

MULTICHOICE SUBMISSION

**SPORTS BROADCASTING SERVICES
AMENDMENT REGULATIONS, 2020**

15 DECEMBER 2020

Introduction

- 1 MultiChoice thanks the Authority for the opportunity to comment on the second draft of the Sports Broadcasting Services Amendment Regulations ("the second Draft Regulations").¹
- 2 We commend the Authority for holding a second round of consultations following the extensive written and oral consultation process conducted on the first Draft Regulations² from December 2018 to August 2019.

Concerns about the first Draft Regulations

- 3 As the Authority is aware, MultiChoice and numerous other parties had very serious concerns about the first Draft Regulations.
- 4 MultiChoice submitted in its response to the first Draft Regulations that the Current Regulations have worked reasonably well and are an appropriate compromise in the public interest. The evidence presented showed that for the sports broadcasting economy, the status quo has been effective, (with not a single dispute having been declared under those regulations) while the first Draft Regulations would have had far-reaching adverse consequences. We appealed to the Authority to abandon the changes proposed in the first Draft Regulations in the interests of certainty for, and protection of, all the interests of all stakeholders in the sports broadcasting value chain.
- 5 As the Authority pointed out, as many as 39 written submissions were made to the Authority in March 2019, including by 13 South African sports bodies and affiliated sports organisations and 8 international sports bodies.

¹ Draft Sports Broadcasting Services Amendment Regulations, 2020, published under notice number 635, Government Gazette number 43877, 5 November 2020

² Draft Sports Broadcasting Services Amendment Regulations, 2018, published under notice number 1388, Government Gazette number 42115, 14 December 2018 ("the first Draft Regulations")

- 6 The sports bodies consistently articulated serious concerns that if the first Draft Regulations were promulgated in their current form, they would have devastating consequences for them and their sports.
- 7 Serious concerns about the first Draft Regulations were also raised by civil society organisations and academics such as MMA and SOS.
- 8 Free to air broadcasters (the SABC, e.tv and Kwesé) also made written submissions in opposition to the first Draft Regulations, which made it clear that they do not wish to be obliged to broadcast listed events given their financial and capacity constraints.
- 9 Some of the recurring themes underscoring the concerns about the first Draft Regulations which were identified in written submissions were that –
 - 9.1 the text of the first Draft Regulations was unclear, ambiguous, contradictory and confusing;
 - 9.2 the first Draft Regulations were not preceded by an economic impact assessment, discussion document or consultation on the Authority's proposed approach;
 - 9.3 the first Draft Regulations were legally flawed, and were *inter alia* irrational and *ultra vires*, would arbitrarily deprive sports bodies of their property, and would be unlawful and unconstitutional and likely to be set aside;³

³ Key legal concerns which were raised in the written submissions were that the first Draft Regulations –

- were procedurally unfair;
- considered irrelevant considerations and failed to consider relevant considerations;
- exceeded the Authority's statutory powers;
- did not meet the clear internal limitations of s60(1) of the EC Act;
- constituted an arbitrary deprivation of sports bodies' property;
- were vague, contradictory and unenforceable;
- were irrational, unreasonable and unlawful; and
- were unconstitutional; and were likely to be set aside

- 9.4 the first Draft Regulations would give rise to severe adverse consequences and would not be in the public interest; and
- 9.5 the first Draft Regulations should not be promulgated.
- 10 Parties overwhelmingly submitted that the current Regulations are working well and require little or no amendment.⁴
- 11 All stakeholders' concerns were thoroughly ventilated in the written submissions made to the Authority in March 2019, oral submissions made to the Authority during the week-long hearings held in May 2019, and supplementary written submissions made to the Authority in August 2019.

The second Draft Regulations

- 12 It is clear from the content of the second Draft Regulations that the Authority has heard and carefully considered all of the submissions which it received, and that it has grappled meaningfully with the evidence and views submitted to it throughout the consultation process. MultiChoice commends the Authority's endeavours to discharge its regulatory mandate pursuant to meaningful consultation.
- 13 As MultiChoice has submitted throughout this process, the public interest is best served when regulation balances the various affected interests and limits interventions to what is truly necessary.
- 14 This is of particular importance in relation to the listing of national sporting events where, as the Authority has recognised, a balance needs to be struck between the interests of sports bodies, who own the broadcasting rights to their sports events, and the need to ensure audience access and support for national

⁴ MultiChoice summarised the key patterns which emerged from these submissions in MultiChoice's response to the Authority dated 4 August 2019

sporting events, given the reliance by sports bodies on the income they generate from selling their sports rights, which is critical to the development of sports.⁵

- 15 We commend the Authority's approach in "*considering the competing concerns of financial sustainability of broadcasters; and to ensure increased access to national sporting events to most of the South African population*".⁶
- 16 We welcome the Authority's recognition "*that the sports industry relies on the sale of broadcasting rights as the biggest source of their revenue*".⁷ We also support the Authority's efforts to "*give effect to the provisions of section 60 of the ECA whilst considering the competing concerns of the financial sustainability of broadcasters and ensuring increased access to national sporting events is provided to most of the South African population*".⁸
- 17 We also note that the Second Draft Regulations are in line with the principles articulated in the recently published draft White Paper on Audio and Audiovisual Content Services Policy Framework: a new vision for South Africa 2020, which proposes that "*it should remain the policy intention to continue to ensure that key national sport events are aired free-to-air, whilst acknowledging that certain exclusive sports events are critical to the viability of the subscription model*".⁹
- 18 We submit that the Second Draft Regulations are a substantial improvement on the first draft, and reflect the Authority's consideration of the evidence before it. MultiChoice believes that the Sports Broadcasting Services Regulations, as proposed to be amended by the Second Draft Regulations, will continue to strike an appropriate compromise in the public interest.

⁵ ICASA's Sports Broadcasting Rights Position Paper published under notice number 2029, Government Gazette number 25249, 25 July 2003, pg 28

⁶ Second draft of the Sports Broadcasting Services Amendment Regulations for public comments, ICASA news release, 9 November 2020

⁷ Explanatory Memorandum to the Second Draft Regulations, para 2.4

⁸ Para 2.5 of the Explanatory Memorandum

⁹ Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A new vision for South Africa 2020, published under notice number 1081, Government Gazette number 43797, 9 October 2020, para 5.2.9.14

- 19 We do not believe that any substantive amendments should be made to the Second Draft Regulations.
- 20 MultiChoice has a few comments on the text of the Second Draft Regulations. In **Annexure A** we raise these points and suggest some drafting changes which we believe could assist the Authority to refine its proposed amendments further and assist in the implementation of the Regulations.

Oral hearings

- 21 We note the Authority's indication that it will make a determination regarding whether to conduct public hearings once it has considered representations received pursuant to the amended Draft Regulations.¹⁰
- 22 As it stands, the Second Draft Regulations appear to have taken into consideration all of the relevant submissions made by all stakeholders in this process to date and strike an appropriate balance in the public interest. All of the substantive issues were thoroughly ventilated in the consultation process in the first round. It is clear from the Second Draft Regulations that the Authority has meaningfully engaged with stakeholders in the consultation process to date and has understood, considered and, where appropriate, implemented the submissions made to it in the first round. The amendments proposed in the Second Draft Regulations reflect this meaningful consultation process. There have been no new factual or policy shifts which would necessitate a reconsideration or update of the Authority's approach.
- 23 Whether oral hearings will be appropriate or necessary will depend on the written submissions made to the Authority in response to the Second Draft Regulations, and whether the Authority proposes to make any substantive amendments to these Draft Regulations. We, too, will only be in a position to properly assess whether there is a need for hearings once all of the submissions have been made public. We therefore support the Authority's decision to make a determination

¹⁰ Para 3.3 of the Explanatory Memorandum

on public hearings after it has considered all of the representations made to it on these Draft Regulations.

- 24 MultiChoice requests an opportunity to make oral representations to the Authority in the event that the Authority holds hearings.

Conclusion

- 25 MultiChoice reiterates its thanks for the opportunity to make this submission and trusts that our comments will contribute constructively to the finalisation of lawful, rational and effective regulations which continue to strike an appropriate compromise in the public interest.

ANNEXURE A: COMMENTS ON SPECIFIC PROVISIONS OF THE SECOND DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS

Definition of "Senior National Team" (Reg. 1)¹¹

- 26 MultiChoice supports the principle underlying the proposed definition of a "Senior National Team", namely that it relates to the highest ranking adult team.
- 27 It appears that the Authority intended to refer to the highest ranking team in a specific sporting code, rather than a specific sporting age group.
- 28 For example, Bafana Bafana is the highest ranking men's national football team. However, there are other national teams, such as the Under-23's, Under-20's and Under-17's, which are based upon sporting age groups.
- 29 We understand that the Authority's intention is to refer to the highest ranking adult national team in a specific sporting code.

30 We propose amending this definition to read as follows:

"'Senior National Team' means the highest-ranking adult national team in a specific sporting ~~age group~~ code;"

Application of criteria for listing national sporting events (Reg. 5)¹²

- 31 The Authority has proposed deleting the phrase "*Subject to the criteria provided in regulation 4(1)(a) – (c) the following are listed national sporting events*" in Reg. 5(1) of the Current Regulations.
- 32 We recognise that the Authority has applied the criteria in Reg. 4 in listing national sporting events in Reg. 5. We understand that it was the Authority's

¹¹ Proposed amendment of Reg. 1 of the Current Regulations by clause 2(h) of the Second Draft Regulations

¹² Proposed amendment of Reg. 5(1) of the Current Regulations by clause 5 of the Second Draft Regulations

intention to list the events in Reg. 5(1) only to the extent that they meet the criteria in Reg. 4(1) (e.g. not the entire Summer Olympic Games or the entire Paralympic Games, etc.)

- 33 However, for the avoidance of doubt, we propose that Reg. 5(1) make it clear that the events listed in Reg. 5(1) are listed only to the extent that they meet the criteria in Reg. 4(1).

- 34 We propose inserting the phrase "*Subject to regulation 4(1)*" in the opening to Reg. 5(1), so that the sentence reads "*Subject to regulation 4(1), tThe following National Sporting Events may be broadcast live, delayed-live or delayed by free-to-air Broadcasting Service Licensees.*"

List of national sporting events: Telkom Knockout (Reg. 5(1)(r))¹³

- 35 The Telkom Knockout has been discontinued.

- 36 Since the event no longer exists, we suggest that it be removed from the list.

- 37 We propose deleting the reference to the Telkom Knockout in Reg. 5(1)(r).

Review of listed events (Reg. 7)¹⁴

- 38 We note an inconsistency between the Second Draft Regulations and the Explanatory Memorandum as regards the removal or addition of a national sporting event from / to the list.

¹³ Proposed amendment of Reg. 5(1)(r) of the Current Regulations by clause 5 of the Second Draft Regulations

¹⁴ Proposed amendment of Reg. 7(1)(a) of the Current Regulations by clause 7 of the Second Draft Regulations

39 The Explanatory Memorandum states that the "*Authority has extended the period for review of the list of national sporting events to every five years instead of the previous four-year period.*"

40 However, the Draft Regulations have not amended Reg. 7(1)(a) to extend the review period from four to five years – it has deleted the current provision which indicates that the Authority will review the list every four years.

41 To the extent that this is an error, we wish to bring it to the Authority's attention and suggest that Reg. 7(1)(a) of the Current Regulations be reinserted, with the necessary change from four to five years, to read as follows:

(1)(a) "To ensure predictability and certainty, the criteria used in the listing of national sporting events and consequently the list of national sporting events will be reviewed after every five years from the date of publication of the Sports Broadcasting Services Amendment Regulations, 2021. A national sporting event may be removed from or added to the list subject to one or more of the following conditions:"

Dispute resolution (Reg. 8(3A))¹⁵

42 Reg. 8(3A) permits a broadcasting licensee entering into a commercial agreement in terms of the Sports Broadcasting Regulations to "*report any unresolved dispute and/or non-compliance with regulation 8(1) and 8(2) to the Authority*".

43 We appreciate that a dispute contemplated in Reg. 8(3A) means a dispute arising concerning section 60(1) of the ECA, as contemplated in section 60(2) of the ECA.

¹⁵ Proposed insertion of Reg. 8(3A) of the Current Regulations by clause 8(a) of the Second Draft Regulations

- 44 For the avoidance of doubt, we propose clarifying Reg. 8(3A) in line with s60(2) of the Act to read as follows:

"3A) A broadcasting service licensee who has entered~~ing~~ into a commercial agreement in terms of these Regulations may report any unresolved dispute between the parties concerning section 60(1) of the Act and/or non-compliance with regulation 8(1) and 8(2) to the Authority."

Monitoring (Reg. 9(1)(bA))¹⁶

- 45 The Authority proposes adding a monitoring requirement in respect of "*all listed national sporting events acquired but not broadcast by free-to-air broadcasters*".
- 46 We understand this obligation to apply to a free to air broadcaster which has acquired rights to broadcast a listed event, but did not broadcast the event to which it acquired the rights.
- 47 We doubt that the Authority expects all broadcasting licensees to keep records in respect of all other broadcasters who acquired, but do not use, rights to particular listed events.
- 48 We propose clarifying that Reg. 9(1)(bA) applies to the free to air licensee who acquired the rights to a listed event, but did not broadcast that event.
- 49 We suggest amending Reg. 9(1)(bA) to read as follows:

"bA) full particulars of all listed national sporting events acquired but not broadcast by that free-to-air broadcasting service licensees; and"

¹⁶ Proposed insertion of Reg. 9(1)(bA) of the Current Regulations by clause 9(c) of the Second Draft Regulations