

EMEDIA INVESTMENTS COMMENTS AND SUBMISSIONS ON THE DRAFT REGULATIONS REGARDING ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIPS 2022

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 Draft Regulations regarding Advertising, Infomercials and Programme Sponsorships, 2022 (“the Draft Regulations”) which are intended to replace the Advertising, Infomercials, and programme Sponsorship Regulations of 1999 (“the 1999 regulations”).
2. The Draft Regulations were published pursuant to a process conducted by the Authority in relation to the Discussion Document on the Review of the 1999 Regulations published by the Authority on 26 March 2021 (“the Discussion Document”). eMedia, amongst others, made written submissions and appeared at hearings in relation to the Discussion Document. Subsequent to the aforesaid hearings, eMedia made further submissions in response to questions posed by the Authority at the hearings.
3. Subsequent to these hearings and on 8 April 2022, the Authority published the Draft Regulations. This was accompanied by a Findings Document in relation to its review of the 1999 Regulations (“the Findings Document”). The Findings Document summarised in detail the submissions made by the various parties who participated in the process and briefly set out the Authority’s findings in relation to each of the issues raised.
4. The Authority has now called on interested parties to comment on the Draft Regulations. eMedia’s submissions in this regard are set out below. However, to give context to eMedia’s submissions, it also sets out various comments and concerns in relation to the Findings Document.
5. Importantly, the Findings Document is ambiguous as to whether the Draft Regulations are still being reviewed by the Authority itself or whether they are in “final form” and may be amended pursuant to submissions and hearing held in relation to the Draft Regulations. So, as an example, in paragraph 6.4.2 of the Findings Document, the Authority states its position as follows: “... *it is still in the process of reviewing the Regulations [the 1999*

Regulations], and upon the finalisation of the process, it would decide on whether to amend certain clauses of the Regulations or not”.

6. eMedia requires an opportunity to make oral representations relating to the comments contained herein and reserves the right to make additional submissions when such oral presentations take place.

eMedia

7. 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 1999 Regulations. Similarly, eNCA holds a significant place in the South African broadcasting landscape and, in this capacity, will also be directly impacted any changes to the 1999 Regulations.

eMedia’s concerns regarding the Draft Regulations

8. In the Discussion Document the Authority explained that the purpose of the review of the 1999 Regulations was to assess the 1999 Regulations which it believed were outdated. In this regard, the Authority stated the following:

*“Given the rapid evolution of the broadcasting sector, Advertising Regulations are **outdated** and need to be reviewed as they have been in force for a period of over 18 years”.*

9. In view of this statement made by the Authority, eMedia believed that the Authority had recognised the importance of the need to review and revamp the outdated 1999 Regulations to keep pace with the rapid evolution of the broadcasting sector. In making its submissions to the Discussion Document, eMedia relied on this statement. It is for this reason that in its submission, eMedia stated that the 1999 Regulations needed to be amended and replaced with a light-touch approach to regulating advertising for broadcasters. eMedia further

submitted that in doing so, the Authority should look to create greater flexibility through deregulation while imposing certain restrictions on subscription broadcasters.

10. It is deeply disappointing and of great concern to eMedia that the Draft Regulations, for the main part, replicate the 1999 Regulations and seemingly ignore the fact that the 1999 Regulations are outdated well as the fact that they fly in the face of ICASA's statement that any new regulations needed to consider the rapid evolution of the broadcasting sector. The Authority appears to have ignored its stated purpose and does not deal with this issue at all in its Findings Document. for the need to review the 1999 Regulations.
11. The lengthy Findings Document sets out a summary of the submissions made by various parties in relation to the Discussion Document. Thereafter, the Authority briefly states its position in relation to each issue dealt with in the Discussion Document. Often the position taken by the Authority does not explain why the Authority adopted such a position and often, no reasons are given as to why it took this position or rejected the submissions of the parties commenting on the Discussion Document.
12. So, for example, in relation to the topic of "recent trends on advertisements, infomercials and programme sponsorship revenues", eMedia submitted that limitations needed to be placed on the amount of advertising time available to subscription broadcasters (see paragraph 7.3 of the Findings Document). The Authority's stated position in this regard is that *"it will continue to observe and monitor the revenue trends"* (see paragraph 7.8.2 of the Findings Document). The Authority completely ignores eMedia's submission in relation to the limitations which it submitted needed to be placed on the amount of advertising time available to subscription broadcasters and provides no reason for this.
13. Further, in response to the Authority's question as to whether there was a need to revisit the definition of advertising, infomercials, and programme sponsorship, eMedia submitted that *"all public service announcements, whether paid or unpaid, should be excluded from the definition of advertisement"* and that *"product placement should be excluded from the definition of sponsorship"* (see paragraph 8.2.1). The Authority's stated position in the Findings Document was that the current definition of advertising was sufficient given that it afforded greater protection to consumers and gave certainty to broadcasters. However, the issues raised by eMedia were, once again, simply ignored without reason. The same applies to the submission made by eMedia on sponsorship.

14. Regarding the question of the impact of the 1999 Regulations on the financial viability of broadcasters, the Authority merely stated that its position was that the 1999 Regulations were drafted so as to ensure that they would strike a balance between broadcasters' financial revenue while protecting consumers. Once again, and without reason, the Authority simply ignored eMedia's submissions concerning the inequality between the licences of MultiChoice and eMedia in respect of the limitations (or lack thereof) contained in their respective licences. Once again, eMedia's proposal that the amount of advertising for subscription broadcasters needed to be limited, was ignored.

Comments on the Draft Regulations

15. Turning to the Draft Regulations, eMedia has the following comments:

- 15.1. **Definition of "*advertisement*"** – section 1.2 of the Draft Regulations

- 15.1.1. for reasons set out in its submissions to the Authority in relation to the Discussion Document, eMedia submits that the words "*public service announcement for which a broadcaster receives a consideration*" as appears in section 1.2.1 should be deleted; and

- 15.1.2. for the sake of consistency, section 1.2.2 should delete the words "*in respect of which the broadcaster does not receive any consideration*" after the words "*public service announcements*". In other words, public service announcements, whether paid or not, should be excluded from the definition of "*advertisement*".

- 15.2. **The definition of "*programme competition*"** in paragraph 1.18 is overly restrictive. In broadcasting programme competitions, broadcasters, and hence the Draft Regulations, need to align themselves with the provisions contained in the Consumer Protection Act (Act 68 Of 2008) which provides, inter alia, that a "promotional competition" is "*any competition, game, scheme, arrangement, system, plan*" which "*is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services*" Accordingly, it is suggested that the definition of "*programme competition*" read as follows:

“programme competition” means a competition which is either a standalone competition or one which forms part of, or is linked to, a programme by way of a competition window, insert or slot”.

- 15.3. **The definition of “public service announcement”** in section 1.20 is overly restrictive as it limits itself to disasters or immediate grave danger to the public or something which is in the interest of public welfare. Public service announcements may be such that they constitute neither an announcement in relation to a disaster, grave danger or one which is in the interest of public welfare. So, for example, a public service announcement calling upon people to register for Set Top Boxes or registering to be on the voter’s roll, do not constitute disasters, grave dangers, or issues to do with public welfare. It is accordingly suggested that the definition contained in section 1.18 of the 1999 Regulations be retained.
 - 15.4. **Clause 1.22 dealing with sponsorship** – it is suggested that the words appearing in section 1.20 of the 1999 Regulations to the effect that sponsorship elements include *but are not limited to* marketing material which forms part of, or superimposed on, the broadcast programme material be reinserted. The omission of the words “but are not limited to” renders the suggested wording in the Draft Regulations overly restrictive.
- 16. Advertising – section 4.2**
- 16.1. The wording is overly restrictive regarding the inclusion of programme competitions for the reasons outlined in paragraph 15 above.
 - 16.2. The very purpose of a programme competition is often to promote the commercial interests of the person, product or service referred to in the course of such transmission. So, for example, e.tv recently broadcast a sponsored competition known as “Sanlam Moola Magic”. This was a standalone competition which formed a programme in its own right. However, during the competition / programme, reference was made to Sanlam, their branding appeared on the sets and the like. This would be precluded by the suggested definition of “programme competition” in the Draft Regulations. Accordingly, the words “programme competition” should be deleted from section 4.2.

17. Programme sponsorship – clause 6.4

17.1. The exclusion contained in this section should also include economic indicators.

18. Product Placement - Clause 6.8

18.1. This clause needs to be deleted in its entirety. The inclusion of this section shows a misunderstanding of the nature of broadcasting. It is impossible to administer what would be required in terms of this provision. There are multiple executions of active and passive placements as well as digital brand integration which often happens at the last minute.

18.2. In a daily soap, product placement may vary from day to day. It would be impractical, almost impossible, and out of context to start a programme showing a logo at the beginning of the programme and at the end of the programme. An episode of any series, whether South African or otherwise, does not start with opening credits. Rather, it commences with the start of the particular episode.

18.3. Insofar as the television viewing public is concerned, there is no reason for the inclusion of the proposed clause. The television-watching public are an intelligent audience. Whether or not they are aware that the use of say, a Mercedes Benz, constitutes product placement, does not in any way impact them particularly as product placement can never take precedence over the content of the programme and in no way has any impact on the audience such that they may need protection.

19. Contravention and penalties

19.1. Insofar as contraventions and penalties contained in paragraph 7 are concerned, these are overly punitive. This is particularly so as no guidance is given (as it is in the ICASA Act) as to the maximum penalty can be imposed in relation to specific contraventions of the Act. It is submitted that there is no basis for suggesting that a fine can be up to 10% of annual turnover. To include this clause could very well cripple a business. The maximum fine should be linked to a particular figure, such as R 3 million as suggested in the Draft Regulations. This is not an insubstantial amount of money.

1 June 2021.