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3 December 2020

Ref:

Enq: Adv N Vanara/am

WITHOUT PREJUDICE

ATTENTION TO: MS VIOLET MOLETE
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
("ICASA")

Block B,
350 Witch-Hazel Avenue
Eco Point Office Park
Centurion

Per Email: Vmolete@icasa.org.za | Pcokie@icasa.org.za

Dear Madam

RE: DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2020

1. We refer to the above matter, your Sports Broadcasting Services Amendment Regulations Gazetted on 14 December 2018 No.1389 and the proposed draft amendment regulations No. 43877, published on 5 November 2020.

SABC'S KEY SUBMISSIONS

2. On 15 March 2019 and 31 May 2019, the SABC presented its submissions to ICASA, on the Draft Sports Regulations. The overarching key submissions of the SABC being: -
 - 2.1 **Sector-specific Regulations:** Sector-specific regulations must be employed to deal with the subscription broadcasting/Pay-tv market.
 - 2.2 **Unbundling of Rights:** ICASA should unbundle Free To Air ("FTA") from the Pay-TV Media Rights ("Rights"). This would assist Pay TV and FTA Broadcasters not to compete for the Rights that are not in their respective terrain. Thus it is the SABC's submission that ICASA could create a conducive competitive broadcast landscape by regulating for the Pay-TV broadcasters to compete for the Pay-TV Rights only and for the FTA Broadcaster to only compete for the FTA Rights.

South African Broadcasting Corporation SOC Limited: Registration Number: 2003/023915/30
Non-Executive Directors: Mr B E Makhathini (Chairperson); Ms M Mohlala-Mulaudzi (Deputy Chairperson); Prof S Cooper; Adv M B B Lekalalaka; Mr D M Maimela; Mr M G Markovitz; Mr D K Mohuba; Ms J Patel; Mr J H Phalane; Ms M B Papayya; Dr M Socikwa
Executive Directors: Mr M T Mxakwe (Group Chief Executive Officer); Mr I C Plaatjes (Chief Operations Officer); Ms Y van Biljon (Chief Financial Officer); **Company Secretary:** Ms L V Bayi

- 2.3 **Exclusivity of Contracts within an Unbundled Rights Framework:** Exclusivity to categories of sports or platform which permits a broadcaster to have exclusivity for a licensed service e.g. Exclusivity to FTA, Pay/Subscription, radio, television should be applicable.
- 2.4 **Rights Acquisition Transparency and Fair Sublicensing of Rights:** The regulations must be fair and have a transparent Rights sub-licensing framework ("sub-licensing").
- 2.5 **Rights Dispute Mechanism:** A mechanism for dispute resolution concerning sub-licensing matters must be considered. The current draft regulations do not provide solution and or guidelines where there is a dispute on Rights.
- 2.6 **Accessibility of Rights:** Rights that are accessed by FTA Broadcasters will be beneficial to all South Africans thus promoting the universal access mandate of the SABC and government policy objectives on universal access of information by the South African general public.
- 2.7 **Funding of Sports:** Exclusive government funding is required for a public broadcaster such as the SABC to cover listed sporting events, developmental and minority sports regulating this area.
- 2.8 **Must Carry Regulations:** A review of the current Must-Carry Regulations is critical for the FTA Broadcasters, and it will address the conduct of double-dipping by Pay-TV Broadcasters on the Rights.

SABC'S ADDITIONAL SUBMISSIONS

- 3. Additional to the proposed submissions to ICASA, the SABC is of the view that the Regulations should give a considered view to the following:-
 - 3.1 **Digital Rights:** Digital Rights, namely livestream simulcast and stand-alone rights, should also be adequately unbundled and/or distinguished by the regulator in line with the following principles:
 - 3.1.1 Livestream, simulcast with FTA rights, allows for FTA broadcasters to broadcast linear content simultaneously on digital platforms;
 - 3.1.2 Livestream simulcast rights should be non-exclusive because all broadcasters also carry their channels and/or content on their digital media platforms.

- 3.2. **Title of Listed Events:** ICASA should amend the title of 'listed events' to "all events" in its regulations to be inclusive of all national sporting events or events of public interest.

FAILURE BY ICASA TO UPHOLD ITS STATUTORY MANDATE

4. ICASA is a statutory body entrusted with the regulation of the public broadcaster **in the interest of the public** and is also entrusted with ensuring affordable services of high quality for all South Africans.
5. Accordingly, section 2 of the Independent Communications Authority of South Africa Act of 2000 ("the Act") as amended, provide that ICASA, as a statutory body, is entrusted with the responsibility to regulate broadcasting in the public interest as required by section 192 of the Constitution of the Republic of South Africa. Consequently, ICASA in its responsibility to regulate broadcasting in the public interest, is also mandated to create competition in the broadcasting services industry to foster a competitive economic environment.
6. The mandate of ICASA to create and/or foster competition in the broadcasting services industry is even recognised and acknowledged by the Competition Commission of South Africa. The Competition Commission of South Africa, which is the primary authority in South Africa on business practices that restrict competition, investigated anti-competitive conduct in the acquisition of sports broadcast rights in South and found that there is potential market failure in this market of sports broadcast rights because of:-
 - 6.1.1 The highly concentrated nature of the subscription television market;
 - 6.1.2 High barriers to effectively enter the market and the inability of other existing firms to expand in the market;
 - 6.1.3 A lack of credible alternative buyers for premium sports rights other than the incumbent (Multichoice);
 - 6.1.4 Overly long and exclusive contracts between the incumbent (Multichoice) and some content suppliers; and
 - 6.1.5 A lack of credible alternatives to which individual consumers can turn to should they wish to switch away from the incumbent (Multichoice).

7. The Competition Commission of South Africa duly recognised at the time of its findings on the sports broadcast rights investigation that ICASA was conducting an inquiry into subscription broadcasting services thus ICASA would be the most suitable authority to address the market failure concerns raised by the Competition Commission of South Africa through a **regulatory intervention to achieve more effectiveness** in this market that shows possible restrictive anti-competitive effects.

8. The Authority has in the **Draft Findings Document: Inquiry into Subscription Television Broadcasting Services** of April 2019, made the following findings:

“1.6.1 The Authority considers the following licence terms and conditions as appropriate to deal with the ineffective competition in the relevant markets:

1.6.1.3 Rights Splitting – this involves splitting content rights into packages and selling them to more than one distributor – The Authority finds that the current practice of allowing a ‘winner – takes – all’ outcome only serves to limit entry into the market.

1.6.1.4 Unbundling - Similar to right splitting. Unbundling allows rights to be held by more than a single distributor. The focus of unbundling is on the modes of distribution, that is, allowing rights to be held simultaneously by subscription, free to air or OTT service providers. Currently, Multichoice holds the rights to all distribution platforms, thus limiting entry by other distributors. The Authority finds this to result in ineffective competition in the identified markets”

8.1 The Authority has decided to renege on its own findings with respect to the splitting and unbundling of rights without providing reasons in the draft amendment sports regulations.

9. The SABC also brings it to the attention of ICASA that sections 3 and 4 of the ICASA Act are clear in directing that ICASA as an independent authority, is subject only to the Constitution and the law, must **be impartial, perform its functions without fear, favour or prejudice and function without any political or commercial interference.**

10. It is the SABC’s considered view that the Draft Sports Regulations, in their current form, do not promote or foster an effective and efficient competitive broadcasting industry and heavily disadvantage FTA broadcasters, in particular the SABC, a public broadcaster which has an unfunded sports mandate. It could, inversely, be argued that ICASA has the responsibility to consider and safeguard the financial viability of public broadcasting

services because of its statutory mandate on broadcasting services industry. However, the manner in which ICASA has responded to the submissions of the SABC on the Draft Sports Regulations, ICASA has duly failed to carry out its mandated responsibility to provide regulation of the public broadcaster **in the interest of the public and also regulation that creates and/or fosters competition in the broadcasting industry.**

11. The SABC is emphatic in pointing out that ICASA has failed, ignored and/or neglected to consider the SABC's reasonable and justifiable submissions on the Draft Sports Regulations and has also failed to provide reasons for its failure to adequately respond to the SABC's reasonable and justified submissions.
12. In the circumstance, the SABC demands that ICASA, as an independent statutory authority, recalls its mandate on the broadcasting industry and reviews the Draft Sports Regulations in the interest of the South African public by considering and incorporating the SABC's proposed submissions in the Regulations before the adoption of the Regulations.
13. The SABC calls on ICASA to also **be impartial and to perform its functions without fear, favour or prejudice and function without any political or commercial interference.**
14. Should ICASA fail to heed and/or ignore the SABC's requests herein, within 14 (fourteen) days and/or before the final regulations are finalized, the SABC reserves all of its rights and remedies available in law to urge ICASA to carry its mandated responsibilities in the broadcasting industry in the interest of the South African public.

Yours faithfully



Advocate Ntuthuzelo Vanara
SABC: Head of Legal Services