

**MULTICHOICE SUBMISSION**

**DRAFT REGULATIONS  
REGARDING ADVERTISING,  
INFOMERCIALS AND  
PROGRAMME  
SPONSORSHIPS, 2022**

**1 JUNE 2022**

## TABLE OF CONTENTS

<b>Introduction .....</b>	<b>1</b>
<b>General comments .....</b>	<b>3</b>
<b>Comments on the draft Regulations.....</b>	<b>5</b>
Regulation 1.11: Definition of "current affairs programme".....	5
Regulation 1.18: Definition of "public service announcement" .....	8
Regulation 1.19: Definition of "programme sponsorship" .....	9
Regulation 4: Regulating the scheduling of adverts, infomercials and programme sponsorships vs. regulating the amount of advertising .....	11
Reg 1.18 and Reg 4.2: Programme competitions .....	12
Regulation 6.2.1: Sponsor influence .....	14
Regulation 6.4: Sponsorship of news .....	15
Regulation 6.8: Product placement .....	16
Regulation 7: Penalties .....	17
Miscellaneous minor comments .....	20
<b>Conclusion.....</b>	<b>21</b>

## Introduction

- 1 MultiChoice thanks the Independent Communications Authority of South Africa ("**ICASA**" or "**the Authority**") for the opportunity to comment on the draft Regulations Regarding Advertising, Infomercials and Programme Sponsorships, 2022 which the Authority gazetted on 8 April 2022 for public comment ("**the draft Regulations**").<sup>1</sup>
- 2 We support the Authority's initiative to review and update the current Advertising Regulations<sup>2</sup> and have participated constructively in the review process to date. We welcome the opportunity to make further comments.
- 3 As the Authority noted, the majority of stakeholders are of the view that the current Regulations are effective, although they felt that some aspects thereof should be reviewed.<sup>3</sup>
- 4 We support the Authority's position that the Regulations are still relevant, but need to be reviewed and updated.<sup>4</sup> We have always complied with the Regulations and support the Authority's approach to carry over many of the existing regulations into the new regime.
- 5 The Findings Document confirms that most stakeholders are concerned about declining advertising revenue, with online media negatively affecting sound and television broadcasters' advertising revenue.<sup>5</sup> We commend the Authority's recognition that advertising is necessary<sup>6</sup> and that market forces such as

---

<sup>1</sup> Draft Regulations Regarding Advertising, Infomercials and Programme Sponsorships, 2022 published under notice number 959, Government Gazette Number 46211, 8 April 2022

<sup>2</sup> Regulations relating to the Definition of Advertising and the Regulation of Infomercials and Programme Sponsorship in respect of Broadcasting Activities, 1999, published under notice number 426, Government Gazette number 19922, 1 April 1999 ("**the Current Regulations**")

<sup>3</sup> Para 4.3 of the Findings Document

<sup>4</sup> Para 8.28.9.2 of the Findings Document

<sup>5</sup> Paras 7.8.2 and 8.25.7.1 of the Findings Document

<sup>6</sup> Para 8.7.6.2 of the Findings Document

audience fragmentation and competition with unregulated on-demand services negatively impact on broadcasting revenue trends.<sup>7</sup>

- 6 In this context, we applaud the Authority's effort to ensure that there is a balance between revenue generation and the viability of broadcasters, on the one hand<sup>8</sup> and the need to protect consumers on the other,<sup>9</sup> by imposing restrictions to address areas that are not adequately taken care of by market forces.<sup>10</sup> We urge the Authority to continue to conduct this vital balancing act as it finalises the Regulations.
- 7 We believe that the proposed amendments to the Regulations are generally on the right track. However, there are some areas where we think the draft Regulations could be improved. The Draft Regulations require refining and amendments to the language used to avoid unintended consequences and, at times, achieve a more modern, less prescriptive approach.
- 8 Our submissions will therefore focus on refining the draft Regulations, including making drafting proposals to streamline and update the regulations (taking into account that the current Regulations were prescribed under the Independent Broadcasting Authority Act), to achieve some of the Authority's objectives in a less prescriptive way, where appropriate and to tighten up some of the drafting.
- 9 We trust that our comments will contribute constructively to the development of appropriate, updated regulations in line with s55 of the Electronic Communications Act, 2005 ("**the ECA**").
- 10 MultiChoice requests an opportunity to make oral representations.

---

<sup>7</sup> Para 7.8.2 of the Findings Document

<sup>8</sup> Para 8.28.9.2 of the Findings Document

<sup>9</sup> Para 8.22.8.2 of the Findings Document

<sup>10</sup> Para 8.22.8.2 of the Findings Document

## General comments

- 11 Prior to commenting on the specific provisions of the draft Regulations, we make some general comments on the Authority's approach.
- 12 As the Findings Document<sup>11</sup> confirms, the purpose of this inquiry is to determine the effectiveness of the Advertising Regulations and whether there is a need for amendments.<sup>12</sup>
- 13 Like the Discussion Document,<sup>13</sup> the Findings Document reiterates that this process is conducted in terms of s55(1) of the ECA.<sup>14</sup> In this regard, we support the Authority's position that -
- 13.1 the Authority's mandate in terms of s55(1) of the ECA is to regulate the scheduling of advertising, infomercials and programme sponsorships,<sup>15</sup> which talks to prescribing regulations related to the scheduling of advertisements in order to protect consumers;<sup>16</sup>
- 13.2 the content of advertising is the role of the Advertising Regulatory Board ("**ARB**" (formerly "**ASASA**"));<sup>17</sup>
- 13.3 licence conditions are separate from this process;<sup>18</sup> and
- 13.4 s60(4) of the ECA falls outside the scope of this inquiry.<sup>19</sup>

---

<sup>11</sup> Findings Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 2022 ("**the Findings Document**"), April 2022 published under notice number 959, Government Gazette Number 46211, 8 April 2022

<sup>12</sup> Para 8.28.9.2 of the Findings Document

<sup>13</sup> 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, paras 2.8 and 6.1

<sup>14</sup> Paras 3.1 and 4.4.2 of the Findings Document

<sup>15</sup> Para 3.10.2 of the Findings Document

<sup>16</sup> Paras 6.4.5, 8.4.10.5, 8.10.5.2, 8.22.8.2 and 8.22.8.3 of the Findings Document

<sup>17</sup> Para 3.10.2 of the Findings Document

<sup>18</sup> Para 8.22.8.3 of the Findings Document

<sup>19</sup> Para 4.4.2 of the Findings Document

14 We believe that the positions adopted by the Authority in respect of the scope and extent of its jurisdiction in respect of these regulations, as set out in the Authority's Findings Document, are by and large correct. We are pleased that the Findings Document and the draft Regulations are confined to the proper scope of the Authority's jurisdiction under s55(1) of the ECA. That is the basis on which we will comment on the draft Regulations.

15 We welcome the Authority's acknowledgment of the impact of on demand services on competition and broadcasting revenue. We concur with the Authority's "*view that the market has changed and there is more competition*"<sup>20</sup> and -

*"The Authority's position is that it accepts that there are market forces such as audience fragmentation, competition with unregulated on-demand services which negatively impact on broadcasting revenue trends."*<sup>21</sup>

16 We agree that the Authority must review the Regulations in line with the current legislation,<sup>22</sup> that s55(1) currently applies only to broadcasters, and that Authority does not (yet) have jurisdiction over unlicensed digital platforms.<sup>23</sup>

17 However, that does not preclude the Authority from considering the impact of on demand services on broadcasters when carrying out the delicate balance between the viability of broadcasters and the protection of consumers under s55(1) of the ECA. We support the Authority's position that -

*"lessons taken from benchmarking on advertising, infomercials, programme sponsorship and product placement regulations should take into consideration the local conditions such as the impact of online media on traditional broadcasters, local market forces and revenue trends."*<sup>24</sup>

---

<sup>20</sup> Explanatory Memorandum on Advertising, Infomercials and Programme Sponsorship Draft Regulations, published under notice number 959, Government Gazette Number 46211, 8 April 2022, para 3.9

<sup>21</sup> Para 7.8.2 of the Findings Document

<sup>22</sup> Para 5.13.3 of the Findings Document

<sup>23</sup> Paras 6.4.3 and 9.2 of the Findings Document

<sup>24</sup> Para 8.21.6 of the Findings Document

- 18 We are heartened that the Authority has noted the views raised regarding the regulation of online media and that the Authority will be following the process emanating from the Draft White Paper.<sup>25</sup>
- 19 Against this background, we now proceed to comment on specific provisions of the draft Regulations.

## **Comments on the draft Regulations**

### Regulation 1.11: Definition of "current affairs programme"

- 20 In order to differentiate between news and current affairs,<sup>26</sup> the Authority has proposed inserting the following new definition of "current affairs programme":

*"Current affairs programme' means programming that is not a news bulletin, which focuses on and includes comment on and interpretation and analysis of issues of immediate social, political or economic relevance and matters of international, national, regional and local significance".<sup>27</sup>*

- 21 MultiChoice agrees that the Authority should define news and current affairs separately and that a definition of "current affairs programme" should be included.

- 22 However, we have two concerns in this context:

22.1 First, we do not believe that it is necessary or appropriate for the Authority to prohibit programme sponsorship and product placement in respect of a current affairs programme.

22.2 Second, we are concerned that the proposed definition of "current affairs programme" is too broad.

- 23 We do not think that programme sponsorship and product placement should be prohibited in respect of a current affairs programme. Any concerns in this regard are already addressed by -

---

<sup>25</sup> Paras 5.13.4 and 9.2 of the Findings Document

<sup>26</sup> Para 3.3.1 of the Explanatory Memorandum

<sup>27</sup> Draft Reg. 1.11

23.1 regulation 6.1, which provides that every broadcasting licensee who receives benefit from a programme sponsorship must ensure that, in relation to the relevant sponsored programme, editorial control remains with that broadcasting licensee; and

23.2 regulation 6.7, which provides that product placement in programming other than news and current affairs shall be subordinate to the content of the programme material.

24 We therefore recommend that the Authority delete the phrase "*or current affairs programme*" from regulations 6.3 and 6.6.

25 As regards the proposed definition of the term, our concern is that by including language such as "*social...or economic relevance*" and "*international, national, regional and local significance*" the scope of what will constitute current affairs programming is cast extremely wide. The list of programmes which could potentially be captured by such a definition includes breakfast shows, talk shows, shows focusing on arts and culture, events of national importance, and even some comedy, sports and reality shows.

26 In short, we submit there is a danger that far too many programmes will fall within the proposed definition of current affairs. And because the draft Regulations prohibit programme sponsorship<sup>28</sup> and product placement<sup>29</sup> in a current affairs programme, there is a danger that this proposed definition could negatively affect the funding of a wide range of programmes.

27 For example, The Daily Show featuring Trevor Noah on Comedy Central draws its comedy and satire from recent news stories and political figures, and arguably includes "*comment on and interpretation and analysis of issues of immediate social, political or economic relevance and matters of international, national, regional and local significance*". Yet there is no reason why a satirical comedy show should not be sponsored or permit product placement.

---

<sup>28</sup> Draft Reg. 6.3

<sup>29</sup> Draft Reg. 6.6



- 28 We submit this unintended consequence should be avoided.
- 29 We have noted the Authority's explanation that it aligned the definition of "current affairs" in these Regulations to the definition of the term in the Local Television Content Regulations, 2016.<sup>30</sup> However, we respectfully submit that the definition of "current affairs programming" serves a different purpose in the Local Content Regulations, which impose minimum local content quotas in respect of, amongst others, current affairs programming.<sup>31</sup> In the local content context it is appropriate to define current affairs programming widely, so as to ensure the production and broadcast of a wide range of local current affairs programming.
- 30 If programme sponsorship and product placement are to be prohibited in respect of current affairs (which we do not support), then the definition of "current affairs programme" should be appropriately narrowed to avoid unduly limiting the funding of current affairs programmes. Stifling the funding of widely-defined current affairs programmes could cut off the lifeline of such programmes and have the unintended adverse consequence of stifling the viability and survival of the very programming which the Authority values and seeks to protect.

- 31 In light of these concerns, MultiChoice recommends that programme sponsorship and product placement should not be prohibited in respect of a current affairs programme and that the phrase "*or current affairs programme*" should be deleted from regulations 6.3 and 6.6.
- 32 Alternatively, we recommend that the Authority amend the definition of "current affairs programme" as follows:

"Current affairs programme' means programming that is not a news bulletin, but which is factual in nature and the primary purpose of which is to inform viewers which focuses on and includes comment on and interpretation and analysis of socio-political issues of immediate social, political economic relevance and matters of international, national regional and local current interest and significance".

---

<sup>30</sup> Para 3.3.1 of the Explanatory Memorandum

<sup>31</sup> Reg. 3(2)(b) and 4(2)(b) of the ICASA Regulations on Local Television Content, 23 March 2016, which require a minimum percentage of current affairs programming to consist of South African current affairs

Regulation 1.18: Definition of "public service announcement"

33 "Public service announcement" is currently defined as meaning -

*"a visual and/or audio announcement transmitted by a broadcaster and aimed at imparting knowledge or information the dissemination of which is in the public interest and/or which attempts to solicit support for, or create awareness of, any non-profit organisation or any other organisation which conducts activities in the public interest".<sup>32</sup>*

34 The Authority has proposed amending the definition to read as follows:

*"public service announcement' means an announcement broadcast by a broadcasting service licensee aimed at providing information concerning a disaster or immediate grave danger to the public or in the interests of public welfare."<sup>33</sup>*

35 The Explanatory Memorandum explains that this definition has been aligned with the Standard Terms and Conditions Regulations.<sup>34</sup>

36 It is not clear what mischief the Authority seeks to address by amending this definition, other than to align the definition with the Standard Terms and Conditions Regulations.

37 However, we note in this regard that the term is used in the Standard Terms and Conditions Regulations in the context of an obligation for a broadcasting licensee to broadcast public service announcements as may be requested by the Authority.<sup>35</sup> In this context, it is appropriate to define the term narrowly, to narrowly tailor the matters on which the Authority may compel a broadcasting licensee to broadcast a public service announcement.

38 The term is used in the draft Advertising Regulations in Reg. 1.2, which indicates when a public service announcement will<sup>36</sup> or will not<sup>37</sup> be regarded as being an "advertisement". In this context, it is appropriate to define "public service

---

<sup>32</sup> Reg. 1.18 of the Current Regulations

<sup>33</sup> Draft Reg. 1.20

<sup>34</sup> Para 3.3.2 of the Explanatory Memorandum

<sup>35</sup> Reg. 10(1) of the Standard Terms and Conditions Regulations for Individual Licensees

<sup>36</sup> Draft Reg. 1.2.1

<sup>37</sup> Draft Reg. 1.2.2

announcement" broadly, to prevent restricting or disincentivising broadcasting licensees from making public service announcements in the public interest.

39 In this regard, we are concerned that the deletion of the phrases "*aimed at imparting knowledge or information the dissemination of which is in the public interest and/or which attempts to solicit support for, or create awareness of, any non-profit organisation or any other organisation which conducts activities in the public interest*" could inhibit broadcasters from making such announcements, for fear that they will not be considered an announcement "*in the interests of public welfare*" in the new regulation 1.20, in which event they would count as advertisements.

40 It appears to us that the deleted portions may fall within the ambit of an announcement "*in the interests of public welfare*" in the new regulation 1.20. If this is the Authority's intention, then we request the Authority to confirm this, in which event we do not have any objection to the amended definition. However, if such announcements would not fall within the ambit of an announcement "*in the interests of public welfare*" in the new regulation 1.20, then we recommend that the Authority add the deleted portions back to regulation 1.20, to avoid such announcements being excluded.

41 We also suggest, for the avoidance of doubt, rephrasing the end of regulation 1.20 to say "... *to the public and/or announcements in the interests of public welfare...*", to be clear that this is a separate ground to that of disaster or immediate grave danger to the public.

#### Regulation 1.19: Definition of "programme sponsorship"

42 The Authority has proposed to carry over the existing definition of "programme sponsorship" from the current Regulations to the new Regulations. However, as we indicated in our submissions on the Discussion Document, MultiChoice believes that the definition of "programme sponsorship" is too wide. We maintain that the definition should not extend to (a) indirect financing or (b) the financing of the transmission of a broadcast programme.

- 43 In its Findings Document, the Authority provides the following reason for maintaining the existing wording, explaining that "*indirect funding and financing of the transmission of a broadcast programme is considered sponsorship as it is intended to promote the sponsor's own or another person's name, trademark, image, activities or product*". But respectfully, this argument does not address the difficulty of the overly wide definition.
- 44 True programme sponsors align with particular programmes in order to achieve their marketing goals. There will frequently be a resonance between what the sponsor's brand stands for and the values and content of the production being sponsored.
- 45 In contrast to this, there are other sorts of contributions made to a production which are not about promoting a sponsor's brand *per se*, but which could still potentially fall within the bound of "indirect funding / financing". For example, in a programme such as MasterChef, SMEG might provide the appliances. This is a significant cost contribution to the programme which gives SMEG exposure, even though SMEG is not making a financial payment in this instance.
- 46 The parties making these sorts of contributions cannot be said to be programme sponsors and shouldn't be treated as such. But it is possible that they will be captured by the overly broad definition.
- 47 Moreover, the overly broad definition could mean that service providers (e.g. caterers, security personnel, companies providing broadcast links, etc.) who could be said to be involved in the indirect financing of the production or transmission of a programme and are credited for providing those services to a production, by way of the depiction of a logo or name in the credits, will automatically be considered to be sponsors and will be treated in the same way as authentic programme sponsors. It further means that these "sponsors" will be subject to all the limitations laid out in the Regulations with regards to sponsorship and that broadcasters will have to take special care in their relationship with them. With respect, we submit that this cannot be what the Authority intends. Nor is there any sound rationale for such an overly broad restriction.

48 We submit that the limitations on programme sponsorship are intended to address true programme sponsors and to ensure that editorial integrity is not compromised in the relationship between them and the production concerned. We therefore reiterate our submission that the definition of programme sponsorship should be tightened.

49 MultiChoice proposes that the Authority amend the definition of "programme sponsorship" as follows:

"Programme sponsorship means the direct ~~or indirect~~ financing, whether partial or total, of the production ~~or transmission~~ of broadcast programme material by an advertiser or person with a view to promoting its or another person's name, trade mark, image, activities or product".

Regulation 4: Regulating the scheduling of adverts, infomercials and programme sponsorships vs. regulating the amount of advertising

50 Regulation 4 sets out how the Authority envisages using the definition of advertising. It provides three purposes for the definition, namely: (a) to ensure compliance with the Regulations (reg 4.1.1), (b) to determine whether jurisdiction in respect of a complaint vests with the Authority or ASASA (now the ARB) (reg 4.1.2), and (c) thirdly, in the case of a television broadcasting licensee, for the purposes of "*regulating the amount of advertising that may be transmitted*" (reg 4.1.3).

51 With the exception of updating various organisational names, the purposes articulated in Regulation 4 are unchanged from the purposes articulated in the original 1999 Advertising Regulations. However, s55(1) – the empowering legislative provision for these Regulations – has been updated since the development of the 1999 Regulations and it is notable that the empowering legislative provision (s55(1) of the ECA) does not speak about "*regulating the amount of advertising*". It rather speaks of "*regulating the scheduling of adverts*".

52 The Authority's Findings Document agrees that the Advertising Regulations must align with s55(1). For instance, in paragraph 3.10.1, the Findings Document states that the Authority's power to develop the Advertising Regulations is derived from s55(1). "*The Authority's position is that section 55(1) of the ECA*

*gives the Authority the mandate to regulate the scheduling of advertising, infomercials and programme sponsorship*"<sup>38</sup>.

- 53 In the light of the subsequent amendment of 55(1) of the ECA to empower the Authority to regulate the scheduling of adverts, we respectfully submit that a primary purpose of the amendment of the Regulations should be to align the Regulations with the current statutory provisions.
- 54 In any event, the draft Regulations do not (and should not) seek to regulate the amount of advertising that may be transmitted. Regulation 4.1.3 also need not be limited to television broadcasting licensees.
- 55 In light of this, MultiChoice submits that the language used in regulation 4.1.3 should be updated and amended to align with the language used in s55(1) of the ECA.

56 MultiChoice suggests that the Authority amend regulation 4.1.3 to read as follows:

~~"4.1.3 in the case of BSL who provide a television broadcasting service, regulating the amount of advertising that may be submitted~~ scheduling of adverts, infomercials and programme sponsorships".

#### Reg 1.18 and Reg 4.2: Programme competitions

- 57 The Draft Regulations introduce some changes to the definition and regulation of programme competitions. However, the drafting is problematic, and the result is that the provisions are difficult to understand and will be challenging to implement. Since the Findings Document does not address these changes, the Authority's reasons for proposing them are not clear.
- 58 From a broadcaster's perspective a programme competition is an opportunity to meet two goals: first, to heighten audience awareness of and engagement with a programme, channel or broadcaster, and second, to create brand exposure for a marketer associated with the programme competition and so gain revenue.

---

<sup>38</sup> Para 3.10.2 of the Findings Document

59 The definition of "programme competition" in the current Regulations takes these dual objectives into account and does not prohibit commercial exposure, only restricting the extent of the exposure. The promotion of the commercial interests of a person, product or service must not be the primary purpose of a programme competition.<sup>39</sup>

60 In addition, regulation 4.2 already provides that the primary purpose of a programme competition must be to promote the broadcasting licensee or programme, rather than the commercial interests of a person, product or service referred to in the course of the transmission.

61 The Draft Regulations do not propose any amendments to regulation 4.2, but the proposed changes to the definition of "programme competition" - which has dropped the words "*as its primary purpose*" at the end of the definition - muddy the waters. The definition of "programme competition" proposed by the Authority in regulation 1.18 omits the words "*as its primary purpose*", such that the draft Regulations propose to amend the definition to read as follows:

*"programme competition' means a competition that forms part of, or is linked to, a programme by way of a competition window, insert or slot, and which does not have the promotion of the commercial interests of a person, product or service as its primary purpose".*

62 It may be that the omission of the phrase "*as its primary purpose*" in the draft Regulations was unintentional, as the sentence is incomplete with this phrase omitted, and we are not aware of any difficulties having arisen in relation to this provision. We doubt that the Authority intended to completely prohibit the promotion of the commercial interests of a person, product or service in a programme competition.

63 Leaving aside the grammatical problems caused by the deletion of the words "*as its primary purpose*", we are concerned that the change may have the effect of prohibiting any promotion of the commercial interests of a person, product or

---

<sup>39</sup> Reg. 1.16 of the Current Regulations provides:

"programme competition' means a competition that forms part of, or is linked to, a programme by way of a competition window, insert or slot, and which does not have the promotion of the commercial interests of a person, product or service as its primary purpose;" (emphasis added)

service in a programme competition. Such a prohibition would undermine one of the imperatives for programme competitions and would certainly have a negative effect on broadcaster revenue. We strongly urge the Authority not to impose any such prohibition.

64 However, it is also not entirely clear whether the Authority actually intends to prohibit commercial exposure from programme competitions or what effect the changes to the definition will have, since regulation 4.2 has been left virtually unchanged and still provides that the primary purpose (not the sole purpose) of a programme competition should be to promote the broadcasting licensee or programme rather than any commercial interests. It is therefore explicit that the commercial interests of a person, product or service may still be promoted, albeit that they should not dominate the competition.

65 The proposed changes to the definition of "programme competition" are therefore confusing, especially when read with regulation 4.2.

66 MultiChoice therefore proposes that the final Advertising Regulations should provide clarity on this matter and continue to permit a programme competition to promote the commercial interests of a person, product or service, provided that this is not its primary purpose.

67 This could be achieved by retaining the existing definition of "programme competition" in reg. 1.16 of the Current Regulations, including the phrase "*as its primary purpose*". Alternatively, we propose that the Authority amend the definition of "programme competition" as follows:

"programme competition' means a competition that forms part of, or is linked to, a programme by way of a competition window, insert or slot and which may include ~~does not have~~ the promotion of the commercial interests of a person, product or service provided that is not as the primary purpose of the competition".

#### Regulation 6.2.1: Sponsor influence

68 Regulation 6.2.1 provides that a sponsor may not "*influence the content or scheduling*" of a sponsored programme.



69 The term "influence" is potentially very wide. As a result, this provision could potentially be construed as preventing a sponsor from having any say or effect whatsoever on the content or scheduling of the sponsored programme.

70 Sponsor influence is not necessarily negative or undesirable.

71 In our view, the key imperative - which is already covered by regulation 6.1 - is that the editorial control of a sponsored programme must remain with the broadcaster. We also believe that the need to prevent a sponsor having undue negative influence over a sponsored programme would most be warranted in relation to news. However, the draft Regulations already preclude the sponsorship of news.<sup>40</sup>

72 We therefore suggest that regulation 6.2.1 be amended to read as follows:

"Every BSL must: in respect of every programme sponsorship obtained or accepted by it, enter into a written sponsorship contract with the sponsor which shall provide that the sponsor shall not be entitled in any way to ~~influence~~ control the content or scheduling of the sponsored programme;"

#### Regulation 6.4: Sponsorship of news

73 We support the principle that the editorial integrity of news programmes should be safe-guarded. However, in the current economic climate, we also urge the Authority to be mindful of the precarious funding base for news programming. This genre of programming is often a loss leader and because of its critical public interest importance it is crucial that there is some commercial funding. Without it we run the risk that the programming is cut or that quality is compromised. We therefore recommend that the Authority explore how it can support the commercial funding of certain aspects of news without undermining editorial integrity.

74 A recommendation in this regard is to widen the current exceptions to the prohibition on news sponsorship (weather forecasts, sports results) to also

---

<sup>40</sup> Draft Reg. 6.3

include other non-contentious segments such as lifestyle, financial or business news and human interest segments.

75 We therefore recommend that the Authority amend regulation 6.4 as follows:

"Notwithstanding sub-regulation 6,3, a BSL who provides a television broadcasting service shall be entitled to obtain or accept a programme sponsorship in respect of a weather forecast or sports result bulletin, lifestyle, financial or business news and human interest segments which constitutes part of a news programme or channel broadcast by that BSL".

#### Regulation 6.8: Product placement

76 The Draft Regulations introduce a new requirement for the signalling of product placements. Regulation 6.8 states:

*"Product placement must be signalled clearly, by means of a logo, at the beginning of the programme in which the placement appears, and at the end of the programme."*

77 While we appreciate that the Authority wishes to ensure that product placement is properly signalled, we are concerned that the requirements in regulation 6.8 are impractical and will be difficult for broadcasters to implement.

78 For instance, a cooking show could have numerous product placements by multiple brands in a single programme. It is not always possible to display a logo – it may be practically difficult to display the logo properly in terms of its particular design specifications, there could be a multitude of logos, and there are also trademark law considerations which could preclude a broadcaster from displaying a logo.

79 Another difficulty is the requirement that product placement be identified both at the beginning and the end of the programme. Credits like this are usually only provided at the end of the show. It seems unwieldy and excessive to require that they are included both at the beginning and the end. Excessive notifications could also disrupt the flow of a programme and irritate viewers. It should suffice to signal the product placements in the credits at the end of a programme.

- 80 By requiring the logo to be displayed both at the beginning and the end of a programme, the regulation is effectively requiring more (not less) commercial exposure for a product or service. This seems to run counter to what the regulation is actually trying to achieve, which is to inform viewers when product placement is included in a programme.
- 81 We believe that the Authority can achieve this objective in a less prescriptive way, by requiring a broadcasting licensee to signal product placement clearly, without being unduly prescriptive as to when and how it should be signalled.

82 We therefore propose that the Authority amend regulation 6.8 as follows:

"Product placement must be signalled clearly, ~~by means of a logo, at the beginning of the programme in which the placement appears, and at the end of the programme in which the placement appears~~".

#### Regulation 7: Penalties

- 83 The current Regulations do not specify penalties for their contravention.
- 84 The Authority has proposed inserting the following new penalty provision:

*"A licensee that contravenes any provision set out in these Regulations is liable to a fine not exceeding 10% of the licensee's annual turnover and/or a fine not exceeding R3 000 000 (three million Rand).<sup>41</sup>*

- 85 This provision is problematic in several respects:

85.1 First, the penalties provision provides a "one size fits all" approach. The proposed penalty applies to the contravention of any provision set out in the Regulations. The draft Regulations do not differentiate between minor and significant contraventions, or once-off versus repeated and material contraventions. Not every contravention should be punishable. A proportionate approach should be applied in the circumstances instead of a blanket approach, and the punishment should be appropriate in the circumstances. For example, if an infomercial was broadcast during prime time or for 2 hours and 10 minutes, it would be

---

<sup>41</sup> Draft Reg. 7

unreasonably harsh to fine the licensee, let alone impose a fine of 10% of the licensee's annual turnover or R3 million.

85.2 Second, the penalty is not clear. Draft regulation 7 proposes two possible fines - a maximum fine of 10% of turnover and/or a maximum fine of R3 million. This lacks the clarity necessary for a potential offender to know the possible consequences of a contravention. We doubt the Authority intended to impose a maximum fine of 10% of turnover plus R3 million.

85.3 Third, the proposed penalty is much too high. 10% of the licensee's turnover - and even R3 million - is a very high penalty which is unjustifiable in the circumstances. In our assessment, none of the provisions of the draft Regulations are sufficiently serious to attract such a high penalty.

86 The Explanatory Memorandum seeks to explain its heavy-handed approach to the penalties provision as follows:

*"Contravention and Penalties*

*3.8 The 'contravention and penalties' provision is in line with section 17H of the ICASA Act and it seeks to regulate non-compliance with the Regulations.*

*3.9 The Authority is of the view that the market has changed and there is more competition hence it is necessary to ensure monitoring and compliance with the Regulations.*

*3.10 The proposed fine is a maximum fine, and a far lesser fine could be imposed. The fine is meant to indicate the seriousness for which the Authority views these Regulations and is meant as a deterrent to non-compliance."*

87 We respectfully submit that this approach to the imposition of penalties is inappropriate and ill-conceived.

88 The penalties provision is not in line with s17H of the ICASA Act. That provision deals with offences. Contravention of the advertising regulations is not, and should not be, an offence.

89 Moreover, the penalties proposed in the draft Regulations are far harsher than those in s17H of the ICASA Act, which provides for a maximum penalty of R5 million for the most egregious of offences involving dishonestly, such as making a false statement before the Authority or the CCC knowing such statement to be false. Even obstructing an inspector in the exercise of his or her powers or falsely holding oneself out as an inspector is punishable by a fine not exceeding R500 000 - a mere 16.66% of the maximum fine of R3 million, and a far cry from 10% of the turnover of a television broadcasting licensee.

90 It is no answer that "*the market has changed and there is more competition hence it is necessary to ensure monitoring and compliance with the Regulations*".<sup>42</sup> It is incumbent on the Authority to monitor and ensure compliance by all licensees. Nor does the extent of competition in a market have any bearing on the penalty that should be imposed for the contravention of advertising regulations.

91 The statement that the fine is a maximum fine and that a far lesser fine could be imposed is also no answer to the failure to set out a clear, appropriate and proportionate fine for deserving contraventions.

92 Penalties are set out in regulations pursuant to the principle of legality.<sup>43</sup> A penalty clause must provide certainty by setting out how a person will be punished if they fail to uphold the law.

93 This requires the application of objective guidelines and criteria to determine the fine imposed, such as considerations of fairness, objectivity, and transparency having regard to the relevant circumstances. Penalties must be proportionate to the gravity of the contravention.

94 MultiChoice therefore, proposes a more nuanced, considered and proportionate approach to the penalties provision. The Authority ought to identify the most

---

<sup>42</sup> Para 3.9 of the Explanatory Memorandum

<sup>43</sup> Snyman, C, *Criminal Law*, 6th ed. Cape Town, Lexis Nexis, 2014. A court or a tribunal cannot impose a punishment unless the punishment is recognised or prescribed by legislation or Common Law (Snyman). The Principle of Legality is underpinned by the themes of constitutional democracy, fairness and the derived values of certainty and fair notice

egregious of contraventions and specify maximum penalties therefore which, we submit, should not exceed a maximum fine of R1 million.

#### Miscellaneous minor comments

95 In an effort to finesse the draft Regulations, we make the following additional minor comments.

96 Regulation 1.13: Definition of "news": "News" is defined as meaning *"programming that is not current affairs by a broadcasting service licensee..."*. The word "broadcast" appears to be missing from this sentence. In addition, for consistency, we suggest that the Authority replace "broadcasting service licensee" with "BSL". This definition could be amended and restructured to read as follows:

"'News' means programming ~~that is not current affairs~~ broadcast by a ~~broadcasting service licensee~~ BSL, in which it reports on news events of immediate social, political or economic relevance and on matters of international, national and local significance, but which is not a current affairs programme".

97 Regulation 1.22: Definition of "sponsorship element": This definition lists items that may constitute a sponsorship element. While the items listed in this clause may constitute a sponsorship element, they do not necessarily. For example, a "squeeze back" could be a sponsorship element, but it could also be an advert. We therefore propose amending the definition of "sponsorship element" to read as follows:

**"sponsorship element"** means marketing material which forms part of, or is superimposed on, broadcast programme material ~~and includes~~ such as on-screen corner logos, opening middle and closing billboards, stings, squeeze backs, the on-air depiction of, or referral to, any brand, product or name, ribbons and crawls, naming rights, and product placements, with a view to promoting a sponsor's name, trade mark, image, activities or product ;"

98 Regulation 2: Scope: Regulation 2 has been amended to provide that the regulations are binding *"on every BSL who provides a television broadcasting service and a sound broadcasting service"*. The word "and" could be construed as meaning that the regulations apply only to a broadcasting service licensee

which provides both a television and a sound broadcasting service, which we doubt was the Authority's intention. We suggest that the Authority amend regulation 2 to read:

"These regulations are binding on ~~every~~ all television and sound BSLs ~~who provides a television broadcasting service and a sound broadcasting service.~~

- 99 Regulation 3: Code of Advertising Practice of the Advertising Standards Authority of South Africa: Regulations 1.3, 3.1 and 3.2 refer to the Advertising Standards Authority of South Africa and its Code of Advertising Practice. The ASASA has been replaced by the Advertising Regulatory Board. We therefore recommend replacing all references to ASASA with references to the Advertising Regulatory Board. We are aware that "Advertising Standards Authority of South Africa" is the term used and defined in s1 of the ECA, and that the term is defined to include "*any entity that replaces it but has the same functions*".

100 Should the Authority wish to retain the term in the ECA, we propose that the Authority (a) retain the definition of the Advertising Standards Authority of South Africa in Regulation 1.3, and (b) insert another definition for the "Advertising Regulatory Board", which could be defined as "*the entity that replaced, and performs the same functions as, the Advertising Standards Authority of South Africa*". Regulations 3.1 and 3.2 could then refer to the "*Code of Advertising Practice of the Advertising Regulatory Board*".

- 101 Regulation 5.3: Maximum duration of infomercials: We suggest that the Authority clarify whether the two hour period is a total of two hours or a consecutive duration of a single infomercial.

## **Conclusion**

- 102 MultiChoice appreciates the opportunity to make this submission.
- 103 We believe that the Findings Document and the draft Regulations are generally on the right track.

- 104 Our comments are intended to refine and modernise the draft Regulations, make the draft Regulations less prescriptive where appropriate, and avoid unintended consequences.
- 105 We hope that our comments will contribute constructively to refining the draft Regulations and request an opportunity to make oral representations.