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Subject: Submission of written representations regarding the Draft Findings Document in the Inquiry into “Subscription Television Broadcasting Services”

1. Introduction

1. The Spanish Football League (“*Liga Nacional de Fútbol Profesional*”), hereinafter, “**LaLiga**” has been recently informed about the inquiry that the Independent Communications Authority of South Africa (“**ICASA**”) is carrying out with regard to subscription television broadcasting services in the territory of South Africa (the “**Inquiry**”).
2. We understand that, on 12 April 2019, ICASA called upon interested parties to make written representations on the Draft Findings Document within 45 days of its publication, and this period was subsequently extended from 27 August 2019 to 4 October 2019.
3. LaLiga has surprisingly become aware that the content of the Draft Findings Document contains certain assumptions and remedies that, if finally implemented, will have a significant impact on the contractual relationships that LaLiga has or may have in the future with certain television broadcaster for the sale of audiovisual rights in South Africa.
4. Watching LaLiga is a “must” for Spanish football fans, but interest in LaLiga beyond the Spanish border cannot be compared to domestic sports competitions, especially in countries like South Africa where foreign football competitions are relegated to a second or third position for sports fans.

5. As a result of such cultural differences, the international expansion of LaLiga relies on the establishment of solid contractual relationships with television broadcasters. Exclusive licencing agreements are necessary and common practice in the audiovisual industry. What unites all sports -when it comes to licensing of audiovisual rights and financing sport competitions- is the necessity for broadcastings services contracts to be based on territorial exclusivity.¹ The use of territorial exclusivity in sporting content is the standard practise worldwide, because it delivers benefits for the seller (sport competition organiser), the purchaser (broadcaster/distributor) and consumers.
6. The appointment of several licensees forced by law could destroy the rights' value that could be generated otherwise. Only other elements that go beyond exclusivity may bring ineffective competition in a given market.² However, LaLiga, in Spain and also abroad, is and will always be concerned about creating a transparent and fair process and a competitive structure for the commercialization of its audiovisual rights. Competition for LaLiga's audiovisual rights has a direct and positive effect on its international expansion.
7. That being said, the Draft Findings Document includes several observations on which we would like to express our concerns:
 - First: From LaLiga's perspective, LaLiga's matches on a live basis should not be considered as "premium content" in South Africa.
 - Second: there is effective competition in the market for the wholesale supply and acquisition of LaLiga's audiovisual rights in terms of its distribution in South Africa.
 - Third: the reduction of the contract duration is likely to be detrimental for the broadcasting of LaLiga's matches on a live basis in South Africa.
8. These points are developed in the following sections of this letter.

2. LaLiga's matches on a live basis should not be considered as "premium content" in South Africa

9. LaLiga has come to learn that, for the purposes of the Inquiry, the Draft Findings Document considers that LaLiga's football matches on a live basis are categorised as "premium content".³
10. This is the first time the Inquiry refers to LaLiga's matches on a live basis. The Discussion Document did not make any reference whatsoever to LaLiga's matches on a live basis or other foreign national league matches on a live basis when describing "premium

¹ See, e.g. Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., Audiovisual sports rights – between exclusivity and right to information, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2016.

² See, e.g. Case 262/81, *Coditel II*, [1982] ECR 3381; see also joined Cases T-185/00 and 300/00, *Métropole II* [2002] ECR II-3805.

³ See paras. 1.3.13 and 5.17.8 of the Draft Findings Document.

content”. Therefore, LaLiga respectfully requires ICASA to reassess its latest conclusions in this regard on the grounds of a more detailed approach to the “premium content” term in South Africa, based on empirical evidence such as an evaluation of audiences of sports competitions in the country.

11. There are strong and convincing arguments that point to LaLiga’s matches on a live basis shall be considered as non-premium content. In fact, with all due respect to the Draft Findings Documents, it is difficult to understand that, in a country such as South Africa, LaLiga may be regarded as premium content, when other sports competitions contents in the country have a far greater impact in terms of audiences.
12. According to the Draft Findings Document, for the purposes of defining the relevant market, a distinction must be made between premium and non-premium content. Although LaLiga does not necessarily agree with this distinction, we would focus on the alleged definition of “premium content”: “*valuable content that is acquired on an exclusive basis and made available on high end premium bouquets*”⁴. This definition supposedly observes certain cases and articles named in the preceding Discussion Paper. However, none of them explicitly indicates or even discuss whether international football matches on a live basis, or any other type non-domestic football matches on a live basis should be considered “premium content”⁵.
13. With all due respect but quite to the contrary, the features of “premium content” identified in those cases and articles should have led ICASA to conclude that LaLiga’s live matches are not “premium content” in South Africa.

(i) *LaLiga’s live matches are not a “driver type content” or a “key sales driver” in South Africa*

14. According to the existing precedents cited in the Discussion Document,⁶ one of the essential elements of “premium content” is the fact that such content is a “*driver type content*” or a “*key-sales driver*”, i.e. it is content that leads consumer to subscribe a particular TV channel/platform.⁷
15. LaLiga’s matches on a live basis in South Africa are not a “*driver type content*” nor “*key-sales driver*”. Football/soccer heavily relies on its links to national roots and how clubs

⁴ See para. 5.6.3 of the Draft Findings Document.

⁵ See para. 5.7.14 to 5.7.18 of the Discussion Document. Interest in supra-national live matches where the national team of South Africa plays are different from competitions where there is no connection with a national element. We refer to the Olympics or other supra-national competitions.

⁶ The Draft Findings Document refers back to the cases and research paper mentioned in the Discussion Document. The Draft Findings Document only mentions one case from the European Commission (British Interactive Broadcasting/Open). This case, unlike what ICASA states, does not include a definition of “premium content” but only provides examples of “premium channels” in the UK.

⁷ See reference to the *Newscorp/Telepiu* case and British Interactive Broadcasting in para. 5.7.14. of the Discussion Document.

are perceived as part of the national culture. Although football fans enjoy watching this sport and may watch a match or two from different domestic leagues, only national teams and domestic leagues from a particular country drive football fans' interest and are watched regularly. Even though this could be the case of Premier Soccer League (“PSL”) or other relevant domestic sports leagues played in South Africa (such as rugby or cricket), it is not possible to assert that LaLiga's matches on a live basis are a key content in order to make South African's consumers to subscribe to a certain TV channel or platform.

16. The European Commission, in the same precedents that ICASA has cited as reference to define what “premium content” is, has made a distinction between a market for the acquisitions of exclusive broadcasting rights for football events played where national teams participate and other audiovisual content. This shows that the relevant market should only take into account, if any, audiovisual rights related to national teams. For instance, in *Newscorp/Telepiu*:

“b) Rights to Football events

64. *The Commission has stated in previous cases that there is a separate market for the acquisition of exclusive broadcasting rights for football events played every year where national teams participate (the national league, primarily first division and cups, the UEFA Champions league and the UEFA Cup). Free-to air TVs participate in the bidding process for rights to Champions league and UEFA cup.*

65. *This market can be distinguished from the acquisition of broadcasting rights for football events that do not take place regularly where national teams participate, such as the World Cup or the European Championship, which are sold by different organisations. To some extent, free-to-air TVs participate in the bidding process for these rights. These findings have been confirmed by the market investigation in the present case.*

66. *For the purpose of this case, the affected market is that of the acquisition of exclusive broadcasting rights for football events played every year where national teams participate (the national league, primarily first division and cups, the UEFA Champions League and the UEFA Cup). The market investigation has clearly confirmed that this type of football contents constitutes a stand-alone “driver” content for pay-TV operators. Moreover, in view of the characteristics of this type of contents and the pricing terms (which are clearly higher than for other regular sport events where national teams participate), **the acquisition of exclusive broadcasting rights for these regular football events where national teams participate can be considered as a separate product market, clearly distinguishable from other contents acquisition markets**”.⁸*

⁸ Case COMP. 2876 *Newscorp/Telepiu*.

17. In fact, the same case clarifies that, although certain contents may be included to complement the bouquet of a pay-TV operator, this does not mean that they are necessarily “*driver-type*” contents, i.e. premium content.⁹ Therefore, although LaLiga’s matches on a live basis may be included in a TV channel together with other pay-TV premium content, it cannot be presumed that such content is also premium.
18. Finally, it is worth mentioning that the Body of European Regulators for Electronic Communications (“BEREC”) in a recent report, has listed as “premium” sports content only the first national football competition of a particular country (domestic soccer league), but not the rest and other European leagues, despite the interest in football within the European Union¹⁰. In South Africa, however, interest in football is devoted to the PSL soccer league, followed by rugby and cricket.

(ii) LaLiga’s live matches are not regarded as a “must-have” for South African viewers

19. “Premium content” is also defined, according to the Draft Findings Document and the Discussion Document -citing an OECD paper- as content that any broadcaster would want for its ability to generate consumers’ demand¹¹.
20. LaLiga’s matches on a live basis in South Africa are not a content that can be categorised as indispensable for obtaining an increasing demand in pay-TV subscription services. Since it is not a domestic competition, LaLiga’s fans are only marginal in South Africa. Therefore, an average broadcaster in South Africa cannot expect to generate a significant demand based on LaLiga’s viewers. This is clear if we establish a comparison between: (i) the audience/viewers of any of the so called “top three sporting codes” in the Draft Findings Document (PSL soccer matches, rugby and cricket) and (ii) the audience/viewers of LaLiga last 2018/2019 Season in South Africa.

Some sports competitions in South Africa	Average Viewership Per Match
PSL Soccer	464,517
Rugby Championship	347,805
South Africa vs Sri Lanka Cricket	140,711

⁹ See *Ibid* (“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”).

¹⁰ See “BEREC report on the impact of premium content n ECS markets and the effect of devices on the open use of the Internet”, available at: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/8013-berec-report-on-the-impact-of-premium-co_0.pdf.

¹¹ See para. 5.7.15 of the Discussion Document. See also para (75) in the *Liberty/Ziggo* case.

LaLiga	43,900
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21. Further, with regard to the analysis in terms of the SSNIP test applied by ICASA,¹² a price increase by a margin of 5%-10% of audiovisual rights associated to PSL soccer matches would amount to one simple conclusion: broadcasters would not decide to switch and acquire LaLiga's matches on a live basis instead. This is because, those two audiovisual products (domestic league and foreign leagues) are not substitutable and, therefore, they are not part of the same market. On the other hand, it is more likely that, in the event of a price increase of LaLiga's matches on a live basis by a margin of 5%-10%, a particular broadcaster would decide to acquire Bundesliga or Serie A matches on a live basis, provided that there is a similar (less) interest in foreign national football leagues.
22. In conclusion, had ICASA made the correct analysis of the SSNIP test, it would not have proposed to include LaLiga's matches on a live basis as premium content. The question is whether two or more types of content are substitutable and could satisfy a typical broadcaster's demand equally. LaLiga's matches on a live basis cannot satisfy the demand of a broadcaster of any of the top three favourites (premium sports) in South Africa: PSL football, rugby or cricket.

(iii) The value of LaLiga's rights is negligible compared to the audiovisual rights for real "premium content"

23. Another element that shows LaLiga's matches on a live basis is not a premium content is the value of such audiovisual rights compared to the value of other "premium sports". The more viewers are willing to pay for a pay-TV subscription, the higher the price of those rights will be, and more interest would have the broadcaster for having such content available on its broadcast programming.

In this regard, the acquisition of PSL's audiovisual rights by SABC only in South Africa amounted to R72M per season¹³ whereas that figure is only close to the value of LaLiga's media rights in a large number of Sub-Saharan African countries altogether.

¹² Analysis of the SSNIP test is discussed in the Discussion Document. For the wholesale market for the supply and acquisition of premium for its distribution in South Africa, see para. 5.9.11. But the SSNIP test has not been carried to determine if international leagues, such as LaLiga, should be included in the proposed market definition.

¹³ See: <https://www.timeslive.co.za/sport/soccer/2019-08-29-sabc-pays-r72m-a-year-for-psl-broadcast-rights>.

3. The Draft Findings Document should have sought guidance from other national regulatory authorities

24. The Draft Findings Document has not taken into account the analysis of the relevant market definition carried out by other national regulatory authorities. In this regard, there are many examples of how regulators from EU Member States consider as premium content the supply and acquisition of football audiovisual rights only from its own domestic league. As advanced, this is the case of most EU national regulatory authorities which have confirmed that the first football league is the main example of a premium content.¹⁴
25. With regard to the Spanish regulator (“*Comisión Nacional de los Mercados y la Competencia*”), it has stated in several occasions that the supply and acquisition of audiovisual rights associated to LaLiga’s matches should be considered as non-premium content outside Spain. This authority has also confirmed that outside the national territory the audiovisual content sold by LaLiga is subject to fierce competition and competes not only with audiovisual rights related to other football leagues but with other sports.¹⁵

4. The Drafts Findings Document contains a clear-cut contradiction in its definition of the wholesale market for the supply and acquisition of premium content for the distribution in South Africa

26. There is also is a clear-cut contradiction in the Draft Findings Document when approaching the concept of “premium content”. Whereas the final conclusion is that LaLiga’s matches on a live basis are part of the wholesale market for the supply and acquisition of premium content for distribution in South Africa, the section devoted to describing premium content in sports does not contain any reference to LaLiga’s matches on a live basis. It only confirms and provides reasons to explain why national sports (from South Africa) are considered “premium content”:

*“When it comes to live sport, a nation’s culture, tastes and preferences determine what constitutes premium sport. In South Africa live rugby, cricket and PSL soccer matches are regarded as the top three sporting codes with a large following and offered on exclusive basis on television. Therefore, the three sporting codes can be viewed as premium content”.*¹⁶

27. It is also noteworthy how the Draft Findings Document describes that “*non-premium content is usually bundled up with premium content in order to create a bouquet or*

¹⁴ *Ibid.* 8.

¹⁵ See Reports of the Spanish regulator authority in Cases INF/CNMC/174/17, International exploitation of LaLiga’s audiovisual rights for 2018/2019 to 2020/2021 Seasons, available at: https://www.cnmc.es/sites/default/files/1806776_12.pdf); and INF/DC/047/19, Exploitation of LaLiga’s audiovisual rights outside the European Economic Area, available at: https://www.cnmc.es/sites/default/files/2420463_2.pdf.

¹⁶ See the Draft Findings Document, para 5.17.13.

package for retail offering". But it does not recognise that this is the case of LaLiga's matches on a live basis when they are offered in a sports channel with other premium content.

28. In conclusion, the Draft Findings Document erroneously includes LaLiga's matches on a live basis as "premium content" for distribution in South Africa.

5. There is effective competition in the wholesale market for the acquisition of LaLiga's audiovisual rights for its distribution in South Africa

29. The Draft Findings Document considers that there is ineffective competition in the wholesale market for the supply and acquisition of premium content for distribution in South Africa. Although it has been already explained that LaLiga's matches on a live basis are not premium content, we would like to make some observations to show that, with regard to LaLiga's matches on a live basis, there is effective competition in the South African market. LaLiga is the first stakeholder interested in fostering competition when it comes to the sale of audiovisual rights in any country. Competition among broadcasters leads to a better offer for final consumers in terms a product of higher quality and better prices offers.
30. One of the factors that ICASA has taken into account for reaching its preliminary conclusion is the existence of entry barriers in the market. However, LaLiga has always encountered several offers for the acquisition of its audiovisual rights, not only from the incumbent operator, but from several broadcasters. In this regard, for instance LaLiga opened an invitation to tender last summer for the licensing of certain audiovisual rights in the Sub-Saharan Africa territories, including South Africa. LaLiga received offers from several local, regional and pan-regional broadcasters. In fact, in this tender process LaLiga received more offers from broadcasters than in the previous cycle, which covered Seasons 2015/2016 to 2019/2020.
31. It is also significant that, although SuperSport International (Pty) Limited ("**SuperSport**") (MultiChoice's subsidiary) was finally the successful bidder, the second best offer was very close to that of SuperSport.
32. On the other hand, it is also worth noting that LaLiga's matches on a live basis are not and will not only transmitted by SuperSport. The new contractual agreement signed between LaLiga and SuperSport for the licensing of LaLiga's audiovisual rights in South Africa during Seasons 2020/21, 2021/22, 2022/23 and 2023/24 is not completely exclusive for that broadcaster. Its exclusivity is only awarded for pay TV, and certain languages, excluding French and Arabic. This means that LaLiga still retains certain audiovisual rights to pursue potential agreements in the territory with other broadcasters on a Free-to-air basis and in other languages. In addition, LaLiga still retains additional rights for its own commercialization as, among others, betting rights, public viewing

rights, in-flight and in-ship rights, virtual reality rights, radio rights, digital platforms exploitation rights or archive footage rights.

33. Finally, LaLiga has recently experienced a relevant interest for LaLiga's matches on a live basis from "non-traditional players". For example, LaLiga has reached several agreements with Facebook to make available LaLiga through this social media network in several countries in South Asia. This is a good example of how OTTs and social media networks should be regarded as actual or potential competitors of traditional broadcasters, making the wholesale market for audiovisual rights ever more competitive than before.
34. In conclusion, LaLiga urges ICASA to reassess its conclusion on the effectiveness of competition in the wholesale market where LaLiga's audiovisual rights are granted.

6. Observations on the proposed reduction of contract duration

35. Among the remedies proposed by ICASA to solve an alleged market failure, the Draft Findings Document recommends the reduction of exclusive licensing agreements duration to three years when the licensee has significant market power. This remedy will have a direct impact on the agreements that LaLiga may reach in the future with certain broadcasters. It would limit LaLiga's capability of protecting the value of its own audiovisual rights in countries where the Spanish football league does not have a pre-eminent position and where conceding the exclusive exploitation of LaLiga's audiovisual rights is a vital assurance to broadcasters.
36. In addition, this remedy runs counter the ability of domestic leagues to extend the duration of exclusive licencing contract up to five years. For instance, in Spain, the national regulator has not detected any competition concerns when LaLiga has established exclusive contracts outside Spain up to five seasons, indicating that it is even possible to include a longer duration but it would preferable not to exceed five seasons¹⁷.
37. It is also remarkable that national governments and regulators in the EU are softening conditions imposed on exclusive licensing agreements for the exploitation of national leagues in their own country. This is the case of France, Germany and the UK. For instance, in France, the French Government eased the regulation applicable to exclusive licensing agreements associated to professional leagues allowing contracts from three to four years. The French competition authority approved this extension due to the rapid technological development experienced by the audiovisual sector and the appearance

¹⁷ See Case INF/CNMC/174/17, International exploitation of LaLiga's audiovisual rights for 2018/2019 to 2020/2021 Seasons, available at: https://www.cnmc.es/sites/default/files/1806776_12.pdf), para. 44 ("For this reason, the CNMC considers that if LFNP [LaLiga] wishes to respect the principles of publicity, transparency, Competition and non-discrimination in the commercialization outside the EEA, this entity should maned the draft in relation to the period of commercialization, choosing one of the following alternatives: "Establishing an specific and single timeframe which does not preferably exceed five seasons".)

of new players in the market, mainly OTTs, increasing the level of competition in the market.¹⁸

7. Conclusions

38. LaLiga believes that the Draft Findings Agreement contains certain observations that need to be reassessed. First, it seems to have erroneously included LaLiga's matches on a live basis as "premium content". With all due respect, in LaLiga's opinion, this classification is far from accurate. LaLiga's matches on a live basis can only be categorised as "non-premium" content in South Africa, as: (i) they are not a "*driver type content*" or a "*key sales driver*"; (ii) they are not a "*must-have*" for South African viewers; and (iii) their value is negligible compared to the value for real "premium content". Furthermore, ICASA should have sought guidance in the decisions held by other national regulatory authorities. For instance, the Spanish regulator (CNMC) has already considered that LaLiga's audiovisual rights in countries other than Spain are considered non-premium content since there is fierce competition from other sports rights.
39. Second, in any event, and contrary to what the Draft Findings Document claims, there is effective competition in the wholesale market where LaLiga's audiovisual rights are granted. The offers received by LaLiga from several broadcasters and the interest of OTTs and social media networks are a clear indicator of fierce competition in the market.
40. Third, should ICASA maintain its proposal of limiting contract duration to three years, this is likely to be detrimental to broadcasters in South Africa willing to expand or complement its football/soccer offer. A shorter duration of exclusive licensing agreements will discourage broadcasters to acquire LaLiga's audiovisual rights. This will be detrimental, ultimately, for LaLiga's fans in South Africa.

¹⁸ See, e.g. the Report of the French competition authority (*Autorité de la Concurrence*) n° 07-A-15 dated 9 November 2007, paras. 7 and 8, available at: <http://www.autoritedelaconcurrence.fr/pdf/avis/07a15.pdf>.