

10 August 2021

Ms Mamedupe Kgatshe
Manager: Content Services
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By email: mkgatshe@icasa.org.za

Dear Ms Kgatshe

Supplementary submission on the Discussion Document on the Advertising Regulations

- 1 We refer to your email of 27 July 2021, in which the Authority requested MultiChoice to provide a supplementary submission following the oral hearings which were held on 26 July 2021 regarding the Discussion Document on the Review of the Advertising, Infomercials and Programme Sponsorship Regulations.¹
- 2 MultiChoice appreciates the constructive engagement during the hearings and the opportunity to participate further in this process.
- 3 We welcome the opportunity to respond to the additional question posed by the Authority, namely to propose an improved definition of sponsorship.
- 4 We have also taken the opportunity to illustrate our recommended approach to the amendment of the Regulations, by way of some examples of how the Regulations could provide more flexibility and deal with scheduling restrictions at the level of principle.
- 5 In addition, we respond briefly to the proposals made by certain third parties that the Authority should restrict subscription broadcasters' advertising revenue.
- 6 Our response is attached for the Authority's kind consideration.
- 7 Please let us know if you require any clarity or further information.

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

Yours sincerely

Lara Kantor
General Manager: Regulatory Affairs

**DISCUSSION DOCUMENT ON THE REVIEW OF THE ADVERTISING,
INFOMERCIALS AND PROGRAMME SPONSORSHIP REGULATIONS:
SUPPLEMENTARY SUBMISSIONS BY MULTICHOICE**

Introduction

- 1 MultiChoice welcomes the opportunity to provide supplementary submissions following the oral hearings which were held on 26 July 2021 regarding the Discussion Document on the Review of the Advertising, Infomercials and Programme Sponsorship Regulations² ("Discussion Document").
- 2 We set out below –
 - 2.1 a brief response to certain third parties' proposals that the Authority should restrict subscription broadcasters' advertising revenue;
 - 2.2 a proposed definition of "programme sponsorship"; and
 - 2.3 some examples of ways in which the Advertising, Infomercials and Programme Sponsorship Regulations ("the Regulations") could be amended to promote flexibility and avoid granularity.
- 3 We make proposals on a recommended approach to the amendment of the Regulations and briefly respond to the proposals made by third parties. However, in doing so, we respectfully submit that the Authority must not lose sight of the bigger picture.
- 4 The Authority needs to take the lead and be future looking. Advertising is rapidly moving online. Online advertising is already forecast to eclipse traditional TV advertising in the latter part of 2021.³ Consumers regulate the amount and frequency of advertising they are prepared to accept by switching to alternatives if advertising becomes excessive. In the past this was only relevant for subscription broadcasting. It is now also relevant for free to air broadcasting. Previously consumers would switch between broadcasters because of limited choice. They are now more likely to switch to online services, where there is an explosion of choice. "*Streaming? More like a flood now*" was how one journalist described it when commenting on the launch of the MTN and eMedia, eVOD partnership.⁴ This happened in the same week as the launch of the BBC/ITV launch of the Britbox online service in South Africa.
- 5 In light of these dramatic changes, the Authority needs to evaluate whether restrictions on advertising, including those on free to air broadcasting, are still relevant.

² 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

³ PwC Entertainment and Media outlook 2019-2023. TV/Video & Digital Adspend trended 2014-2019 with forecasts for 2019-2023

⁴ Goldstuck, A. 2021. "*Streaming? More like a flood now*", Sunday Times, 8 August 2021.

Third parties' proposals to restrict subscription broadcasters' advertising revenue

- 6 A number of parties made radical proposals for the Authority to limit subscription broadcasters' advertising revenue.
- 7 As indicated in MultiChoice's oral presentation, the Authority is not empowered to impose restrictions on subscription broadcasters' advertising revenue.
- 8 In particular, the measures proposed by the SABC and eMedia in this regard fall outside the purpose and scope of ss55 and 60(4) of the Electronic Communications Act ("the ECA").
 - 8.1 s55(1) of the ECA empowers the Authority to make advertising regulations on the scheduling of adverts in order to protect the viewer from excessive or inappropriate timing, frequency and duration of advertising. Advertising restrictions under s55(1) have as their purpose the protection of audiences. They have nothing to do with the protection of competing broadcasters, the total volume of advertising which is sold, or broadcasters' respective audience share.
 - 8.2 s60(4) of the ECA deals with the internal apportionment of a subscription broadcasters' revenue. The purpose of s60(4) is not to protect certain broadcasters (or a certain class of broadcasters), but simply to ensure that subscription broadcasters derive more revenue from subscriptions than they derive from advertising and sponsorships, in accordance with their licensing as subscription broadcasters.
- 9 The SABC accepts that the imposition of any advertising revenue restrictions on subscription broadcasting services would require a prior legislative amendment.⁵
- 10 MultiChoice does not dispute that the Authority may make recommendations to the Minister on amendments to the ECA.⁶ However, any such recommendations must (a) accord with the objects of the ECA and the ICASA Act to promote development in the broadcasting sector, and (b) be supported by evidence, based on the results of proper investigation. We respectfully submit that neither of these grounds have been met.
- 11 The Authority has given notice of its intention to conduct an inquiry in terms of s4B of the ICASA Act for the purpose (as required by s4B(2)) of reviewing the Advertising Regulations made under the predecessor of s55(1). No evidence has been placed before the Authority in this inquiry which would justify a legislative amendment to further restrict subscription broadcasters' advertising revenue. Nor would such restrictions promote the Acts' objectives to promote

⁵ SABC submission on the Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 7 June 2021 ("SABC written submission"), para 3.2.2

⁶ s4(3)(a) of the ICASA Act

development in the broadcasting sector – they would simply undermine the pay TV sector and the wider broadcasting and advertising sectors.

- 12 During its oral presentation eMedia abandoned certain proposals which it had made in its written submission. While the full scope of the matters abandoned by eMedia is not clear,⁷ it appears that, at a minimum, eMedia has abandoned its proposals as regards subscription broadcasting services, that –
 - 12.1 no advertising should be permitted on channels not produced in South Africa or on programmes produced by any company associated with or within the group of companies providing the subscription broadcasting service; and
 - 12.2 advertising should be permitted only on locally produced channels which are not produced by a producer who is associated with (whether at the level of shareholder or otherwise) or in the same group of companies as, the licence holder of the subscription broadcasting licensee.⁸
- 13 eMedia also indicated in its oral presentation that it is developing a new proposal which it intends to submit to the Authority in due course. The nature and basis of eMedia's new proposal is not clear and we are not in a position to comment meaningfully on it at this stage. However, it appears to propose limiting subscription broadcasters' revenue based on their audience share, based on what it understands to be the position in the United Kingdom.
- 14 Such a measure to restrict subscription broadcasters' advertising revenue would likewise be *ultra vires* and unlawful.
- 15 Accordingly, we do not anticipate that the Authority will seriously entertain eMedia's new proposal in this inquiry.
- 16 However, should the Authority be inclined to consider it, we make the following preliminary points, without prejudice to our right to comment on the full proposal in due course:
 - 16.1 Both the SABC and eMedia raised broadcasters' audience share in relation to their advertising revenue.
 - 16.2 Broadcasters are not entitled, and do not have any legitimate expectation, to receive a particular proportion of advertising revenue in the market either generally or in relation to their audience share.

⁷ When asked which aspects of its written submission it has abandoned, eMedia's representative indicated that it has abandoned those matters with which it did not deal during its presentation

⁸ eMedia Investments Comments and Submissions on the Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 7 June 2021 ("eMedia written submission"), para 7 and response to question 4

- 16.3 TV advertising is two-sided: Broadcasters offer programming to attract viewers on one side of the market, while on the other side of the market they sell access to those audiences to advertisers.
- 16.4 However, it does not necessarily follow that a broadcaster's advertising revenue share will be proportionate to its audience share.
- 16.5 Broadcasters' advertising revenue share cannot be viewed in isolation. Broadcasters convert their audience ratings into advertising revenue through desirable content, good business practices and acumen, efficient marketing and sales, and effective yield management.
- 16.6 A broadcaster's advertising revenue will depend on many factors, most significantly, the value proposition which the broadcaster offers advertisers. As the SABC stated in its written submission:
- "Essentially, advertisers advertise to get return on investment..."*⁹
- 16.7 The SABC has recently attributed its low advertising revenue to, amongst other things *"market pressures"* and *"limited marketing initiatives..."*¹⁰ Conversely, in June 2021 the SABC attributed its improved advertising revenue to its turnaround plan, stating that the SABC has *"been focusing on four key areas – financial sustainability and governance, content, HR and digitisation"*, and that *"activities in these key areas have culminated into revenue generation and profit" largely due to advertising sales.* It explained that the –
- "SABC's previous approach to sales was fragmented, with different departments not talking to each other and separate products offered for its advertising platforms. 'One of the things that we've focused on is reviewing our sales model, how we go to market and the way in which we put together our packages..."*¹¹
- 16.8 In June 2021 eMedia's Annual Financial Statements indicated that its advertising revenue *"outperformed the market"*, and that the *"Group's television advertising revenue is approximately 8% better than the market and this can be attributed to the increased prime time market share..."*¹²

⁹ SABC written submission, response to question 4.24 of the Discussion Document

¹⁰ SABC 2020 Annual Report

¹¹ *One simple change helped the SABC make its first monthly profit in 5 years*, My Broadband, 4 June 2021 (Available at https://mybroadband.co.za/news/broadcasting/400141-one-simple-change-helped-the-sabc-make-its-first-monthly-profit-in-5-years.html?utm_sou%E2%80%A6)

¹² eMedia's 2021 Annual Report, pgs 2 and 75. It states:

"The Group's performance in the second half of the financial year saw a recovery of advertising revenue to the extent that the Group outperformed the market, with the total market going back 15.70% and the Group showing a setback of only 7% through the pandemic set fiscal. In general, the Group's media sales team performed better than the market throughout the year and in the last six months outperformed the prior year almost every month."

- 16.9 A lower or higher "power ratio" (i.e. proportion of advertising revenue in relation to audience share) may be attributable to any number of reasons. For example, the SABC indicated that it has a low power ratio in relation to radio advertising, with a 32% share of radio revenue (compared to a 26% radio revenue share held by Primedia), despite a 72% radio audience share (compared to a 3% radio audience share held by Primedia).¹³ It is therefore apparent that the SABC's low power ratio is neither (a) specific to television nor (b) attributable to MultiChoice.
- 16.10 Competing broadcasters cannot be blamed for other broadcasters' inefficiency to optimally monetise their inventory.
- 16.11 To the extent that eMedia's new proposal seeks to implement a model adopted in the UK, we point out that the UK has a unique advertising trading mechanism¹⁴ agreed upon between broadcasters and advertisers, and not imposed by any regulator.
- 16.12 In any event, we are not aware of any regulatory restrictions in the UK to restrict broadcasters' advertising revenue in relation to their audience share.
- 17 If the Authority is inclined to entertain eMedia's new proposal within the confines of this inquiry, we respectfully submit that the Authority would be required to conduct a comprehensive investigation of the proposed measures and their effects and implications in the South African context, and provide all interested and affected parties an opportunity to comment meaningfully on the proposed measures.

Proposed definition of "programme sponsorship"

- 18 The Authority has requested MultiChoice to propose an improved definition of "programme sponsorship", in line with paragraph 7 of Annexure A of MultiChoice's submission.
- 19 As we indicated in our written submission, MultiChoice believes that 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.
- 20 MultiChoice proposes that the definition of "programme sponsorship" be amended as follows:

¹³ Slide 14 of the SABC's PowerPoint presentation at the hearings. MultiChoice has not verified these figures and does not necessarily accept the accuracy thereof. We simply use these figures for illustrative purposes

¹⁴ Ofcom has noted that the trading mechanism appears to be unique to the UK (*Competition in the UK TV advertising trading mechanism, Consultation on the potential reference to the Competition Commission*, Ofcom, 10 June 2011 ("Ofcom Advertising Consultation"), para 1.12) In the UK, broadcasters and advertisers have opted to deal in commercial impacts (measured in television ratings), rather than selling advertising slots. i.e. Broadcasters and advertisers contract with one another for the delivery of a given volume of television ratings from a particular demographic group

"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".

Examples of ways in which the Regulations can be less granular

- 21 MultiChoice has submitted that the changing landscape warrants an easing of the restrictions on advertising, infomercials and programme sponsorship. Our over-arching view is that detailed restrictions are not appropriate and that the Regulations should allow for maximum flexibility in implementation. In light of that, we have suggested that the Authority should consider repealing the regulations.
- 22 Alternatively, we have argued that if the Authority decides to leave the regulations in place, the regulations should be amended to focus on issues of principle. Such an approach would mean that in future, the regulations can more easily be applied to the new audiovisual content services, at a point when those new services are brought into the licensing and regulatory framework.
- 23 To illustrate the approach that any amendments to the Regulations should focus on issues of principle, we give the following examples of how the regulations could be amended to promote flexibility and avoid granularity.

Example 1: Existing regulation 5.1 – editorial integrity of sponsored programmes

- 24 Reg. 5.1 deals with programme sponsorship. It provides:
- 5.1 "Every broadcaster who derives benefit from a programme sponsorship shall ensure that, in relation to the relevant sponsored programme, editorial control remains with the broadcaster.
- 5.2.1 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 the content or scheduling of the sponsored programme;
- 5.2.2 On the Authority's request furnish the Authority with copies of sponsorship contracts concluded by that broadcaster".
- 25 As indicated in the Discussion Document, the over-riding concern with programme sponsorship is to preserve the editorial integrity of sponsored programmes.¹⁵
- 26 Reg. 5.1 could be replaced with a principle based provision as follows, which would ensure that the editorial integrity of programming content is not compromised, without being prescriptive as to how that objective must be achieved:

¹⁵ Para 4.13 of the Discussion Document

"a) Programming content may be sponsored, provided that the sponsorship does not undermine the editorial integrity of the sponsored programme.

b) Licensees who accept sponsorship of their programmes must put in place relevant procedures to ensure that a person who provides a programme sponsorship to a broadcaster does not unduly acquire control of editorial and / or scheduling decisions in relation to the sponsored programme.

c) Licensees shall provide an annual report to the Authority, six months after the end of each financial year, on the procedures they have implemented to ensure that the editorial integrity of sponsored programming is not undermined by its sponsorship".

Example 2: Existing regulation 5.5 – subordination of programme sponsorship to programme material

27 Reg. 5.5 seeks to ensure that undue prominence is not given to a person who provides a programme sponsorship to a broadcaster. It provides:

"Any depiction of, or referral to, the name, logo product or service of a person who provides a programme sponsorship to a broadcaster, whether before, during or after the broadcast of the relevant programme, shall be subordinate to the content of the programme material to ensure that undue prominence is not given to that name logo, product or service".

28 Reg. 5.5 could be replaced with a principle based provision as follows:

"Where a person provides a programme sponsorship to a broadcaster and a product or service of the sponsor is depicted in the sponsored programme, the depiction of such product or service in the programme must not be unduly prominent such that it excessively supersedes the programming content without editorial justification".

Example 3: Existing regulation 5.9 – sponsor credits

29 Reg. 5.9 requires a broadcaster who accepts programme sponsorship to clearly state the nature of the sponsor's association with the relevant sponsored programme. It provides:

"In all cases of programme sponsorship, the broadcaster shall, before and after the transmission of the sponsored programme, state clearly the nature of the sponsor's association with the relevant sponsored programme. Preference should be given to descriptions such as "sponsored by" or "in association with" as opposed to descriptions such as "brought to you by" or "with compliments of".

30 Reg. 5.9 could be replaced with a principle based provision as follows:

"Where a broadcaster accepts a programme sponsorship, the broadcaster must indicate clearly before, during or after the programme that the programme is sponsored."

Conclusion

- 31 MultiChoice reiterates its thanks for the opportunity to provide this supplementary submission.
- 32 We suggest that the Authority should either repeal the regulations or amend the entire regulations along the lines suggested in the above examples.
- 33 The Authority needs to take the lead and be bold. The lens through which the Authority regulates the sector in all respects needs to adapt and be forward looking. What the sector does not need is any regulation that will accelerate the move to online advertising which would hobble the local broadcasting sector as a whole. We also urge the Authority to be mindful of aligning its findings with the final White Paper on Audio and Audiovisual Content Services Policy Framework.