GOVERNMENT NOTICE

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

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FINDINGS AND REASONS DOCUMENT

ON THE

SPORT BROADCASTING SERVICES REGULATIONS, 2010

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A. INTRODUCTION

1. Aims of Findings Document

The primary purpose of this Document is to highlight key issues raised by stakeholders during the consultation process with the intention to ensure that the decisions taken by the Authority take into account the views raised by industry, sport rights holders and the general public. This document is confined only to those issues that were raised in the consultation document published in Government Gazette No 31483 dated 02 October 2008.

The Authority published a Discussion Document on 02 October 2008 inviting inputs from interested stakeholders and the general public. The document specifically mentioned Dispute Resolution as the cornerstone of the review, although stakeholders were invited to raise any other related matters. The extension of the discussion beyond the introduction of a specific dispute resolution mechanism was informed by the fact that the 2003 regulations were up for review. The Authority is of the view that a comprehensive discussion was needed to ensure that South Africans, including those from historically disadvantaged communities are exposed to as many sporting codes as possible. The Authority believes that exposure to more sporting codes by historically disadvantaged individuals and communities will accelerate the transformation of the sporting codes themselves.

The 2008 Discussion Document raised a number of competition issues as a way to locate the review within a broader context, taking into account the implications of chapter 10 of the Electronic Communications Act, 2005 (ECA). Although competition issues were raised for the purposes of sketching the broader context, the Authority was aware that any competition matters can only be addressed through the process outlined in Chapter 10 of the ECA. It is for this reason that the draft regulations do not carry forward the competition issues raised in the Discussion Document. The Authority is embarking on a separate process to deal with competition issues in broadcasting.

In order to deal with the complex and competing needs of various stakeholders, the Authority also relied on benchmarking with other countries. In particular, the

Authority's approach to dispute resolution has been influenced by other jurisdictions, including the United Kingdom, Ireland and the United States of America.

2. Legislative Background

In 2003, the Authority, in fulfilling its legislative obligations, published a Position Paper and Regulations on Sports Broadcasting Rights, 2003. This regulatory framework was a culmination of a public inquiry which sought to ensure universal access to sporting events of public and national interest, as well as encourage investment to promote the economic stability and the competitiveness of the broadcasting industry.

Although the existing regulations were formulated in terms of the Broadcasting Act, Section 60(1) of the Electronic Communications Act, 2005, which repealed some of the provisions of the Broadcasting Act, directs the Authority to regulate the acquisition of rights to national sporting events.

Section 60(1) provides that:

> *"Subscription services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister of Communications and the Minister of Sport and in accordance with the regulations prescribed by the Authority"*

Section 60(2) states that:

> *"In the event of a dispute arising concerning subsection (1), any party may notify the Authority of the dispute in writing and such dispute must be resolved on an expedited basis by the Authority in accordance with the regulations prescribed by the Authority.*

In order to comprehensively review the current regulations on Sports Broadcasting Rights and fulfil the provisions of section 60(1) and (2) of the ECA, the Authority invited interested parties and the public to respond to the issues and questions raised in the Discussion Document. The closing date for the receipt of representations was initially set at 7 November 2008 and later extended to 21

November 2008. The Authority received Twelve (12) submissions, seven (7) of which expressed their interest to make oral presentations. Submissions were received from the following stakeholders:

- M-net
- SABC
- E-TV
- PSL and SAFA
- WoWtv
- Telkom Media
- Shaun Ryan
- SARU
- ODM
- MultiChoice
- MTN
- Cricket SA

Public hearings on the Discussion Document were held on the 22 and 23 January 2009. The hearings allowed interested parties opportunity to highlight and clarify their positions on all issues raised in the Discussion Document.

Based on the preliminary findings received from interested stakeholders and the public, the authority issued the Draft Regulations on Sport Broadcasting Rights for further consultation. The Draft Regulations were submitted to the Minister of Communications and Minister of Sport and Recreation as required by section 60 (1) of the ECA. Where necessary, the views of the Ministers are incorporated as part of the analysis of the written and oral submissions. In addition to the responses from the Ministers, the Authority received seven (7) submissions on the Draft regulations from the following interested stakeholders:

- SABC
- E-TV
- M-Net and MultiChoice
- PSL
- GPA

- SARU
- Cricket SA

B. ANALYSIS OF WRITTEN AND ORAL SUBMISSIONS PRESENTED ON THE DISCUSSION DOCUMENT

II. SUBMISSIONS TO THE DISCUSSION DOCUMENT

The Discussion Document raised sixteen questions as a way to guide the discussions with stakeholders and the general public. For the purposes of consistency, the submissions are analysed in terms of the questions as they appear in the Discussion Document. Below is the analysis of the submissions.

1. Should the Authority impose License conditions to prevent pay TV operators from obtaining exclusive rights to televise listed events?

Telkom Media is of the opinion that the Authority should consider licence conditions relating to the acquisition of exclusive rights in the case of licensees with significant market power (SMP). This should include conditions relating to rights acquired by affiliates of an SMP entity in vertically and/or horizontally integrated companies. The conditions should enable sublicensing of content to non-dominant competitors on a non-discriminatory basis; that is, on the terms offered to affiliates in vertically and/or horizontally integrated companies. This should be imposed at least for an interim period of five (5) years, (or until the completion of the application of Chapter 10 of the ECA to the broadcasting industry) extendable if market statistics do not reveal significant penetration of the market by the competitors.

WOWtv is of the view that the Authority should not prevent pay-tv licensees from obtaining exclusive rights to televise listed events, but should rather require them, after securing such rights, to immediately conclude a sublicensing agreement with a free to air broadcasting service licensees with regard to listed events.

ODM is of the view that the Authority should make use of all policy and regulatory instruments available to it to encourage and ensure fair competition, without

becoming directly involved in the day to day operations and the commercial activities of subscription broadcasting service licensees.

ODM does not support an outright prohibition on obtaining exclusive rights, either through regulations or licence conditions. In fact, this would be contrary to industry and regulatory practice worldwide, where the right to acquire exclusive rights is recognised as the basis of Pay TV and indeed public service and commercial broadcasting.

However what regulators around the world have sought to achieve is the "packaging" of exclusive rights so as to require rights' holders to make their content available to a greater number of broadcasters. ODM submits that such an approach would also be in line with the provisions of the Competition Act. ODM is of the view that the most effective way in which the Authority can secure the free availability of all listed "national sporting events", is for the Authority to require all broadcast services licensees to agree on:

(1) a transparent and open procedure for the bidding for rights
(2) a procedure for the acquisition of rights that FTA broadcasters cannot or do not wish to acquire.

Shaun Ryan[1] submits that the Authority should not implement a set of licence conditions that restrict pay-TV operators from acquiring exclusive broadcast rights to listed sporting events. Pay-TV operators should be able to acquire rights to listed sporting events but have to (under Section 60(2) of the *Electronic Communications Act* of 2005 "ECA") sub-licence the rights to a free-to-air broadcaster. This would ensure that pay-TV operators are afforded the opportunity to attract subscribers to their networks.

The listed event would also be broadcast on a free-to-air broadcaster (not necessarily live) to ensure that South Africans are able to engage with the text;

[1] Shaun Ryan is an academic. He recently completed his Masters dissertation at the University of Kwa-Zulu Natal and writes in his personal capacity. The dissertation examined the influence of globalisation and media control on the national interests in terms of South Africans sport broadcasting rights, as represented in the ICASA Position Paper (2003).

irrespective of their financial status. Shaun believes the Free-to-air broadcasters should still be able to acquire exclusive rights to listed events through competitive bidding, to ensure that both pay-TV and free-to-air broadcasters bid extensively for the rights to broadcast events live; enabling sport rights holders to generate revenue.

Cricket South Africa (CSA) would prefer a non-regulatory environment. Cricket SA is in support of the self-regulation of sport broadcasting rights. Meanwhile SA Rugby states that the regulatory intervention should be minimal. SA Rugby proposes that the Authority should develop regulations around dispute resolution to resolve disputes between pay television and free-to-air broadcasters. Such a Dispute Resolution mechanism should be confined to the listed national sporting events.

M-Net supports a self regulatory mechanism as sport federations themselves are best positioned to determine what is best for their sporting events and how best to sell their broadcasting rights. Thus, the rights holders, instead of the Authority, will state the terms and conditions of the broadcasting rights. Therefore the regulation should not deal with the prevention of subscription broadcasters from acquiring exclusive rights or hinder the free-to-air broadcasters from broadcasting the sporting event. This should be left to the arbitrator to decide whether the subscription broadcaster is hindering free-to-air licensees to broadcast a listed sport event.

The SABC agrees that the Authority must make it a condition that a package of broadcast rights relating to listed national sporting events be sold exclusively to free-to-air broadcasters. They further state that the Authority must ensure that pay TV operators who acquire broadcast rights to listed national sporting events are placed under an obligation to offer some of the events to free-to-air broadcasters (propose at least 50% of the matches must be available on free-to-air platform).

E-tv supports the SABC and states that the broadcast of key sporting events exclusively on pay-TV has a negative impact on the participation of many South Africans in sport and could undermine transformation in sport.

MTN submits that it is not necessary for the Authority to impose license conditions on broadcasters to prevent pay TV operators from obtaining exclusive rights to televised listed events. The reason is that the ECA, in section 60(1), already prohibits the acquisition of exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events prescribed by regulation.

2. **Are the criteria used to list an event still relevant? If not give an alternative that the Authority should consider applying in the regulations. Refer to annexure A (Listed National Sporting Events)**

Telkom Media and WOWtv submit that the listing criterion as contained in the current regulations remains relevant. Telkom Media believes that the current approach should be maintained and applied accordingly in the determination of national sporting events.

ODM believes that the current criteria have served their purpose and still bear relevance but should be updated to take into account local and global developments in sports broadcasting and regulation.ODM proposes that the Authority retain the current list and include with each event on the list the following addition: "*and any other international and national events that satisfy the criteria but are not listed at the time at which the regulations come into force and before the regulations are revised or updated*".

Shaun Ryan submits that the current criteria used to determine the national sporting events ensure that South Africans are exposed to the senior national teams of the most popular sports whilst, at the same time, generating exposure for local competitions and domestic leagues. Although it would be admirable to include the semi-finals of the national knockout competitions listed in Annexure A, it could place unnecessary strain on the capacity of free-to-air broadcasters, who have their own schedules to uphold.

PSL and SAFA are of the view that the Authority should not change the current regulations as they are working perfectly for the industry and the list should not be

expanded as it will adversely impact and decrease the revenue of PSL and SAFA. They believe that listing of matches devalues its rights, and states that this is evident in listing of Bafana Bafana as pay televisions are excluded from bidding because they are interested in acquiring exclusive rights for their viewers. Thus, competition is only limited between SABC and e.tv (has no capacity and interest) and leaves the public broadcaster to acquire the rights in a far less price below the market value. However, the federations believe that the new deal packaging of the rights to broadcasters does not devalue the sports rights but promote exposure while generating revenue.

CSA is of the view that the criteria selection of listed sporting events should not be amended as national interest is based upon the resonance of an event with the population of the country as a whole. CSA and SA Rugby concur with PSL and SAFA that the listing of sporting events automatically devalues the sports rights which negatively impacts on the sale of the broadcasting rights which consequently affect the revenue derived.

The SABC's study on audience segmentation and others[2], have reported that the current listing criteria are no longer relevant. The SABC also do not believe that the existing criteria were used in a consistent manner, and thus urge that the Authority in reviewing the current listing take into account the SABC's proposed list.[3]

3. <u>Which events in the current list are eligible for listing or de-listing? Please provide your proposed list giving justification for adding or removing an event from the list.</u>

As stated above, Telkom Media is in agreement with the listed events but would recommend that the list be updated to include name and sponsorship changes, and WOWtv's proposal list for sporting events include the National cycling events and International boxing events. However, ODM does not believe that the list needs to be revised.

[2] Market intelligence provided by agencies such as BMI Sportrack et al

[3] Par. 49 on pgs 18 to 20 of the SABC SUBMISSION/Final Response to Discussion Paper on Review of Sports Broadcasting Rights Regulations

Shaun Ryan is of the view that the events that are represented on the list cover an array of sports with particular attention being paid towards the three main (or most popular) team sports in South Africa (cricket, rugby and soccer). There is room for the Vodacom Cup (rugby) final to be incorporated into the list. He states that the Vodacom Cup is billed as being a development tournament for young rugby players. Listing the Vodacom Cup final as a national interest event could help promote the 'prestige' of the tournament and expose South Africans to the country's young talent. He stresses that the current list of sporting events deemed to be in the national interest does lack local or indigenous South African sports.

The SABC submits that the sporting events list[4] will have to be revised every 3 years as some of the sporting codes may shift in terms of preference and popularity. In addition the Gauteng Promoters Association (GAPRASSO) propose that the list should include boxing as an event which will allow the South African public who do not have access to subscription television channels a chance to witness boxing contest.[5]

M-Net suggests that the current regulations should not be amended as they are currently working well. M-Net however, concurs that the Authority has powers to review the regulations as it deems necessary..

4. Should the Authority follow the same monitoring approach outlined in the current regulations?

The view of the SABC, WOWtv and ODM is that the Authority should follow the same monitoring approach as outlined in the current regulations.

[4] Par. 50 on pg 20 of the SABC SUBMISSION/Final Response to Discussion Paper on Review of Sports Broadcasting Rights Regulations

[5] Boxing events to be listed: pg 2 of the Oral submission by GAPRASSO

The current regulations make provision for compliance monitoring. The Authority is required in terms of regulation 7(2) to issue an annual compliance report indicating the following:

(1) The extent to which events on the list have been acquired by free-to-air television broadcasting licensees;

(2) The extent to which those events for which the rights have been acquired or offered have been televised by free-to-air television broadcasting licensees; and

(3) Whether there are grounds for the Authority to remove events from the list.

Telkom Media is not aware of the existence of annual compliance reports that address the above-mentioned issues, and finds it difficult therefore to propose changes to the existing regulations without having assessed the efficacy of the current monitoring approach. Shaun Ryan is of the view that the current regulations appear to be beneficial to all parties concerned.

5. Should the Authority adopt a similar approach to the Australian "anti-hoarding" regulation? If not please provide an alternative.

WOWtv suggests that the Authority should learn from the Australian approach as it remains robust thus allowing for a transparent and non-discriminatory regulatory regime. However, the view should be to be prepared to continuously improve on the Australian approach as circumstances might dictate locally.

Telkom Media supports the "anti-hoarding" regulations as they provide that unused rights acquired by broadcasters to provide coverage of a live event must be made available to other broadcasters. They propose that unused rights be made available to all broadcasting services through a public process.

ODM agrees with the notion of "anti hoarding regulation" and any other regulations that invoke 'use it or lose it' principles both as a deterrent to anticompetitive behaviour and in the best interests of consumers. Therefore submits that reference to regulations applied in other jurisdictions may provide a useful source of "tried and

tested" methods to deter anti-competitive conduct and serve the interests of consumers.

Shaun Ryan disagrees and submits that the South African list does not include all sporting events. The sporting events identified as being in the national interest do not pose too great a strain on the broadcast schedules of the free-to-air broadcasters. He further submits that the sporting events considered to be in the national interest must be broadcast on a free-to-air broadcaster. An anti-hoarding type approach may need to be implemented with regards to the new subscription based broadcasters, considering the fact that MultiChoice dominates the market at the moment.

PSL and SAFA are of the view that the Authority should not review the current list as the additional list proposed by the SABC argued for classic derbies as this will have deleterious effects on the whole PSL matches which will consequently affect other PSL matches. They believe it is better to sell the rights jointly as opposed to individually.

The SABC agrees, noting that anti-hoarding rules under the Broadcasting Services Act of 1992[6] require a pay TV operator who has acquired rights to broadcast a listed event or series live but does not intend to broadcast the whole or part of the aforesaid event or series to offer to transfer the right to broadcast the whole or part of the aforesaid event or series to the national broadcasting services (Australian Broadcasting Corporation and Special Broadcasting Service Corporation) for a nominal fee.

[6] Australian Broadcasting Act of 1992

6. Should the Authority include a regulatory clause codifying the length of time broadcasters can take in terms of committing to coverage and timing of a sporting event?

Telkom Media agrees with the proposed inclusion of a regulatory clause codifying the length of time broadcasters can take in committing to the coverage and timing of listed events as this will ensure greater clarity regarding the broadcasting of national sporting events. WOWtv also agrees but state that the time should be reasonable taking into account all relevant logistics.

ODM agrees and submits that a reasonable timeline needs to be established depending on the event and timeframes where free to air (FTA) broadcasters decide not to use a right.

Shaun Ryan submits that the sporting events that are deemed to be in the national interest and therefore required to be made available to all South Africans with access to a television on a free-to-air broadcaster should be broadcast as close to the actual time of the event as possible. Pay-TV broadcasters who secure the rights may want to broadcast the event live (on an exclusive basis) to attract subscribers and sustain their own financial interests.

The sub-licensed rights acquired by the free-to-air broadcaster should stipulate the most appropriate time for the event to be broadcast. If the sub-licence agreement allows the free-to-air broadcaster to begin screening the event 'delayed live' then the event should be broadcast during half-time of the live event. This will ensure that needs of the subscription based broadcaster are met. If the agreement stipulates that the event must be 'delayed' then broadcasting should commence on the free-to-air broadcaster within an hour of the event's culmination.

M-Net believes that the Authority has no jurisdiction over sports rights holders of the national sport events (sports federations), thus it cannot regulate commercial agreements between the rights holders and rights purchasers and how rights should be packaged.

According to the SABC the regulator should protect the public broadcaster in terms of the actual promotion of the events as this can be a limiting factor depending on what the sub-licensing agreement entails. SABC is against promotional restrictions and submits that the rights owners restrict the sub-license from promotion of events.

7. What should be the recommended period that a broadcaster can take in committing a sporting event before it is broadcast?

Whilst there is no universally defined period for committing to broadcasting listed events, the European Broadcasting Union's (EBU) regime for sub-licensing sports programmes provides some guidance:

> *"The Member shall decide on its intention to broadcast live as early as possible, and at the latest three months before the start of an event..."*[7]

Telkom Media therefore submits that broadcasters should commit to broadcasting a listed event within a 3 – 6 month period. WOWtv also suggest a minimum of six months. ODM also concur given the complicated planning and logistics of broadcasting a live sports event, FTA broadcasters should be required to indicate their desire to cover a listed event at least 6 months before a scheduled event.

Shaun Ryan is of the view that events must be broadcast at a time that suits the consumers. Broadcasting events at the middle of the night would be impractical as many interested audience members may not be able to watch the event.

The SABC proposes a period of six months prior to the actual broadcast as it will allow the national public broadcaster sufficient time to exploit content in case the rights are being sub-licensed.

[7] European Broadcasting Union, Sublicensing Rules for Eurovision Sports Programmes, 2005. http://www.ebu.ch/CMSimages/en/leg_rules_sublicencing_150305_tcm6-44855.pdf

8. In an event that a free-to-air broadcaster has failed to commit to broadcasting a listed event, should the sport bodies assume there is no interest to broadcast such an event?

Telkom Media submits that failure to commit to broadcasting a listed event by a free-to-air broadcaster may be attributable to a number of factors, including scheduling and budgetary limits.

Non-committal to broadcasting listed events may further be attributed to the fact that there are neither obligations nor penalties that compel free-to-air broadcasters to acquire the rights to listed events. There are no guarantees that free-to-air broadcasters will broadcast, live and in full, the listed events for which they have acquired rights. Therefore in attempting to enhance the operation of the anti-siphoning provisions, the Australian Ministry for Communications, Information Technology and the Arts developed guidelines to ensure coverage of listed events by free-to-air broadcasters[8].

The seven 'use-it-or-lose-it" guidelines consider, inter alia, an assessment of the rights acquired by free-to-air broadcasters and the extent to which sports rights have been used. Listed events that have been shown to receive inadequate coverage, or are not acquired by FTA broadcasters, may be eligible for permanent or temporary de-listing.

It is Telkom Media's view that the obligation for pay-tv to offer sub-licensing rights to FTA broadcasters should be matched by a corresponding obligation on free-to-air broadcasters to broadcast listed events. Furthermore, Telkom Media submits that regular compliance reports will inform the extent to which events should be removed from the list, or made available to other commercial broadcasters.

WOWtv also proposes the implementation of the "use it or lose it" approach. ODM submits that other broadcasters should be given a reasonable opportunity to bid for the rights to broadcast such a listed event, subject to reasonable timelines.

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[8] 'Use it or lose it' guidelines released for anti-siphoning sport, 20 December 2006/ http://wwww.minister.dcita.gov.au/coonan/media/media_releases/use_it_or_lose_it_guidelines

Shaun Ryan submits that should a national interest sport not be broadcast on a free-to-air broadcaster the perceptions of audience members should be gauged. If there would have been a significant following of the event, the event should remain listed but the free-to-air broadcaster who had acquired the rights must broadcast the event as stipulated at a later stage. The national interest is established to meet the nation's interests. The viewers need to be consulted.

PSL and SAFA emphasise the minimal intervention by the Regulator and the need for self regulation as the sports bodies are best placed to find solutions to the challenges they encounter on a daily basis. They state that in few occasions, the SABC has failed to broadcast matches on an exclusive basis because of capacity constraints as they have other obligations to fulfil (examples of matches listed in the submission).

SABC states that it will not be reasonable for the Authority to come to a conclusion that the SABC does not have interest to broadcast a listed event. There may be a whole range of reasons which may preclude a broadcaster from committing to broadcast a listed event. By way of illustration, it is conceivable that two listed events may take place on the same day and a pay TV operator may fail to reach agreements on the terms and conditions (including price) for the broadcast.

9. Is there a recommended procedure that the sports bodies should follow, before making a listed event available to subscription broadcasters, in an event that free-to-air broadcasters have not committed to a particular sporting event?

Telkom Media submits that the current legislative and regulatory framework does not confer automatic rights to free-to-air broadcasters to broadcast listed events. The intention of Section 60(1) is to ensure universal access to national sporting events through sub-licensing to FTA broadcasters.

In line with international best-practice, as identified in the discussion document, Telkom Media suggests that the following principles be applied in making national sports broadcasting rights available to all broadcasting services:

(1) Unbundled rights/packages across different platforms;
(2) Public tender process with fair and transparent terms;
(3) Limited contract duration (3 years).

WOWtv suggests that the Authority should set out clear and concise a criterion that qualifies a sporting event to be listed or delisted. In addition ODM submits that a reasonable timeline needs to be established, depending on the event and timeframes where FTA broadcasters decide not to use a right. ODM submits that FTA broadcasters should be required to indicate their desire to cover a listed event at least 6 months before a scheduled event.

Shaun Ryan submits that pay TV operators should always be able to access the material. However, if a free-to-air broadcaster acquired the exclusive rights to an event, and the pay-TV operators would not be able to broadcast it (but having shown intent during the bidding process) they should be able to acquire the rights from the free-to-air broadcaster. Self-regulation should prevail with the broadcasters coming to a mutual agreement. If an agreement cannot be met, the Authority should be consulted.

The SABC submits that the Authority should look at enforcing the law of unbundling the rights to free-to-air and should the pay TV broadcaster be the gate keeper, at least 50% of the rights must be available on the free to air space.

10. <u>With the introduction of digital terrestrial television technology, does the current list suffice? Will it still be necessary to remove an event based on capacity constraints?</u>

WOWtv is of the view that the list should not be driven by capacity but should be guided by set principles that are clear and concise to either qualify or disqualify certain sports. While ODM submits that the introduction of DTT will indeed make

more channels available to current free to air (FTA) broadcasters, and it is anticipated that after the dual illumination period, new broadcasters/channels will be licensed. The Authority will have to review the Sport Broadcasting Rights regulations after 2011, in light of the progress made in the migration to DTT, and in light of the provisions of the Competition Act.

Shaun Ryan submits that the introduction of digital technologies should improve channel capacity. Events, therefore, should not be removed.

The SABC does not believe that there will be a further need to increase the list suggested.[9] The SABC has detailed information on the business model for sport in a DTT environment. However, the information is confidential and can only be made available on request by the Authority.

11. In addressing competition concerns do you agree that the Authority will require a separate process? Give reasons for your answer.

Telkom Media submits that there has not been effective competition in the pay-tv industry and this is having a dampening effect on the expansion of pay-tv within South Africa. However, with the issuance of competitive licenses, new competitors will enter the market, ready, willing and commercially able to provide competitive alternatives to South Africans, if the Authority acts to regulate behaviour within the industry.

Telkom Media agrees that the Authority should conduct a separate process for addressing competition concerns in the broadcasting market. This view is supported by the Authority's comments and concerns as articulated in the discussion document. Competition issues may be addressed through the provisions of Chapter 10 of the ECA.

[9] Refer to footnote 2 above.

Telkom Media's submission to the Authority with respect to the draft section 67 regulations addressed competition concerns in the broadcasting market.[10] These include:

(1) The identification of all possible broadcasting markets;
(2) The identification of broadcasting services with Significant Market Power ("SMP");
(3) The identification of broadcasting markets with ineffective competition;
(4) The decision on pro-competitive remedies to be imposed to circumscribe abuse of dominance.

Telkom Media suggests that the Authority examine six areas for further regulatory intervention. They pertain to regulation of entities with significant market power in any content market in South Africa. These areas include:

(1) Regulatory conditions imposed on dominant broadcasters and their affiliates that require forced sublicensing of content to non-dominant competitors on a non-discriminatory basis on the terms offered to affiliates in vertically and/or horizontally integrated companies. This should be imposed at least for an interim period of five (5) years, extendable if market statistics do not reveal significant penetration of the market by the competitors;

(2) The development of regulations that prohibit the exclusive acquisition of broadcast rights by licensees with SMP and their affiliates to essential content.

The development of regulations that enforce the mandatory release of content by licensees with SMP to competitors through sublicensing on fair and reasonable terms, rights which (1) they do not plan to use; (2) do not

[10] Submission by Telkom Media concerning the ICASA Draft Regulations issued in terms of section 67(4) of the ECA, 14 May 2008.

have sufficient air time to use; (3) do not have historic business model or current infrastructure to use at the time of purchase; (4) do not actually use at the time of opening of the broadcasting season in the case of seasonal programming or the sports season in the case of sports content;

(3) The prohibition of anti-competitive business tactics by licensees with SMP which effectively threaten content rights holder with retribution if the rights holder deals with a competitor. This includes, among others, refusal-to-deal threats and tactics, bundled pricing discounts, packaged pricing discounts, acquisition and hoarding of content for deprivation of competitors, engaging in predatory pricing, and similar anti-competitive schemes promoted by licensees with SMP;

(4) The prohibition of exclusive rights on any platform that would extend the market control of a licensee with SMP from its legacy platform to other platforms, including the platforms of its competitors and/or to new markets. This could include mobile TV, IPTV and online video, etc. For an interim period of five years;

(5) The development of regulations proscribing cross-media ownership by a licensee with SMP of different media distribution types (eg. Satellite DTH television; IPTV; mobile and on-line, print media, radio, etc.) for an interim period of five years, renewable if and as the Authority concludes at the end of the five years that the SMP continues to dominate the distribution market; and

(6) The imposition of a balancing test to evaluate, alter or nullify existing exclusive contracts of licensees with SMP based on five factors:

(i) Effect on the development of competition in local and national markets,

(ii) Effect of the exclusive contract on competition by multichannel distributor in distribution technologies,

(iii) Effect of the exclusive contract on attracting capital investment into new programming,

(iv) Effect of the exclusive contract on diversity of programming in the multichannel distributor distribution market, and

(v) Duration of the exclusive contract.

Telkom Media therefore submits that there is a need to undertake a separate inquiry into competition matters in the broadcasting market in order to address the acquisition and exploitation of broadcasting rights based on the following principles outlined above:

(1) interim mandatory licensing of content by licensees with SMP to competitors on a non-discriminatory basis and on terms equal to those provided to affiliates;

(2) restriction of exclusive rights to essential content (e.g. sports and premium entertainment) and mandatory sale or sublicensing of rights by a licensee with SMP to competitors;

(3) prohibition of specific anti-competitive behaviour (such as directly or indirectly influencing content rights holders not to deal with competitors);

(4) prohibition of a licensee with SMP to purchase exclusive rights to content for distribution on a new platform or to a new market into which a new licensee has recently entered for an interim period of five years;

(5) at least interim prohibition of cross-ownership by a licensee with SMP of different platforms for content distribution;

(6) regulatory amendment to existing exclusive contracts of a licensee with SMP based on a five-pronged public interest balancing test.

WOWtv is of the view that if an anti-competitive behaviour is reported, the Authority needs to follow a separate process and refer the matter to the Competition Commission.

ODM fully agrees with the view that in addressing competition issues the Authority will be required to adhere to the requirements of chapter 10 of the Act. However, given the link between these regulations and the proposed chapter 10 process, ODM has set out proposals on interim measures. By way of illustration, ODM draws the Authority's attention to two ways in which the dominance of sports rights holders is kept in check in other countries:[11]

(1) Firstly, sports rights' holders may be required to split large events into rights packages, so that more than one player has the opportunity to share the rights. This approach was followed in the UK, in respect of the Football Association Premier League (League) by the League itself, but only because the League knew that the regulator would step in if it did not address the competition concerns that would otherwise arise. (This has the likely additional impact of maximizing revenues for the rights holders and therefore not being something they are fully against).

(2) Secondly, the incumbent can be required to wholesale its sports channels to the 'market', so that any other channel reseller/TV platform can access the channels at a wholesale price and resell channels to customers.

In so far as this Discussion Document deals with competition matters, ODM has made certain submissions in this document but also wishes to engage with the Authority in a more systematic and comprehensive manner regarding competition matters. Specifically, ODM notes at paragraph 2.6 of the Discussion Document that the Authority plans to "embark on a separate exercise to discern competition issues in broadcasting, especially taking due regard to the implication of Chapter 10 of the ECA".

[11] 1 As discussed below, section 3(1) of the Competition Act, 89 of 1998, as amended, "applies to all economic activity within, or having an effect within, the Republic [of South Africa]."

ODM is concerned that the Sport Broadcasting Rights regulations will be published by the Authority in due course, but prior to the conclusion of the Chapter 10 processes. ODM considers it imperative that the regulations provide for mechanisms to ensure effective competition in the broadcasting sector and ODM would be grateful for the opportunity to engage with the Authority on competition issues in advance of the publication of the regulations. ODM representatives will make themselves available for such engagement with the Authority.

Shaun Ryan agrees the competition that will arise between commercial broadcasters will need a separate process. The identification of the national interest should only apply to events that need to be acquired by a free-to-air broadcaster. The competition that could arise between competing pay-TV operators may require different regulations as events other than those listed as national interest events may be affected.

CSA states that ICASA's jurisdiction is only limited to the broadcaster and has no authority to regulate the sports federations, thus competition matters have no bearing on the sporting events of national interest.

The SABC disagrees and states that the legislature under section 67(4) of the EC Act has sought to impose on the Authority an obligation to first define the relevant market segment in the regulation. They submit that the factors set out in sub-section 67(4) (a-f) can only be properly dealt with by the Authority once it has defined the relevant markets and market segments.

E.tv supports the Authority's proposal that it conduct a separate study on the implication of Chapter 10 of the ECA on broadcasting services. E.tv submits that it is essential that such a study should be convened as a matter of urgency as it impacts on various policies and regulations currently being considered by the Authority.

12. Should the Authority develop a sublicensing system for the listed events?

Telkom Media submits that sub-licensing should be subject to commercial negotiations but that ICASA should assist by creating a framework that provides predictability and transparency.

The European Union has intervened more actively to provide specific guidance on the policies required to provide competitors access to sports programming and content. In 2003, the Commission ruled to permit NewsCorp's purchase of Telepiu and Stream which allowed the combined entity to possess about 80% of the sports content rights in Italy. In order to achieve approval, NewsCorp had to make commitments until December 31, 2011 (an 8 year commitment) which included the following: rights for football clubs to unilaterally terminate contracts entered into with Stream and Telepiu with no penalties; NewsCorp's waiver of exclusive rights with respect to platforms other than DTH (terrestrial, cable, Internet, mobile, etc) as well as PPV and video on demand; and NewsCorp's obligation to offer third parties, on an unbundled and non-exclusive basis (so called, forced licensing), the right to distribute premium content on platforms other than DTH on a wholesale basis. In addition, due to its domination on DTH, NewsCorp had to divest Telepiu's digital and analogue terrestrial broadcasting assets and not enter into further digital activities in Italy. NewsCorp was also to be subject to an arbitration procedure through the expiration of the commitments.

Since the 2003 NewsCorp decision, the European Union has more actively developed requirements for open tender procedures for bidding on sports broadcasting rights. In the UEFA Champions League case from July 2003, the Commission first accepted joint selling with restrictions until July 31, 2009.[12]

[12] Commission Decision of July 23, 2003 relating to a proceeding pursuant to Article 81 of the EEC Treaty and Article 53 of the EEA Agreement (COMP./C.2-37.398 - Joint Selling of the commercial rights of the UEFA Champions League). The following restrictions apply until 2009:

- Award of rights based on an open invitation to tender;
- Breakdown of rights to packages;
- Reversion of rights on a non-exclusive basis to clubs if not sold within a week;
- Internet rights;
- Wireless rights for a period of four and then only three years;

Next, the Commission decided the German Bundesliga case in 2005 in which rights were again segmented into separate packages for TV broadcasting, Internet and mobile platforms, rights were to be disposed of using a public tender procedure and exclusive rights contracts were limited.[13]

Finally, in 2006, the Commission entered a formal decision in the English Premier League case which resulted in the imposition of additional pro-competitive measures within the already significantly competitive European environment. These elements are closer to what is required in South Africa for the introduction of competition in the pay television market.[14] Of particular relevance in South Africa is the prohibition of a single-buyer of live TV rights and reversion of rights not used immediately to keep licensees with SMP from hoarding rights to keep them away from competitors.

Further, the European Union issued a sector inquiry into the provision of sports content over third generation mobile networks which resulted in a report on September 21, 2005. In that report, it was concluded that the mobile phone market for sports content was different from the television market as one could not be substituted for the other. Still, similar competitive issues were identified to be

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- And other categories of rights.

[13] Commission Decision of January 19, 2005 relating to a proceeding pursuant to Article 81 of the EEC Treaty and Article 53 of the EEA Agreement (Case COMP/C.2/37/214 - Joint selling of the media rights to the German Bundesliga).

[14]The restrictions are:

- Limited duration of the agreements;
- Unused rights revert to the clubs for their redistribution;
- An explicit no single-buyer provision for live TV rights;
- Creation of more balanced rights packages;
- Increased availability of rights to broadcast via mobile phones (and online platforms); and
- Oversight of the process by a monitoring trustee.

[15] *Concluding report on the sector inquiry in to the provision of sports content over third generation mobile network*, European Commission, September 21, 2005.

addressed by the Commission, namely: cross-platform bundling; restrictions as to length and timing of coverage; joint selling; and exclusive access, including concerns about the duration of term.[15]

Telkom Media suggests that ICASA develop fair, transparent and non-discriminatory sublicensing guidelines for listed events that will guide commercial negotiations and promote competition between broadcasters. The sub-licensing guidelines should be based on the following general principles:

(1) Unbundled rights/packages across different platforms;
(2) Public tender process with fair and transparent terms;
(3) Limited contract duration (3 years).

WOWtv believes that the Authority should give detailed guidance to regulate the sub-licensing process so as to prevent possible exploitation. But ODM is of the view that the Authority should rather explore possibilities around windows and rights' apportionment directly with all the different channels, as opposed to creating sub-licensing environments.

Shaun Ryan submits that events that are deemed to be in the national interest should have a sub-license system in place. This would enable pay-TV operators to acquire rights and broadcast events live with a free-to-air broadcaster showing the event either delayed or delayed live. All parties (including the South African public) stand a chance to benefit in this regard. The new subscription based broadcasters will also be able to access valuable sporting content in a competitive market.

M-Net submits that the authority should not regulate the sub-licensing and pricing as it is outside of its jurisdiction. Further, it will be difficult for the Authority to determine prices, thus it should be left between parties to negotiate.

The SABC agrees and states that the Authority may need to have regard to the UEFA 2008 various media package deals which were concluded between the SABC and SuperSport, which was the official rights' holder.

MTN agrees with ICASA that the EC Act does not contain an empowering provision authorising the Authority to impose a sub-licensing regulatory regime. It further agrees with the Authority that care must be taken to avoid over-regulation of the market, and agrees that a sub-licensing regime is an effective regulatory tool and commercial mechanism available to both the Authority and a broadcaster to ensure that a broadcaster does not fall foul of section 60(1) of the EC Act.

The provisions of section 60(1) leaves a broadcaster with no option but to enter into a commercial sub-licensing agreement, i.e. should a broadcaster fail to enter into a commercial sub-licensing agreement, he will be in breach of the ECA and could be subjected to the enforcement provisions and sanctions of the ECA.

A failure of the parties to reach a commercial agreement will lead to a dispute and in terms of section 60(2), such dispute must be resolved on an expedited basis by the Authority in accordance with the prescribed regulations.

MTN submits that a sub-licensing regime by the Authority in terms of section 60(2) could indeed be one of a number of effective dispute resolution mechanisms i.e. a regulatory framework which first of all relies on commercial agreement to prevent a breach of section 60(1), and regulatory intervention only occurs if a dispute is referred to the Authority in terms of section 60(2).

13. Should the Authority adopt the approach followed by most jurisdiction of requiring the parties to resolve the dispute first through the non regulatory route before attempting the regulatory approach?

Telkom Media submits that the decision regarding dispute resolution would depend on the nature of the dispute. Where the dispute arises from a matter subject to regulation, such as failure of a party to make rights available within the required time period in terms of any anti-hoarding regulations, the matter should be resolved by the Complaints and Compliance Committee.

WOWtv believes that parties require resolving the dispute first through the non regulatory route before attempting the regulatory approach.

ODM is of the view that the approach followed by many other jurisdictions that require the parties to resolve disputes through the non-regulatory route should be adopted by the Authority. This has a number of advantages. On a capacity basis, it would reduce the burden on the Authority and demand on its resources. A further advantage of this approach is that it would allow the industry to resolve disputes through commercial negotiations and Alternative Dispute Resolution (ADR) mechanisms. ODM considers that the leading principle that the Authority should adopt is light touch regulation when it comes to subscription broadcasting services.

PSL, SAFA and Shaun Ryan agree and states that the parties concerned should be encouraged to resolve any disputes quickly, cost effectively and amicably. A competitive environment that is governed by forethought and commonsense will promote a healthy market conducive to serving the needs of the South African television audience.

CSA and SA Rugby supports the ADR mechanisms as it has been proven to be working and so far sport federations use it in commercial agreements as the preferred dispute resolution, and suggest that it be outsourced to professional entities who attend to these matters on a daily basis as their principal activity. In addition M-Net proposes that the Authority should incorporate the use of skilled and experienced commercial mediators and arbitrators.

M-Net submits that the Authority has no power to adjudicate disputes between the rights holders and broadcasters.

The SABC supports the approach, however it must be pointed out that it is critically important that a non-regulatory route followed be of a limited period to afford the aggrieved party sufficient time to pursue a final and binding process (in the event that the non-regulatory process fails) prior to broadcast. Also submit that the parties should nevertheless notify the Authority in writing about the nature of the dispute.

The Authority should have power to appoint a mediator if the parties fail to reach agreement on the mediator.

E.tv submits that the Authority should not become involved in any manner in resolving such disputes. Such disputes should be resolved privately unless the dispute concerns a breach of the regulations in which case the Complaints and Compliance Committee of the Authority should decide the matter.

14. How long should the Authority take in resolving a dispute?

Telkom Media proposes that disputes should be resolved in an expedited manner, as suggested in section 60(2) of the ECA. Telkom Media therefore proposes that the dispute should be resolved within a minimum 60-day period, but that the process should make provision for urgent matters. On the other hand WOWtv suggest a maximum of 60 (sixty) days, while ODM submits that the Authority should attempt to resolve a matter within 30 days.

Shaun Ryan submits that if a dispute cannot be resolved by the parties concerned then the Authority must conclude its rulings within thirty days. The Authority must attempt to resolve the dispute quickly and ensure that the broadcasters have ample time to prepare for events if any change in the awarding of rights takes place.

The SABC is of the view that the Authority should ensure that the dispute is resolved within a reasonable period after referral to afford an aggrieved party sufficient time to exploit the rights.

MTN submits that the Authority does have the power to refer the hearing of a sport rights dispute to the Complaints and Compliance Committee (CCC) and support the use of the CCC as a vehicle to deal with sport rights disputes. They also note the obligation on the Authority in terms of section 60(2) to ensure that such disputes are resolved on an expedited basis and is concerned that the prescribed process of the CCC and applicable time frames may not meet the level of expediency required for resolution of these types of complaints.

MTN proposes that the Authority, as a matter of urgency, prescribe procedures for the handling of urgent complaints i.e. Sport rights disputes , in terms of section 17 C(5) of the ICASA Act.

15. Which recommended steps/process should the parties follow before a dispute is filed with the Authority?

Telkom Media submits that parties to a dispute should follow the steps outlined in s17(c) of the ICASA Act. WOWtv suggests that the parties should demonstrate to the Authority that they have attempted to resolve the dispute amongst themselves first.

ODM is of the view that the steps/process developed by OFCOM bear relevance for South Africa and could be used without much modification. ODM recommends that the Authority make use of this process, since it is a "tried and tested" process and, more importantly, enjoys the support of global broadcasters and the holders of global rights to major sporting events, including events currently listed as national sporting events.

Shaun Ryan submits that the parties should try and resolve all disputes before the Authority is called upon. Parties must communicate their concerns in writing. Both parties must then reply to the initial document stating the reasons on their stance and provide an outline for steps they think should be taken to resolve the dispute. Together an agreement must be met through consultation, justification and understanding.

MultiChoice states that one of disputes amongst others that may arise include terms and conditions offered by the subscription broadcasters to free-to-air broadcasters. For instance the SABC may allege that the terms and conditions offered by M-Net are unfair and hinder the public broadcaster to broadcast the listed event. In that case, the Authority has to assess whether the terms and conditions offered are market related. If they are not market related, then the dispute has to be first

resolved by the involved parties, then, referred to a mediator, if fails the last resort will be arbitration. These disputes emanate from different factors such as industry practice, trends and market realities.

MultiChoice proposes that the Authority should include in the Current Regulations the following four-step process:[16]

1. If the parties to a dispute concerning the interpretation and/or application of section 60(1) of the EC Act are unable to resolve the dispute on their own, any party to that dispute may notify the Authority of the dispute.

2. The chairperson of the Authority's Complaints and Compliance Committee ("the CCC") must then determine whether the dispute is a notifiable dispute in terms of section 60(1) and (2) of the EC Act. If the dispute is a notifiable dispute, the Authority must refer the dispute to mediation.

3. A mediator must attempt to facilitate the resolution of the dispute.

4. If the dispute cannot be settled by mediation, the chairperson of the CCC must refer the dispute to a special committee of the Authority for arbitration, and that special committee must arbitrate the dispute.

The SABC believes that the dispute should be referred to a non-binding mediation. They believe that this process should take no longer than three days to resolve. If the mediator fails to resolve the dispute, the dispute should be referred for arbitration by the Arbitrator to be appointed by the Authority.

16. If ADR is the preferred method of arbitration, how should the Authority deal with a situation where the parties in dispute do not agree to the appointment of an arbitrator?

According to WOWtv, the ADR process itself is aimed at resolving a dispute amongst parties without the involvement of a third person such as an arbitrator. However, should an arbitrator be called to intervene and the parties differ on the arbitrator, the

[16] Pgs 9 to 15 of the Multichoice's representations on the Authority's review of the Sports Broadcasting Rights dated 21 November 2008.

Authority should appoint one on their behalf. Telkom Media recommends that disputes be resolved through the existing CCC mechanism. If the Authority decides to provide for ADR in the regulations, then it could make provision for the CCC to be used as an arbiter of final resort on all matters relating to disputes on sports broadcasting.

Shaun Ryan submits that if the situation arises parties concerned should be able to appeal the ruling. The judgement should be taken into consideration and both parties should try and reach an agreement independently again. If the dispute remains, cases should be presented to a panel that will collectively give judgement and determine the best way to resolve the ongoing dispute. This should be final measure as the parties should be encouraged to resolve all disputes before the Authority is called upon.

The SABC believes that in such an event, the Authority should appoint the Arbitrator who is knowledgeable on the sports arena. This approach is generally followed in arbitration clauses found in commercial agreements.

II. SUBMISSIONS TO THE DRAFT REGULATIONS

The Authority received submissions from interested persons on a range of issues in relation to the draft regulations. The general view of these submissions confidently stated that there is no need for the Authority to amend the existing regulations, save to introduce a dispute resolution mechanism. SARU, PSL and CSA maintain their view that they are in favour of self regulation, and SARU believes that whilst the current regulations would certainly not have been their first choice, they are a suitable middle ground in the public interest. Therefore SARU, PSL and CSA submits that the Authority should allow the status quo regarding the regulations to remain.

1. Definitions

SARU and CSA submits that the draft regulations seek to introduce new concepts which are unclear as the EC Act already defines the conceptual boundaries of the sport broadcasting regulations. With regard to "confederation sporting activity", M-Net and MultiChoice submits that the definition is vague as it contains words such as the "official", "sporting activity", "involves" and "friendly games" which are so general that they could be referring to any kind of activity, ranging from an event to a training session. On the other hand the Ministry of sport proposed that the word "activity" be replaced with "event" and also proposed that the definition should provide that such sporting event need to be the one arranged by CAF, FIFA or a recognised international sports body that governs a particular sport which involves a national federation as contemplated in terms of section 1 of the National Sport and Recreation Act, 1998 (Act No. 110 of 1998).

The Ministry of sport and M-Net together with MultiChoice propose that the Authority revert to the definition of "delayed live" as contained in the existing Regulations. M-Net and MultiChoice also propose the same with the definition of "delayed"

M-Net and MultiChoice submits that there is no need to define "dispute", while the Ministry of sport submits that the definition of "dispute" should include the interpretation of a commercial agreement entered into by broadcasting service licensees regarding the broadcast of a national sporting event.

M-Net and MultiChoice submits that the definition of national sporting event does not accord with the wording of s60(1) of the EC Act, which refers to "national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport". They further elaborated that "after consultation" means that the Authority must consult with the Ministers, but does not have to reach consensus/agreement with them. They are of the view that this accords with s192 of the Constitution, which requires the independent regulation of broadcasting in the public interest. The SABC, on the other hand, submits that the definition of national sporting event puts more burden on the public broadcaster to broadcast more events than it should under the existing regulations. The SABC propose that the Authority should define "public interest" considering the definition of national sporting event.

M-Net and MultiChoice submits that the definition of national team is so wide as to render it meaningless and propose a deletion. The Ministry of sport is of the view that the word "senior" should be included before "team" in the definition of a "national team".

2. Criteria for determining national sporting event of public interest

M-Net and MultiChoice submit that the Authority is required, when determining the relevant criteria and the national sporting events to be listed, to weigh the interests of the different constituencies[17], which interests may well conflict with one another. They further require the Authority to strike the right balance between these interests, and only to intervene in a manner that it is proportionate to the objectives of the legislation (i.e. s60(1) of the EC Act).

The SABC submit that draft regulation 4(1)(d) puts more burden on the public broadcaster to broadcast more events than it should under the existing regulations. SARU, PSL, CSA, M-Net and MultiChoice submit that an automatic listing will create serious uncertainty and would have devastating consequences. M-Net and MultiChoice submits that s60(1) of the EC Act requires the Authority to list those national sporting events the broadcasting of which is in the public interest, instead of providing for the "automatic listing" of events.

3. Listed national sporting events

PSL, CSA, M-Net and MultiChoice submit that the Authority should retain the current list of national sporting events as the expansion of such will result in a decline in the value of their broadcasting rights. CSA, M-Net and MultiChoice oppose the amendment of listed national sporting events, especially the addition of "T20 Cricket" and "Olympic games" as is uncertain and vague. E-tv is also of the same view that reference to "Olympic games" and "all national knockout competitions" could mean every sporting code which will render the list to be too wide. M-Net and

[17] Pgs 8 to 9 of the M-Net and MultiChoice's submission on the Authority's review of the Sports Broadcasting Rights dated 5 March 2010.

MultiChoice concur with E-tv that the reference to "a national knockout competition" is widely phrased that it would capture all national knockout competitions in all sports. They also highlight the term "knockout" and submit that it creates uncertainty. For example, the Telkom knockout competition (where a team is knocked-out upon its first defeat) is different from a league format type of competition, which eventually leads to semi-finals and finals (such as the Currie Cup). Second, M-Net and MultiChoice are of the view that semi-finals and quarter finals do not constitute a national sporting event the broadcasting of which is in the public interest.

M-Net and MultiChoice state that for an event to be listed, it must be a national sporting event the broadcasting of which is in the public interest. The event must be that of a major sport in South Africa, taking into consideration the number of people who play it, and the number of people who watch it either at the venue where it is played or on television, or who listen to radio coverage of the event. They submit that the only three sports which meet this criterion are cricket, rugby and soccer. The SABC share the same view with M-Net and MultiChoice that the listing of boxing was not included in the previous regulations and therefore would not be in the new regulations.

4. Procedure of listing events

PSL, CSA, SARU, M-Net and MultiChoice submits that the draft regulations remove the flexibility which the existing regulations give broadcasters to broadcast listed events at an appropriate time, taking into account their scheduling and other constraints. E-tv also submit that compliance with regulation 6(2) is impossible as there is more than one free-to-air broadcaster, and they believe that it is outside the scope of section 60(1) of the EC Act. E-tv explicate that section 60(1) does not place any obligation on free-to-air broadcasting services to broadcast national sporting events, whether live or not, but rather places a prohibition on subscription broadcasters from acquiring exclusive rights to these events.

The SABC submits that it would be premature for the Authority to impose such obligations as the Public Broadcasting Bill is currently reviewing the public service

obligations and funding of the Corporation. The SABC propose that the Authority allow for the finalisation of the broadcasting bill before imposing new regulations. However, the SABC state that the provision on live broadcasting only, is over prescriptive and not always pragmatic in instances such as where there is technical problems of feeds and also where there may be more than one event of national importance.

The SABC is of the view that the broadcaster should be exempted from the local content requirements, where a national sporting event clashes with a local content programme, as the sporting event is of national interest and serve the South African public. SABC emphasise that the provision should be consistent with the current licence provision that allows for application for exemption from compliance with the licence conditions in circumstances where there is a broadcast of events of national importance.

5. Removal and addition of events

SARU, PSL and CSA propose a deletion of draft regulation 7 regarding the removal and addition of listed events in its entirety as they believe that regulation 6 adequately dealt with the review of such events or alternatively revert to the four-year interval. PSL further elaborates that an annual review of national sporting events will also distort the markets as no television broadcasting licensee will be prepared to invest in a product that is not commercially viable. M-Net and MultiChoice concurs with PSL and submits that draft regulation 7(1)(a) creates uncertainty for the sports federations, free-to-air broadcasting services and subscription broadcasting services.

6. Dispute Resolution

M-Net and MultiChoice submits that draft regulation 8(1) and (2) on Dispute Resolution is *ultra vires* as the Authority has no jurisdiction to interfere with or dictate the terms and conditions of "Commercial agreements entered into between free-to-air services licensees and subscription broadcasting service licensees ...". With regard to draft regulation 8(3) and (5) M-Net and MultiChoice submits that the

"Alternative Dispute Resolution mechanism" does not extend to arbitration. If it did include arbitration, the arbitration award would be final and binding on the parties, and accordingly the dispute could not then be referred to the Authority. M-Net and MultiChoice recommend that the Authority should consider the extensive representations which have been made by the various parties concerning what would constitute an appropriate dispute resolution mechanism for disputes arising from s60(1) of the EC Act. SARU submits that the draft regulations provide insufficient guidance as to the principles to be applied and the procedure to be followed as regards the resolution of disputes by the Authority.

7. Monitoring and Compliance

The Communications Ministry submits that it is important that the Authority builds into these regulations, effective monitoring mechanism to ensure strict compliance. M-Net and MultiChoice submits that it is unfortunate that draft regulation 9 when compared with existing regulations 7 (Monitoring compliance with the Regulations) and 8 (Records), one notes that the monitoring function to be performed by the Authority as set out in existing regulation 7 has fallen away, and such monitoring would indicate whether these Regulations are in fact working, and whether it is appropriate that all the events listed ought to remain on the list.

The PSL supports the resolution of disputes as provided for in terms of Section 60 (2) of the Electronic Communications Act, 2005, and that such disputes be dealt with by way of alternate dispute resolution ("ADR"). On the other hand, CSA oppose draft regulation 8 as they believe that it proposes the implementation of alternative dispute resolution.

8. Anti-retrospectivity provision

SARU, M-Net and MultiChoice opposes the deletion of the anti-retrospectivity provision in regulation 11of the current regulations, which makes it clear that the Regulations only apply to broadcasting rights that have been acquired after the effective date of the Regulations.

C. DECISIONS AND REASONS

The Authority has finalised and published the Sport Broadcasting Services Regulations, 2010 in terms of section 60 (1) and (2) of the EC Act. These Regulations seek to ensure the broadcasting of 'national sporting events', as identified by the Authority, on free-to-air television. They also seek to, amongst other things, encourage investment in the broadcasting industry, promote stability within the broadcasting industry and ensure fair competition between broadcasting licensees. In addition sport broadcasting services regulations aim to broaden the audience and support base of the South African sport industry by exposing the majority of South Africans to 'national sporting events'.

The Sport Broadcasting Services Regulations, 2010, represent the regulatory position adopted by the Authority in response to the findings of the Discussion Document and the Draft Regulations' consultative processes. The Authority engaged on a public consultation process with the intention to consider written and oral submissions from stakeholders before publishing the final regulations. It is within that understanding that the Authority wishes to highlight the reasons informing its decisions as contained in the final regulations.

The Authority has considered the proposal by the Ministry of Sport to rename these regulations. The previous regulations were referred to as the sport broadcasting "rights" which limited their scope as the regulations dealt with issues beyond rights. The regulations are now known as the Sport Broadcasting Services Regulations, 2010.

The Authority has also considered the proposal by CSA and others on the definition of "confederation sporting activity" as published in the draft regulations versus the "national sporting event" and decided to retain the two concepts and define them appropriately. The Authority concurs with CSA that "activity" is not an "event" and has decided to replace the word "activity" with an "event" as a contest in a programme of sporting.

With regard to the list of national sporting events, the Authority is of the view that national sporting events should be confined to those sporting events that are national in character and not merely based on the popularity of a particular activity. The Authority is fully aware of the existing practice to confuse a national sporting event and a popular event, which should possibly fall under the category of premium sport, which fall under a separate competition regulatory paradigm.

With regard to the broadcast of these listed events, the Authority considered the fact that free-to-air broadcasters are unlikely to have the capacity to broadcast listed events live. This is compounded in the Local Content requirements imposed on free-to-air broadcasting licensees. In this regard the Authority sought to balance the broadcast of national sporting events and local content requirements.

A national sporting event remains so irrespective of the number of people who physically attend scheduled games. Experience worldwide, including the United Kingdom, with a well established tradition of regulating sport rights, suggest that popular sport such as the Premier League are treated as premium sport and not as national sporting events. It is therefore possible, given the outcome of the competition process, that popular sporting codes such as the PSL may be deemed as premium sport which should be subjected to the necessary competition regulation in terms of section 67 of the Act.

The Authority is of the view that South Africans, especially those from historically disadvantaged communities, should be exposed to more sporting activities as part of the transformation of sport. In other words, a balance should be struck between maintaining the current sporting preferences in historically disadvantaged communities, while, at the same time, allowing them to access other sporting events.

Recent experience, during the Olympic Games held in Beijing, China, where fewer black people participated, indicates that the transformation and development of sport should be inclusive of all sporting codes. For the reasons stated, the Authority has decided to include a range of sporting activities beyond rugby, soccer and cricket. In light of these, all professional international boxing federations where Boxing SA is affiliated, are listed whenever a South African is involved.

The Authority has taken a view that national knockout competitions should remain listed until the finalisation of the competition framework. This should be done considering existing consensus amongst stakeholders who have indicated that these should remain listed. In an endeavour to strike the necessary balance, the Authority has decided to retain the listing of semi-finals and finals of knockouts.

With regard to confederations sport, involving various countries or national federations, the Authority takes a view that these should be listed. These are normally confederation sporting activities which take the form of a tournament, over a short period of time, in a single location. Confederation sporting activities taking the form of a tournament include:

(a) Summer Olympic Games;

(b) Commonwealth Games;

(c) All Africa Games;

(d) FIFA World CUP;

(e) Africa Cup of Nations;

(f) IRB Rugby World Cup;

(h) ICC Cricket World Cup;

(i) ICC T20 Cricket World Championships;

(j) Comrades Marathon;

(k) Two Oceans Marathon

The Authority proposes that all official confederation sporting events featuring a senior South African national team should be automatically listed. The Authority further proposes that the opening games, one quarterfinal, one semi-final and finals of confederation sporting activities should be listed even if there is no South African national team taking part in the event. This is approach is informed by the understanding that, even if there is no national team playing, South Africa remains part or an affiliate to the concerned confederation sporting activity.

With regard to confederation sporting activities where the national team is involved, but the events do not take a form of a tournament, such as the Super 14 Rugby and COSAFA Cup, the Authority takes a view that only games involving a senior South African national team and the finals should be listed.

There are, of course, confederation sporting activities that involve individual South African team as opposed to the national teams. These are knockout competitions such as the CAF Champions League and the CAF Confederations Cup. The Authority is of the view that the finals of these sporting activities should be listed.

During the public hearings, the SABC complained about the current regulatory and contractual requirements that force the FTA services not to show national sporting events live. In light of the discussion in the preceding paragraphs, the Authority takes a view that all national sporting events be shown on FTA services.

Where a national sporting event clashes with a local content programme, the Authority is of the view that the national sporting event can be shown delayed or delayed live. In arriving at this conclusion, the Authority has attempted to arrive at a balance between the need for free to air to broadcast national sporting events, without neglecting the requirement to broadcast local content. The Authority takes this view because there is no legislative basis empowering it to participate in the scheduling of fixtures, some of which are set by international bodies, such as FIFA and CAF.

On competition matters, the Authority concurs with all stakeholders who argued that competition issues should be addressed in a separate regulatory process in terms of Chapter 10 of the ECA. The Authority is aware of the urgency with which this matter should be resolved amicably.

As stated in the preceding paragraph, the current review of the Sport Broadcasting Rights Regulations was undertaken primarily to introduce a Dispute Resolution mechanism. In the development of such a dispute resolution mechanism, the

Authority proposes that there should be a clear separation between commercial disputes and compliance issues.

As such, the Authority proposes that all compliance issues related to these regulations should be referred to the Complaints and Compliance Committee, while disputes related to commercial agreements should be addressed through an Alternative Dispute Resolution Mechanism.

To expedite the resolution of commercial disputes, the Authority suggests that any dispute should be resolved within a reasonable time period. When entering into commercial sub-licensing agreements, the parties to the agreement should also include an Alternative Dispute Resolution mechanism which may include mediation and arbitration. All agreements pertaining to national sporting events should be filed with the Authority, and where necessary, the Authority will protect confidential information as submitted by parties to the agreement.

With regard to the application of these regulations on the existing contracts, the Authority has decided that these regulations should apply to broadcasting rights that have been acquired after the effective date. This is important to avoid interfering with existing contracts before they lapse, thus creating uncertainty in the sport broadcasting market. This is consistent with regulation 11 of the previous Sport Broadcasting Rights Regulations, 2003. Notwithstanding the Authority's commitment to facilitate regulatory certainty and the smooth transition to a new ADR mechanism, the Authority encourages parties to existing agreements to introduce ADR mechanisms, where such do not exist. This is a significant development considering that a successful sport broadcasting services market depends on the ability of parties to resolve conflicts on an expedited basis.

Given the significant nature of national sporting events in the socio-economic lives of South Africans, the Authority proposes that non-compliance should be punishable by a fine of not less than R 500 000.00, subject to the findings of the CCC.

D. ANNEXURES

The Sport Broadcasting Services Regulations 2010

SIGNED and **DATED** at **SANDTON** on this ..31st..day of **MARCH 2010.**

PARIS MASHILE

CHAIRPERSON OF COUNCIL

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA