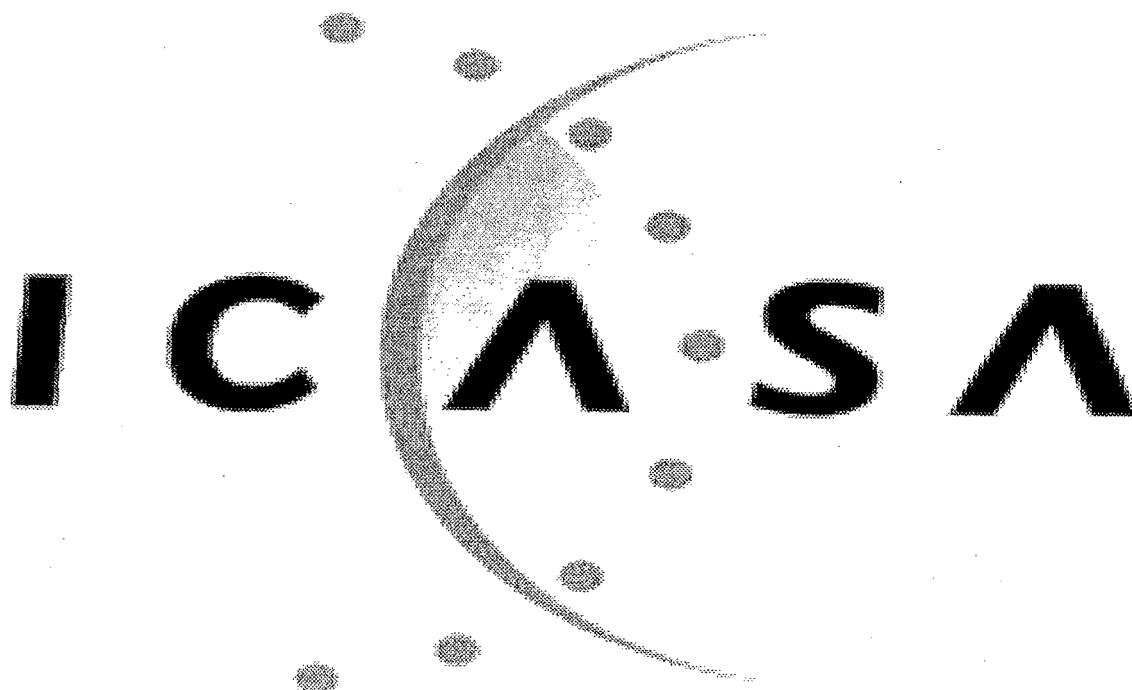

GENERAL NOTICE

NOTICE 1238 OF 2008



Review of Sport Broadcasting Rights Regulations

Discussion Document

September 2008



**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA (ICASA)**

**NOTICE OF INTENTION TO MAKE REGULATIONS IN RESPECT
OF THE SPORT BROADCASTING RIGHTS**

The Independent Communications Authority of South Africa ("the Authority") hereby gives notice that it intends making regulations in terms of the following Sections of the Electronics Communication Act, 2005 ("the EC Act"):

Section 60(1) states that:

"Subscription broadcasting 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 and the Minister of Sport and in accordance with the regulations prescribed by the Authority."

Section 60(2) of the ECA provides 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".

Written submissions on the issues raised by the discussion paper are invited from all interested parties. The closing date for submissions is Friday, 7 November 2008, by no later than 16h00 pm, by post, hand delivery or facsimile and also in electronic format (Microsoft Word 6.0, Adobe PDF) transmission for the attention of and should be directed to:

Ms Nozipho Mvulane
Independent Communications Authority of South Africa
Private Bag X10002
Sandton
2146

Delivery address: Block A, Pinmill Farm, 164 Katherine Street, Sandton
Where possible, written representations should also be e-mailed to:
Nmvulane@icasa.org.za or Lmofokeng@icasa.org.za

Submissions will be considered by ICASA officials in the preparation for drafting the regulatory framework for the Sports Broadcasting Rights regulations.

ICASA may post all or parts of any written submission on its website at www.icasa.org.za. ICASA will consider you to have consented to posting by making a submission, unless you clearly specify otherwise in your submission.

Please advise if you have any objection to the release of any information contained in a submission, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. ICASA will take into account all such objections when responding to requests for copies and information on submissions to this document.

Persons submitting written representations are further invited to indicate whether they require an opportunity to make oral representations and the estimated duration thereof, which duration shall not exceed one hour.

ICASA will review and analyse all comments received from stakeholders in response to this consultation/discussion document, in order to draft the proposed regulatory provisions. The draft provisions will then be published for public comment in the Government Gazette.

PARIS MASHILE
CHAIRPERSON

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1. INTRODUCTION AND AIMS OF THE DISCUSSION DOCUMENT

- 1.1 The purpose of this discussion document is to solicit input from all stakeholders and the general public, to lay a foundation for the development of regulations on sport broadcasting rights. While the inclusion of dispute resolution mechanism forms the basis of this review, the Authority will welcome any other input on related matters should stakeholders deem it necessary.
- 1.2 The Authority notes that given the strategic nature of sport, as one of the drivers of competition in broadcasting, this document is likely to generate unprecedented interest within the broadcasting and sporting fraternities. The Electronic Communications Act, 2005 "the ECA" (Act No. 36 of 2005), creates a transparent approach to regulation, it allows for a broad range of licenses, provides for regulation of competition and therefore a robust discussion that may follow, is encouraged and welcome with the hope that it will yield optimal results.
- 1.3 This review also seeks to ensure that sport is as accessible as possible to the people of South Africa, while at the same time, it continues to drive competition in the fast changing technological and market contexts. The Authority believes that exposure to more sporting codes by historically disadvantaged individuals and communities will accelerate the transformation of the sporting codes themselves.
- 1.4 In particular, the changing market environment driven by digitization and the liberalization necessitates a complete relook at sport broadcasting rights as a tool to facilitate competition thus enhancing the growth of the broadcasting market. And, as mentioned above, the quest to create a competitive environment should not negate the equally important task of ensuring accessibility of sport, especially to the urban and rural poor.
- 1.5 In this undertaking, the Authority will endeavor to meet the needs of all stakeholders, especially consumers, subscription television services, free-to-air television services and, equally important, the needs of the sporting codes, especially commercial sport.

- 1.6 In order to deal with the complex and competing needs of various stakeholders, the Authority has always relied on benchmarking with other countries, with similar regulations. The Authority is indeed aware that benchmarking with others, especially developed countries, should take into account the prevailing local context; hence the document also make specific reference to local developments in South Africa .
- 1.7 The Authority's approach to dispute resolution has been influenced by other jurisdictions, including the United Kingdom, Ireland the United States of America.
- 1.8 These countries have been preferred because of their well established, up to date regulatory frameworks. In its conclusion the Authority has also sought guidance from the ICASA Act which establishes the Complaints and Compliance Committee, which acts as an adjudicator of conflicts, as appointed by the Authority.
- 1.9 While this document focuses on television, the Authority is of the view that sound broadcasting services should also continue to play a significant role in broadcasting sport. Over the years sound broadcasting services have played a significant role in the broadcasting of sports events. To date, there are still many South Africans who rely on sound broadcasting services for sport broadcast.

2. BACKGROUND AND LEGISLATIVE FRAMEWORK

2.1 In 2003, the Authority, in fulfilling its legislative obligations, published a Position Paper and Regulations on Sports Broadcasting Rights, 2003.

2.2 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.

2.3 While the existing regulations were formulated in terms of the Broadcasting Act, this review is undertaken in terms of the Electronic Communications Act of 2005 which in section 60(1) states that:

"Subscription broadcasting 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 and Minister of Sport and in accordance with the regulations prescribed by the Authority".

2.4 Meanwhile Section 60(2) of the ECA provides 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".

2.5 It is thus in the interest of meeting the requirements of sections 60 (1) and (2) that the Authority undertakes this review. The Authority believes that this undertaking will go a long way in creating the required certainty, competition and stability in the broadcasting industry

2.6 The document also raises a number of competition issues as a way to locate this review within a broader context. The Authority will embark on a separate exercise to discern competition issues in broadcasting, especially taking due regard to the

implication of Chapter 10 of the ECA on broadcasting matters. This exercise will allow a further discussion on the extent to which sport broadcasting rights can be regulated by competition law.

3. REGULATING SPORTS BROADCASTING RIGHTS

3.1 OVERVIEW

- 3.1.1** The publication of this consultation document coincides with ongoing robust discussion related to the acquisition of the Premier Soccer League (PSL) rights by Multichoice (through Supersport). The Authority notes that recent developments in sport rights discourse point to the centrality of sport rights in facilitating competition between broadcasting services licensees, especially between commercial subscriptions and free to air television services.
- 3.1.2** While the Authority was not involved in the latest discussion, as it took place outside the existing regulatory framework, and was limited to commercial transactions between parties, it is hoped that experiences in this regard will enrich the review of the regulations, therefore ushering in a new era in the regulation of sport rights.
- 3.1.3** There is no doubt that sport broadcasting rights will continue to be contested as they constitute a significant revenue stream for both television and sound broadcasting services. This situation is likely to be accentuated by the recent licensing of subscription television services and the advent of digital migration.
- 3.1.4** The advent of new channels will undoubtedly enhance the commercialization of sport, as different television services compete for lucrative content, within and outside South Africa. This changing environment will impose enormous pressure on policy and regulatory institutions to continue searching for better ways to regulate sport rights, in the interest of all role players.

- 3.1.5** Increasingly, across the world, regulators are more in favour of creating a climate that facilitates competition between licensees, with limited or no exclusivity at all. However, this trend is more prevalent in the developed world where most people have access to both subscription and free- to- air television services.
- 3.16** In a developing country context, the disparities between the rich and the poor necessitates the introduction of regulatory regimes that set aside certain sporting codes to be broadcast on both the subscription television and free-to-air broadcasting services. This has been a practice in South Africa, since the introduction of the first Sports Broadcasting Rights, in 2003.
- 3.1.7** But, while the debates tend to be between subscription television services and free-to-air services, it is important that in the process the interest of sporting codes themselves are not negated. This is particularly important as sporting codes rely on sport rights for their financial and commercial viability.
- 3.1.8** The quality of sport and its competitiveness depend on the ability to generate revenues through, inter alia, sport broadcasting rights. The Authority has an obligation to ensure that its decisions do not compromise the need for different sports codes to use sport rights to increase their revenue streams.

3.2 LISTING OF SPORT EVENTS

- 3.2.1** Interventions in the sport broadcasting market seek to ensure that all viewers, including those in the lower socio-economic strata, have an opportunity to watch sport deemed as the sport of national importance. It is for this reason that the listed events principle ensures that only those events with special national resonance are protected.
- 3.2.2** The advent of subscription television in Europe was accompanied by concerns regarding the possible migration of sport content from free-to-air television to

subscription television services. As a remedy, the EU introduced Article 3a in the Television Without Frontiers Directive, ¹allowing each Member State to take measures in accordance with Community Law to ensure that subscription broadcasting service licensees under its jurisdiction do not broadcast, on an exclusive basis, events which are regarded by a concerned Member State as being of major importance to society.

3.2.3 In Australia, the Australian anti-siphoning provisions empower the Minister for Communications, Information Technology and the Arts to list in a formal notice termed the 'anti-siphoning list' events that should be available on free-to-air television for viewing by the general public and thereby prevents such events from being 'siphoned off' by pay-TV.

3.2.4 In terms of the 'use- it- or- lose- it', events protected on the anti-siphoning list will remain so only if free- to- air broadcasters 'use' the rights. An event is taken to be *automatically de-listed* twelve weeks before the start of the event unless the Minister publishes a declaration that the event continues to be listed. The Australian Broadcasting Act provides that the Minister cannot publish a declaration preventing automatic delisting unless the Minister is satisfied that 'at least one commercial television broadcasting licensee or national broadcasting licensee has had a reasonable opportunity to acquire the right to televise the event concerned'².

3.2.5 The South African 2003 sports broadcasting rights regulations, were developed on the same principles as their international benchmarks, with the intention to protect sport of national interest from migrating to subscription television, therefore ensuring that the public is not denied access to such events.

¹ Patrice Aubry, (2000), The "Television Without Frontiers" Directive", Cornerstone of the European Broadcasting Policy.

² Broadcasting Services Act 1992, Australia

3.2.6 According to the current sport regulations in South Africa "national sporting events" refers to the events that are deemed to be of National Interest³. The current defining principle is consistent with a view expressed by Chris Smith⁴, who argues that *"Where an event has particular national resonance, engaging the population of the country as a whole, and not just the dedicated followers of the sport itself, then it ought to be available freely to all, and the law needs to intervene in order to ensure that this can happen"*.

3.2.7 Guided by this approach, the Authority came with a list which was included in the 2003 regulations as indicated in annexure A of this document. This list sought to create exposure to most sporting codes by all South Africans, including those from historically disadvantaged communities. The Authority opted for this approach to ensure that access to sport is not delineated along racial lines, but that all South Africans have access to variety of sporting codes, irrespective of their historical exposure.

3.2.8 It is important to note that the transformation of the different sports codes depend on the extent to which they are accessible to most South Africans. With regard to soccer, the Authority opted to strike a balance between the needs of people from historically disadvantaged communities as well as those of the sport.

3.2.9 Meanwhile, in South Africa, subscription broadcasting licensees have expressed reservations regarding the capacity of free-to-air broadcasting service licensees to broadcast certain sporting events, due to limited budget and space as they have to fund a full range of local programming as required by the local content regulations.

3.2.10 Subscription services pointed out instances where the SABC's capacity limits resulted in their not broadcasting listed events. An example was the 2006-2007 Pro-20 cricket series where highlights were shown despite having obtained rights

³ ICASA Sports Broadcasting Rights Regulations, 2003, Republic of South Africa

⁴ Chris Smith, statement issued by the Ministry for Culture, Media and sports in the Government of the United Kingdom.

to five (5) live matches. Reference was also made to the soccer matches where exclusive rights were made available, translating into 180 days worth of broadcasting, but only around 18 hours worth was screened.

3.2.11 Sports bodies have also expressed concerns regarding the inability of free-to-air broadcasting licensees to commit to schedules, stating whether a sporting event will be broadcast live or delayed live. This development is partly attributed to the obligation on free-to-air services to broadcast local content. While the basis behind this lack of clarity is understandable, it has serious implications for advertising and sponsorship deals, resulting in the loss of significant income.

3.2.12 However, the current limitations of the SABC to broadcast sport should not be a basis to limit exposure to certain sport events or categories by historically disadvantaged people who rely on public broadcasting services for television viewing. In the long run and with the advent of digitisation, it is possible that the SABC and other free-to-air services will expand their coverage of sports of national importance.

4. COMPETITION ISSUES

4.1 COMPETITION LAW

4.1.1 In the EU Sports broadcasting rights are regulated by a combination of sector specific regulation and the competition law.

4.1.2 In terms of the sector specific regulation, the Television Without Borders Directive deals with content issues. Article 3(a) of the TV Without Borders Directive permits Member States to take measures to ensure wide access by the public to free-to-air television coverage of major sport events that are regarded as being of national importance. On the other hand, the competition law framework prohibits restrictive agreements between competitors and anti-competitive conduct by dominant operators.

- 4.1.3 The deregulation of the television markets has increased competition, which means that, the European Commission has to deal more regularly with issues connected with the application of competition law in the area of sport broadcasting rights.
- 4.1.4 From a competition perspective, the regulation of the sport rights market is based on market definition, which requires that the relevant markets must be defined before dominance and competitiveness of these markets can be tested. The rationale behind market definition suggests that the narrower the relevant market is, the easier it is to identify a dominant market position and therefore an abuse of dominance or an anti-competitive behavior.
- 4.1.5 Sport broadcasting rights have been distinguished from other programme markets on account of their huge economic importance. The European Commission has segmented sport broadcasting rights into separate product markets such as the market for exclusive broadcasting rights to football matches held regularly all year round. This includes the national league and cup competitions, the Champions League and the UEFA Cup.
- 4.1.6 The commission further defined the acquisition of exclusive rights to football events that take place every year where the national teams participate, as a separate market. Broadcasting rights for international sport events such as tennis tournaments, boxing matches, golf tournaments and motor sport events constitute another separate market, distinct from other content markets.
- 4.1.7 These are less significant than football as key drivers for subscription television services and are nevertheless important for subscription television services as they have a potential to generate interest among a number of viewers. The commission also draws a distinction between different modes of delivery of audio visual content to consumers. It has made a distinction between the market for subscription television services and the market for free-to-air television.
- 4.1.8 In South Africa, Section 67 of the Electronic Communications Act empowers the Authority to remedy market failures. The Authority is in the process of concluding

public consultation on the application of Chapter 10 on Electronic Communications Services and Electronic Communications Network Services. Plans are also underway to conduct a separate study on the implication of Chapter 10 of the ECA on broadcasting services.

4.2 ACQUISITION OF RIGHTS

4.2.1 The acquisition of sport rights remains a contentious matter, as most broadcasting service licensees depend on these rights to attract maximum audiences.

4.2.2 In some jurisdictions, within the EU, the acquisition of a listed event will depend on the penetration levels of a particular broadcasting service licensee. In some cases 90% penetration levels of a broadcasting service licensee is a prerequisite for broadcasting a listed event. The rights owners publish bids, inviting broadcasting service licensees to bid for the rights with full knowledge of the terms and conditions of the contracts to be entered into.

4.2.3 The EU competition law sets out certain conditions guiding the marketing of media rights, such as ⁵ (1) the rights have to be sold in several packages in a transparent, non-discriminatory procedure; (2) before the rights are awarded, an invitation to tender must be issued, giving all qualifying broadcasting service licensees an equal opportunity to bid for the rights.

4.2.4 In some cases, Competition Law has intervened in the acquisition of rights by outlining conditions for the sale of rights such as the duration of exclusive contracts for a particular event (period not exceeding three years), and the provision that sports broadcasting rights have to be available in packages (there has to be a package for free-to-air, subscription and new media platforms.)⁶

⁵ Herbet Ungerer, 2005, Understanding the sports rights debate, presented in Brussels 19 January 2005.

⁶ Ibid

4.2.5 In South Africa, the regulation of the sport broadcasting market is currently limited to the listed sport events. In terms of the ECA, subscription television services are prohibited from acquiring exclusive rights of sport of national importance. This means that whenever a subscription television service acquires sport rights, such acquisition must be followed by a sublicensing of the rights to the free- to- air television services.

4.2.6 The difference between the two models lies in that the European Union model places emphasis on all sporting events, while in South Africa, regulation is limited to listed events. The EU's approach seeks to ensure that all broadcasting service licensees get a fair chance to participate in the acquisition of sport broadcasting rights.

4.2.7 The current system in South Africa has limitations because it is open to abuse by broadcasting service licensees with financial leverage to conclude long-term contracts, in the long run, limiting the competitiveness of the broadcasting sector. It is in the interest of strengthening competition within the sector that the Authority encourages discussions on this matter, without deviating from the main reasons of this consultative process.

4.3 EXCLUSIVITY

4.3.1 As noted above, the conclusion of exclusive contracts is a threat to competition in broadcasting. In the EU, the conclusion of exclusive rights for a limited period is accepted. However, exclusivity agreements of a longer duration (period exceeding three years) for a wide range of rights can restrict competition, as it is likely to lead to market foreclosure, especially in cases where a broadcasting service licensee is dominant or if the market is oligopolistic in nature⁷.

⁷ Torben Toft, 2003, TV Rights of Sports events.

- 4.3.2 Competition is also endangered where exclusivity arrangements contain provisions allowing for automatic renewal⁸. In situations where exclusivity is likely to lead to foreclosure of access to the markets, the EU regulatory framework proposes a sub-licensing system as a remedy⁹.
- 4.3.3 Premium content has been identified as a major bottleneck affecting the development of the content industry. The scarcity of content, combined with exclusivity has increased the value of rights to exorbitant amounts which create barriers to entry and high financial risks for new broadcasting service licensees. In sport events, substitution is very limited because viewers who prefer a particular event are not likely to be satisfied with the coverage of another event. The availability of rights is reduced further by the volume of TV rights contracts being concluded on an exclusive basis for a long duration¹⁰.
- 4.3.4 New broadcasting service licensees enter the market at zero subscriber base, yet they have to compete with existing broadcasting service licensees for subscribers. Like the incumbents their sustainability is dependent on sport rights, that is, getting a significant market share to attract advertisers & sponsorships. They are always faced with a challenge to access premium content that appeals to viewers. And competition is limited to block buster movies, which are limited, and sport events.¹¹
- 4.3.5 In their recent submissions to the Authority, the newly licensed subscription television services have expressed concerns around the potential foreclosure effects created by the monopoly in the subscription market, where Multichoice has acquired valuable rights to most popular sporting codes.

⁸ Ibid

⁹ Ibid.

¹⁰ Damien Geradin, (2005), Access to content by New Media Platforms: A review of the competition law problems.

¹¹ Ibid

- 4.3.6** Multichoice currently dominates rugby and cricket. It has acquired rights to the Tri-Nations, Six Nations, Super 14, Curry Cup and the Vodacom Cup, leaving newly licensed broadcasters to compete for club and university rugby. With regard to Cricket, they have secured rights for the Standard Bank Cup one-tournaments and the Supersport series four-day tournament. In addition, Multichoice has acquired rights to the next two Olympic Games¹².
- 4.3.7** The newly licensed subscription television services are concerned that if left unchecked the current rights of Multichoice can translate into anti-competitive behavior.
- 4.3.8** The Position Paper on sports broadcasting rights 2003 stipulated that subscription broadcasting services can acquire rights to broadcast listed events, subject to a requirement to sub-license such rights to free-to-air services¹³. However, sub-licensing as a regulatory requirement was not provided for in the regulations.
- 4.3.9** As the market matures, disputes are likely to arise as a result of exclusivity and sub-licensing issues. Recent disagreements between the SABC and the Premier Soccer League point to a necessity for a watertight regulatory regime, particularly in respect to issues of sub-licensing and dispute resolution mechanisms.
- 4.3.10** During the ensuing public discussion of the SABC-PSL dispute, ETV and Telkom Media indicated that they would investigate potential options for sub-licensing¹⁴ even in the absence of a clear regulatory framework, in this regard. To address potential foreclosure effects likely to be caused by the long-term contracts between Multichoice and the rights owners, a well-articulated sublicensing system could be a possible remedy. A sub-licensing system should be seen as a prerequisite in the sport broadcasting rights market, especially with the increase in the number of broadcasting service licensees in the market, without leading to the over-regulation of the market.

¹² No Sporting chance for new Pay-TV players, 20 September 2007, www.journalism.co.za

¹³ ICASA Sports Broadcast Rights Position Paper, 2003, Republic of South Africa.

¹⁴ Outrage as SABC loses soccer broadcast rights, 15 June 2007, www.mybroadband.co.za.

4.3.11 The absence of an empowering legislative provision to address the conditions that determines fair and transparent sub-licensing conditions, poses a regulatory challenge to the Authority. The challenge is particularly serious when it comes to the unlisted sporting codes which hitherto have been left to commercial agreements.

QUESTIONS

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

Q. 2. Is 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

Q.3. 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.

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

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

Q.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?

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

Q.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?

Q.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?

Q.10. 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?

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

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

5. DISPUTE RESOLUTION

5.1 Section 60(2) of the ECA requires the Authority to develop regulations on dispute resolution. In terms of this provision, the Authority has to provide a transparent regulatory framework. Such a regulatory framework should not place unnecessary burdens on industry or create unnecessary obstacles to efficient competition.

5.2 Dispute resolution can be addressed from two separate approaches, namely: regulatory and non-regulatory perspectives. The regulatory approach to disputes encompasses the exercise of legal powers by regulators to resolve disputes in

terms of the law. A non-regulatory approach encompasses a less formal, conciliatory approach to resolution of a dispute.

5.3 REGULATORY PERSPECTIVE

5.3.1 This approach is still fairly new in most countries; however, it is recognized as the cornerstone of dispute resolution in the telecommunications sector¹⁵. One advantage of this approach is that it gives the public a platform to participate in decision making processes; hence regulators are required by law to take public input into consideration when finalizing regulations.

5.3.2 Notwithstanding its advantages, this approach has its own limitations. As it is based on extensive, transparent consultations, this approach can be costly as a result of lengthy and cumbersome procedures. It can also be susceptible to abuse by market-players, particularly incumbent licensees who can introduce delaying tactics to hinder the imposition of pro-competitive remedies. Lack of adequate skills within the regulatory institution can also act as a limitation.

5.4 NON REGULATORY PERSPECTIVE

5.4.1 The non-regulatory approach or alternative dispute resolution (ADR) is a less formal means of dispute resolution. ADR is defined as any process that leads to the resolution of a dispute through the agreement of the parties without the use of a judge or arbitrator. It is commended worldwide as the most efficient method of resolving disputes.

5.4.2 This method of resolving disputes has been popular because the process is quick, it is cost saving and offers the parties involved in the dispute confidentiality

¹⁵ International Telecommunications Union, ICT regulatory toolkit: Dispute Resolution and Enforcement, www.ictregulationtoolkit.org:

when they are avoiding unwanted publicity. With ADR there is flexibility and control, the parties remain in full control of the ADR process and any settlement agreed. If no settlement is reached the parties retain their rights to sue. This approach is characterized by a common commitment and desire by the parties in dispute to resolve a problem/dispute amicably and speedily and for this reason negotiations must be based in good faith.

5.4.3 The central objective of ADR is to encourage and promote the settlement of disputes without litigation. ADR procedures fall into three primary categories being negotiation, mediation and conciliation, and arbitration¹⁶.

5.4.4 As the sector continues to undergo changes underpinned by liberalization and convergence, regulators are increasingly under pressure to find effective and efficient systems of resolving disputes. Failure to speedily resolve disputes can have adverse effects on the business of respective stakeholders.

5.4.5 Countries vary in their stage of market development, regulatory approaches, dispute resolution and general business cultures. As such, their experiences in the application of remedies such as regulatory adjudication, arbitration, mediation, negotiation, and other approaches would differ.

5.5 INTERNATIONAL BENCHMARKING ON DISPUTE RESOLUTION MECHANISMS

5.5.1. UNITED STATES

5.5.1.1 In the United States, sports disputes are regarded as private matters. The Federal Communication Commission (FCC), as a sector regulator, generally coordinates, and adjudicates regulatory issues, as well as disputes arising from their implementation.

¹⁶ Ian S. Blackshaw (2002), *Mediating sports disputes: National and International perspectives*.

5.5.1.2 The FCC provides parties with a choice of ADR procedure as mandated under the Telecommunications Act of 1996. The FCC proposed binding arbitration as the dispute resolution mechanism in the United States. This process involves a submission of disputes to a third party or arbiter who issues a final decision after hearing arguments and reviewing evidence from all concerned parties.

5.5.1.3 This method was chosen to expedite dispute resolution as the Act requires the Commission to resolve disputes within 30 days after receiving a notification from one of the parties to the dispute. To resolve disputes within such a short space of time, binding arbitration was adopted as the most feasible dispute resolution mechanism.

5.5.1.4 Section 273 (d) (5) of the Telecommunications Act directs that the Commission “shall not establish itself as a party to the dispute resolution process”. Instead the process shall permit resolution “in an open, non-discriminatory and unbiased fashion within 30 days after the filing of such dispute and that the Commission will establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process”.

5.5.2 IRELAND

5.5.2.1 In Ireland, government intervened to regulate sports broadcasting rights by amending the Broadcasting (Major Events Television Coverage) Act of 1999 to include, among other things, an arbitration process between event organizers and a qualifying broadcasting service licensee to determine a fair market price¹⁷.

5.5.2.2 The Broadcasting Act 1999 incorporated into Irish law the provisions of Article 3a of the European Television Without Frontiers Directive which mandates governments to designate sports of national importance. In terms of the Act, the Minister of Communications, Marine and Natural Resources, may designate certain events as events of major importance to society for which the right to

¹⁷ Broadcasting (Major Events Television Coverage) (Amendment) Act, 2003, Ireland

provide coverage on free television services should be provided in the public interest.

5.5.2.3 The Act further provides that a broadcasting service licensee qualifies to participate only if it provides a free to air coverage to over 90% of the population. Furthermore the amendments mandate that where an event organizer has not, within 28 days of the event taking place, entered into a contract with a qualifying broadcasting service licensee, then the a qualifying broadcasting licensee may request the High Court to direct the event organizer to give it rights to the event.

5.5.2.4 The High Court may direct that rights be given to a qualifying broadcasting service licensee even before the terms, including price, have not been concluded. This provision does not apply where an event organizer has decided not to sell broadcasting rights and has informed the Minister of its decision before a qualifying broadcasting service licensee makes an application to the High Court.

5.5.2.5 The Act provides for a voluntary and non-binding arbitration mechanism to assist event organizers and qualifying broadcasting service licensees to agree to the terms governing the sale and broadcasting of designated events. These include agreements around reasonable rates. Should the parties fail to agree on the appointment of an arbitrator, the Act provides that the Minister must appoint an arbitrator within 21 days of being notified.

5.5.2.6 Section 4 of the Broadcasting Amendment Act of 2003 states that in instances where a non-qualifying broadcasting service licensee acquires exclusive rights to broadcast a designated event, such an entity will not broadcast any activity until the event has also been made available to a qualifying broadcasting service licensing, on request and after the the payment of reasonable market rates by the qualifying broadcasting service licensee.

5.5.2.7 In case the broadcasting service licensees fail to agree on what constitutes a reasonable market rate with respect to coverage of an event, either one of the

broadcasting service licensees may apply to the High Court for an order to determine reasonable market rates for the event in question.

5.5.2.8 Section 6 of the Act states that in determining what constitutes reasonable market rates or terms, the High Court or an arbitrator shall have regard to, inter alia:

- Previous fees (if any) from the event or similar events,
- Time of day for live coverage of the event,
- The period for which rights are offered, and
- The revenue potential associated with the live or deferred coverage of the event.

I

5.5.3 THE UNITED KINGDOM

5.5.3.1 In the United Kingdom, Courts do not generally intervene in sports disputes, leaving the responsibility to the concerned parties. The rules however provide that parties in dispute must attempt to settle their disputes by mediation at an early stage in the litigation process¹⁸.

5.5.3.2 The Office of Communications (Ofcom) as the sector regulator has been given powers under the Communications Act 2003 and the Broadcasting Acts, to investigate complaints about breaches of conditions imposed on licensees and to resolve disputes relating to conditions imposed under the EU Directives.

5.5.3.3 The EU Directives allow National Regulatory Authorities (NRA's) not to consider disputes if Alternative Dispute Resolution (ADR) mechanisms are available. As a general rule, Ofcom will decline to resolve a dispute unless one party is dominant or if the failure to agree would be detrimental to competition or consumers. Under the directives, NRAs are expected to resolve disputes within a period of four to six months. Ofcom has set four months as the maximum period taken to resolve disputes.

¹⁸ Ian S. Blackshaw (2002) *Mediating Sports Disputes: National and International perspectives*.

5.5.3.4 Submissions of dispute made to OFCOM must include the following information before they can be considered: (i) Clear scope of the dispute; (ii) Evidence of failed negotiations between the parties involved in the dispute and (iii) Declaration by an officer of a company stating that the submission is correct and that the best endeavors have been used to resolve the dispute.

5.5.3.5 The following procedures are used by OFCOM following a referral of a dispute:

- OFCOM first confirms that the subject in question is within its dispute resolution powers;
- Once a dispute is confirmed to be within the scope of OFCOM, then the regulator evaluate if the submission criteria (as stated above) has been met and
- Once all procedural issues have been addressed, the following steps are undertaken:
- Following an accepted submission OFCOM has an initial analysis and discussion with parties;
- Draft information requests are sent;
- Final information requests are sent with a set deadline;
- Preparation and publishing of the draft determination;
- Ten day consultation period with the stakeholders and lastly;
- Preparation of final decision and publishing of that decision.

6. IMPLICATIONS FOR SOUTH AFRICA

- 6.1 In South Africa the ECA does not propose any specific mechanism to deal with disputes related to sports rights. The task of establishing a dispute resolution mechanism has been left to the Authority in terms of Section 60 (2) of the ECA, which mandates the Authority to develop dispute resolution mechanisms to address any dispute that may arise between broadcasting service licensees.
- 6.2 The advent of the ECA to regulate dispute resolution in the sport rights market coincided with the establishment of the Complaints and Compliance Committee ('CCC') in terms of section 17A of the ICASA Act, as amended. The ICASA Act empowers the CCC to investigate and adjudicate on any issues, referred to it by the Authority. Section 17C outlines the procedure to be followed by the Committee in resolving any disputes of non-compliance by licensees to their terms and conditions.

However, in recent consultations with industry, some stakeholders have argued that the mandate of the CCC is limited to those areas that are specifically mentioned in the law, and does not extend to other areas not mentioned in the Act.

- 6.3 This is beside the fact that by its legislated scope and function the CCC can be regarded as institutional arbitration tribunal, as its decisions are binding.
- 6.4 Given its focus, the Authority proposes that the CCC should be considered as a possible vehicle to deal with sport rights disputes. At issue, here, is whether the Authority has powers to refer the hearings of sport rights disputes to the CCC, without taking away its decision making powers. This means that industry will refer all disputes to the Authority which will within a particular period refer the matter to the CCC.

7. CONCLUSION

- 7.1 Regulating sport rights is increasingly becoming critical as broadcasting licensees depend on sports rights for their businesses. Due to that, new competition issues are emerging, prompting regulators to engage sport rights as a competitive market, instead of confining discussions to the listing of sports of national importance.
- 7.2 In South Africa hitherto the focus of sport regulations has been confined to the listing of sports of national importance, a situation that appears likely to change given the implementation of Chapter 10 of the ECA which provides the introduction of pro-competitive measures in anti-competitive markets.
- 7.3 While indeed this discussion focus on the review of the current regulations within the confines of the law, it is still important for the Authority to start engaging on related competition matters in anticipating a dedicated inquiry to deal with competition issues in broadcasting. The Authority thus welcome inputs on how in the long run, competition law, especially Chapter 10 of the ECA, will deal with sport rights, as a market.
- 7.4 As also stated above, the advent of liberalisation and competition necessitates the introduction of a comprehensive dispute resolution mechanism. The Authority, accordingly, invites industry and the general public to make representations on their recommended dispute resolution mechanism.
- 7.5 And while this document dedicates much focus to dispute resolution, the Authority also invites stakeholders to make representations on any matter in the existing regulations, even if such an issue is not specifically mentioned in this discussion document.

QUESTIONS**Questions**

Q.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?

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

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

Q.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?

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ANNEXTURE A**4. National Sporting Events**

The following sporting events were declared national sporting events according to regulation 4 of the Sports Broadcasting Rights Regulations 2003:

- 4.1 the Summer Olympic Games;
- 4.2 Commonwealth Games;
- 4.3 All Africa Games;
- 4.4 With regard to the FIFA World Cup, the African Cup of Nations, the IRB Rugby World Cup, and the ICC Cricket World Cup:
 - (i) All South African team matches;
 - (ii) Opening match
 - (iii) Two quarter finals;
 - (iv) One semi-final;
 - (v) Final match; and
 - (vi) Opening and closing ceremonies.
- 4.5 Finals of the following national knockout competitions: (doesn't it include semi finals)
 - (i) ABSA Cup (soccer);
 - (ii) Coca Cola Cup (soccer);
 - (iii) SAA Super Eight Cup (soccer);
 - (iv) Currie Cup (rugby); and
 - (v) Standard Bank Cup (cricket).
- 4.6 Finals of the following international knockout competitions (if a South African team is involved):
 - (i) CAF Champions League (soccer);
 - (ii) CAF Confederations Cup (soccer); and
 - (iii) The Super 12 (rugby).

4.7 International Events

- (i) Soccer: all international matches played in South Africa involving the senior South African national team;
- (ii) Rugby: all international matches played in South Africa involving the senior South African national team;
- (iii) Cricket: all one day international matches played in South Africa involving the senior South African national team;
- (vi) Netball: all international matches played in South Africa involving the senior South African national team.

4.8 Athletics

- (i) The Comrades Marathon; and
- (ii) The Two Oceans Marathon,