

Lagardère Sports' Comments on Draft Sports Broadcasting Services Amendment Regulations 2018

A. Introductory Comments

1. Lagardère Sports and Entertainment ("*LSE*") is hereby responding to the invitation of the Independent Communications Authority of South Africa ("*ICASA*") in the local Government Gazette number 42115 dated 14 December 2018 for interested parties to make written representations on the Draft Sports Broadcasting Services Amendment Regulations, 2018 ("*Draft Regulations*").
2. LSE's response is set out in two parts. The first of which is a summary of LSM's analysis of the sports media rights landscape in South Africa and LSE's perceived implications and consequences of the Draft Regulations were they to become legally enforceable (particular in light of LSE's relationship with the Commonwealth Games Federation and the Confédération Africaine de Football). By way of brief summary, having considered the matter as a whole in the contextual framework of its industry experience, LSE does not agree that the proposed far-reaching amendments to the existing Sports Broadcasting Services Regulations (2010) will achieve the aims of ICASA in relation to the protection of the sports industry in South Africa and moreover, the interests of the public.
3. LSE respectfully submits that its views on the necessity and overall effectiveness of the Draft Regulations should be taken into consideration by ICASA. In the alternative, if ICASA is ultimately unwilling or unable to set aside the principle of implementing revised Draft Regulations, LSE is of the view that the drafting of the Draft Regulations needs to be revisited and clarified. LSE has set out its concerns and comments regarding the drafting in Part Two of its' response.

B. Part One

1. The Draft Regulations risk jeopardising the development, or in some cases, viability, of sporting federations in South Africa. The requirement to distribute certain listed events and codes live and on free-to-air will almost certainly prevent the substantial investment into sports that is currently made (by subscription broadcasters) such that the availability of sports to the viewing public will be reduced, thereby conflicting with LSE's understanding of ICASA's primary interest.
2. Furthermore, reduced investment in the industry will certainly lead to cuts in grassroots investment, the effect of which is to make sports more elitist and inaccessible to the many as well as creating a public health problem. The levels of investment cannot be replicated in a free-to-air environment.
3. This is all the more so since the coercive and mandatory characters of the Draft Regulations do not appear to be compatible with the current organization of the free-to-air market in South Africa and the applicable regulations.

It is worth noting that the current organization of the free-to-air market in South Africa is not adequate to deal with the supply of certain premium Confederation Sporting Events (as defined by the existing Sports Broadcasting Services Regulations, 2010), whether or not South African teams participate in such events. Thus, for example, since 2017, the Women Africa Cup of Nations, the CAF Champions League and the CAF Confederation Cup (ie three events concerned by the Draft Regulations) have not found takers in South Africa for Free-to-air broadcasting rights.

When a Free-to-air broadcasting services license is granted for South Africa with Free-to-air broadcasting rights of a Confederation Sporting Event, the licensee is only able to broadcast a small proportion of the event, as it has not enough channels to cover the event. This is the case in particular with South African Broadcasting Corporation which is granted the Free-to-air broadcasting rights in South Africa for the whole Africa Cup of Nations (senior male competition), but is only able to broadcast 13 matches among 52 because of the number of its channels.

Moreover, regulatory constraints oblige South African Broadcasting Corporation to broadcast specific programs at the time the matches are played, thus often preventing it from broadcasting the matches live. Such constraints are inconsistent with the objective of full live coverage as provided by the Draft Regulations for the National Sporting Events listed in Clause 5.1, including the Africa Cup of Nations (male and female soccer) and the Commonwealth Games.

4. The Draft Regulations appear to be somewhat unrealistic about the way the Pan-Africa TV channels operate internationally. Indeed, the subscription broadcasting services licensees' market, as well as the market of the broadcasting rights accessible through subscriptions, are global, or at least by large geographical areas in Africa. The new constraints that the Draft Regulations intend to impose on subscription broadcasting services licensees regarding their business and programming in South Africa specifically are inappropriate for Pan-Africa TV channels operating internationally from South Africa or elsewhere. In particular, they require such licences to have South Africa specific programming and specific sorts of broadcasting rights which would create challenges for the business model of such Pan-Africa TV channels and, therefore, the means by which the broadcasting rights are internationally marketed and acquired, causing serious distortions of competition at an international level.
5. Furthermore, it is well understood that Rights Holders are very reticent to sell their broadcasting rights for below market value. If they are not able to strike a deal with broadcasters in a particular territory, their events (such as the Commonwealth Games) might not be broadcast in that territory, which would have the effect of prejudicing the public at large.
6. The Draft Regulations, should they be approved as they stand, would undoubtedly undermine the economic viability of subscription broadcasting service licensees, whether national or international, which, consequently, would necessarily lead to an impoverishment of sports incomes and therefore sports institutions in South Africa. In addition, it is also likely that broadcasts operated on an exclusive basis from outside South Africa by means of Internet broadband and OTT services for instance, would be afforded a disproportionate level of exposure. In any case, we do not believe that the changes that the Draft Regulations may introduce achieve the objective stated in s60(1) of the Electronic Communications Act, 2005.

C. Part Two

LSM has commented on amendments to the Draft Regulations where it considers that clarification is required to create consistency of interpretation and allow for practical application.

Definitions

['IRE' should reference World Rugby and not the International Rugby Board]

'National Senior Team' – 'specific sporting age group' is not clear

Clause 4(1)(a) – Are these criteria applied on an event-by-event basis? For example, is FIFA World Cup a listed event because South Africa are *sometimes* featured or is it only a listed event when South Africa *are* featured? Furthermore, multi-disciplinary events such as Summer Olympic Games and Commonwealth Games, are not arranged by 'a recognised international sport body that governs a *particular sport*' and as such does not comply with the criteria for 'a Confederation Sporting Event' as defined. Presumably, that is not the intention of the drafting?

Clause 5.1 –

How does 'full live coverage' apply in the context of multisport events (Commonwealth Games in particular) where multiple events taking place at the same time. Also, is live obligatory where the event is in an unaccommodating time zone?

'full live coverage' seems inconsistent with clause 6.2, as the latter gives option of broadcast live, delayed live or delayed.

Clause 5.1.1 – What is the significance of the Commonwealth Games being listed further down in the list?

Clause 5.1.1(i) and (k) – which events do these include or is it criteria dependent?

Clause 5.1.2 –

What is 'cannot acquire' intended to cover? Lack of resources/finance? Inability to agree terms? Inability to 'broadcast on full live coverage on Free-to-air' as requested in Clause 5.1.1?

'must inform' should cross reference clause 6.

'non-exclusive basis' how does this apply in practice if there is only one interested party?

With regard to the objective stated in s60(1) of the Electronic Communications Act, 2005, we understand that such 'non-exclusive basis' is only between Free-to-air broadcasting services

licensees and subscription broadcasting services licensees, and does not prevent a subscription broadcasting service licensee from bidding for pay broadcasting rights on an exclusive basis. This should be specified.

Clause 5.2 – ‘non-exclusive basis’ – how does this apply in practice if there is only one interested party? Moreover, is this only between free-to-air broadcasting services licensees and subscription broadcasting services licensees or might it also apply between the subscription broadcasting services licensees?

‘sub-licensing conditions’ – what does this mean?

To the extent that there is no reference to the criteria defined in Clause 4., does that mean that all the events listed in Clause 5.2.1, in their entirety, are governed by Clause 5.2?

Clause 5.2.1 – does ‘Domestic’ mean hosted domestically or only featuring domestic athletes/teams?

Clause 5.2.1(d) – The CAF Champions League is an interclub competition and, as such, is not a “National Sporting Event” as defined in Clause 1. As such, on what basis is the CAF Champions League part of the Group B events?

Clause 5.2.1(d) – The CAF Confederation Cup is an interclub competition and, as such, is not a “National Sporting Event” as defined in Clause 1. As such, on what basis is the CAF Confederation Cup part of the Group B events?

Clause 5.3 –

‘broadcast by subscription and FTA broadcasters’ – Do they both have to broadcast or can either broadcast?

To the extent that there is no reference to the criteria defined in Clause 4., does that mean that all the events listed in Clause 5.3.1, in their entirety, are governed by Clause 5.3?

Clause 5.3.2 –

With regard to the objective stated in s60(1) of the Electronic Communications Act, 2005, why should a minimum number of events be broadcast by subscription broadcasting services?

In other respects, presumably no minimum number of hours?

And does ‘per annum’ mean ‘per period of 12 months’ or ‘per calendar year’?

Clause 6.1 –

'broadcasting service licensee' is not defined in Clause 1. Does it mean either a Free-to-air broadcasting services licensee or a subscription broadcasting services licensee?

In such a case, with regard to the objective stated in s60(1) of the Electronic Communications Act, 2005, why should a Free-to-air broadcasting services licensee inform subscription broadcasting services licensees?

How does this work in practice?

Clause 6.2 – Seems inconsistent with clause 5.1, particularly reference to 'may' and the option of delayed live and delayed.

Also, does this only apply to national sporting events forming part of Groups A and B events?

As the national sporting events forming part of Groups A and B events may be broadcast live, delayed live or delayed, is the requirement of 'non-exclusive basis' met if a subscription broadcasting services licensee is granted exclusive broadcast live rights without preventing any Free-to-air broadcasting services licensee from broadcasting delayed coverage?

Clause 7(1)(a) – How does the public input element work in practice?

Clause 7(1)(b) – Can we get an understanding of what sort of reasons might be accepted?

Clause 8(1) – Throughout the regulations 'national sporting event of public interest' should be a defined term.

'Alternative Dispute Resolution' is not defined and could be interpreted very differently depending on the governing law. Clause 8(3A) and 8(4) – what jurisdiction does the Authority and the CCC have over non-SA rightsholders?

D. Conclusion

LSE, as interested party to make representations on the Draft Sports Broadcasting Services Amendment Regulations published on 14 December 2018, thanks ICASA for taking into account the comments of LSE and providing the necessary clarifications and answers.

Since the current wording of the Draft Sports Broadcasting Services Amendment Regulations published on 14 December 2018 does not provide an accurate picture of its actual scope, LSE would be grateful if ICASA, with regard to the principle of equal treatment, could make public all the clarifications and responses that ICASA will provide to the interested parties who have made representations and, on the basis of such clarifications and responses thus made public, to give all the interested parties, including LSE, a further opportunity to comment on the Draft Sports Broadcasting Services Amendment Regulations published on 14 December 2018.