



Policy and Regulatory Affairs

Radio Park, Henley Road, Auckland Park, 2092
Private Bag X1 Auckland Park 2006, Gauteng,
South Africa.

E-mail: moilwap@sabc.co.za

Tel +27 011 714-3708 Fax +27 11 714-4508

www.sabc.co.za

15 March 2019

ATT: Ms Violet Molete

ICASA
Block B
350 Witch-Hazel Ave
Eco-Park Estate
Centurion
0144

Tel: Tel: (012) 568-3715

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

Dear Ms Molete

**THE SABC SUBMISSION ON THE DRAFT SPORTS BROADCASTING SERVICES
AMENDMENT REGULATIONS, 2018**

Attached hereto, please find the SABC's submission on the draft sport broadcasting services amendment regulations, 2018.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Philly Moilwa', written over a horizontal line.

**PHILLY MOILWA
GENERAL MANAGER:
POLICY AND REGULATORY AFFAIRS**



**SABC SUBMISSION ON THE SPORTS
BROADCASTING SERVICES
AMENDMENT REGULATIONS, 2018**

15 MARCH 2019

1. EXECUTIVE SUMMARY

- 1.1 The SABC welcomes the opportunity to make written representations on the ICASA Draft Sports Broadcasting Services Amendment Regulations (“the Draft Regulations”). Furthermore, the SABC commends the Authority for the spirit with which the Draft Regulations are being developed; it is rightly stated in the Draft Regulations that the Authority seeks to regulate the national sporting events in the public interest in the Republic and to strike a balance between revenue and audience. For the SABC, these landmark Draft Regulations promises to level the playing fields, promote fair competition within the broadcasting sector and further address long-standing matters that the SABC has grappled with over the years.
- 1.2 Going-forward, the SABC sees itself as a multiplatform content provider which delivers public service content that includes content gathering, creation, commissioning, duration, packaging and distribution through public service media. For this to happen, it is critical to have an enabling environment which seeks to ensure the protection of the integrity and the viability of public broadcasting services as stated in the section 2(t) of the Electronic Communications Act (“ECA”).
- 1.3 First and foremost, it has to be noted that the SABC is expected to deliver on its broad public service mandate that it cannot afford and which is largely shouldered by commercial revenue. As such, there is even a greater need to create a regulatory environment which enables the SABC to provide national sporting events to all citizens and still remain financially viable.
- 1.4 Secondly, the SABC submits that the success of these Draft Regulations is intricately linked to the pending ICASA processes with respect to the review of the Must Carry Regulations, the review of Subscription Broadcasting Regulations and the roll-out of the Digital Migration Project. As such, it is essential for the Authority to conclude the pending reviews of the above-mentioned regulations in order to foster fair competition within the broadcasting sector. If all things were equal and essential regulations were

in place, the national sporting events could have been used by the SABC to drive the uptake of broadcasting digital migration, which will ultimately lead to the freeing of the radio frequency spectrum for other important services. In any event, digital migration is being undertaken for the public good and therefore there is a need for regulatory protection for broadcasters who are expected to migrate.

1.5 Thirdly, the SABC submits that giving Free-To-Air (“FTA”) services ‘first choice’ with respect to Group A events will not necessarily resolve the existing regulatory bottlenecks or reduce the cost of sports rights. Over the years sports rights have become extremely expensive and in this submission the SABC will indicate the revenue loss it incurred during the implementation of the 2010 ICASA Sports Broadcasting Services Regulations (“2010 Sports Regulations”). It is the SABC’s considered view that the solution to the existing barriers is to require that sports associations unbundle sports rights so that rights can be acquired separately for FTA, pay-tv, online, radio and other platforms. This approach will lead to more access to rights by FTA services and should result in the reduction of the cost of sports rights by FTA, in particular.

1.6 Fourthly, the SABC notes that acquiring exclusive rights is not only advantageous for pay-tv broadcasters but for FTA broadcasters as well. In general exclusive sports rights represent a guarantee of the value of sports content, an opportunity to build up audiences, the potential for a sizeable advertising or sponsorship revenue, a degree of exclusive standing that distinguishes a broadcaster from other existing broadcasters. Thus, the SABC submits that exclusivity should be allowed on unbundled rights (for example exclusive FTA rights can be acquired by a broadcaster who has a licence for that particular broadcasting platform). It would make no sense if the SABC invested in acquiring FTA rights only to find that the same or similar rights had been granted to an FTA competitor. This would dilute audiences and make it difficult to achieve a return on investment.

1.7 Lastly, the SABC submits that these Draft Regulations should have been preceded by an economic impact assessment which seeks to measure how the Regulations would

affect all parties and further assess if the public is likely to benefit from what is proposed. Sports broadcasting involves 4 distinct groups. The FTA broadcasters, Pay-Tv broadcasters, Sports Associations (or the rights holders) and the public. An economic or regulatory impact assessment (RIA) would have assisted the Authority in determining, for instance, whether the draft regulations could have unintended and negative financial consequences.

2. INTRODUCTION

2.1 On the 14th of December 2018, the Independent Communications Authority of South Africa (“the Authority”) published the Draft Regulations for public comment. The publication also invited interested parties to submit written comments or representations on the Draft Regulations by 04 February 2019 and it was later extended to 15 March 2019 to allow for a meaningful public consultation process.

2.2 The SABC hereby makes its representation regarding the Draft Regulations and will focus on areas that affect the business of public broadcasting services. Furthermore, the SABC would like to be given an opportunity to participate in the public hearings, should the Authority decide to conduct same.

2.3 The SABC welcomes the proposals to amend the 2010 ICASA Sports Broadcasting Services Regulations (“the 2010 Sports Regulations”). The SABC has long been concerned about the impact of the 2010 Sports Regulations on the financial sustainability of the Corporation. It is about time that the regulatory framework advances the public interest through availing national sporting events on FTA platforms. Since there is high levels of inequalities in South Africa, it is critical to have regulatory frameworks that begin to bridge the gap between the haves and the have nots. Thus, the public should have full access to national sporting events irrespective of their socio-economic status.

2.4 The SABC's objective is that the Draft Regulations should yield the following outcomes:

- a) Substantial access to national sporting events by the majority of the citizenry. This includes access to prime sports like rugby, cricket and football by free-to air services;
- b) An enabling regulatory environment that encourages investment in the broadcasting industry;
- c) Promote stability within the broadcasting industry and ensure fair competition between broadcasters;
- d) Widened audience and support base of the South African sport industry by ensuring that the majority of the citizens access national sporting events;
- e) Unbundling of rights with the view to have more broadcasters accessing national sporting events; and
- f) National Sporting events that advance the interests of national teams.

3. PUBLIC SERVICE MANDATE

3.1 The SABC, as the only public broadcaster within the Republic of South Africa, is charged with a public service mandate to inform, educate and entertain all citizens. Currently, the SABC has 19 radio stations, 5 Television Channels with which it provides public broadcasting services. In the main, the SABC is also mandated to ensure that public broadcasting services reach all citizens and all official languages. Amongst other things, the SABC mandate extends to other areas such as:

- 3.1.1 Provision of national sports, developmental and minority sports;
- 3.1.2 Provision of diversity of services and / programmes which are educative, informative and entertaining;
- 3.1.3 Provision of services targeted at people with disabilities, youth, children and women;
- 3.1.4 Provision of international, national, regional and local news and information; and

3.1.5 Development of the creative industry.

3.2 The SABC acknowledges that the mandate to deliver national sports on the airwaves emanates from industry policy and legislation. The 1998 White Paper on Broadcasting, in paragraph 3.3.2, states that Government's commitment to the provision of national sports to all South Africans must find expression in policy and regulation. As result, this commitment is emulated in section 60 (1) of the Electronic Communications Act of 2005 (ECA) which enjoins the Authority to prescribe regulations that prevent subscription broadcasting services from having exclusive rights to national sporting events to the exclusion of free-to-air broadcasters.

3.3 Furthermore, in terms of section 10 (i) of the Broadcasting Act of 1999 (Broadcasting Act), the SABC's public service wing is required to provide national sports programming, as well as developmental and minority sports. In essence for the SABC to deliver on its broad and unique mandate, substantial funding for acquisition and production of national sporting events is required.

3.4 It is worth noting that South Africa is one of the most unequal societies by any measure. These inequalities play-out in the form of high poverty and high unemployment levels. The Statistics South Africa - Quarterly Labour Force Survey Q3: 2018, as published on 30 October 2018, reported that 6.2 million South African are now unemployed.¹ In the past 10 years (2008-2018) the unemployment rate has increased from 21, 5% to almost 28, 0%.² As such, the effects of unemployment should not be underestimated even as regulations are being developed; national sporting events as national assets should be accessible to all with a view to bridge the gap of existing inequalities. Access to national sporting events permits the citizenry to exercise their right to freedom of expression as stated in section 16(1) (b) of the Constitution of the Republic. This right includes the freedom to receive or impact information or ideas.

¹ <http://www.statssa.gov.za/?p=11688> (visited on 08 January 2019)

² *ibid*

4. SUBMISSION ON THE PROPOSED AMENDMENTS

4.1 Sector specific regulations

4.1.1 The SABC is of the view that South Africa still needs sector specific regulations for sports broadcasting, especially because competition law has failed to make the sports broadcasting market accessible to FTA services at a reasonable cost. Effectively, non-regulation of sports broadcasting rights will result in subscription broadcasting services (“SBS”) monopolising national sporting events to the detriment of FTA services and the public.

4.1.2 Whilst it is commendable that the 2010 Sports Regulations sought to establish access to national sporting events for FTA services, unfortunately these Regulations have some substantial limitations, which the SABC has raised on several occasions with the Authority over the years. It goes without saying that in South Africa, MultiChoice has made commercial success from extensive and exclusive broadcast of South Africa’s most popular sports, i.e. rugby, football and cricket. Thus, going-forward it is advisable that the regulatory framework is amended to allow for FTA services to have access to national sporting events at a reasonable cost.

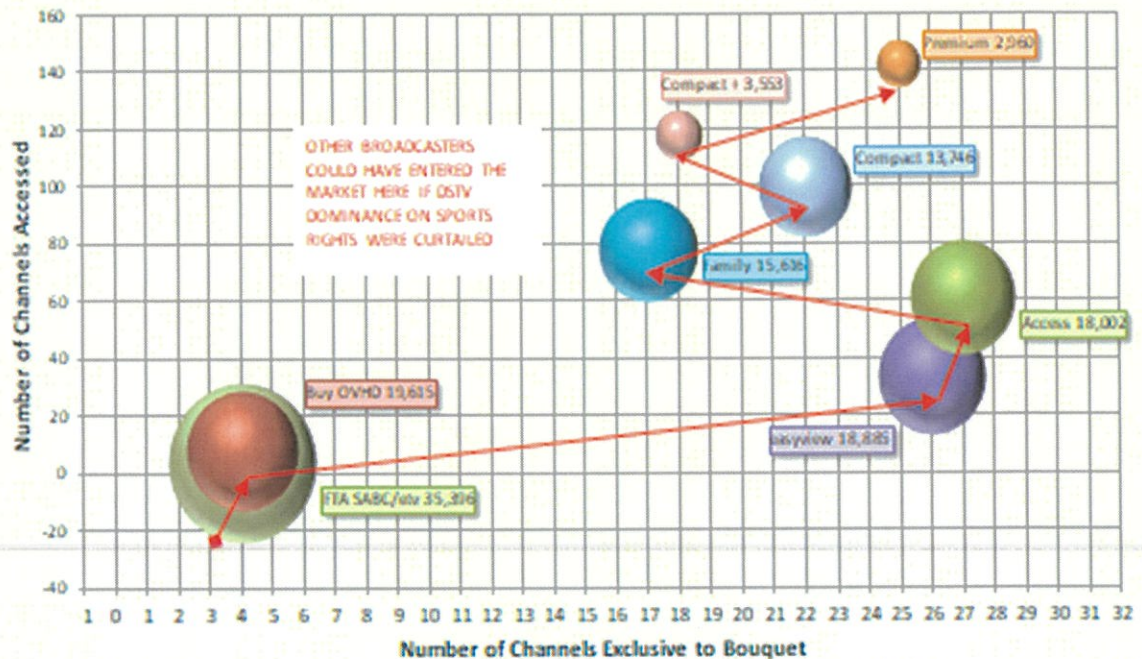
4.1.3 To this end, the SABC has grappled with the negative effects of the ICASA Must Carry regulations which further perpetuate unfair competition between broadcasters in that they permit SBS who carry SABC services in line with these regulations to also benefit from listed national sporting events that are acquired by the public broadcaster. Consequently, the Must Carry Regulations perpetuated unfair competition in the broadcasting sector and the SABC has proposed a regulatory invention to correct this anomaly.³

³ SABC request for urgent ICASA Review and Amendment of the Regulations: Extent to which Subscription Broadcasting Must Carry the television Programmes provided by the public broadcast service licensee “ the Must Carry Regulations, 21 November 2017;
The SABC on the ICASA Discussion Document: Inquiry into Subscription Television Broadcasting Services, 04 December 2017;
The SABC Presentation on the ICASA Inquiry into Subscription Broadcasting Services, 08 May 2018

4.1.4 Effectively the current regulations mandate the SABC to make available, at sole cost to SABC, its three television channels SABC 1, 2 and 3 to competitive subscription television broadcasters free of charge and without any payment from these competitors for this supply of 3 end to end channels. This is highly disadvantageous and prejudicial to the SABC given its huge investment in content which it acquires through a competitive process. It is therefore unfair for competitive commercial operators to benefit from the investment by a public institution. This regulation is also in conflict with the legal provisions in the ECA, section 60(3) which allows the parties to negotiate commercial terms in the must carry agreements. However, the Authority has mandated the SABC to avail its channels for free, without payment, thereby waiving the SABC's rights in this matter, as outlined in the ECA.

4.1.5 The table below indicates the unintended consequences of the Must Carry Regulations, which have gravely disadvantaged the public broadcaster and has contributed to the financial instability of the SABC. At the core, it indicates how FTA services have built a niche universe for SBS due to unregulated spaces. Broadcasters such as OpenView, Starsat and MultiChoice through all its bouquets/packages, benefit from the SABC must carry channels or national sporting events free of charge. Consequently, they grow their audience through the SABC's content without proper compensation by the SABC and without a fair playing field being created by the regulatory environment.

How FTA Built a Premium Niche Universe for Pay TV



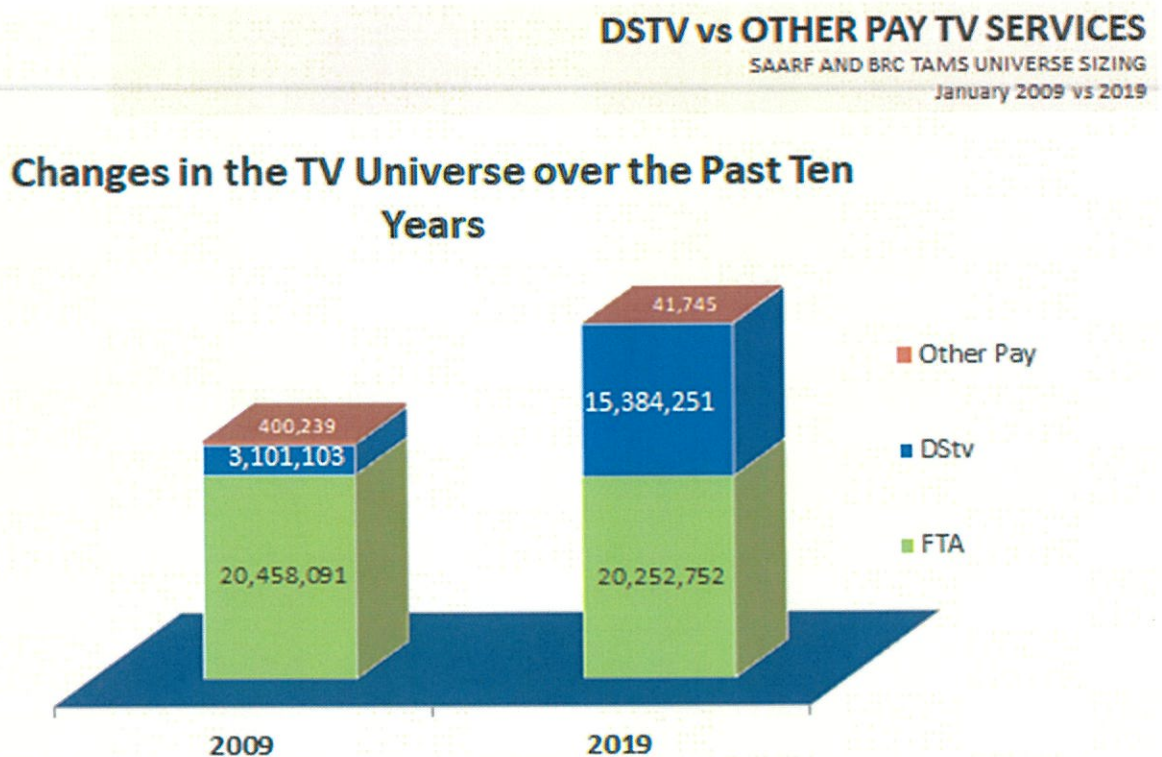
4.1.6 On 05 February 2019, the Competition Commission (“the Commission”) reported its decision to drop MultiChoice and SuperSport case, which looked at the various complaints of abuse of dominance because there was no reasonable prospect of success and concluded that a regulatory intervention by the Authority would be more effective. In the same breath, the Commission reported that there is potential market failure because of:

- a) “A high concentrated nature of subscription broadcasting market;
- b) High barriers to effectively enter the market and the inability of existing broadcasters to expand in the market ;
- c) limited credible alternative buyers of premium sports rights other than MultiChoice;

- d) A limited credible alternatives to which individual consumers can turn to should they require to switch away from MultiChoice; and
- e) Overly long and extensive contracts between the incumbent (MultiChoice) some content suppliers.”⁴

Thus, the Commission has recommended that there be more targeted regulatory intervention to foster competition and make this market competitive.⁵

4.1.7 The table below indicates the dominance of MultiChoice which has been fuelled by exclusive access to premium content and the existing regulatory gap.



SOURCE: TAMS ADULTS (15+) 0500-23H00

⁴ <http://www.compcom.co.za/wp-content/uploads/2019/01/COMMISSION-DECIDES-NOT-TO-PROSECUTE-MULTICHOICE-003.pdf> (visited on 11 February 2019)

⁵ *ibid*

4.1.8 The SABC notes that the Honourable President Cyril Ramaphosa, in the State of the Nation Address - 2019, has stated that the Commission has to be empowered through legislation, the Competition Amendment Bill, now the Competition Amendment Act 2018, to open up new opportunities for more players to enter various sectors of the economy and compete on an equal footing.⁶ The SABC hopes that this legislation will address competition barriers in the broadcasting sector.

Recommendation

The SABC again proposes that the Must Carry Regulations must be reviewed to ensure compliance with the enabling legislation which provides that Must Carry agreements should be subject to commercial negotiation.

It is also recommended that the sector-specific regulations (Digital Migration Regulations and Subscription Broadcasting Services Regulations) should be considered with the view to foster the stability of the broadcasting sector.

4.2 Accessibility of National Sporting events for FTA services

4.2.1 Regulation 5.1 of the Draft Regulations states that it is compulsory for FTA services to provide Group A-national sporting events. It is understood and appreciated that the Authority seeks to facilitate that these be acquired by FTA services. However, it may not be practical for the SABC to acquire all these rights due to existing financial and capacity constraints. Thus, it is submitted that the wording should change to provide for prioritisation of Group A events instead of making Group A rights mandatory. In that way, FTA Services will prioritise the Group A events in line with the applicable conditions.

⁶ <https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000> (visited on 19 February 2019)

4.2.2 It is noted with concern that the Regulations seem to be silent on the definition of 'full live'. It is necessary for the Draft Regulations to detail what 'full live' coverage is. If 'full live' coverage means the broadcast of composite rights in their entirety, it should be noted that the acquisition of composite rights are usually determined by Sports Confederations/ rights owners. Therefore, in those cases, it will be impractical to cover broadcast national sporting events full live. Thus, it is submitted the regulations should consider how rights owners packaged rights and thereafter the Authority can prescribe regulations that are implementable.

4.2.3 Regulation 5.1 gives an impression that it is mandatory for public, commercial and community free-to-air services to broadcast the Group A events. Indeed it is progressive for the regulations to provide for a collective obligation on facilitating accessibility to national sporting events. All role players, broadcasters, and sports confederations need to play their part in the provision of listed events. Furthermore, in terms of monitoring the implementation of the Regulations, the SABC submits that the Authority should hold all free-to-air services accountable and not only the SABC.

Recommendation

Thus, it is submitted that the Authority should:

- a) Be in the position access commercial agreements of broadcasters as and when disputes arise;
- b) Facilitate that there is a collective responsibility from all role players in the advancement of public interest or universal provision of national sporting events;
- c) Consider the manner in which rights are packaged by rights owners in order to prescribe measurable regulations.

4.3 Competition challenges

4.3.1 It is public knowledge that the bulk of national sporting events are held by a subscription broadcasting service (MultiChoice). The table below shows key sports rights that were held by MultiChoice.

YEAR	SOCCER TOURNAMENTS	RUGBY TOURNAMENTS	CRICKET TOURNAMENTS
2010	FIFA SWC	CURRIE CUP, SUPER 14, SA GAMES	ICC 20/20, CHAMP LEAGUE T20, IPL, SA TOUR BROADCAST
2011	ABSA, TELKOM	RUGBY WORLD CUP, SUPER RUGBY, TRINATION, CURRIE CUP	ICC CRICKET WORLD CUP, IPL, SA GAMES TOUR
2012	UEFA, ABSA	SUPER RUGBY, SA GAMES, CURRIE CUP, IRB INTERNATIONAL, IRB JUNIOR WORLD CHAMP, CASTLE CHAMP	KFC T20, ICC 20/20, SA GAMES, IPL, CHAMP LEAGUE T20
2013	AFCON, ABSA, UEFA	WELSH INTERNATIONAL, CASTLE CHAMP, CURRIE CUP, SUPER RUGBY, MANDELA CUP	ICC CHAMP TROPHY, SA GAMES, SUNFOIL SERIES, CHAMP LEAGUE T20, IPL
2014	FIFA, NEDBANK, MTN	CURRIE CUP, CASTLE CHAMP, IRISH INTERNATIONAL, SUPER RUGBY	ICC T20 WC, RAM SLAM (SA), SUNFOIL, KFC, IPL
	UEFA, CAF, EPL, ABSA	RUGBY WORLD CUP, COPA, INTERNATIONAL : SA VS WORLD	ICC CRICKET WC, KFC, SA GAMES
2016	UEFA, CAF, EPL, ABSA, CARLING, LALIGA	CASTLE CHAMP, SUPER RUGBY, RUGBY CHAMPS, CURRIE	ICC WORLD T20, KFC, NELSON MANDELA LEGACY, IPL, SA GAMES
2017	CARLING, LALIGA, ABSA, EPL	SUPER RUGBY, CURRIE CUP, HSBC SEVENS WORLD SERIES, RUGBY CHAMP	KFC, ICC CHAMPS TROPHY, SA GAMES, IPL, RAM SLAM
2018	MANDELA CUP, UEFA, ABSA, EPL, FA CUP	HSBC SEVENS SERIES, SUPER RUGBY, SIX NATIONS	KFC, SA, IPL

4.3.2 Furthermore MultiChoice owns sizeable stakes in several sports franchises, these franchises constitute significant voices in the organisations with whom MCSA negotiate sports agreements. The franchises in question are:

- a) Supersport United Football Club: 100%
- b) KZN Cricket: 50%
- c) Western Province Professional cricket: 50%
- d) Titans Cricket: 50%
- e) Free State Cheetahs: 24.5%
- f) The Sharks: 40%⁷

In essence, MultiChoice has a toehold effect in that as a bidder in an auction, it has an ownership stake in the property being sold and that stake increases the bidders' chances to win the auction, even when the ownership stake is relatively small.

4.3.3 Whilst Multichoice is not prohibited from entering into such business arrangements, it is equally important for the Authority to note that this business model grants MultiChoice an upper hand in relation to the acquisition of these rights and in other instances this practice may translate into a barrier to entry for other content providers and/or broadcasters.

Recommendation

It is recommended that the Authority should address the existing competition challenges through suitable regulations in order to foster stability and fair competition amongst broadcasters.

4.4 Unbundling/ Packaging of rights

4.4.1 The SABC appreciates the spirit with which the Authority seeks to advance public interest through the Draft Regulations. The SABC acknowledges that the Authority is legislatively empowered by section 192 of the Constitution of the Republic, regulate broadcasters and prescribe appropriate regulations that will ensure accessibility of listed national sporting events to the public.

⁷ http://financialresults.co.za/2011/multichoice02_ar2011/our-business.php (visited on 25 Feb 2019)

4.4.2 The SABC in its previous submission to ICASA on the Review of Subscription Broadcasting Services Regulations submitted as follows:

- a) The revised regulations should also require broadcasters to acquire rights (local & international) for only licensed platforms (i.e. SBS , FTA, Radio and TV) ; and
- b) The revised regulations should oblige National Confederations to unbundle and package their television, radio and digital rights into separate FTA broadcasting rights and Pay/Subscription broadcasting rights.

4.4.3 FIFA, have unbundled their rights in order to open the market to all broadcasters and to foster universal access of listed events. In South Africa Premier Soccer League packages rights in the following categories:

- i. Composite package (all of the below)
- ii. Free-to-air terrestrial television (live)
- iii. Free-to-air terrestrial television (near live)
- iv. Free-to-air terrestrial television (delayed live)
- v. Subscription Broadcasting including Clip rights (live)
- vi. Subscription Broadcasting including (near live)
- vii. Subscription Broadcasting including (delay live)
- viii. Free-to-air terrestrial television magazine programme
- ix. Free-to-air terrestrial television highlights/preview
- x. Clip rights live, near live, delayed
- xi. Subscription Broadcasting including magazine programme
- xii. Subscription Broadcasting including highlights/preview

It is submitted that the regulations can prescribe that broadcasters should only acquire rights for their licensed platforms. For example, a Pay-tv broadcaster should not be allowed to acquire terrestrial FTA TV sports rights as this will inflate the cost for broadcasters who require those rights.

4.4.4 FIFA Model

Some International Confederations, such as, FIFA, has begun to unbundle sports rights with a view to open the market for more distribution platforms. FIFA packages some of their sports rights in this manner:

- i. Live and Delayed – Free-to-air TV rights (permitted transmission- cable and terrestrial);
- ii. Live and Delayed – Free and/or Pay TV Rights (permitted transmission – cable, satellite and Terrestrial)
- iii. Live and Delayed – Pay Television Rights (permitted transmission – (cable; satellite and Terrestrial)
- iv. Live and Delayed – Pay Radio Rights (permitted transmission – Cable , Satellite and terrestrial)

Based on the above-mentioned packages, it is clear that the approach of unbundling rights can work for broadcasters and the public at large. Thus, it is submitted that the unbundling of rights approach must be pursued with the view to allow FTA services to access national sporting events for the public good.

Recommendation

Thus, the SABC submits that unbundling of rights will resolve most of the existing problems of inaccessibility of listed events by the public, high cost of rights, barrier to entry in the broadcasting sector due to lack of content, financial sustainability of the FTA tier.

4.5 Exclusivity

It is acknowledged that exclusivity of sports rights represents a guarantee of the value of sports content, an opportunity to build up audience and support base, the potential for a sizeable advertising or sponsorship revenue, a degree of exclusive standing that distinguishes a broadcaster from other existing broadcasters. However,

exceptions can be employed in areas where regulatory intervention is required. The SABC proposes that category or platform exclusivity should be permissible only if a broadcaster acquires rights for a licensed service. For example, the SABC should not be allowed to acquire SBS rights as it does not have a licence for SBS. The reverse applies for SBS licensees and FTA rights.

4.6 Funding of national sporting events

4.6.1 Section 8(b) of the Broadcasting Act, provides that the SABC should be funded through advertisements, subscription, sponsorship, licence fees or any other means of finance. The SABC is still predominantly reliant on the commercial revenue, as this constitutes approximately 80% of its annual income. To this end, the SABC assessed the cost of public mandate and thereafter made submissions to the Shareholder (Department of Communications)⁸ and National Treasury to request financial support with a view to cover public service mandate.

4.6.2 In the interim, the SABC continues to (a) offer its services to all citizens in all the official languages, (b) play a developmental role in the creative industry, (c) offer unprofitable content such as, developmental and minority sports and (d) offer content which educates, informs and entertains, but it is vital for the SABC to have exclusive funding for public service mandate, particularly with respect to national sporting events given the high cost of rights acquisition. As it stands, the SABC, by virtue of being the public broadcaster, must provide full spectrum content irrespective of the profitability of that content. Therefore, the funding of public broadcasting services must be considered and supported.

⁸ SABC Submission on the Review of Public Broadcasting Policy,

4.6.3 The table below indicates the five year trend analysis which reflects the cost incurred vs. revenue received for broadcast of sporting events. All sports related costs are funded by the SABC. Operating losses from broadcasting these events have to be absorbed by the Corporation.

Item	2013/14 R'000	2014/15 R'000	2015/16 R'000	2016/17 R'000	2017/18 R'000
Total expenses	574 897	813 430	882 040	857 773	643 951
Revenue and Income	21 870	91 722	11 739	10 873	12 008
Operating losses	553 027	721 708	870 301	846 900	631 943

4.6.4 The SABC further attaches the cost of the acquisition of some sports rights for the period 2015-2018 for the Authority's consideration. In some listed instances the SABC has had no return on investment. Those key sports rights are as follows (Please see Annexure A for the cost thereof):

Super rugby	twenty 20 ICC world cup
Cosafa cup	Currie Cup
PSL	

4.6.5 The above-mentioned information is shared with the Authority with the view to highlight the negative financial implications that persisted under the 2010 Sports Regulations regime. The intention of the Regulations was to give FTA services access to national sporting events but owing to commercialisation of sporting rights and anti-competitive practices, some sports rights were acquired at a very high cost. In the SABC's current financial situation it can only acquire rights that it can afford. In the past, the SABC carried the full load of the unfunded mandate and was not able to recoup its investment.

Recommendation

The SABC submits that the Authority should recommend government funding for the SABC to cover national sporting events. Furthermore, the SABC and the Department of Sports and Recreation should engage on support for the SABC in particular for the coverage of developmental and minority sports.

4.7 Dispute Resolution

On dispute resolution, the SABC commends the Authority for the proposals in Regulation 8 (3A) and Regulation 8(4) which allow for unresolved disputes between parties to be escalated to the Authority. Whilst this is appreciated, the SABC is of the view that a meaningful dispute resolution system can only work if the Authority ensures that the required technical and commercial expertise on the subject matter is employed and the process in itself should be time sensitive- similarly to when Authority fast-tracks dispute resolution during the election period.

Recommendation

Therefore the SABC submits that:

- a) The CCC should draw in the required expertise as and when these disputes arise and the adjudication process should be time sensitive in order to ensure that the broadcast of sports rights is not compromised; and
- b) the Authority should be empowered to have sight of commercial agreements with a view to monitor fairness and implementation of regulations. In this way ICASA will assess the whether the regulations end up benefiting the citizenry or limited broadcasters.

4.8 Sub-licensing conditions

4.8.1 Currently, the SABC often acquires these rights from subscription broadcasting services at a substantial cost. The licensor (rights holder) would typically impose severe restrictions with respect to advertisement of the event on the licensee (the SABC); for example, the SABC would be expected to advertise the event on the eve of the event. As a result, the SABC has often been deprived of the opportunity to fully exploit the sports property. This is one of the unreasonable sub-licensing conditions that the SABC has had to absorb in the interest of public service mandate.

4.8.2 It is worth noting that accessing rights from third parties is often expensive and onerous. For example, there was an instance wherein SAFA sold the Rights for Bafana, Bayana and the U20 matches for R1billion to Siyaya TV in 2015. Upon noticing that SiyayaTV may require more money for sublicensing , the SABC negotiated with SAFA directly and as a result the fee was reduced to R330m over a three year period just for the Rights. Furthermore, Siyaya TV did not have the broadcast infrastructure to broadcast any of the matches and as such the SABC was the only broadcasters to cover all SAFA matches on an FTA. This experience shows therefore that (1) if rights are acquired from third parties, they become unnecessarily expensive, and (2) if are rights acquired without the broadcast infrastructure, they may not be optimally exploited.

Recommendation

Should the Authority decide to retain sublicensing of sports rights, as a means to get the SABC to access these rights, the following areas should be considered:

- a) The bidding process for subsidiary rights should be open and transparent;
- b) The process of determining the subsidiary rights should be fair and the criteria on which fairness will gauged should be set;
- c) The pricing of secondary rights should be reasonable; Where another broadcaster decides not to buy the full rights from a subscription broadcaster but opts to for

certain packages, such as, local team games and the quarter, semi-finals and finals, subscription broadcasters should be obligated to sell such packages at a reasonable rates;

- d) In other cases subscription broadcasters sell big games but then only allow broadcasts to commence later. This arrangement makes the event less attractive and it inhibits a sub-licensee from generating revenue as advertisers are reluctant to advertise when there is a delayed broadcast;
- e) Secondary rights should not be solely confined to delayed broadcasts;
- f) Regulations should prohibit the hoarding of rights; and
- g) Commercial agreements should be concluded timeously in order to allow sub-licensor to promote the event in advance.

4.9 Listing of national sporting events

The SABC has noted that the listing of events in Group A and Group B seem to be inconsistent, in that, in other cases Confederation events are listed whilst in other cases sporting codes are listed. If Confederations fall apart, then it means the actual sporting code may be taken out of the list. For example, Athletic South Africa was or is under administration, if the organisation can close down chances are the sporting codes may suffer. Therefore, there is a need to protect sporting codes rather than organisations/Confederations.

Recommendation

It is therefore recommended that only sporting codes be listed instead of the Confederations themselves because the primary purpose is to protect and promote access to sporting codes.

4.10 Clash with local content programming

Experience has taught the SABC that coverage of national sporting events, in certain instances, disrupts the local content delivery. Furthermore, Regulation 5.1 requires FTA services to cover Group A events full live. As such, the SABC submits that the Authority should consider removing the burden of applying for exemption, in cases where the broadcast of listed national sporting events clashes with the delivery of licence and regulation obligations. Whilst it is understood that the broadcast of national sporting events could be shown delayed or delayed live, in other instances live broadcasts may impact with the television schedule to the extent that licence conditions may be breached. Since the broadcast of national sporting events serves the public, it is only fair for the Authority to grant the SABC automatic exemption as and when the national sporting events / sports of national interests are broadcasts. The SABC could report to the Authority every quarter about sports events that affected local content delivery.

4.11 Review of Regulations

Regulation 7(1)(a) provides that the Authority will review these Regulations every three years. However, the 2010 Sports Regulations were not reviewed as per the prescripts of the Regulations. It is important to have regular reviews which ensures that the Regulations remain relevant to the evolving broadcasting sector.

Recommendation

The SABC submits that the Authority should stick to the review period as mentioned in Regulation 7(1) (a).

4.12 Miscellaneous

4.12.1 Developmental sports and Minority Sport

The SABC submits that if the intention of Group C is to promote developmental sports and minority sports, the definitions must be demystified and they should not be lumped together as other events will be perpetually disregarded.

In most instances minority sports have huge sponsors as compared to developmental sports. For example, events like indigenous games do not have extensive sponsorships as compared to events like Tennis and Golf which have much more commercial support. Therefore, it is not advisable to lump them together as doing so will not sufficiently promote developmental sports.

There may also be a need for the regulations to indicate that if Group C sports are not exhaustive in order to allow for all unexposed sporting codes to be catered for in due course.

4.12.2 National sporting events and sports of national interest obligation

The SABC has noted with concern that the Draft Regulations mentions the definition of "sports of national interest" but there is no reference to sports of national interest in the body of the regulations. Consequently, it is not clear as to what extent the SABC is obligated to provide sports of national interest. One would have thought that some Group B sporting events would have been deemed as sports of national interest, i.e. PSL tournaments. Therefore, the Regulations need to clarify the obligation of FTA services with respect to sports of national interest.

The definition of sports of national interest assumes that it will be easy to measure that a particular event appeals to the majority of audiences. In fact, this may be difficult to gauge. Therefore, it is recommended that it be clarified how 'public appeal' will be measured during the implementation stage.

4.12.3 Group B national sporting events

Over the years some national sporting events have been either changed or scrapped. In the interest to ensure that the listed national sporting events are up to date, it is submitted that the following events should be reconsidered:

- (i) 'Super 14 Rugby' should be replaced by 'Super Rugby';
- (ii) 'Charity Cup (Soccer)' should be scrapped
- (iii) 'Super 8 Cup (Soccer)' should be scrapped
- (iv) Premier Soccer League should also include all its associated tournaments

It is further submitted that the following events should be added in the Group B category:

- a) Inbound Cricket Tournaments
- b) Outbound Cricket Tournaments
- c) Springbok Tournaments
- d) National Cricket Team Tournaments

4.12.4 Live, delayed and delayed live broadcasts

There seems to be a contradiction between Regulation 5.1 which speaks to compulsory Group A national sporting events that must be covered 'full live' and Regulation 6.2 which provides that listed national sporting events may be broadcast live, delayed live and delayed by free-to-air service licensee. Therefore, it is submitted that the Regulations should clarify if Regulation 6.2 is applicable to all national sporting events

5. INTERNATIONAL BENCHMARKS

5.1 Australia

5.1.1 The Australian Broadcasting Corporation (ABC) is an autonomous public service corporation which is largely funded through federal government funds. Additionally, there are sector-specific regulations (anti-siphoning regulations) that are employed to, amongst other things, safeguard the interest of ABC with respect to the acquisition of sports rights. These Regulations provide for anti-siphoning list of sporting events is determined by government and is made available to free-to-air television for viewing by the general public. In the main, the anti-siphoning list aims to prevent these events being 'siphoned off' by subscription television to the detriment of free-to-air viewers. The Minister for Communications determines the anti-siphoning list unlike in South Africa where the list is determined by ICASA.

5.1.2 Foremost, the Australian anti-siphoning system has two distinguishing features, namely:

- i. Free-to-air broadcasters (national or commercial broadcasters) have priority in the acquisition of broadcast rights and prevent pay-tv broadcasters from obtaining the exclusive rights to listed events. Pay-tv broadcasters are prohibited from acquiring the right to televise an event on the anti-siphoning list, unless free-to-air broadcasters have not obtained these rights by 26 weeks before the start of the event or the rights are held by commercial television licensees who have the right to televise the event to more than 50 per cent of the Australian population the rights are held by either the ABC or SBS ; and
- ii. the number of listed events covered by the Australian list is much more extensive than the list adopted in Europe.⁹

⁹ Smith, P.; Evens, T. & Iosifidis, P. (2015). The regulation of television sports broadcasting: a comparative analysis. Media, Culture & Society, 37(5), 720-736. DOI

5.1.3 In the period between 2006-2010 the Australian list had over 1800 in a given year whereas in most European Countries cover less than 100 events. This goes to show that in this jurisdiction free-to-air services are substantially safeguarded from pay-tv competition in the interest of the citizenry.

5.1.4 The following conditions with respect to the anti-siphoning scheme are worth noting. Anti-siphoning does not:

- reserve the broadcast rights to listed events solely for free-to-air broadcasters;
- oblige free-to-air broadcasters to buy the rights to events on the list;
- guarantee free-to-air broadcasters exclusive rights to events on the list; and
- compel free-to-air broadcasters that acquire the rights to listed events to broadcast the events live, in full or at all¹⁰.

5.2 European Union (EU)

5.2.1 The EU's sports broadcasting regulation is based on a 'dual rights system'.

In terms of this system listed sports rights can be purchased by either free-to-air or pay-tv broadcasters but not broadcast exclusively on Pay-tv, unless if there is an interest in providing coverage of an event from free-to-air broadcasters.

5.2.2 In terms of the EU, the conditions for acquiring rights include:

- Members States must submit lists of major events to the EU Commission;
- Major events shouldn't be broadcast in such a manner that a 'substantial portion' of the population is deprived of the possibility of the following the event on free television.¹¹

¹⁰ <https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/sport-anti-siphoning-tv-content-regulation-acma> (last visited on 30 January 2018)

¹¹Smith, P.; Evens, T. & Iosifidis, P. (2015). The regulation of television sports broadcasting: a comparative analysis. Media, Culture & Society, 37(5), 720-736. DOI, at page 13

5.3 United Kingdom

In the United Kingdom (UK), the Broadcasting Act of 1996 grants the Secretary of State for Digital, Culture, Media and Sport the power to designate listed events. In the main, this ensures that the broadcast rights of these events are offered to the main free-to-air terrestrial broadcasters on fair and reasonable terms. However, qualifying broadcasters are not obliged to bid for these rights

The UK model is more or less similar to what the Authority proposes in the 2018 Draft Regulations. There are Group A and Group B events. Group A events are offered with full live coverage by FTA channels that are received by at least 95% of the UK population (i.e. (BBC1, BBC2, ITV1, Channel 4 and Channel 5)¹². Whilst Group B events may have live coverage on pay-tv provided that secondary coverage is offered to FTA broadcasters. Effectively, this model prioritises the interests of both the public and FTA services because in the absence of these regulatory parameters, FTA will get the remnants from the pay-tv table.

5.4 Benchmark Conclusion

It is worth noting that the EU, UK and Australian jurisdictions have the element of making listed sporting events accessible to the majority of the population. In all these models this is done through the sector-specific regulation, whereby the FTA services have first choice in the acquisition and production of listed sports events. It is acknowledged that there are lessons to be learned from the above mentioned jurisdictions but their models cannot be applied *in toto* because of different funding and commercial environments. For example ABC and BBC are largely funded by government and/or licence fees. However, in South Africa, the SABC has an unfunded public service mandate which has to be largely funded by commercial revenue. This dynamic on its own, calls for a greater regulatory protection of public broadcasting services by the Authority. Section 2(t) of the ECA enjoins the Authority to protect the integrity and viability of the public broadcasting services. In this case, that protection can be realised through appropriate and effective sector-specific regulation, through the ICASA Sports Broadcasting Regulations.

¹² John Woodhouse, Briefing Paper on Listed Events, 03 October 2018 (House of Commons Library), at page 3

6. CONCLUSION

The SABC would like to thank the Authority for the opportunity to make this submission and would like to participate in the oral hearings.

ANNEXURE A : ROI - SUPERSPORT

ROI - SUPERSPORT

	Premier Soccer League 2018	ICC World Cup - 2015	Rugby World Cup - 2015	Currie Cup 2018	Super Rugby 2018	Total
	000	000	000	000	000	000
Income	62 289	3 085	39 815	482	240	105 911
Classic TV	22 623	896	7 516	89	0	31 123
Sponsorship TV	39 666	2 189	30 098	319	0	72 272
Sub Total	62 289	3 085	37 614	408	0	103 396
Radio Classic	0	0	462	74	172	709
Radio Sponsorship	0	0	1 739		67	1 806
Sub Total	0	0	2 201	74	240	2 515
Costs	287 690	70 902	186 022	8 247	11 465	564 326
Rights TV	240 000	63 800	172 900	4 958	1 400	483 058
Rights Radio	0		0	1 000	1 969	2 969
Marketing Cost	2 066	1 042	3 347	0	0	6 455
Production Expenses TV	45 624	6 060	8 189	565	2 754	63 192
Production Expenses Radio	0	0	1 586	1 725	5 341	8 652
Cash Inflow/ (Outflow) Before Tax	-225 401	-67 817	-146 207	-7 765	-11 225	-458 416

-458 416