

3 August 2022

Independent Communications Authority of South Africa

Attention: Mamedupe Kgatshe

By email: MKgatshe@icasa.org.za

Dear Sirs

RE: eMedia Investments (“eMedia”) – Comments on the Findings Document and Draft Regulations Regarding Advertising, Infomercials and Programme Sponsorship

1. We refer to the hearings held before the Authority on 11 July 2022 in which eMedia Investments made an oral presentation in relation to the Findings Document on the Review of the Independent Broadcasting Authority's (Advertising, Infomercial and Programme Sponsorship) Regulations 1999 as well as the Draft Regulations which accompanied the findings document.
2. Pursuant to the hearing and on 25 July 2022, the Authority requested eMedia to provide supplementary submissions on certain aspects which arose during the public hearings. The due date for these additional submissions is 3 August 2022.
3. In this letter eMedia responds to each of the issues raised by the Authority in its letter in respect of which it requested supplementary submissions.

eMedia's submission that the Authority did not consider its response to the Discussion Document regarding limiting advertising time for subscription broadcasters, when the Authority responded that the current process focuses on Section 55 of the Electronic Communications Act.

4. eMedia is concerned that the Authority's position in relation to the Discussion Document, the Finding Document and the Draft Regulations made pursuant thereto, is limited by the parameters of Section 55 of the Electronic Communications Act, 2005 (Act No 36 of 2005) ("the ECA"). It is clear that the Authority considered the issues raised in both written and oral submissions made by interested parties in relation to both the Discussion Document and the Findings Document through the prism of Section 55. This accordingly coloured the drafting of the Draft Regulations given that, in dealing with the various submissions as aforesaid, the Authority failed to deal with submissions it believed fell outside the parameters of Section 55 of the ECA.
5. Section 55 of the ECA deals with control over advertisements and the obligations of all broadcasting service licensees to adhere to the Code of Advertising Practice ("the Code") from time to time determined and administrated by the Advertising Standards Authority of South Africa ("ASASA"). Unlike other sections of the ECA, Section 55 does not mention the Authority or direct that it should regulate advertising in accordance with Section 55 as the Authority has now done in drafting the Draft Regulations. The simple reason for this is that the purpose of Section 55 is to place an obligation on broadcasters to comply with the

Code and gives the Complaints and Compliance Committee jurisdiction concerning breaches of the code in respect of broadcasters who are not members of ASASA. Section 55 of the ECA does not empower the Authority to regulate advertising in relation to the matters set out in both the 1999 and Draft Regulations. In fact, Section 55 has nothing whatsoever to do with the matters dealt with in both the 1999 and Draft Regulations.

6. The 1999 Regulations as well as the Draft Regulations deal with issues relating to, inter alia, regulating the amount of advertising that may be transmitted by broadcasters; distinctions between advertising, programme material, infomercials and programme sponsorships; rules in relation to advertising, infomercials and programme sponsorship generally including:
 - 6.1. when infomercials may be broadcast and how they need to be labelled;
 - 6.2. the duration of infomercials;
 - 6.3. the need for broadcast service licensees to retain editorial control even where a programme is sponsored;
 - 6.4. the prohibition on a broadcasting service licensee from accepting programme sponsorship in respect of any news or current affairs programme;
 - 6.5. the manner in which programme sponsorships are to be dealt with generally; and
 - 6.6. product placement.
7. On the other hand, the ASASA Rules and Code only regulate the content of advertisements and deal with issues such as offensive advertising, misleading advertising, and competitive advertising.
8. Accordingly, the 1999 Regulations and the Draft Regulations have nothing whatsoever to do with the ASASA Rules or Code.
9. In view of what is set out above, it is clear that the Authority has misdirected itself in drafting the Draft Regulations. All of eMedia's rights in this regard are reserved.
10. Issues relating to limitations of advertising time which ought to be placed on subscription broadcasters was dealt with extensively in eMedia's reply to questions raised in the Discussion Document, its written submissions in relation to the Findings Document and its submissions relating to the Draft Regulations as well as the at oral hearings held in relation to both sets of submissions. These submissions are repeated and the Authority is invited to reconsider these submissions in light of what is set out above.

Reasons for the suggested definition of programme competition

11. As stated in eMedia's written submission and repeated during the oral presentation on 11 July 2022, the definition of "*programme competition*" in the Draft Regulations is overly restrictive as it limits a competition to one which forms part of or is linked to a programme by way of a competition window, insert or slot, and which does not have the promotion of the commercial interests of a person, product or service. This means that a competition which takes place in, for example, a sponsored programme, the sole purpose of which is to promote the commercial interests of the sponsor, would not be permitted. Such programmes are broadcast from time to time and contribute to the advertising and sponsorship revenue of broadcasters. They may be standalone programmes (which may be 24 or more minutes long) rather than being linked to a programme by way of a

competition window, insert or slot. Any such sponsored programmes constitute programme competitions as contemplated by section 36 of the Consumer Protection Act, 68 of 2008.

12. Accordingly, eMedia contends that the definition of “programme competition” to be included in any regulations which replace the 1999 Regulations should be aligned with the definition of Promotional Competition in the Consumer Protection Act. The suggested definition of programme competition intends to achieve this purpose. However, in view of what is set out above, perhaps a future proofed and better definition would be:

“Programme Competition’ means a competition which is conducted in accordance with the Consumer Protection Act, 68 of 2008.”

13. This would then apply to all competitions irrespective whether they were standalone competitions or were competitions forming part of, or which were linked to, a programme by way of competition window, insert or slot.

The definition of public service announcements and why the Authority should not refer to paid or unpaid when defining public service announcements.

14. As set out in eMedia’s response to the Discussion Document, a public service announcement is a message in the public interest which is aimed at providing members of the public with information relating to matters which are of public importance. The definition of public service announcement should not be limited only to announcements concerning disasters or immediate grave danger to the public or which are in the interests of public welfare. So, for example, announcements in relation to elections or the need for indigent members of the public to register to receive subsidised set top boxes, would not be considered public service announcements. This needs to change.
15. Moreover, as long as a public service announcement is one which falls within the definition as set out above or which finds its way into any regulations, there is no law stating that it cannot be paid for. So, for example, if the Government decides to engage in a length campaign for indigent members of the population to register to receive subsidised set-top-boxes, and given the duration of the campaign it pays for such announcements, there is no rational reason why this should be excluded from the definition of a public service announcement and be considered an advertisement the aim of which is to promote the commercial interests of the advertiser.

Serious as opposed to non-serious offences and suggested penalties

16. eMedia holds the view that the section dealing with contravention penalties ought to give guidance as to how penalties should be imposed.
17. The mere breach on one occasion of any regulation made to replace the 1999 Regulations, should not, in the first instance, be one which can be liable to the maximum fine. Rather, the section dealing with contravention and penalties should be more specific and give guidance as to how a penalty should be imposed. Moreover, the aim of a penalty is not to put a licensee out of business which the proposed definition may do. Account also needs to be taken of factors such as whether the offence is intentional or not and whether the contravening licensee has breached the same regulation in the past. Accordingly, eMedia proposes that to take into account what is set out above, the section on penalties should read as follows:

“A licensee that contravenes any provision set out in these Regulations may be liable to a fine not exceeding R3 000 000 (three million rand). The maximum

fine shall only be imposed on repeat offender. In the instance of a first offence, the maximum fine which can be imposed on a licensee shall not exceed R500 000 (five hundred thousand rand). Any fine shall be imposed after due consideration of any mitigating circumstances, including, but not limited to, the seriousness of the contravention and whether it was intentional or not.”

Cap on Minutes of Advertising

18. eMedia has previously suggested that there should be no cap on the duration of advertising which any Broadcasting Licensee can broadcast in any hour. Rather, this should be regulated by the broadcaster dependent on the needs and tolerance levels of its audiences. This would level the playing fields between free-to-air broadcasters, including e.tv, and subscription television broadcasters such as DSTV. While eMedia acknowledges that the limitation on the amount of advertising which e.tv is able to broadcast in any one hour is contained in its Licence Conditions, the Regulations can override this. There is no reason why e.tv should go through the time and expense of having to apply for an amendment of its Licence. In any event, in terms of the ECA, the Authority may amend an individual licence after consultation with the Licensee to make the terms and conditions of the individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type and for purposes of ensuring fair competition between licensees. This will dispense with e.tv having to apply for an amendment.

Product placement

19. As stated in its written submissions and at the oral hearing on 11 July 2022, eMedia holds the view that clause 6.8 of the Draft Regulations ought to be deleted and that the only requirement insofar as product placement is concerned is that it needs to be subordinate to the content of the programme material. This is adequately dealt with in clause 6.7 of the Draft Regulations. The need to signal product placement at both the beginning and end of the programme in which the placement appears is unrealistic and practically impossible. In any programme, there may be multiple executions of active and passive placements as well as digital brand integration. Often, particularly insofar as digital brand integration is concerned, this occurs at the last minute and shortly before the broadcast of a programme. It would therefore be impossible to edit the particular programme.

20. Additionally, in a daily soap, product placements may vary from day to day. Opening credits are standardised and repeated on a daily basis. To have to edit them daily, is impossible, prohibitive and out of line with international practice. The same applies to end credits.

We look forward to hearing from you.

Kind regards

Philippa Rafferty

eMedia Investments: Legal and Regulatory