



***competition*commission**
south africa

**COMMENTS TO THE DRAFT SPORTS BROADCASTING
SERVICES AMENDMENT REGULATIONS, 2018**

**SUBMITTED TO THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA ON 26 APRIL 2019**

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1. INTRODUCTION

- 1.1. The Competition Commission (Commission) has prepared the following submission as input to the Draft Sports Broadcasting Services Amendment Regulations, 2018 to the Independent Communications Authority of South Africa (ICASA), (hereinafter referred to as the Regulations).¹ This submission takes into account engagements with the officials of ICASA.
- 1.2. The Commission understands from its engagement with ICASA that the principal rationale of the amendments to the Regulations is to facilitate access of South Africans to televised national sporting events and sports of national interest. The amendments seek to ensure that consumers are not deprived of viewing national sports broadcasts. Hence, the emphasis on the public interest objective. The amendments also seek to ensure that Free-to-air (FTA) and subscription broadcasters secure sport rights content through a competitive bidding process on a non-exclusive basis.
- 1.3. The Commission's submission provides input in relation to some of the amendments to address potential competition issues identified by the Commission. In particular, it will address the following areas of the Regulations and competition-related issues:
 - a) Regulation 5: Listed sporting events and codes
 - b) Regulation 7: Review of the listed events
 - c) Regulation 10: Penalties

2. REGULATION 5: LISTED SPORTING EVENTS AND CODES

- 2.1. The amendments introduce a new list of sporting events and codes, divided into three groups according to the level of public interest. Regulation 5 is amended to indicate the national sporting events that must be broadcast on full live coverage on Free-to-air (FTA) (Group A) and subscription broadcasts (Group B) and by both categories of broadcasters (Group C). Group A includes premium and major sports events such as the Summer Olympic Games, Paralympics, FIFA World Cup, Africa Cup of Nations, Rugby World Cup and ICC Cricket World Cup, among others that must be broadcast by FTA.² This is subject to the proviso stated in paragraph 5.1.2 of Regulation 5 that if a FTA licensee cannot acquire the sporting rights for the events cited in Group A, this

¹ Government Gazette Notice No. 42115 14 December 2018.

² These are considered by ICASA to be accessible to most South Africans and are already held by the FTA broadcasters.

will afford subscription service broadcasters an opportunity to bid for the rights on a *non-exclusive* basis. Similarly, the national sporting events listed in Group B (Super 14 Rugby, All Africa Games, Supa 8 Cup, Currie Cup, Two Oceans Marathon and Comrades marathon, among others), must be offered to a subscription broadcaster on a *non-exclusive* basis under sub-licensing conditions. The Commission interprets this to mean that the sporting events cited in Group B can still be broadcast by an FTA through a sub-license. Group C is non-premium content, geared at minority and developmental sporting events to be broadcast by FTA and subscription broadcasters.

- 2.2. Previously, Regulation 5 of the 2010 Regulations did not specify a television broadcaster category, which meant that the national sporting events listed in Regulation 5 could be bid for and broadcast from either FTA or Pay-TV/subscription. With the new amendment, the national sporting events listed in Group A will be offered to FTA (SABC, e.tv and new entrants) and Group B to Pay-TV broadcasters but only those events cited in Group C will be offered to both categories of broadcasters. In this way, it appears that the amendments to the Regulations serve to prevent any particular broadcaster from owning all the broadcasting rights to broadcast sporting events (the so-called winner takes all principle) and thus challenges incumbency.
- 2.3. The Commission recognizes that the amendments are useful to make broadcasting accessible to most consumers (no subscription payment is required for Group A) and opens up the market for the broadcast of Group A national sporting events. It increases entry of FTA broadcasters (such as SABC and e.tv) for premium content, which is currently aired predominately by a subscription broadcaster, MultiChoice.
- 2.4. The Commission has previously undertaken investigations and research into this market. It has identified the Pay-Tv market as a two-sided market consisting of advertisers and subscribers. In defining the relevant upstream product markets, it was found that premium sports content constitutes a separate market to premium movies and general entertainment. Accordingly, the relevant upstream product markets were defined as the market for the sale and acquisition of premium sports content rights from content rights holders, the market for the sale and acquisition of complete premium sports content, from wholesale channel providers and the market for the packaging of premium sports content into different bouquets. The relevant downstream product market was found to be the market for the retailing of subscription television bouquets carrying premium sports channels. The geographic market for each of these

product markets was found to be national. However, the Commission has not done extensive work on market definition.

- 2.5. The Commission is of the view that the three Groups (A, B and C) set out in the amendments to Regulation 5 are deemed appropriate for the categorisation of premium and non-premium national sporting events. However, the Commission has not yet had cause to consider more extensively this delineation of premium and non-premium content and therefore is not in a position to give an informed view in this regard. If ICASA is able to share its research that supports this categorisation, the Commission may evaluate it further.
- 2.6. There are applicable remedies that have been measured and applied globally to remedy competition-related concerns in subscription television markets, which may be equally applied in the South African context. These remedies are:
 - a) **Shortening the period of exclusivity to between 3-5 years:** this restricts broadcasting agreements that require exclusivity to between 3 and 5 years. In addition this remedy entails the prohibition of automatic renewal clauses, rights of first refusal and rights of first option;
 - b) **Unbundling of sports rights:** this refers to the offering of rights to more than one buyer (as opposed to a “winner takes all”-approach). Different buyers can be ensured by offering different “packages” according to, for example, the type of right (television, radio, streaming), type of platform (FTA, subscription television or internet), timeslot or day of the week on which the broadcast takes place. The remedy can be further extended by restricting the total number of packages that a single firm can buy, thereby ensuring that other firms are not excluded as a result of a dominant firm buying up all the packages;
 - c) **Rights splitting:** this remedy imposes an obligation on the rights owner to split the content rights and sell them to more than one broadcaster, usually in the form of a right per event/game/tournament. This is different from unbundling in that unbundling usually consists of a package of rights unbundled in terms of the types of rights or platforms, whilst rights splitting provide for even greater granularity;
 - d) **Wholesale-must-offer obligations:** this remedy refers to the imposition of an obligation on a content/channel provider (such as Multichoice) to offer to wholesale a channel (such as Supersport 1 or Supersport 4) or channel packages/bouquets to other broadcasters on regulated terms;

- e) **Opening network infrastructure distribution:** this remedy requires a dominant firm to open up its network/distribution infrastructure to other players in the market in an attempt to lower the barriers to entry. In doing so a rival broadcaster can distribute its content over the network of Multichoice. The terms of such access is technical and requires regulation; and
- f) **The introduction of set-top box interoperability:** this remedy entails the capability to deliver content across multiple platforms and devices based on commercial agreements and technological solutions that provide for content protection. In practical terms, this entails different broadcasters broadcasting their own content on a rival's set-top box/decoder. Thus, interoperability does away with the need for consumers having to purchase multiple decoders to view the content from different broadcasters.

2.7. None of the proposed remedies is sufficient to address competition issues if considered in isolation. Rather, the Commission recommends a combination of the proposed remedies can serve to deal with the identified market failures and competition challenges in the market. The Commission provides an explanation of what each of these remedies entail in relation to the amendments below.

2.8. **Unbundling of National Sporting Events**

2.8.1. Unbundling of national sporting events refers to the offering of rights to more than one buyer as opposed to a "winner takes all" approach. The remedy can further be extended by restricting the total number of packages that a single firm can buy, thereby ensuring that other firms are not excluded as a result of a dominant firm buying up all the content. This in turn enables a larger audience over a number of channels to access national sporting events making it financially and economically practical for consumers to afford at reasonable prices.

2.8.2. The Commission interprets the effect of the amendments to Regulation 5 is to achieve an unbundling of national sporting events into groups A, B and C, however, this is neither articulated in the Regulations, nor in paragraph 1.6 of the Explanatory Memorandum on the Review of the Sports Broadcasting Services Regulations, 2010. The Commission recommends that this desired objective of unbundling is mentioned in Regulation 5. It should be expressly stated in Regulation 5 that premium and non-premium sports rights content will be assigned between subscription sports rights holders and FTAs through a competitive bidding process.

2.8.3. These inclusions will assist to clarify the objective of the Regulations for the relevant role players including the pro-competitive rationale and outcomes from unbundling of sports rights content from an exclusionary perspective.

2.9. **Non-exclusivity of Sport Content Rights**

2.9.1. The Commission understands that sporting federations (Premier Soccer League, South African Rugby Union and Cricket South Africa) currently have the ability to sell their rights exclusively at a premium. Regulation 5 provides a list of sporting events that are expected to be broadcast by FTA. The Commission is of the view that this exerts pressure on them to broadcast these events. For instance, the cost of acquiring premium sports content, minimum production standards and relationships with sports bodies requires a substantial amount of investment for FTAs. The Commission is not certain if FTAs will have the ability to obtain the rights in the Group A category because it appears they have raised concerns to ICASA regarding the challenges faced to meet these requirements to secure sport content rights. In fact, the SABC has previously reported its concerns to ICASA that in certain instances the broadcast of these sporting events have yielded negative financial returns relative to the high cost of the rights investment made. In light of this, the Commission is concerned that this scenario will *de facto* lead to a subscription broadcaster acquiring the rights, thus defeating the purpose of the Regulations.

2.9.2. In this regard, the Commission notes the stated proviso of paragraph 5.1.2 that makes provision for subscription broadcasters to bid for the rights on a *non-exclusive* basis if FTA licensees cannot acquire the sporting rights. The Commission understands from its engagement with ICASA that the rationale is to ensure that subscription broadcasters do not acquire rights on an exclusive basis. However, they can sub-license the rights to FTAs.

2.9.3. Regarding the exclusive acquisition of these rights, there may be instances where it is required based on sufficient justifications by the subscription broadcaster or sporting federation concerned. In such instances, the Commission recommends that broadcasting agreements that require exclusivity based on reasonable justifications should be limited to a period of time of between 3 to 5 years. The Commission's investigations of the nature of contracts reveals that new entrants are likely to attain minimum efficient scale that would enable them to enter and compete effectively in a

market within a period of 3 to 5 years. In addition, this is likely to be a reasonable period of time for a rights holder to recoup its investment.

2.9.4. Therefore, the phrase “non-exclusive basis” referred to in paragraph 5.1.2 should be defined in the Regulations to this effect. In addition, automatic renewal clauses, rights of first refusal and rights of first option should be prohibited. This is because the continuous renewal of exclusive contracts with the same broadcaster may serve to entrench incumbency.

2.9.5. It is acknowledged that this remedy could create a regulatory burden for ICASA to regulate for a particular context of a license and that this remedy requires implementation on a case-by-case basis. Furthermore, notwithstanding the imposition of shortening the duration of exclusive contracts, the Commission is of the view that a combination of competition law and *ex ante* regulatory interventions are required to deal with the market failures and potential competition challenges that are observed in this market.

2.10. **Right splitting**

2.10.1. Rights splitting is an obligation imposed on the rights owner to split the content rights and sell them to more than one broadcaster, usually in the form of a right per event/game/tournament. This is different from unbundling in that unbundling usually consists of a package of rights unbundled in terms of the types of rights or platforms.

2.10.2. The Commission understands from its engagement with ICASA that the splitting of rights is left to the rights holder. In this regard, the Commission accepts that the Regulations in its current form do not restrict the ability of rights holders and broadcasters to split the rights within a package of content rights. Rights splitting in this way can facilitate entry of broadcasters into the market and the Commission would recommend that the regulations encourage this.

2.11. **Wholesale must-offer obligation**

2.12. This remedy would be imposed on subscription broadcasters (Multichoice), regulated by ICASA, to ensure that new entrants and FTAs are able to access premium content. The Commission considered the origin of the wholesale must-offer remedy further as it understands that the market dynamics of the sports broadcasting industry most

closely resembles that of the United Kingdom. The Office of Communications (Ofcom) in the United Kingdom concluded a review in 2007 of the subscription television market. Following its review, Ofcom imposed a wholesale must-offer obligation on British Sky Broadcasting Limited (BSkyB, now Sky). In 2014, Ofcom reviewed the wholesale must-offer obligation to determine if continued regulation was required. Following its review in 2015, Ofcom deregulated the wholesale must-offer condition in the United Kingdom.³ It concluded that the condition did not stimulate new entry in the UK market and only served to advantage the existing three incumbents. One key factor in this decision was evidence regarding a series of commercially agreed deals that Sky had concluded with other major pay-TV retailers, outside the scope of the whole must-offer obligations.⁴

2.13. The wholesale must-offer remedy can only be effective if the regulatory framework which controls the price, terms and monitoring is put in place. This would require ICASA to devise such regulations.

2.14. **Sub-licensing**

2.14.1. ICASA indicated to the Commission that Regulation 6.1 allows for the sub-licensing of the rights, which the Commission interprets to mean a primary rights holder of most of the premium sport content, such as Multichoice, can sub-license the rights to a FTA at any cost. Compulsory sub-licensing on commercial terms raises competition concerns because the terms of access are not regulated. Since the terms of access are not regulated, subscription broadcasters can set the price at any level, giving it the upper hand in negotiations with sub-licensees.

2.14.2. As was correctly pointed out by ICASA in its previous engagement with the Commission, its mandate does not extend to the regulation of the contractual terms between the rights holder and the sub-licensee. However, a broader systemic problem arises because, notwithstanding the imposition of remedies to achieve a competitive bidding process for rights, the desired competitive outcome is undermined due to the absence of regulating the conditions attached to a sub-license.

³ OFCOM's statement is accessible at <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-must-offer> last accessed on 6 March 2019.

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707563/DCMS_Ofcom_Removal_of_must_offer_obligation_on_Sky.pdf last accessed on 6 March 2019.

2.14.3. Therefore, the amendments to the Regulations present an opportunity to deal with competition and regulation issues holistically and by defining a sub-licensing framework for national sporting events. This would require a review of the sub-license conditions and the pricing of sports content rights with a view to addressing anti-competitive concerns.

2.14.4. The bidding process (ITA)

2.14.5. ICASA should consider abandoning the ITA approach. Instead, it should introduce an open tender approach to allow any type of broadcaster to apply for sports rights. This could be optimal if paired with unbundling of the rights.

2.14.6. Conclusion on appropriate remedies

2.14.7. There are remedies that have been applied to remedy the competition concerns in these markets but these would require a regulatory body, such as ICASA, to oversee and implement. The Commission recommends that period of exclusivity should be shortened to between 3 to 5 years. Unbundling, rights splitting, wholesale must-offer obligations and regulations designed to regulate sub-licensing should be considered and catered for in ICASA's regulatory framework. From a long term perspective, the Commission is of the view that these remedies should be introduced as part of a series or framework of long term regulatory interventions.

3. REGULATION 7: REVIEW OF THE LISTED EVENTS

3.1. Sub-section (1)(a) provides that the review of listed sporting events will take place every three (3) years from the date the Regulations come into effect. Regulation 7(a) of the 2010 Regulations contemplates that the criteria used in the listing of national sporting events and the list of national sporting events will be reviewed after every four (4) years from the date of the publication of the 2010 Regulations. The Commission supports reducing the time period of the review to three (3) years, thereby facilitating timely public input. However, this obligation should apply equally to the criteria used in the listing of national sporting events, which has been omitted from sub-section (1)(a) of Regulation 7.

4. REGULATION 10: PENALTIES

4.1. The Commission recommends that Regulation 10 read as follows:-

“A broadcasting service licensee that contravenes or fails to comply with the provisions of these Regulations shall be referred to the CCC for the determination of appropriate action.”

5. CONCLUSION

5.1. The Commission trusts that this submission will assist ICASA to address the competition issues identified and to bolster competitive outcomes in the sports broadcasting industry. The Commission remains open to further engagement with ICASA.

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