

**EMEDIA INVESTMENTS COMMENTS AND SUBMISSIONS ON THE DISCUSSION DOCUMENT ON THE REVIEW OF THE INDEPENDENT BROADCASTING AUTHORITY (ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIP) REGULATIONS, 1999 (“THE DISCUSSION DOCUMENT”)**

**Introduction**

1. eMedia Investments (Pty) Ltd (“eMedia”) thanks the Independent Communications Authority of South Africa (“ICASA” or “the Authority”) for the opportunity to comment on the Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999 (“the Advertising Regulations”). eMedia wishes to participate in any public hearings convened in relation to the review of the Advertising Regulations.
2. eMedia (Pty) Ltd is a South African media group with holdings in a variety of broadcasting, content and production businesses including, e.tv (South Africa’s only commercial free-to-air television broadcasting service licensee), Openview (a free-to-air satellite multi-channel television broadcaster) and eNCA (South Africa’s most watched 24-hour news channel). e.tv and Open View, as significant free-to-air broadcasters, are solely reliant on advertising and are, accordingly, directly impacted by any change to the Advertising Regulations. Similarly, eNCA holds a significant place in the South African broadcasting landscape and, in this capacity, is also directly impacted by the Advertising Regulations.
3. The Discussion Document comes at a time when hearings are being held concerning submissions made in respect of the Draft White Paper on Audio and Audio-Visual Content Services Policy Framework (“the Draft White Paper”) issued by the Department of Communications and Digital Technologies. The Draft White Paper, *inter alia*, proposes a new licensing and regulatory framework for all content services and not only broadcasters. One of the issues canvassed in the Draft White Paper relates to advertising. The Draft White Paper recognises that there is a regulatory imbalance between the regulations of advertising on broadcast platforms and on online platforms. This comes at a time when the television industry is facing increased competition from online platforms. eMedia have made

submissions in relation to the Draft White Paper and will be participating in the oral hearings currently underway in Relation to the Draft White Paper. eMedia supports the idea that all content service providers, and not only broadcasters, should be regulated in the same way insofar as advertising is concerned.

4. Importantly, the Draft White Paper suggests that legislation should require the Authority to hold an inquiry concerning, *inter alia*, issues surrounding whether the current share of advertising revenue by subscription services is appropriate and what the impact of offline advertising will be on the TV advertising market in both the long and short term. It is recognised that, if this impact is determinantal to the survival and viability of free-to-air services, the Authority will need to make regulations to protect the sustainability and viability of free-to-air services in South Africa which will need to consider the expansion of the proposed regulatory licensing framework to include all audio-visual content service providers and not only broadcasters. The Draft White Paper suggests that an inquiry should be conducted in this regard. eMedia supports this idea and has made numerous submissions to the Authority concerning the urgent need to properly regulate subscription broadcasters particularly when they hold a monopoly (which for current purposes is limited only to Multichoice). This should apply to any regulatory regime relating to advertising.
5. Given that advertising on online platforms is increasingly eating into the available advertising pie and taking revenue away from broadcasters, the Draft White Paper correctly recognises the need to regulate all audio and audio-visual service providers in this regard. However, it is clear that until the process surrounding the Draft White Paper is finalised resulting in a change to existing legislation, which will take many years, the Advertising Regulations need to be amended to bring them into line with developments in the advertising market, the broadcasting sector and the economic environment generally. In this regard, recognition needs to be given to the fact that the existing Advertising Regulations were promulgated 22 years ago and, at that time, the landscape in which the Regulations were made differed substantially to the current landscape.
6. It is, *inter alia*, for the above reasons, that eMedia submits that the Advertising Regulations need to be amended so that there is a light touch approach to regulating advertising for broadcasters. This is particularly so in circumstances in which the country finds itself in the midst of a pandemic in respect of which there is currently no end in sight. Accordingly, any amendment of the Advertising Regulations or any new advertising regulations which are

promulgated, should impose no further regulatory measures or limitations on advertising, infomercials, product placements and programme sponsorship in the broadcasting market (save for subscription broadcaster). Rather, the Authority should look to create greater flexibility through de-regulation while imposing necessary restrictions on subscription broadcasters. Any further reduction in the advertising spend available to broadcasters will threaten the viability of free-to-air (“FTA”) broadcasters. Following the trend in other countries, it is likely that advertising spend on online platforms will grow at the expense of broadcasters. Broadcasters, and particularly FTA broadcasters without access to any other form of income or government grants, need to be protected. The only way to do this is by deregulating advertising by introducing a light touch approach leaving it up to broadcasters to substantially regulate themselves in accordance with market demands and what their audiences want.

7. However, in addition to this, e.tv has on numerous occasions made submissions to the Authority that limitations should be placed on subscription broadcasters who rely on subscriptions as their greatest source of income. With the shrinking advertising pie available to broadcasters, to ensure the continued viability of free-to-air broadcasters, limitations need to be placed on the amount of advertising time available to subscription broadcasters. In this regard, it is submitted that advertising should only be permitted 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. Regarding the above, it is important to recognise that the audience share of Multichoice has and continues to grow thereby churning audiences away from FTA broadcasters which directly impacts the advertising spend on such broadcasters (with that of Multichoice growing at the expense of FTA broadcaster).
9. As pointed out by eMedia in its submission to the Authority in relation to the Draft Findings Document in Respect of the Inquiry into the Subscription Broadcasting Services, dated 14 January 2021 (“the Inquiry”), *“MCA [Multichoice] has an unfair share of advertising revenue based on its audience share, which is driven by FTA channels.”* This is directly in contradiction to Multichoice’s previous submission to the Authority that it would not impact on the advertising revenue of FTA channels.

10. In the aforesaid submission, it was shown that Multichoice's advertising share of income was 39% whereas the percentage share available for the rest of the market was 61%. In real terms, MCA advertising income was greater than the income of eMedia in circumstances where the greatest part of its income was earned through subscription revenue. This is set out in annexure "A" hereto.
11. In the Authority's Draft Findings in relation to the Inquiry, it held the view that Multichoice should be regulated and that licence conditions should be imposed on licensees with significant market power (such as Multichoice) to inhibit anti-competitive practices and promote competition in the broadcasting sector which includes FTA broadcasters. It is for this reason that, in addition to introducing a light touch approach, limitations should be placed on subscription broadcasters regarding the duration of advertising time available and how this is sold. Reference is made to what is set out above in this regard.
12. In adopting a light touch approach (particularly to advertising by FTA channels), the Authority should be guided by the principle that advertising is an enabler regarding economic growth. Television advertising is at the forefront of enabling such growth and, accordingly, imposing any strict advertising regulations on broadcasters, would stifle growth in most aspects of the economy. This would represent a draconian attempt which would impact both the economy (at a time when growth needs to be stimulated) and the continued viability of FTA. This is particularly so in the current environment in which South Africa finds itself where there has been a decrease in economic growth and hence an increase in unemployment, both made worse by the current pandemic. The Covid related regulations recognise this by loosening the limitations in relation to advertising, in particular, the ability for broadcasters to advertise in excess of the time limitation placed on them in their licence conditions.

### **General comments regarding the Discussion Paper**

13. In paragraph 3.2 of the Discussion Paper, the Authority recognises that advertising revenue decreased in 2018 and 2019. However, the Authority points out that advertising revenue increased by 4.93% overall between 2015 and 2019. It is submitted that rather than focussing on what has taken place over an extended period of time, it would be more appropriate to focus on what has happened in the immediate past. This will reflect what is currently taking place in the market given, inter alia, the impact of advertising spend in

respect of online services. The same would apply to revenue from infomercials, programme sponsorship as referred to in paragraphs 3.2 to 3.5 of the Discussion Document. In this regard, advertising spend in the industry declined by 4.05% in the period ending March 2019 and by 4.81% in the period ending March 2020.

14. Of relevance in assessing the issues set out below is that recognition be given to the fact that the incremental and sustained increase in online advertising means that it is likely to surpass television advertising in the near future. This will directly impact free-to-air broadcasters who do not have a secondary source of subscription revenue and even more so, those who have no other sources of income such as licence fees revenue or government grants.
15. By reason of the aforesaid, in answering the below questions, a central theme will be the extent of which online advertising has impact and will increasingly impact the advertising spend available to broadcasters with a concomitant knock-on effect which may threaten the viability of free to air broadcasters, hence, the need for a light touch approach.

## **Questions**

**e.tv now turns to deal with the questions posed by the Authority in the Discussion Document.**

- 1. Are the current Regulations of Advertising, Infomercials and Programme Sponsorship effective? Please elaborate.**

Some aspects of the current Regulations of Advertising are effective and give certainty to participants in the broadcasting sector. Editorial control, in relation to sponsored programme, remaining with the broadcaster, ensures that broadcasters preserve the editorial integrity of the said sponsored programme and viewers/consumers are protected from unduly advertising.

With that said, other aspects of Advertising Regulations are not effective. The non-acceptance of programme sponsorship pertaining to news and/or current affairs programme/s needs to be reconsidered. Monetising a 24-hour news channel, such as eNCA, with such restrictions is challenging. Push advertising is one way of creating alternative revenue in order to sustain the business. Only allowing programme sponsorship in weather forecasts or sports results rather than

news generally, limits broadcasters such as a 24hour news channel insofar as far as the creation of alternative revenue is concerned. As stated, a light touch approach is recommended which would allow a broadcaster greater flexibility in relation to advertising, sponsorship, product placement and infomercials. This could be determined within certain loosely defined parameters while, at the same time, allowing the broadcaster to base any of its decisions on factors determined by it, such as impact on audience share and commercial rationale.

However, in addition to assessing the current Advertising Regulations, recognition must also be given to the limitations placed in e.tv's licence relating to advertising. While e.tv recognises that this needs to be dealt with through an amendment to its licence conditions than in any regulations, e.tv submits that the current limitations disadvantage it. In this regard, MultiChoice has no such limitations in circumstances in which eMedia suggests that limitations placed on MultiChoice should be substantially more stringent than those placed on a free-to-air broadcaster.

**2. Is there a need to revisit the definition of Advertising, Infomercials and Programme Sponsorship? If the response is yes, how should they be redefined?**

eMedia submits that insofar as the definition of "advertisement" is concerned, all public service announcements (whether paid or not) should be excluded from the definition. A public service announcement is just that, irrespective of whether it is paid or not. Similarly, in the current environment, an Infomercial should be permitted subject to it being of one minute duration or less. This will, in particular, benefit free-to-air broadcasters, given the limitations placed on them relating to, *inter alia*, the amount of advertising they can broadcast in any one hour and per hour during any licence year.

Insofar as sponsorship is concerned, the definition should exclude product placement which is defined separately.

**3. What is your view on advertising during news and current affairs for radio and television?**

See answer to question 1 above.

Moreover, free-to-air broadcasters relying solely on advertising and sponsorship revenue will be greatly impacted by the growth in online advertising. In this regard, the Authority acknowledges the need for such broadcaster to generate revenue to sustain themselves. At this stage, radio

broadcasters are not prohibited from obtaining or accepting any programme sponsorship in respect of any news or current affairs programme. There ought to be no distinction between television and radio broadcasters in this regard. While e.tv recognises that the rationale for this limitation is to maintain editorial control and independence, the same would apply to radio broadcasters. There is no basis for this distinction. Editorial integrity and independence is a core value of independent broadcasters such as etv, Openview and eNCA irrespective of those who advertise on its channel whether in respect of news or otherwise. Accordingly, it is submitted that Regulation 5.3 and 5.4 of the Advertising Regulations should be deleted and all broadcasters should be able to accept programme sponsorship of news and current affairs programmes which would include weather forecasts or sports result bulletins.

#### **4. What is the impact of the current Advertising Regulations on the financial viability of broadcasters?**

The impact on the Advertising Regulations is substantially greater on FTA broadcasters as opposed to subscription broadcasters. Reference is made to what is set out above in this regard. Insofar as subscription broadcasters are concerned, the impact of the Advertising Regulations will be negligible. Not only do subscription broadcasters have no limitations placed on them in their licences regarding duration of advertising in any one hour or over any financial year, but their subscription far exceed advertising revenue and is obliged to be so by reason of the provision of the Electronic Communications Act. In South Africa, this is exacerbated by the almost total monopoly of MultiChoice and the inability of new entrants to enter into the marketplace as a result of that dominance. It is for this reason that eMedia submits that the Advertising Regulations (read together with any regulations into subscription broadcasting services) should limit the amount of advertising available to subscription broadcasters. This should relate not only to time limits but also to programme limits so that, for example, no advertising should be permitted on channels not produced in South Africa (generally pass through channels) or on programmes produced by any company associated with or within the group of companies providing such subscription broadcasting service.

Reference is also made to the answers to questions 1 and 3 above and the submissions set out further below that the time limit placed on Infomercials should be increased.

#### **5. Are current Advertising Regulations able to protect broadcasters on editorial independence?**

Yes. In our view the current Advertising Regulations are effective.

**6. Does the current labelling of advertising make it easy for viewers/listeners to differentiate it from normal programming?**

Yes. In our view the current Advertising Regulations are effective.

**7. What is your view on advertisements that supersede programming?**

In reality, advertisements never supersede programming. This is particularly so given the time limits placed on advertising in any one hour or year. Moreover, with a light touch approach, even if there were no limits on the extent to which advertising could supersede programming, should any broadcaster elect to have advertisements supersede programming this would, no doubt, impact its audience share and hence the appetite for advertisers to continue advertising on that channel or during that programme.

**8. What programmes should not allow Infomercials?**

Programmes are clearly distinguishable from Infomercials and this is covered by the definition of Infomercials in the Advertising Regulations. The issue is not one of which programmes should not allow Infomercials but rather the time periods during which Infomercials should be permitted. In this regard, a light touch approach would mean that the limitations placed on Infomercials should no longer apply (clauses 4.1 and 4.3 of the Advertising Regulations) and the broadcaster should be permitted to determine when Infomercials should be broadcast based on own internal regulation. In other words, it is likely that a broadcaster would not, notwithstanding the lack of any limitation placed on when Infomercials can be broadcast, continue to broadcast Infomercials during primetime as this would affect audience share and hence advertising such broadcaster would receive during primetime.



**9. Should the Authority regulate the duration of infomercials? Please elaborate**

It is not necessary for the Authority to regulate the duration of infomercials. This should be left at the discretion of the broadcaster who is able to assess the impact of the duration of any infomercials on its audiences or business. Additionally, placing a limit of two hours in the performance period in any one day, is overly restrictive and should be increased to three hours. Light touch regulation would mean that a broadcaster could determine whether it is viable to broadcast infomercials during the performance period as well as the duration of such infomercials. Reference is made to the response to question 9 above.

**10. Should the Authority regulate the frequency of Infomercials? Please elaborate.**

eMedia refers to what is set out in the response to questions 9 and 10 above. The Authority should not regulate the frequency of Infomercials. There should be a light touch approach which should permit broadcasters to determine the frequency of Infomercials which would be based on commercial criteria.

**11. What indicators of infomercials can be used so that they are easily identifiable?**

The current provision of clause 4.2 of the Advertising Regulations adequately deal with what indicators can be used to make infomercials easily identifiable.

**12. Should the Regulations continue to prohibit the transmission of infomercials during prime time? Kindly provide a reason for your answer.**

In our view there should be less limitations on advertising, infomercials or sponsorships during prime time. A light touch approach to infomercials during primetime is required. Reference is made to what is set out in the response to questions 9 and 10 above. The broadcaster can assess whether Infomercials will be more or less profitable to it and attract viewers or impact them negatively if broadcast in prime time. Ultimately, a light touch approach would mean that broadcasters would rely on a commercial rationale as to when it broadcast Infomercials and the duration of such Infomercials.

**13. How should the Authority deal with push advertisement (squeezebacks)?**

Push advertisements should be allowed across all types of content offerings (News, Local Drama's etc). As broadcasters cannot currently obtain or accept programme sponsorship in respect of any news or current affairs programme, the opportunity to utilise push advertising as an alternative revenue stream allows for broadcasters to sustain and monetise their offering. This type of advertising should not be limited to any specific genre of content but should be left at the discretion of the broadcaster as to how they go about integrating a sponsor into the said content while maintaining final editorial control. Once again, a light touch approach is suggested in the current environment.

**14. How should the Authority regulate product placement and promotional material inside a programme in a way that it does not supersede programming or tamper with editorial control?**

The current regulations in place pertaining to product placement are adequate. Measures such as entering into a written contract with the sponsor, will enable the parties to outline the rights of both the advertiser and the broadcaster. By having final editorial resting with the broadcaster, this will continue to ensure that an advertiser's or sponsor's exposure within a programme does not supersede programming or interfere with editorial control. This will protect the consumers.

Moreover, given the current definition of "product placement", it is clear that product placement and promotional material inside a programme would not supersede programming or tamper with editorial control. The nature of product placement is such that it is subtle rather than dominant. Moreover, there is no reason why product placement as opposed to advertising or sponsorship generally should tamper with editorial control. eMedia Investments prides itself that its channels are independent and that no outside forces impact on such editorial control. This much is made clear in, for example, its sponsorship agreements and advertiser funded programme agreements.

**15. What mechanisms should be put in place to ensure that programme sponsorship does not influence programmes?**

The current mechanisms of requiring that the broadcaster maintains editorial control in respect of the sponsored programme and is required to enter into an agreement with the sponsor as

discussed in question 14 above, ensures that programme sponsorship do not influence programmes.

**16. What other measures can be put in place to ensure compliance with programme sponsorship requirements?**

No other measures are required at this point in time. The Advertising Regulations are effective.

**17. Should the Authority request that product placement be signalled? How should it be signalled?**

Product placement differs to sponsorship. Accordingly, while programme sponsorship is to be distinguished and the broadcaster is obliged to state the nature of the sponsor's association with the relevant sponsored programme (see Regulation 5.9 of the Advertising Regulations), to extend this to any element other than sponsored programmes would be cumbersome and, hence, unnecessary.

Again, a light touch approach is recommended.

**18. Should product placement and sponsorship be allowed during children's programme? If so, what mechanisms should be put in place to ensure that there is a clear distinction between product placement and the programme?**

The best interest of the child is paramount. Notwithstanding this, no damage would be caused by allowing relevant, child orientated, product placement and sponsorship during children's programming, provided that protective measures detailed in any applicable codes or regulations are adhered to.

**19. Product placement is a component of branding, what other elements of branding should the Authority be concerned with?**

We are not aware of any other elements.

**20. In your view how should the Authority ensure that public interest is protected when regulating advertising, infomercials, product placement and programme sponsorship?**

The current rules and regulations from the Authority along with those from the Advertising Regulatory Board (ARB) are sufficient to ensure that public interest is protected when regulating advertising, infomercials, product placement and programme sponsorship. A light touch approach is encouraged, particularly in the current environment.

**21. What lessons can be learned from other countries in terms of advertising, infomercials, programme sponsorship and product placement?**

It is important to recognised that online advertising is encroaching on advertising spend available to broadcasters. If one considers how this has played out in other jurisdictions, South Africa is lagging behind these jurisdictions. This means that it is likely, following these trends in other countries, that online advertising will take an increasingly greater share of the advertising market thereby directly impacting broadcasters and, particularly, those FTA broadcasters whose sole source of income is advertising.

Other than this, South Africa must be seen as a unique market and any regulations should be tailored to that market. Accordingly, the responses set out herein adequately deal with all relevant issues prevailing in South Africa.

**22. How should the Authority ensure the balancing act between sustainability of broadcasters relating to revenue generation through sponsorships, infomercials and advertising, with the need to protect the consumers?**

The Authority currently achieves this balance through the existing regulations in conjunction with the ARB code which ensures that content advertising rules supplement similar objectives. However, broadcasters are losing revenue due to limitations/prohibitions on:

- (1) programme sponsorships of any news or current affairs programme.
- (2) limitations placed on duration of advertisements in any hour and/or in any financial year. These would need to be assessed not only irrelevant the Advertising Regulations but in any licence conditions.
- (3) programme sponsorships in children's programming which can also benefit the children.
- (4) the duration of Infomercials as well as the prohibitions relating to the broadcast of Infomercials during primetime.

**23. What is your view in terms of promotional material inside programmes and advertising during the breaks on whether these amount to excessive advertising?**

Promotional material inside programs are subtle, indirect, look accidental and part of the program that the viewers generally never notice. Accordingly, promotional material inside programmes and advertising during the breaks do not amount to excessive advertising.

**24. What are the determinants of advertising revenue?**

Advertising revenue is earned from advertising, sponsorship (including advertiser funded programmes), infomercials and product placements, in respect of which a broadcaster receives revenue.

**25. What is the impact of online media on radio and television advertising revenue?**

The impact of online media on broadcaster advertiser revenue (and particularly television broadcasters given the limitations of sponsorship on news) negatively impacts on broadcasters given that online media is taking an increasing share of the advertising pie and has no regulation on it whatsoever as do broadcasters. Reference is made to what is set out above in this regard as well as the suggestion in the Draft White Paper that all audio and audio-visual service providers should be similarly regulated.

**26. To what extent does the ECA provide the Authority with the requisite legislative mandate to regulate the broadcasting Advertising, Infomercials and Programme Sponsorship during the digital era?**

The ARB already regulates both online advertising as well as advertising by broadcasters. However, no other limits are placed on broadcasters, such as no sponsorship of news, duration of advertising in any one hour, and the like. This should be brought into alignment. Digital broadcasting, whether it is a simulcast or video-on-demand should apply the same rules. It would be detrimental to a broadcaster to have different standards to meet. In this respect, we note the Draft White Paper is aiming to bring about parity between traditional linear broadcasting and digital broadcasting.

**27. To what extent should the Authority regulate Advertising, Infomercials and Programme Sponsorship in the digital environment to ensure that the regulations protect consumers?**

In our view this is not necessary in light of the role of the ARB. However, it is submitted that online advertising has no limitations placed on it as to broadcasters give online advertisers a substantial advantage over broadcasters. Any form of audio or audio visual service provider should have the same limitations placed on it as contemplated in the Draft White Paper.

**28. Are there any other issues that the Authority should consider in the Regulation of Advertising, Infomercials and Programme Sponsorship?**

As set out above, a light touch approach is suggested which will protect broadcasters, and particularly free-to-air broadcasters whose only source of income arises from advertising, sponsorships and infomercials. This is particularly so in the current environment when advertising revenue in the broadcasting sector is declining and that of online revenue increasing. Moreover, all audio and audio-visual service providers should be subject to the same regulatory regime. Reference is made to the Draft White Paper in this regard. Indeed, it is for this reason that the future regulation of advertising, and hence the promulgation of any further advertising regulations, would, perhaps, best be left until the results of the Draft White Paper reach legislative fruition.

Secondly, the Authority should not collect confidential contracts between the broadcaster and advertisers except in exceptional cases such as if required by the Complaints and Compliance Commission.