

MULTICHOICE SUBMISSION

**ADVERTISING DISCUSSION
DOCUMENT, 2021**

7 JUNE 2021

TABLE OF CONTENTS

Introduction	1
Trends in advertising and the approach to advertising regulation.....	3
Approach to regulation of advertising in Europe.....	9
Policy changes in South Africa	11
Legal context	12
Suggested approach to be taken in reviewing the Advertising Regulations	16
Advertising	19
Infomercials	19
Programme sponsorship	20
Answers to specific questions.....	21
Conclusion.....	21
ANNEXURE A: MULTICHOICE'S RESPONSE TO QUESTIONS POSED IN THE DISCUSSION DOCUMENT	22

Introduction

- 1 MultiChoice thanks the Independent Communications Authority of South Africa ("**ICASA**" or "**the Authority**") for the opportunity to comment on the Discussion Document on the Review of the Advertising, Infomercials and Programme Sponsorship Regulations (the "**Discussion Document**").¹
- 2 As a subscription broadcaster, MultiChoice draws revenue from subscriptions and advertising. The review of the Advertising, Infomercials and Programme Sponsorship Regulations, 1999 (the "**Advertising Regulations**") is therefore relevant to MultiChoice and we wish to participate constructively in this process. We request an opportunity to participate in the oral hearings to be convened by the Authority in due course.
- 3 This review occurs at a time when, due to increased competition, audience fragmentation and the economic downturn exacerbated by COVID-19, broadcasters have experienced one of their toughest years ever. Given this context, we are understandably apprehensive of any regulatory process which might negatively affect broadcasters' ability to earn advertising revenue and which might worsen the difficulties broadcasters are facing.
- 4 We welcome ICASA's initiative to review and update the current Advertising Regulations, which were, after all, developed more than 20 years ago. We believe that the entire rationale for these regulations should be critically examined in the light of the changes which have occurred over the past two decades and the current trends in the advertising environment. What is the rationale for continuing to subject broadcasters to old-style granular regulations when advertising revenue is increasingly flowing off-shore to competitors who are not subject to any such restrictions?

¹ Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, published under Notice Number 264, Government Gazette Number 44333, 26 March 2021

- 5 It is critical that any review of the Advertising Regulations must consider how the restrictions can be equitably applied to all audio-visual services, not just traditional broadcasting services.
- 6 In this regard, it is noteworthy that government's Draft White Paper² has proposed the inclusion of new audio-visual services within the country's licensing and regulatory framework. In the two decades since government's last White Paper, there have been startling changes in the sheer number and diversity of new audio-visual services available to South Africans and these services increasingly compete with traditional broadcasters for both audiences and advertising revenue.
- 7 We detail these changes and the implications for the approach to the regulation of advertising in this submission.
- 8 Given the significant impact that the Final White Paper is likely to have on the broader audio-visual environment and the approach to be taken on advertising issues, we submit that ICASA's review of the Advertising Regulations should be mindful of the outcomes of that process.
- 9 We submit that ICASA's review should be guided by the following principles:
 - 9.1 ICASA should endeavour to regulate no more than is strictly necessary and the regulations should be amended so they are not so granular.
 - 9.2 ICASA should ensure that the amended regulations do not disadvantage broadcasters as compared to those new services with which they compete for advertising, including online and social media services.
 - 9.3 ICASA should ensure that the amended regulations will also be capable of applying to "TV like" audio-visual services operating in the South African market (not only the traditional broadcasting services).

² Draft White Paper on Audio and Audio-visual Content Services Policy Framework: A New Vision for South Africa 2020, October 2020

- 10 In line with these principles, our submission will focus on those elements of the current Advertising Regulations which should be amended and streamlined, in light of the increased competition with new audio-visual services and the changing advertising environment.
- 11 We will reflect on advertising trends and the legal context, before commenting on the approach which we believe the Authority should adopt in reviewing the Advertising Regulations. We will then respond to the specific questions posed in the Discussion Document.
- 12 We urge ICASA to relax the limitations and create maximum flexibility, having regard to the realities of the new audio-visual environment, within the constraints of ICASA's existing power to prescribe advertising regulations in terms of s55(1) of the ECA.

Trends in advertising and the approach to advertising regulation

- 13 The world has changed dramatically over the past two decades since the Advertising Regulations were published by ICASA's predecessor, the Independent Broadcasting Authority, in 1999.
- 14 In 1999, television broadcasters controlled access to the television set and competition for viewers' attention was limited to radio, print media, movie theatres, video stores and game consoles. DVDs had just replaced VHS format two years before, in 1997, and the most popular mobile handset in SA, the Nokia 5110, only allowed you to do voice, text and play simple games like "Snake". Napster had just been released and would soon revolutionise music distribution. There was no Facebook, Twitter, YouTube and the first iPhone that would lead to the smartphone revolution would only be released in 2007. Online advertising which had begun with the first banner ad a mere five years before, was still in its infancy. Therefore, at the time the Advertising Regulations were developed, the changes that would in time completely disrupt the TV industry were barely understood and appreciated.

- 15 The challenges posed by new media platforms for the old, established ones had been seen before. In 1951 an article written in the United States described the challenge television and radio would bring for print media.

*"The challenge of television to the newspaper is one which newspapermen cannot take lightly, and one which you must consider, as radio is having to do. What you face, and for that matter what radio faces, is an intense new competition for the free time of the American public. Time to read newspapers. Time to listen to the radio. Time to watch a television set...If you do not consider carefully what you can do better than radio or television, and emphasize that part of your operation, you will find yourselves in a losing battle for time, and you will find the public will drift from you to the other media."*³

- 16 The obstacles faced by print media so long ago with the advent of new media platforms is the very same issue that has faced television broadcasters with the growth of the Internet over the past two decades – a platform which now draws away significant viewership and advertising revenue from TV.
- 17 The world we live in today is very different from that which was conceived when the Advertising Regulations were developed. The television set which used to only be addressed by licensed television broadcasters and could only transmit content actually broadcast in a country, is now a smart TV connected to the Internet and allows viewers to consume content from anywhere in the world. The video store has been replaced by online on-demand video service providers many of which are based outside our borders. Social media and user-generated content sites all seek to dominate viewers' attention. The television set is no longer the primary device for the consumption of audio-visual media: it now competes for attention with smart phones, tablets and laptops.

³ 1951: *How Can Newspapers Meet Competition of Radio and Television*, Nieman Reports, October 1951 (<https://niemanreports.org/articles/1951-how-can-newspapers-meet-competition-of-radio-and-television/>)

18 As can be seen from the charts below, television is clearly not the same mass medium it once was. This fact has also been recognised by advertisers, who increasingly spread their advertising budgets amongst the different media platforms.

18.1 In global markets, TV advertising spend has, since 2017, been eclipsed by the advertising spend directed to online and mobile platforms. In South Africa that same global trend is anticipated to happen by 2021.⁴ Advertising spend in the television market grew each time a new TV broadcaster entered the market. However, as the online digital advertising market has grown we have seen a relative decline in TV advertising spend.

18.2 A key reason is that revenue is flowing to online digital channels rather than to the traditional television market and that advertisers increasingly demand data and analytics which online digital platforms are in a better position to provide. This access to key demographic data allows more personalised ad campaigns to be run and provides a clear indication of what ads and content drive the best return on investment.⁵

18.3 Online advertising increased its share of overall ad spend from 9.2% in 2016 to 13.1% in 2019 and 21.1% in 2020, and is the fastest growing segment in the South African advertising market. The only segments growing at a similar rate are new segments such as video games, e-sports and podcasts.⁶

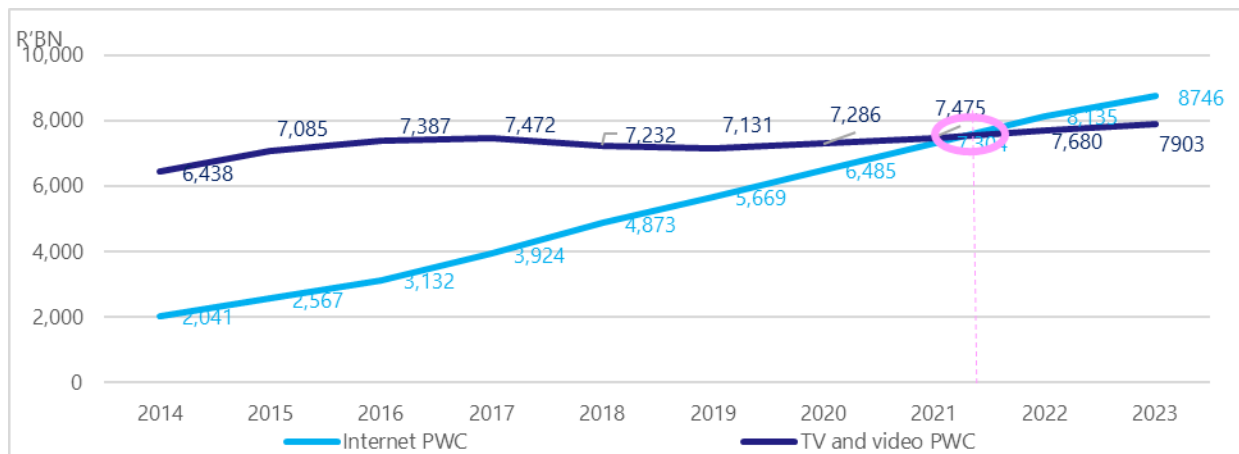
⁴ PWC Entertainment and Media Outlook - Africa 2019-2023

<https://www.pwc.co.za/en/publications/entertainment-and-media-outlook.html>

⁵ Adglow at 10 – What's changed in the last 10 years? (Adglow <https://www.adglow.com/blog/adglow-at-10-whats-changed-in-the-last-10-years>)

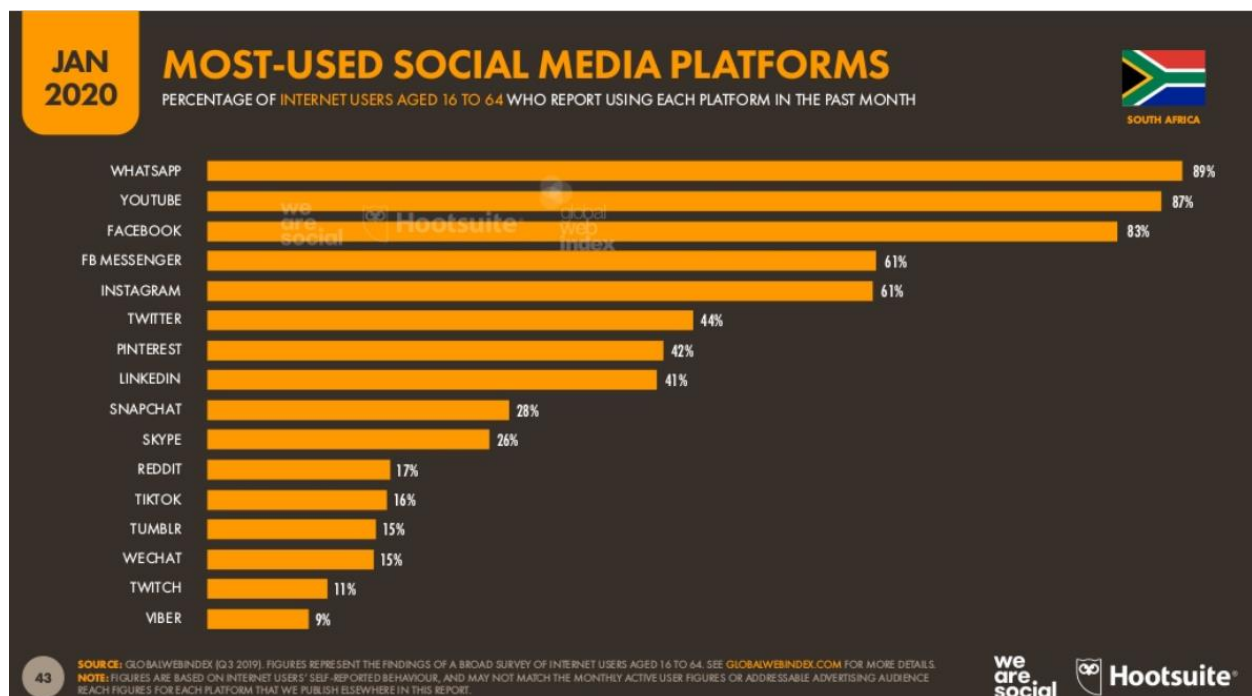
⁶ PwC, IAB release latest Internet Advertising Revenue Report, Bizcommunity, 28 April 2020 (<https://www.bizcommunity.com/Article/196/19/203267.html>)

Digital adspend will overtake TV in 2021



Source: PwC Africa Entertainment & Media Outlook 2019-2023

Total internet advertising: SA



- 19 Broadcasters now compete not just with local players, but also with huge international companies with global significant market power. An analysis of the top 5 online sites accessed by South Africans in May 2021 shows the strength of the global players:

- 19.1 Google.com;
 - 19.2 YouTube.com;
 - 19.3 Google.co.za;
 - 19.4 Netflix.com;
 - 19.5 Facebook.com.⁷
- 20 As we can see from the top 5 list of websites in South Africa and the graphic above on the most-used social media platforms in South Africa, the huge growth in digital advertising is dominated by global US companies, meaning the advertising revenue generated by online advertising at the cost of local television companies, is flowing offshore. In fact, it may never land on these shores at all because, despite South Africa having many advertising agencies, they are largely owned by a handful of major international holding companies such as WPP, Omnicom and Publicis, with role players estimating that almost 80% of the industry is in foreign hands.⁸
- 21 Technology is also playing a role in the decline of traditional television as the platform of choice for advertising spend. In a linear world a viewer watched advertising in order to see the content that followed it. This is no longer true. The immediacy of catch-up services and video-on-demand means that in the non-linear environment it is easy to simply fast forward through the advertising. In contrast, YouTube can offer a number of different advertising formats such as:
- 21.1 **Skippable in-stream ads** – ads appearing before, during, or after videos, that users can skip after five seconds. If the user watches one of these ads for more than 30 seconds or interacts with it, the advertiser is charged by Google.

⁷ Alexa, *Top Sites in South Africa* (<https://www.alexa.com/topsites/countries/ZA>) [Accessed 4 June 2021]

⁸ *The Advertising Industry in South Africa, 2020*, Research and Markets, June 2020 (<https://www.researchandmarkets.com/reports/5118943/the-advertising-industry-in-south-africa-2020>)

- 21.2 **Non-skippable in-stream ads** – 15-second video ads playing before the main video that users cannot skip. These are accompanied by a countdown box;
- 21.3 **Discovery ads** – ads which appear among video suggestions on the right side of the player or when users search for specific keywords on YouTube. In this case, the advertiser is charged every time a user clicks on their ad; and
- 21.4 **Bumper ads** – quick, 6-second ads that are unskippable, appear right before videos, and are sold on cost per thousand basis.
- 22 Another advantage of YouTube advertising is that, because it is owned by Google, any video ads displayed there are also shown on all other websites that are part of the Google Display Network.⁹
- 23 Other social media platforms, such as Facebook, Snapchat and TikTok, have also taken advantage of their unique features to offer different types of advertising formats and opportunities for brands to tell their own stories.
- 24 The growth of social media, online and mobile platforms has meant traditional television broadcasters are under tremendous pressure and compete on a daily basis for advertising revenue, audience and access to audio-visual content.
- 25 Not only are traditional broadcasters experiencing significant constraints from a plethora of legally recognised platforms; they are also experiencing constraints from illegal content providers / intellectual property infringing platforms that generate advertising revenue by funnelling advertisements onto their platforms / sites through programmatic advertising. In assessing the effects of intellectual property infringing websites, the European Commission commissioned a study which monitored 7 627 websites from 19 EU countries. Of these websites, 4 576 (60%) were illegal

⁹ *The Evolution of Video Advertising: From TV Commercials to the Mobile Age*, Creatopy, 1 October 2020 (<https://blog.creatopy.com/evolution-of-video-advertising/#D>)

websites and 3 051 (40%) were high risk websites. Out of a total of 2 545 062 ads collected from the monitored websites, about 725 978 (29%) ads were located on illegal websites and 1 819 084 (71%) ads were located on high-risk websites. In addition, it was found that the illegal websites had a greater number of branded advertising, about 60%, as compared to the high risk websites, which sat at 41%.¹⁰

- 26 In this new world, advertising regulations focused solely on advertising appearing on licensed broadcasting services, are an anachronism of a time past. They have little relevance in the current market which is, after all, made up of many more players than just the licensed broadcasters – a point which European jurisdictions have been mindful of.

Approach to regulation of advertising in Europe

- 27 In Europe, television advertising, sponsorship and teleshopping were previously broadly regulated by the AVMS Directive of 2010. The Directive was aimed at protecting consumers against excessive television advertising and set out fairly strict rules to ensure consumer protection. In South Africa, the IBA seems to have been informed by the European approach, as it took a similarly restrictive approach when it developed the Advertising Regulations in 1999. Since that time, however, Europe has identified the need to relax advertising restrictions.
- 28 In the past decade there has been a shift to advertising self-regulation, specifically recognised after an impact assessment exercise and evaluation in the European Parliament's resolution "Towards Digital Single Market Act" which called for a

¹⁰ *European Commission Study on the Impact of the Memorandum of Understanding on Online Advertising and Intellectual Property Rights on the Online Advertising Market*, August 2020 and *European Commission Report on the Functioning of the Memorandum of Understanding on Online Advertising and Intellectual Property Rights*, 14 August 2020

"*strengthening of co- and self-regulation*" in the review of the AVMS Directive 2010.¹¹

- 29 On 6 November 2018, the Commission adopted a revised version of the AVMS Directive¹² in view of changing market realities and noted that:

*"the market for television broadcasting has evolved and there is, therefore, a need for more flexibility with regard to audiovisual commercial communications, in particular for quantitative rules for linear audiovisual media services and product placement."*¹³

- 30 Television advertising, sponsorship and teleshopping regulation has been updated in line with market realities to include online VOD and video-sharing platforms on a graduated basis.
- 31 The AVMS Directive 2018 still aims to protect consumers against excessive television advertising. However, in acknowledgment of the principle of self-regulation, more flexibility has been given to broadcasters around the timeframe of placement of television advertising and teleshopping spots and unnecessary restrictions, such as the previous general prohibition on product placement, have been removed.¹⁴
- 32 This extension of the regulatory framework to include on-demand video and video sharing platforms and the relaxation of advertising regulation for television broadcasters in Europe is clearly linked to the growth of online digital advertising.

¹¹ European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI)), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IP0009&from=EN>

¹² Directive 2018/1808 (AVMS Directive 2018). Member states had to transpose the new rules into their national legislation by 19 September 2020

¹³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, para 32

¹⁴ AVMS Directive, Directive 2018/1808, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&rid=9>

- 33 The UK House of Lords Select Committee on Communications and Digital conducted an inquiry which found that in the UK, digital advertising is growing quickly and taking an increasing share of advertising spend as advertisers have followed audiences online,¹⁵ and that online advertising often was not bound by the rules that applied to traditional platforms.¹⁶ As a result it recommended that:

*"As conventional TV viewing decreases, particularly among younger audiences, the value of TV advertising will come under increasing pressure from online advertising. Differences in the regulation of broadcast and non-broadcast advertising should be reviewed and the Government should think very carefully before imposing further regulatory burdens on broadcast advertising."*¹⁷

Policy changes in South Africa

- 34 The trend of reviewing regulation to better align with current market realities has found support in South Africa with the publication, in October 2020, of the Draft White Paper which is very clear that:

*"Audio and audiovisual content consumption via the Internet are fundamentally transforming the South African audio and audiovisual landscape creating a broader content market than traditional broadcasting."*¹⁸

- 35 The approach to the regulation of this broader audio-visual market, outlined in the Draft White Paper, is very similar to the approach of the European AVMS Directive 2018.

- 36 As the Draft White Paper notes:

"Television advertising and online video advertising compete for the same budgets and the same advertisers in the same way, even if the services do not play the exact same function for advertisers. There are differences in the rules

¹⁵ *UK Advertising in a Digital Age*, House of Lords Select Committee on Communications and Digital, HL Paper 116, 11 April 2018, paras 13, 14 and 21

¹⁶ *Public Service Broadcasting: as Vital as Ever*, House of Lords Select Committee on Communications and Digital, HL Paper 16, 5 November 2019, para 209

¹⁷ *Public Service Broadcasting: as Vital as Ever*, House of Lords Select Committee on Communications and Digital, HL Paper 16, 5 November 2019, pg. 4

¹⁸ Draft White Paper on Audio and Audio-visual Content Services Policy Framework: A New Vision for South Africa 2020, Government Gazette, Vo. 664, No. 43797, 9 October 2020 para 1.1.16, p.28

around advertising which creates a regulatory imbalance as advertisers may be able to do things online which the rules would not permit on television".¹⁹

37 We support the Draft White Paper's recognition that the -

"legislative framework is effective and co-regulation is working. However, the framework applied by the regulator does need to expand to include all AAVCS. The regulator in respect of limitations on the amount of advertising on AAVCS can relax limitations and allow services to be flexible".²⁰

38 It follows that any meaningful review of the Advertising Regulations in South Africa should focus on the audio-visual market in South Africa and not just traditional broadcasting. In order to address the principle of regulatory parity, a relaxation of the current approach to advertising regulation is warranted.

39 While ICASA should not necessarily await the outcome of the final White Paper, that will broaden ICASA's jurisdiction to include online video on demand and video sharing platforms, this review should take into account the realities of the modern audio-visual environment and advertising in a digital online context, and provide for maximum flexibility so as to regulate in a way which is cognizant of, and appropriate for, the dynamic features of the modern advertising environment.

40 In any event, any regulations to be prescribed pursuant to this review must fall within the parameters of s55(1) of the ECA.

Legal context

41 As the Discussion Document notes, the Authority's power to prescribe advertising regulations derives from s55(1) of the ECA.²¹

¹⁹ Para 5.4.1 of the Draft White Paper

²⁰ Para 5.4.2.2 of the Draft White Paper

²¹ Paras 2.8 and 6.1 of the Discussion Document

- 42 s55 permits, but does not require, ICASA to make such regulations. Accordingly, the first question to be assessed by ICASA is whether the regulations, or portions thereof, are relevant and necessary in the current environment.
- 43 The regulations prescribed by ICASA in terms of s55 of the ECA, if any, must (a) fall within the parameters of the Authority's jurisdiction under that empowering provision; and, (b) regulate no more than necessary to achieve clearly defined objectives (only to the extent that those objectives cannot be achieved through market-forces and regulation).
- 44 These are additional reasons why we urge ICASA to critically review the need for, and the approach to, advertising restrictions having careful regard to the new features that characterise the modern audio-visual and advertising environment.
- 45 s55 contains two distinct components:
- 45.1 First, it requires broadcasting service licensees to adhere to the Code of Advertising practice determined and administered by the Advertising Regulatory Board ("**ARB**") (formerly the Advertising Standards Authority of South Africa). The ARB is "*the entity which regulates the content of advertising*".²²
- 45.2 Second, it requires broadcasting service licensees to comply with any advertising regulations prescribed by ICASA in "*respect of scheduling of adverts, infomercials and programme sponsorships*". ICASA is the entity which may regulate the scheduling of adverts, infomercials and programme sponsorships on broadcasting services.

²² The reference to the "Advertising Standards Authority of South Africa" in s55 of the ECA includes the ARB as its successor. The term is defined in s1 of the ECA as meaning "*the entity which regulates the content of advertising, or any entity that replaces it but has the same functions*"

- 46 There is accordingly a clear delineation in s55(1) between content and scheduling restrictions.²³
- 47 This split between the regulation of (a) content and (b) scheduling reflects the two primary policy objectives which underpin the regulation of advertisements on broadcasting services; both of which are driven by the primary purpose of protecting consumers, whilst, at the same time, striking a balance between the interests of consumers and the financial interests of broadcasters and advertisers.²⁴
- 47.1 The rationale for the regulation of the content of advertisements is to protect the viewer from advertisements which are harmful or inappropriate due to the nature of their content e.g., false or misleading advertisements and the advertisement of illegal activities.
- 47.2 The rationale for scheduling restrictions is to protect the viewer from excessive advertising and advertising at inappropriate times, e.g., regarding the times of day at which adverts or specific types of adverts are broadcast; the frequency with which adverts interrupt normal programming, and the broadcasting of adverts or specific types of adverts during the transmission of specific types of programmes.
- 48 In recent years, the trend has shifted to focus on the first rationale, namely to protect consumers from harmful advertising content, and away from scheduling restrictions.

²³ In addition, s56 and 58 of the ECA deal with political advertisements. s56 prohibits the broadcasting of "political advertisements" outside specific circumstances. s58 regulates the broadcasting of political advertisements, including their timing, content and technical quality. s56 and 58 protect the viewer in relation to both the content and other matters in relation to the broadcasting of political advertisements, given the importance of political advertisements to a Constitutional democracy

²⁴ *Subscription Broadcasting Services Position Paper*, the Authority, 1 June 2005, pg 52

49 The Discussion Document points out that:

*"the role of ASASA, as contemplated in section 55(1) of the ECA is with regards to content of Advertising whilst the Authority's focus is on scheduling of adverts, infomercials and programme sponsorship"*²⁵

and that:

*"The Authority does not regulate advertising content..."*²⁶

50 However, some of the questions posed for discussion creep beyond the Authority's mandate.

51 For example, in reviewing the Advertising Regulations, the Authority seeks to ensure that advertising, infomercial and programme sponsorship are clearly distinguishable from normal programming.²⁷ This is already covered by the ARB Code, which requires advertisements to be clearly distinguishable and readily recognised as an advertisement.²⁸

52 Since the ARB is the *"entity which regulates the content of advertising"*, we urge ICASA to exercise caution not to over-reach into the bounds of advertising content regulation or other restrictions beyond the scheduling of adverts, infomercials and programme sponsorships.

53 In prescribing regulations under s55(1), we urge the Authority to heed s2(y) of the ECA, which enjoins the Authority to refrain from undue interference in the commercial activities of licensees.

²⁵ Para 6.1 of the Discussion Document

²⁶ Para 4.6 of the Discussion Document

²⁷ Para 2.13 of the Discussion Document

²⁸ Clause 12.1 of the ARB Code

54 We welcome, in this regard, the Authority's acknowledgement of -

*"the need for the broadcasters to generate revenue to sustain themselves, which should be balanced with the purpose of broadcasting, which is to inform, educate and entertain, whilst considering protection of consumers."*²⁹

55 As regards subscription broadcasting services in particular, we urge the Authority to remain mindful of –

55.1 the contractual nature of the relationship between subscription broadcasters and subscribers which places an inherent constraint on subscription broadcasters to ensure that they do not alienate subscribers with inappropriate advertising scheduling and subsequently, cause them to unsubscribe; and

55.2 the existing statutory restriction on the proportion of revenue subscription broadcasting services may draw from advertising and sponsorships in s60(4) of the ECA.³⁰ ICASA is specifically not permitted, under s55(1) or any other regulatory power which it may have, to make regulations which purport to override or alter the limit s60(4) imposes on the revenue subscription broadcasting licensees may derive from advertising and sponsorship.

56 We now turn to consider the approach we believe should be taken in reviewing the Advertising Regulations.

Suggested approach to be taken in reviewing the Advertising Regulations

57 We submit that the starting point for the Authority should be the question whether it is still necessary to regulate advertising in the context of the developments that we

²⁹ Para 6.3 of the Discussion Document

³⁰ s60(4) of the ECA provides: "*Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, in no event may advertising or sponsorship, or a combination thereof, be the largest source of annual revenue*"

have already referred to in this submission, and which have also been identified by the Authority.³¹

- 58 We are of the opinion that the current broadcasting and audio-visual landscape warrants a drastic departure by the Authority from the current regime. This is because: (a) licensed broadcasting services are increasingly having to compete with unlicensed digital platforms, which are not subject to any regulations, and (b) the rationale for imposing scheduling restrictions in regulations is diminishing given the commercial constraints to which broadcasters are subject.
- 59 It is for this reason that MultiChoice, in its response to the Questionnaire on the Advertising Regulations,³² and elsewhere in this submission, submits that there is a need to consider the relevance of the Advertising Regulations.
- 60 We are of the view that, due to the developments that we have highlighted in this submission, the previous rationale for advertising scheduling restrictions has diminished significantly to the point that it is questionable whether the Advertising Regulations achieve a legitimate regulatory purpose.
- 61 In addition, the current prescriptive approach of the Advertising Regulations, which imposes detailed granular restrictions, is no longer appropriate in an environment that requires broadcasters to have utmost flexibility to adapt to changing circumstances.
- 62 We therefore submit that the Authority should consider repealing the Advertising Regulations.
- 63 However, in the event that the Authority disagrees with us on this point, and has identified evidence warranting the continued imposition of advertising scheduling

³¹ Para 2.12 of the Discussion Document on Advertising Regulations, ICASA, 26 March 2021

³² Response to Question 18

restrictions, the Regulations must take into account the realities of the prevailing environment.

64 We submit that the Authority should be guided by the following when reviewing the Advertising Regulations:

64.1 The changing landscape warrants an easing of the current advertising restrictions rather than the introduction of any additional restrictions.

64.2 This review should be used to introduce more flexibility – not prescriptive granular restrictions. The Authority should limit the Advertising Regulations to broad principles rather than introducing further detailed restrictions.

64.3 Any Advertising Regulations which ICASA may prescribe under s55(1) of the ECA should be capable of being applied to all audio-visual services, not only broadcasting services, taking into account the proposals in the Draft White Paper that new audio-visual services will also be subject to the licensing and regulatory framework. While we recognise that ICASA's jurisdiction has not yet been extended to include on-demand services we urge ICASA to make forward-looking regulations, that could easily be applied to all audio-visual services (both linear and non-linear), to avoid ICASA having to repeat this review, once the legislation is amended, to apply to on-demand services. Accordingly, the outcome of this review of the Advertising Regulations should be future proof.

64.4 The Authority should continue to apply the established principle and differentiated approach, to regulating different tiers of broadcasting services, with commercial subscription broadcasting services attracting the least onerous regulations in the light of the principles that: (a) subscription broadcasting services should be subject to the lightest regulation, in general, and (b) the contractual relationship between

subscription broadcasting services and their subscribers inherently constrains subscription broadcasters to ensure that advertising is appropriate and not excessive – failing which subscribers will churn.

- 65 In the paragraphs below, we share our overarching comments on the approach we recommend the Authority should adopt with regard to (1) Advertising, (2) Infomercials, and (3) Programme Sponsorship.

Advertising

- 66 We are of the view that the current definition of advertising is appropriate and does not require any amendment.
- 67 However, as indicated in the preceding paragraphs, we oppose the introduction of any further granular restrictions on advertising which would constrain the ability of broadcasters to earn advertising revenue at a time when they are facing increased competition and financial pressure.
- 68 Subscription broadcasting services, in particular, are under pressure to ensure that viewers experience minimal interruption in order to retain subscribers. We are therefore always conscious that consumers will churn if they find advertising too intrusive, or if it jars with the programme content. Since self-regulation is effective, it is not necessary for the Regulations to impose any scheduling restrictions on subscription broadcasting services.

Infomercials

- 69 One of the significant changes since the Advertising Regulations were published in 1999 is the decline of infomercials.
- 70 Infomercials are an outdated form of advertising which is hardly used, if at all, and are no longer seen on our schedules.

- 71 Given that infomercials are no longer a feature of the modern advertising environment, the existing restrictions on infomercials may no longer be necessary in the current environment and are unlikely to be relevant in the future.
- 72 We therefore submit that the restrictions on infomercials are outdated and should be removed.

Programme sponsorship

- 73 Broadcasters are significant investors in local productions as local content is a commercial and regulatory imperative. However, local production is under pressure. Economic conditions continue to worsen in the face of: competition, poor economic conditions (exacerbated by recent COVID challenges), costs rising and, support from government and funding sources being under pressure. In this context, programme sponsorship has become an increasingly important source of funding for local production.
- 74 Although it is a significant source of funding, programme sponsorship does not pose a threat to editorial control over programming. Broadcasters and producers have processes in place to ensure that the editorial integrity of programmes is not undermined when it is sponsored. For instance, all programming, whether sponsored or not, is produced under the guidance of a commissioning editor and follows standard quality assurance and programme acceptance steps. These processes are exactly the same for sponsored programming, thus ensuring the editorial integrity of sponsored programming.
- 75 In our view, it is therefore not necessary to introduce any further restrictions to protect the editorial integrity of sponsored programmes.
- 76 In fact, we suggest that the Authority amend the existing restrictions on programme sponsorship so that they are less granular.

- 77 The existing granular regulations on the labelling of programme sponsorship and the depiction of sponsor logos are unnecessary. The Advertising Regulations should rather focus on the key principle: which is that programme sponsorship must not detract from the broadcaster's editorial control over the programme.

Answers to specific questions

- 78 Our response to the specific questions posed in the Discussion Document are set out in **Annexure A**.

Conclusion

- 79 MultiChoice thanks the Authority for the opportunity to make this submission.
- 80 We welcome ICASA's initiative to amend and update the current outdated Advertising Regulations. However, we believe that the entire rationale for these regulations should be critically examined especially in light of the current trends in the digital advertising environment.
- 81 We suggest that ICASA amend the Regulations so that they contain future-proof principles on core issues rather than imposing prescriptive granular restrictions which restrict broadcasters' abilities to adapt, and disadvantage broadcasters (as compared to the new digital services).

ANNEXURE A: MULTICHOICE'S RESPONSE TO QUESTIONS POSED IN THE DISCUSSION DOCUMENT

Question 1. - Are the current Regulations of Advertising, Infomercials and Programme Sponsorship effective? Please elaborate.

- 1 The Regulations have been in force for over 20 years. They are premised on a world which bears no resemblance to the current digital advertising environment.
- 2 The granular restrictions on advertising, infomercials and programme sponsorships in the Advertising Regulations are no longer appropriate.
- 3 We urge the Authority to critically assess the entire rationale for the Advertising Regulations and, to the extent that they are retained, we recommend that the Authority review them substantially to remove unnecessary provisions and to shift to principles-based provisions, rather than prescriptive granular requirements.
- 4 They should also be reviewed in a future-proof way so that they can be easily applied to on-demand audio-visual services once they are included in the ECA regulatory framework.

Question 2. - Is there a need to revisit the definition of Advertising, Infomercials and Programme Sponsorship? If the response is yes, how should they be redefined?

- 5 The definition of "*advertising*" is appropriate and does not require any amendment.
- 6 The definition of "*infomercial*" may no longer be required, as infomercials are no longer a prominent feature and could simply be treated as normal mainstream advertising. To the extent that it is retained, the definition of "infomercial" is adequate.

- 7 The definition of "*programme sponsorship*" is too wide. It need not extend to (a) indirect financing or, (b) the financing of the transmission of a broadcast programme. Programme sponsorship is an important means of funding local productions and it should not be unduly restricted through excessively wide definitions.

Question 3. - What is your view on advertising during news and current affairs for radio and television?

- 8 There should be no restrictions on scheduling advertising during news and current affairs programmes. Such a restriction could have a devastating effect on the funding of news and current affairs programming which serves an important role in access to information in a democracy.

- 9 Clause 12.1 of the ARB Code already requires that:

"When an advertisement appears in a medium which contains news, editorial or programme matter it should be so designed, produced and presented that it will be readily recognised as an advertisement".

- 10 To the extent that there is a concern that advertising should not affect the editorial integrity of a news or current affairs programme, this should be dealt with in the Regulations at the level of principle. For example, ICASA could amend the Regulations to provide that *"Any advertising scheduled during a news or current affairs programme may not adversely affect the editorial integrity of the programme."*
- 11 This would achieve the objective of ensuring editorial independence over news and current affairs programming in a less restrictive way, and without stifling the funding of such programming.

Question 4. - What is the impact of the current Advertising Regulations on the financial viability of broadcasters?

- 12 Broadcasters are under increasing pressure from: audience fragmentation, competition with unregulated on-demand services, loss of advertising revenue to online advertisers, and tough economic and operating conditions which have been worsened by the COVID-19 pandemic.

- 13 The granular requirements in the Regulations restrict broadcasters' flexibility to adapt easily and seamlessly.
- 14 This review comes at a particularly difficult time – when broadcasters have experienced one of their toughest years ever. Any amendment of the Advertising Regulations should ease the restrictions on broadcasters, and should certainly not worsen the difficulties broadcasters are facing.

Question 5. - Are current Advertising Regulations able to protect broadcasters on editorial independence?

- 15 Broadcasters are incentivised to maintain their editorial integrity failing which they could lose audiences.
- 16 Broadcasters have sufficient controls in place to ensure that their editorial independence is not compromised by advertising or programme sponsorship.

Question 6. - Does the current labelling of advertising make it easy for viewers/listeners to differentiate it from normal programming?

- 17 Advertising on MultiChoice's services is easily differentiated from programming. MultiChoice has not experienced any difficulties in this regard.
- 18 In any event, this requirement is covered by the ARB Code which requires advertisements to be clearly distinguishable and readily recognised as an advertisement.³³

Question 7. - What is your view on advertisements that supersede programming?

- 19 Programming is considered primary, whereas advertising is secondary. This is particularly important in the pay TV context where excessively intrusive advertising will alienate subscribers.
- 20 If advertising intrudes too much on the programme material, viewers will simply tune out.

³³ Clause 12.1 of the ARB Code

Questions 8 – 12. – Infomercials

Question 8. - What programmes should not allow infomercials?

Question 9. - Should the Authority regulate the duration of infomercials? Please elaborate. Question 10. - Should the Authority regulate the frequency of infomercials? Please elaborate. Question 11. - What indicators of infomercials can be used so that they are easily identifiable? Question 12. - Should the Regulations continue to prohibit the transmission of infomercials during prime time? Kindly provide a reason for your answer.

- 21 Infomercials are outdated and no longer feature prominently – or at all. It is therefore not necessary to prohibit infomercials during any particular programmes, to regulate the duration or frequency of infomercials, or to prohibit their transmission at any time (such as prime time).
- 22 Nor is it necessary to require the use of indicators to easily identify infomercials. To the extent that a broadcaster still broadcasts infomercials the requirement for advertisements to be clearly distinguishable and readily recognised as an advertisement would be covered by the ARB Code (since an infomercial is a kind of advertisement under the ARB Code).

Question 13. - How should the Authority deal with push advertisement (squeezebacks)?

- 23 Squeezebacks should be permitted, subject to the ARB requirement that they be distinguishable and readily recognised as an advertisement.
- 24 Subscription broadcasters are already constrained to ensure that advertisements do not excessively intrude in, or disrupt viewing. No further restrictions are required.
- 25 This is an example of granular regulation which MultiChoice cautions against.

Question 14. - How should the Authority regulate product placement and promotional material inside a programme in a way that it does not supersede programming or tamper with editorial control?

- 26 We are of the view that it is not necessary to place restrictions on product placement to ensure that it does not supersede programming or tamper with editorial control.
- 27 Product placement is important to both advertisers (for brand exposure) and to broadcasting services (in allowing added value to be provided to clients).
- 28 The Authority also recognises in its Discussion Document the importance of product placement to local content production. We agree with the Authority that further restriction on product placement will negatively impact local content production.
- 29 In our view, product placement does not detract from the viewing experience or interfere with editorial control over programming. This is because, in general, the product owners look for opportunities to expose their products or brands in programmes that are already in production and have an established story line. Product placement usually does not affect the plot. Rather, it is concerned with brand exposure. In our experience, the channel retains editorial control and implements measures to ensure quality and programme integrity.
- 30 Broadcasters also ensure that product placement is not overly intrusive to annoy viewers. Subscription broadcasters in particular are constrained not to alienate viewers.
- 31 Reg. 5.7 already requires product placement to be subordinate to the content of the programme material and therefore, already adequately deals with concerns about product placement superseding programming or interfering with editorial control.³⁴

³⁴ Reg. 5.7

Question 15. - What mechanisms should be put in place to ensure that programme sponsorship does not influence programmes?

32 Reg. 5.1 already provides that:

"every broadcaster who derives benefit from a programme sponsorship shall ensure that, in relation to the relevant sponsored programme, editorial control remains with that broadcaster".

33 This requirement is sufficient. No additional mechanisms are required to ensure editorial integrity over programming.

34 The Regulations should also recognise that there may be instances where programme sponsorship may influence programme material other than news.

Question 16. - What other measures can be put in place to ensure compliance with programme sponsorship requirements?

35 The current mechanisms are sufficient. MultiChoice is not aware of any unresolved complaints in this regard.

Question 17. - Should the Authority request that product placement be signalled? How should it be signalled?

36 Product placement could be required to be signalled in the credits at the end of the show.

37 However, we submit that this is not necessary.

Question 18. - Should product placement and sponsorship be allowed during children's programme? If so, what mechanisms should be put in place to ensure that there is a clear distinction between product placement and the programme?

38 Product placement should not be permitted in programming targeted at children aged 7 or under.

39 Reg. 5.1 already deals adequately with sponsorship and no additional provisions are required in relation to children's programming.

Question 19. - Product placement is a component of branding, what other elements of branding should the Authority be concerned with?

40 No additional requirements are necessary in relation to branding.

Question 20. - In your view how should the Authority ensure that public interest is protected when regulating advertising, infomercials, product placement and programme sponsorship?

41 The public interest, in relation to protection from harmful content, is already addressed through the ARB Code.

42 In relation to scheduling regulating in the public interest requires the Authority to balance the needs of all interested and affected parties, including broadcasters, advertisers, producers and the viewing public. Regulating in the public interest requires the Authority to regulate no more than necessary and, to ensure that the Advertising Regulations do not unduly restrict broadcasters' abilities to earn revenue.

43 In particular, no measures are required in the subscription broadcasting context, as subscription broadcasters are inherently constrained to ensure that they do not alienate viewers.

Question 21. - What lessons can be learned from other countries in terms of advertising, infomercials, programme sponsorship and product placement?

44 Internationally there is a trend towards co-regulation, the easing or, where appropriate, removal of restrictions, and a shift towards greater flexibility in implementation.

45 Kindly refer to paragraphs 27 to 32 of our main submission.

Question 22. - How should the Authority ensure the balancing act between sustainability of broadcasters relating to revenue generation through sponsorships, infomercials and advertising, with the need to protect the consumers?

46 We commend the Authority for posing this question. We support the Authority's acknowledgment in the Discussion Document of:

*"the need for the broadcasters to generate revenue to sustain themselves, which should be balanced with the purpose of broadcasting, which is to inform, educate and entertain, whilst considering protection of consumers."*³⁵

47 The Authority could achieve this balance by: ensuring that it restricts advertising no more than is strictly necessary to achieve clearly defined objectives and, restricting advertising only to the extent that those objectives cannot be achieved through market-forces and regulation.

48 This balancing act will also be supported through: the removal of unduly restrictive regulations, cognizance of the pressures on broadcasters, and the development of flexible, future-proof principle-based regulations that do not unduly interfere with the commercial activities of licensees.

49 As regards subscription broadcasting, the Regulations should be consistently informed by the inherent constraint on subscription broadcasters to ensure that their advertising is not excessive or overly intrusive – failing which it will alienate subscribers. Accordingly, lighter touch regulation is warranted in relation to subscription broadcasting services.

Question 23. - What is your view in terms of promotional material inside programmes and advertising during the breaks on whether these amount to excessive advertising?

50 MultiChoice submits that broadcasters are best placed to determine when promotional materials and advertising breaks are excessive, as viewers will tune out if it is too intrusive. Free-to-air broadcasters are subject to licence conditions in this regard while subscription broadcasters are subject to inherent constraints

³⁵ Para 6.3 of the Discussion Document

due to the contractual nature of their relationship with subscribers, as well as s60(4) of the ECA.

- 51 Given the current challenging operating environment, broadcasters should not be subject to any further restrictions.

Question 24. - What are the determinants of advertising revenue?

- 52 It is advertisers who determine where to spend their money. Broadcasting services are only one of a choice of platforms available to advertisers, among print media, online media, social media, out of home media and many others.
- 53 Advertisers will consider the extent to which a particular advertising platform will meet its particular requirements having regard to: the product, the target market, the reach of the platform and its demographics, quality of service, value for money, the availability of data and analytics, and the ability to direct advertising to as targeted an audience as possible.
- 54 Ultimately, advertising revenue is determined by the advertiser's ability to spend according to their financial budgets and the value which they derive from advertising on a particular platform (having regard to the platform's target market segments, platforms and product offerings i.e., where the advertiser will get the best results and value for money).

Question 25. - What is the impact of online media on radio and television advertising revenue?

- 55 The most significant threat to broadcasters' advertising revenue is from online platforms.
- 56 This is a global trend, which government and regulators have recognised in leading jurisdictions such as the United Kingdom, Australia and Canada.
- 57 For example, the UK has recognised that digital advertising is taking an ever larger share of adspend as advertisers have followed audiences online and, that television advertising revenue is under pressure due to the growth of online

advertising. This has caused the UK House of Lords to caution against further regulatory burdens on broadcast advertising.

58 Similarly, the Australian Communications and Media Authority has recognised that *"online platforms that offer new content are challenging traditional funding models for print media and commercial broadcasters"*.³⁶

59 In Canada the Broadcasting and Telecommunications Legislative Review Panel considered concerns about the flow of advertising revenue to digital platforms and its impact on traditional media and recognised that *"traditional news outlets are losing both advertising and subscription revenues"*, while Canadians are increasingly accessing news content through online social media platforms:³⁷

"Advertising revenues are moving to the Internet, and subscription revenues from cable and satellite services, which support Canadian production, are declining".³⁸

Question 26. - To what extent does the ECA provide the Authority with the requisite legislative mandate to regulate the broadcasting Advertising, Infomercials and Programme Sponsorship during the digital era?

60 It is not clear whether this question seeks guidance on the Authority's jurisdiction under s55 of the ECA broadly or specifically in relation to the digital era.

61 More generally s55 permits, but does not require, ICASA to prescribe regulations on the scheduling of adverts, infomercials and programme sponsorships. As the Discussion Document notes, the Authority's jurisdiction is confined to this role. ICASA may not regulate advertising content or override or alter the limit s60(4) of the ECA imposes on the revenue subscription broadcasting licensees may derive from advertising and sponsorship. The ECA is technologically neutral and does not differentiate between analogue and digital broadcasting services insofar as advertising restrictions are concerned.

³⁶ *Digital Platforms Inquiry: Issues Paper*, ACMA submission, April 2018, pg 13

³⁷ *Final Report: Canada's Communications Future: Time to Act, Broadcasting and Telecommunications Legislative Review*, January 2020 ("the Panel's Final Report"), pg 15

³⁸ Pgs 115 and 119 of the Panel's Final Report

- 62 Please refer to paragraphs 41 to 55 of our main submission, in which we considered the Authority's legislative mandate arising from s55 of the ECA.
- 63 As regards advertising regulation "*during the digital era*", MultiChoice submits that we are already in the digital era.
- 64 Although ICASA's jurisdiction does not currently extend to on-demand services, Government's Draft White Paper³⁹ has proposed the inclusion of new audio-visual services within the country's licensing and regulatory framework.
- 65 While ICASA should not necessarily await the outcome of the final White Paper, that will broaden ICASA's jurisdiction to include online video on demand and video sharing platforms, this review should take into account the realities of the modern audio-visual environment and advertising in a digital online context, and provide for maximum flexibility so as to regulate in a way which is cognizant of, and appropriate for, the dynamic features of the modern advertising environment.
- 66 MultiChoice submits that ICASA's review should be guided by the following principles:
- 66.1 ICASA should endeavour to regulate no more than is strictly necessary and the regulations should be amended so they are not so granular. This review should ease the current restrictions and introduce flexibility.
 - 66.2 ICASA should ensure that the amended regulations do not disadvantage broadcasters in comparison to those new services with which they compete for advertising, including online and social media services.
 - 66.3 ICASA should ensure that the amended regulations will also be capable of applying to "TV like" audio-visual services operating in the South African market (not only to traditional broadcasting services).

³⁹ Draft White Paper on Audio and Audio-visual Content Services Policy Framework: A New Vision for South Africa 2020, October 2020

- 67 ICASA should make forward-looking regulations that could be easily applied to all audio-visual services, both linear and non-linear, to avoid ICASA having to repeat this review once the legislation is amended to apply to on-demand services. Accordingly, the outcome of this review of the Advertising Regulations should be future proof.

Question 27. - To what extent should the Authority regulate Advertising, Infomercials and Programme Sponsorship in the digital environment to ensure that the regulations protect consumers?

- 68 Please refer to the response to question 26.
- 69 MultiChoice submits that there is a need to review the relevance of all regulations given that licensed broadcasting services are increasingly having to compete with unlicensed digital platforms (which are not subject to any regulations). Advertising revenue is increasingly flowing (largely offshore) to these unregulated services (which hardly make fiscal and other contributions to the local broadcasting industry and economy) at the expense of local broadcasters.
- 70 Any review of the Advertising Regulations should consider how restrictions can be equitably applied to all audio-visual services: not just broadcasting services. These circumstances warrant an easing of the advertising restrictions on broadcasting services rather than the introduction of any additional restrictions.

Question 28. - Are there any other issues that the Authority should consider in the Regulation of Advertising, Infomercials and Programme Sponsorship?

- 71 In light of the challenges faced by local broadcasters, with regard to competition with unregulated digital platforms and the loss of ad revenue to digital platforms, MultiChoice submits that the Authority should carefully consider to what extent the Advertising Regulations are still required.

- 72 MultiChoice further submits that any Advertising Regulations should be capable of application to all audio-visual services (not only broadcasting services) and that, as a general principle, the advertising restrictions on broadcasting licensees should be eased – rather than increased – and should allow utmost flexibility in implementation.