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TO: THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
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**DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2020: JOINT SUBMISSION
BY MEDIA MONITORING AFRICA AND THE SOS COALITION: SUPPORT PUBLIC BROADCASTING TO
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

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LIST OF ACRONYMS

ECA	Electronic Communications Act 36 of 2005
FTA	Free-to-Air
ICASA	Independent Communications Authority of South Africa
MMA	Media Monitoring Africa
SABC	South African Broadcasting Corporation
SEIAS	Socio-Economic Impact Assessment System
SOS	SOS Coalition: Support Public Broadcasting

INTRODUCTION

1. Media Monitoring Africa (MMA) and the SOS Coalition: Support Public Broadcasting (SOS) provide this joint submission on the Draft Sports Broadcasting Services Amendment Regulations, 2020 (the Draft Regulations), in response to the call for submissions by the Independent Communications Authority of South Africa (ICASA or the Authority). MMA and SOS welcome this opportunity to make further submissions to ICASA on these regulations
2. Sport involves money, lots and lots of money, and with that money comes power. There is so much money in sport there are dedicated conferences focused on Money in Sport.¹ For most people the figures professional sports players earn are beyond comprehension. According to Reuters² the average monthly salary of Premier League Footballers is 240 000 UK Stirling, or about five million Rand a month. Locally, PSL players earn around R200 000 a month³. We know the broadcasting rights for the PSL deal in 2007 changed the previous dominance of SABC as the broadcaster with a one billion Rand deal over five years. More recently, the dominance of Multichoice was bolstered with the news that DStv would be the new sponsor of the PSL⁴. Multichoice now has the exclusive rights to the PSL, they are the major sponsor, they also own a team Supersport United, and they also sponsor the referees for SAFA⁵. The power that comes from the money in sport, the broadcast rights, the sponsorships, might work for the behemoths and relevant sporting codes, but they run the risk of alienating the fans. A quick review of the shifts in power⁶ and money in cricket have seen the growing dominance of India, Australia and England to the detriment of the other cricket playing nations and the fans in those countries in particular.
3. Importantly, sport is also about another kind of power.
"It has the power to inspire. It has the power to unite people in a way that little else does. It speaks to youth in a language they understand. Sport can create hope where once there was only despair. It is more powerful than government in breaking down racial barriers." - Nelson Mandela⁷

A wily politician as much as he was an inspirational leader, Mandela also knew and understood the value and importance of sport to a nation, not just for nation building but for giving hope⁸. We know that the value of sport is immense, it enabled us all to cheer when Oscar Pistorius ran in the able-bodied Olympics, which ironically made his heinous murder all the more offensive, when a sporting hero committed such awful violence. Sport enabled us to unite again when we won the Rugby world Cup in 2019 and it enabled us to get behind Caster Semenya and celebrate then be outraged as a nation at her offensive treatment. It is vitally important that the Authority balances these two powers in drafting regulations. Given

¹ <https://moneyinsport.com/events/2020-money-in-sport-conference/>

² <https://www.reuters.com/article/health-coronavirus-england-soccer-idUSL8N2BU5XL>

³ <https://briefly.co.za/29056-top-10-highest-paid-soccer-players-south-africa-absa-psl-2020.html>

⁴ <https://www.dailymaverick.co.za/article/2020-09-25-dstv-sponsorship-wont-affect-psl-viewership-for-south-africans-without-cable-television-irvin-khoza/>

⁵ <https://www.goal.com/en-za/news/safa-announces-long-term-sponsorship-deal-with-multichoice/6mehowghhbsazqa9g7lgxscg>

⁶ <https://www.theguardian.com/sport/2017/feb/16/can-cricket-be-saved-icc-reform-australia-england-india>

⁷ <https://www.youtube.com/watch?v=y1-7w-bJCtY>

⁸ <https://www.nytimes.com/2013/06/12/sports/soccer/12iht-soccer12.html>

the inequality in power dynamics between the bodies that control sport and the social power of sport and its benefits, in seeking such a balance it is critical that the Authority work in favour of the public interest, and the social power of sport.

4. Few years have been as traumatic as 2020. Not only have we already had to deal with appalling economic conditions, rising unemployment, deepening inequality, epidemic levels of gender-based violence, the effects of climate change, unstable power supply and COVID19, we have also had to deal with further efforts to spread hatred, Afrophobia and disinformation. The media sector has seen significant depressed conditions and persistent instability, free to air broadcasters are struggling and several key policy issues continue to hold us back. To add salt to the gaping wounds, for a significant part of the year teams weren't even allowed play. If ever there was a content and a need for us to have sport, to help inspire hope and bring people together, it is now.
5. In this context then the Draft Regulations take on an even greater level of importance, and the critical role and social power of sport is essential.
6. Access to the broadcast of national sporting events is generally expensive and requires paid subscription services in order to receive quality viewing experiences. While the legitimate pursuit of commercial interests in broadcasting national sporting events must be recognised, there is an equal and compelling imperative that the broadcasting of certain national sporting events be made accessible to the broader public – including those whose socio-economic circumstances may not permit access to subscription broadcasting services – given the unique role of national sports in promoting unity and social inclusivity. As such, MMA and SOS submit that any rules and regulations that govern the broadcasting of national sporting events must be developed with due regard to public interest considerations and the impact on national unity that such events may have.
7. As in our previous submission, this submission has a particular emphasis on the impact of the Draft Regulations on the South African Broadcasting Corporation (SABC) as the public broadcaster and a free-to-air (FTA) licensee. We note and commend the inclusion of the “public interest” in some of revised draft regulations.
8. This submission is structured as follows:
 - 8.1. **First**, an overview of MMA and SOS.
 - 8.2. **Second**, our concerns regarding the continued absence of a socio-economic impact assessment.
 - 8.3. **Third**, the absence of consideration of future trends and digital consumption, in particular via mobile and OTT services as well as pay for view options.
 - 8.4. **Fourth**, our concerns regarding the removal of references to developmental and /or minority sports and incentives to carry them.

8.5. **Fifth**, our concerns regarding the failure to address gender considerations.

9. We deal with each of these in turn below.

I OVERVIEW OF MMA AND SOS

MMA

10. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.
11. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 27 years' experience in media monitoring and direct engagement with media, civil society organisations and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.
12. For more about MMA, please visit: www.mediamonitoringafrica.org.

SOS

13. SOS is a civil society coalition that is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is our primary focus – as the key site of and the institution established to drive public interest broadcasting – SOS also engages in the advancement of community broadcast media in South Africa. SOS is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, scriptwriters, film makers, producers and directors).
14. For more about SOS, please visit: www.soscoalition.org.za.

II THE NEED FOR A SOCIO-ECONOMIC IMPACT ASSESSMENT

15. In our previous submission we made the following submission which we are including again as it seems no credence was paid to its inclusion despite it being an increasingly common and critical step for draft regulations.
16. Following the establishment of the socio-economic impact assessment system (SEIAS) by the Cabinet in February 2007, from 1 October 2015 any Cabinet Memoranda seeking approval for draft policies, bills or regulations must include a socio-economic impact assessment compiled

and approved by the SEIAS Unit.⁹ At this stage, MMA and SOS have neither had sight of any socio-economic impact assessment for the Draft Regulations, nor have we been made aware that an impact assessment has been completed and made publicly available.

17. As set out in the SEIAS Guidelines, SEIAS aims to: (i) minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes; and (ii) anticipate implementation risks and encourage measures to mitigate them.¹⁰ The SEIAS Guidelines state further that one of the key ways in which regulations or other legal instruments can lead to unintended consequences is “where stakeholders face excessive cost from complying with the regulation”.¹¹
18. In the present circumstances, while some of the most onerous cost implications for free to air broadcasters have been removed, there appears to be no motivation for the model being proposed. It is for this precise reason that a socio-economic impact assessment should be seen as an imperative.
19. MMA and SOS submit if an impact assessment has been completed, it should be made public without undue delay and stakeholders should be permitted the opportunity to make submissions thereon. However, in the event that it has not been completed, further deliberations on the Draft Regulations should be halted until such time as stakeholders have had the opportunity to consider, and the public has had the opportunity to provide submissions on the socio-economic impacts of the Draft Regulations.

III NEED TO INCORPORATE FUTURE TRENDS AND DIGITAL SHIFTS IN SPORTS BROADCASTING

Overarching concerns

20. As a general note, MMA and SOS are concerned that the Draft Regulations, while mentioning the public interest, fail to offer any meaningful response to the dominance in the sector by one major player. The failure is made all the more egregious when the regulations also contain no reference or attempt to address looming digital trends and shifts. As with the previous draft regulations there does not appear to have been appropriate regard to the shift to mobile and pay-per-views for niche sports or pop-up channels. Of critical importance, the Draft Regulations need to be responsive to the reality of FTA broadcasters moving towards online digital broadcasts, and the likelihood that in time online digital broadcasts may command larger audiences than other mediums. The Draft Regulations need to contend with how best to

⁹ Department of Planning, Monitoring and Evaluation, *Socio-Economic Impact Assessment System (SEIAS): Guidelines* (May 2015) at page 3:
<http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf>.

¹⁰ Id.

¹¹ Id.

safeguard local licensees against threats from bigger global players that move into the realm of content provisions.

21. An international trend report by Linklaters¹² points not only to shifts to digital but also the diminishing role of Broadcasters generally. The increase in OTT services, as well as the imminent development of the English Premier League's own streaming services Premiflix, *"would have the effect of removing traditional sports broadcasters from the fold and further disrupting the sports broadcasting industry."*¹³
22. Not only do we need to address the issue of the shift to digital but also the move by global behemoths like Amazon into the sports rights arena. As highlighted in the Linklaters report:

"Amazon's venture into the sports broadcasting market extends beyond football, and online-streaming providers' coverage has expanded to football, tennis, NFL, boxing, esports and more. For example, prior to the pandemic:

*Amazon had purchased the exclusive broadcasting rights of several international tennis events due to take place between 2021 to 2023, including the US Open, the Laver Cup, the French Open and the ATP and WTA tours due to take place in the UK. During the pandemic, it also secured the exclusive broadcasting rights to live-stream the recent Schrodgers Battle of the Brits exhibition tennis tournament."*¹⁴
23. As things stand the FTA and the SABC in particular are in an impossible position. What will happen if and when any of the emerging digital behemoths purchase exclusive rights to South African sports? How will the majority of people who rely on SABC services have access to the sports they love? The reality will be an entrenchment of the digital and economic divide.
24. It seems there is currently no thinking being presented on how we can create a more competitive and more equitable environment in which FTA can compete with the subscription services and other global giants. Instead of dealing with sub-licensing and instead of possibly unbundling rights on different platforms and for different games, and preventing exclusivity for all games, the regulations are silent.
25. As much as Multichoice for example have a clear monopoly of football in South Arica, not even they will be able to compete against the might of Amazon who will be buying in USD with unlimited budgets. In such a scenario we can be sure that the sporting federation whose goal is to make money, will not act in the public interest, but in their own interests and take the deal. The losers will be the local broadcasters and the public.
26. No mention is made of these trends nor is there any suggestion of how the Authority plans on addressing the issues.

¹² <https://www.linklaters.com/en/insights/blogs/sportinglinks/2020/july/sports-broadcasting-in-the-tech-era-recent-trends-exclusivity-and-covid-19-implications>

¹³ Id.

¹⁴ Id.

27. MMA and SOS repeat the submission for the Authority to develop a dispensation in order to enable the SABC and the Draft Regulations to more fully meet the desired objectives and enable a wider audience to be able to access sporting events. In particular, in this regard, MMA and SOS submit that for certain national sporting events in the public interest, in which broadcasting service licensees have acquired rights, such broadcasting service licensees should be required to sub-license to the SABC on a free or reduced financial basis, for example at a fee of 20% of the commercial rate. This proposal is informed by the following:
- 27.1. The acknowledgement that national sports events are important for national unity and in the public interest and should not be the preserve of only those who have the means for subscription services.
 - 27.2. The role of the SABC as the public broadcaster, established by statute, and in light of its public objectives contained in the Broadcasting Act.
 - 27.3. The unique position of the SABC in that it does not share the same profit motive as other licensees in the fulfilment of its public service mandate.
 - 27.4. The extent of the audience of the SABC across the country, and the dependence of the public on the SABC as a main source of news and entertainment.
 - 27.5. The geographic reach of the SABC across the country.
28. In our previous submission we had set out possible options for ensuring that there was not an undue financial burden placed on subscription service licensees. We note that the submissions were not included in the revised regulations.

IV. REMOVAL OF MINORITY AND DEVELOPMENTAL SPORTING EVENTS

29. MMA and SOS had previously welcomed the inclusion of minority and development sports and we note with deep concern that that all reference to them has been removed.
30. The only rationale we are given is:
- “Whilst the Authority continues to advocate for the promotion of minority and developmental sports, it is aware of the concerns raised by various stakeholders regarding the previous iteration of the Draft Regulations (i.e. the 2018 Draft Regulations). Following further consideration, the Authority has removed the developmental sports from the current iteration of the Draft Regulations as they do not fall within the ambit of section 60(1) of the ECA”*
31. MMA and SOS fail to see how the Authority can advocate for the promotion of minority and development sports if there is no mention of them at all in the regulations. We had proposed that a system be developed that would encourage and help incentivize broadcasters to carry some of these sports in the hope that they would help encourage their development. In our view, while not national events, some of the sports would certainly meet the requirement for

being national teams (Chess, for example, or Ballroom dancing) and they would also meet the public interest requirement.

32. The deliberate exclusion of minority and development sports is an abject failure by the Authority to act in the public interest and instead appears to be an obsequious acquiescence to the dominant large sporting codes.

V GENDER CONSIDERATIONS

33. MMA and SOS note that the latest draft Regulations do now include some Women's sports in the list of national events. This includes the FIFA Women's World Cup and the Netball World Cup. No rationale is given for the exclusion of the ICC Women's Cricket World Cup. Despite these inclusions, we submit that the Regulations have again failed to seize an opportunity for the Authority to play a constructive role in encouraging women's participation in sport and to combatting gender discrimination in sport.
34. That the revised regulations can once again be gender blind in a society like ours where patriarchy is the norm, is an egregious omission and failure to act in the public interest and in line with the Authority's own Constitutional mandate to help build a society in which all people are treated with dignity and equality.
35. Accordingly, MMA and SOS again submit the following:
 - 35.1. That draft regulation 2 be amended to include an objective to "promote gender equality and combat gender discrimination in sports".
 - 35.2. That draft regulation 5 be amended to make clear that the listed sporting events apply to both male and female competitors.

CONCLUDING REMARKS

36. MMA and SOS submit that the Draft Regulations fail to meet the requirements and address the issues the Authority themselves set out in either the Background¹⁵ or in 5.1 of the Conclusions¹⁶.
37. MMA and SOS submit that these draft Regulations not only fail to achieve a balance in favour of the public interest they instead represent a one-sided perspective that seeks to entrench existing anti-competitive practice. The absence of any means of addressing digital trends means while existing dominant stakeholders will benefit in the short term, in the medium to long term our broadcasters are being exposed to enormous risk. The losers as usual will be the public and in particular those who cannot afford access to such platforms.

¹⁵ Government Gazette No. 43877 5 November 2020 Page 14.

¹⁶ Id. Page 18

38. We submit that the draft regulations fail to ensure that *“Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events.”*¹⁷ Indeed the exclusion of minority and development sports or any incentives to help boost them as well as the marginalization of women in sport is not only grotesquely at odds with the public interest and mandate of the Authority but they also miss an opportunity to help realize the social power of sport.
39. MMA and SOS submit that the Draft Regulations in their current form are either considerably amended and revised or they are scrapped in their entirety and a new process focused on the digital realities and acting in the public interest is undertaken.
40. MMA and SOS remain open and willing to support the Authority in the redrafting process and we would also welcome an opportunity to make oral submissions.

Media Monitoring Africa and SOS Coalition
15 December 2020

¹⁷ ECA Act Section 60(!)