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Adv Dimakatso Qocha

ICASA

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Dear Adv Qocha

**JOINT WRITTEN RESPONSE BY THE SOS COALITION AND MEDIA MONITORING AFRICA TO  
THE REQUEST FOR FURTHER INFORMATION FOLLOWING PRESENTATIONS MADE IN THE  
INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES**

1. Thank you for your letter dated 14 January 2021.
2. Ad paragraph 4.1:
  - 2.1 In this paragraph, ICASA make the following request: "In light of the SABC's proposal for a cap on advertising revenue of the entity with significant market power "(SMP)", SOS/MMA is requested to provide its recommendations regarding where the SNP's advertising revenue should be capped at as well as any documents, information and/or research underlying such recommendation".

- 2.2 We are not sure why we are referred to the SABC's proposal but upon reflection, (see slide of 23 of the SABC's oral presentation on this issue made on 13 January 2021) our initial proposals are very similar to theirs. In this regard we think it important to reiterate our initial submissions on this issue made over three years ago now on 4 December 2017 as follows:

*The ECA contains very few restrictions on subscription broadcasting services, particularly so since ICASA, without an appropriate public rule-making process, unilaterally decided that sections 65 and 66 of the ECA do not apply to subscription broadcasting services...*

*One of the few provisions is section 60(4) of the ECA which prohibits the subscription broadcaster from having advertising or sponsorship, or a combination thereof, as their largest source of annual revenue. The aim of this section is clearly to prevent a situation where a successful subscription broadcaster is able to monopolise advertising as well as subscription income, thereby endangering not only other subscription broadcasters but free to air broadcasters too.*

*As shown in PwC's Entertainment and Media Outlook Report, 2016-2020<sup>1</sup> subscription revenue significantly outstrips the total advertising pool. This reality has made meaningless the legislative requirement that a Pay TV operator's revenue from advertising must never exceed its subscription revenue. DStv could take 100% of the available advertising revenue, leaving none for any other television operator, and still not breach this requirement. SOS believes it is essential that ICASA, together with the Competition Commission, urgently investigate and squarely address this advertising issue.*

*Ultimately SOS and MMA are of the view that section 60(4) of the ECA will require to be amended to ensure that advertising remains the lifeblood for free to air broadcasting which was the original intention of the provision. SOS and MMA are of the view that ICASA must commission an international benchmarking research exercise in regard to appropriate levels of advertising allowed on monopoly or dominant subscription broadcasters.*

- 2.3 Consequently we have never suggested a particular threshold and so can provide no additional information to support same.
- 2.4 However, we reiterate our position that it is for the regulator to fund (perhaps in conjunction with the Competition Commission AND the Department of Communications and Digital Technologies (DCTD)) our proposed international benchmarking research exercise in regard to appropriate levels of advertising allowed on monopoly or dominant subscription broadcasters. In this regard, we note that the SABC had proposed that the enquiry should consider the following:

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<sup>1</sup> <https://www.pwc.co.za/en/assets/pdf/enm/entertainment-and-media-outlook-2016-2020.pdf>

- 2.4.1 whether the current share of advertising revenue by SBS/Pay-TV services is appropriate; and
  - 2.4.2 what the impact of online advertising is on the broadcasting sector as a whole.
- 2.5 We are of the view that such an enquiry could also address the concerns raised by the DCTD in:
- 2.5.1 paragraph 5.4.4.2 of the White Paper on Audio and Audiovisual Content Services Policy Framework: a New Vision for South Africa 2020 published in Notice 1081, Government Gazette No. 43797 dated 9 October 2020 (the White Paper) that the current restrictions contained in section 60(4) of the ECA “no longer pose a limit on advertising market share.”;
  - 2.5.2 paragraph 5.4.4.3 of the White Paper that “[w]hile pay-TV is eroding the terrestrial free-to-air broadcasters’ dominance of TV advertising budgets, there are differing revenue share figures that need a proper enquiry to resolve.”;
  - 2.5.3 paragraph 5.4.4.4 of the White Paper that “[o]nline TV advertising is still growing and while it is not at the levels in Europe and the United States yet, it has the potential to significantly erode TV advertising market share soon; and
  - 2.5.4 paragraph 5.4.4.5 of the White Paper that “recommends that section 60(4) of the ECA which focuses on traditional television be replaced with the requirement that Icasa hold an enquiry into whether the current share at advertising revenue by subscription services is appropriate and what the impact of online advertising will be on the TV advertising market in the short and medium term. If it is detrimental to the survival and viability of free-to-air services, the regulator must make regulations to protect the sustainability and viability of free-to-air services in South Africa taking into consideration the expansion of the regulatory licensing framework to include all audio and audiovisual content services.”
- 2.6 Further, we note that eMedia Investments also addressed this issue in its oral presentation dated 14 January 2021, providing numerous instances where ICASA has recognised the potential existential threat posed by the SMP subscription operator to free-to-air TV but has failed to act. Its submission also contains a great deal of information regarding advertising and subscription revenue growth on the part of the SMP subscription operator and the dire situation that e-tv finds itself in.
- 2.7 Consequently we think it is clear that all of the government, the public broadcaster, the sole free-to-air commercial television operator and two significant civil society organisations (SOS and MMA) have been calling for an enquiry into a review of section 60(4) of the ECA for a number of years now.

- 2.8 It remains for ICASA to do as suggested by SOS and MMA in 2017, namely, that ICASA commission an international benchmarking research exercise in regard to appropriate levels of advertising allowed on monopoly or dominant subscription broadcasters and hold an enquiry to present the research findings and develop regulatory mechanisms to address the problem. Needless to say it is disappointing that more than three years has passed since this was initially mooted by us and it is clearly urgent to address this as is recognised by all sectors, including government.
3. Ad paragraph 4.2:
- 3.1 In this paragraph, ICASA make the following request: “in light of SOS/MMA’s recommendation that the SABC be paid for its carried content, a detailed write-up accompanied by documents and/or information regarding how the above recommendation will contribute to remedying the ineffective competition identified in the draft findings document”.
- 3.2 We think it imperative that Icasas address the “Must Carry” issue bearing in mind its obligations to facilitate and protect:
- 3.2.1 the public’s right of access to public interest broadcasting content on a variety of content platforms; and
- 3.2.2 the integrity and viability of the public broadcaster as ICASA is required to do in terms of section 2(t) of the ECA.
- 3.3 Consequently we think it is important that public interest broadcasting content be available on qualifying subscription broadcasting services. Our law recognises this in section 60(3) of the ECA which requires Must Carry Regulations to be developed by ICASA.
- 3.4 However, and most unfortunately, ICASA has acted *ultra vires* its own relevant statutory powers in regulating as it has done in section 6(1) and 7(1) of its Must Carry Regulations (Notice 1271, published in Government Gazette No. 31500 dated 10 October 2008) that “[t]he PBS licensee must offer its television programmes, at no cost, to a SBS licensee upon a request from the SBS licensee” and that “[t]he PBS licensee bears the costs of transmission of the broadcast signal to the SBS licensee”. These provisions are unlawful because section 60(3) of the ECA includes the requirement that “the Authority must prescribe regulations regarding the extent to which subscription broadcasting services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee.” (Our emphasis).
- 3.5 The effect of this has been, in our view, that ICASA has failed to fulfil its legislative objectives to protect the integrity and viability of the public broadcaster as ICASA is required to do in terms of section 2(t) of the ECA. Consequently, we are at a loss to understand why ICASA

is referring to this issue as a matter of “ineffective competition identified in the Draft Findings Document”. This is not simply a matter of ineffective competition, it is a clear violation by ICASA of its statutory obligations laid down in the ECA, which violation has been ongoing for the past 13 years and has undoubtedly contributed to the “ineffective competition” problem so recently identified by ICASA.

- 3.6 In light of the above, we recommend that Icasa follow the requirements of section 60(3) of the ECA.
4. We trust that the above is helpful and look forward to the final findings document which we trust will announce an enquiry into appropriate advertising restrictions in respect of SMP subscription broadcasters and contain draft amendments to the Must Carry Regulations to bring them in line with the legal requirements of the ECA.

Thank you

**Sincerely**



**Duduetsang Makuse**

**National Coordinator**



**William Bird**

**Director**