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## GENERAL NOTICE

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### NOTICE 125 OF 2010



#### **NOTICE IN TERMS OF SECTION 95 OF THE ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO. 36 OF 2005) AND SECTION 4B OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT, 2000 (ACT NO. 13 OF 2000)**

The Independent Communications Authority of South Africa ("the Authority") hereby gives notice in terms of section 95 read with Section 60(1) and (2) of the Electronic Communication Act, 2005 ("the Act") and further read with section 4B of the Independent Communications Authority of South Africa, 2000 ("the ICASA Act") of its intention to review the 2003 ICASA Sport Broadcasting Rights Regulations setting out the criteria for determining national sporting events.

- (1) A copy of the proposed regulation will be made available on the Authority's website at <http://www.icasa.org.za> and in the ICASA Library at No. 164 Katherine Street, Pin Mill Farm, (Ground Floor at Block D), SANDTON between 10h00 and 16h00, Monday to Friday only.
- (2) Interested persons are invited to submit written comments or written representations with regard to the proposed regulations, to be received **by no later than 16h00 on 05 March 2010** by post, hand delivery, facsimile transmission, or electronically (in Microsoft Word) and marked specifically **Attention: Ms Refilwe Ramatlo**. Further enquiries in that regard may also be directed to her via e-mail at: [rramatlo@icasa.org.za](mailto:rramatlo@icasa.org.za) or [hmashapha@icasa.org.za](mailto:hmashapha@icasa.org.za) or by facsimile: 011 566-3252 or by telephone: 011 566 3251; between 10h00 and 16h00, Monday to Friday only.
- (3) Any person who wishes to make a written representation is requested to indicate if s/he would also like to make oral submissions in the event that ICASA

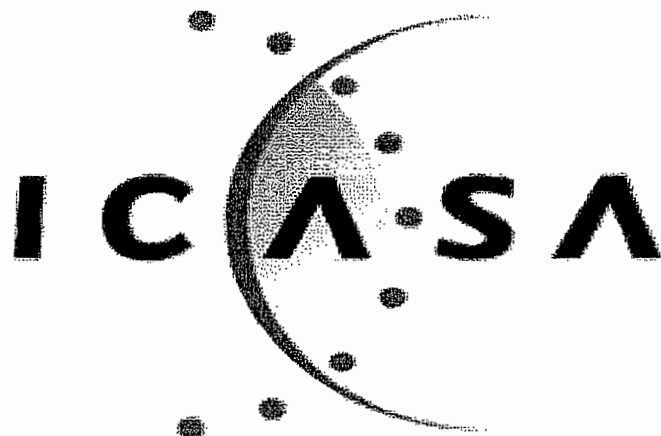
conducts public hearings in terms of Section 4(6) of the Act. The estimated duration of an oral submission at the hearing may not exceed one (1) hour.

- (4) Any written representation(s) submitted to ICASA pursuant to this notice, will be made available for inspection by interested persons at the ICASA library and copies of such representations will be obtainable upon payment of the prescribed fee.
- (5) At the request of any person who submits written representations pursuant to this notice, ICASA may determine that such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be allowed to withdraw such representations or portion thereof.
- (6) With respect to written representations or portions thereof determined to be confidential in terms of paragraph 5 above, ICASA may direct that the public or any member or category thereof, not be present while any oral submissions relating to such representations or portions therefore are being made; provided that interested parties will have been notified in that regard and allowed to object thereto. The Authority will consider the objections and notify all interested parties of its decision.
- (7) The final regulations following the conclusion of the consultative process including any hearing that may be held, will be published in the Government Gazette and made available on the website referred to under (1) above.



**PARIS MASHILE**

**CHAIRPERSON**



**PRELIMINARY FINDINGS AND  
CONCLUSIONS DOCUMENT**

**ON THE**

**REGULATION OF SPORT BROADCASTING  
RIGHTS**

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## **A. INTRODUCTION**

### **1. Aims of the Preliminary Findings Document**

The primary purpose of this Document is to highlight key issues raised by stakeholders during the consultation process on sport broadcasting rights. The document is referred to as the Preliminary Findings Document because the Authority envisages publishing a final document after consultation on the draft regulations, herewith attached.

In particular, the document deals with the issues raised in the Discussion Document on Sport Broadcasting Rights published in Government Gazette No 31483 dated 02 October 2008 and the public hearings which took place on 22 and 23 January 2009. Both processes sought to solicit input from stakeholders before the Authority publishes draft regulations for further consultation.

In October 2008 the Authority published a discussion document inviting stakeholders and the general public to submit written comments. The 2008 Discussion Document raised a number of competition issues as a way to locate a review of the current regulations 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.

The extension of the discussion beyond the introduction of a specific dispute resolution mechanism, which was the main aim of the review, was informed by the fact that the 2003 Sport Broadcasting Rights regulations were already 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 also accelerate the transformation of the sporting codes themselves.

## **2. Legislative Background**

In 2003, the Authority published a Position Paper and Regulations on Sport 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 to 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 of 1999, Section 60(1) of the Electronic Communications Act, 2005, which repealed some sections 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 published a Discussion Document on 03 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 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.

## **B. ANALYSIS OF WRITTEN AND ORAL SUBMISSIONS**

The Discussion Document raised sixteen (16) questions as a way to guide 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 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 service licensees to agree on:

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

Shaun Ryan<sup>1</sup> submits that the Authority should not implement a set of licence conditions that restrict pay-TV operators from acquiring exclusive broadcast

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<sup>1</sup> 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

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; 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 regulation 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 to broadcast the sporting event.

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media control on the national interests in terms of South Africans sport broadcasting rights, as represented in the ICASA Position Paper (2003).

This should be left to the arbitrator to decide whether the subscription broadcaster is hindering free-to-air licensee 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 the transformation in sport.

MTN submit 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. 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 (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 perfectly working 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. competition is, thus, only limited between SABC and e.tv (has limited capacity and has hitherto shown limited interest). As a consequence it leaves the public broadcaster to acquire the rights, in a far less price, below the market value.

CSA is of the view that the criteria selection of listed sports event 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 sports 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<sup>2</sup>, have reported that the current listing criteria is no longer relevant. The SABC also do not believe that

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<sup>2</sup> Market intelligence provided by agencies such as BMI Sportrack et al

the existing criteria was used in a consistent manner, thus urge that the Authority in reviewing the current listing take into account the SABC's proposed list.<sup>3</sup>

**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.**

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.

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 submit that the sporting events list<sup>4</sup> 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

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

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

African public who do not have access to subscription television channels a chance to witness boxing contest.<sup>5</sup>

M-Net suggest that the current 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.

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.

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<sup>5</sup> Boxing events to be listed: pg 2 of the Oral submission by GAPRASSO



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

WOWtv suggest 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 effect 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 as the anti-hoarding rules under the Broadcasting Services Act of 1992<sup>6</sup> 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. 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 African 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

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<sup>6</sup> Australian Broadcasting Act of 1992

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..."<sup>7</sup>*

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<sup>7</sup> European Broadcasting Union (2005) Sublicensing Rules for Eurovision Sports Programmes, 2005.

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.

**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<sup>8</sup>.

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. While 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.

Shaun Ryan submits that should a national interest sport is not 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 emphasis 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

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<sup>8</sup> 'Use it or lose it' guidelines released for anti-siphoning sport, 20 December 2006/  
[http://www.minister.dcita.gov.au/coonan/media/media\\_releases/use\\_it\\_or\\_lose\\_it\\_guidelines](http://www.minister.dcita.gov.au/coonan/media/media_releases/use_it_or_lose_it_guidelines)

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 suggest 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. 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?**

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.<sup>9</sup> 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 the 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 rose in the discussion document. Competition issues may be addressed through the provisions of Chapter 10 of the ECA.

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

- (1) The identification of all possible broadcasting markets;
- (2) The identification of broadcasting services with Significant Market Power ("SMP");

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<sup>9</sup> Refer to footnote 2 above.

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



- (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 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 of 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 Commissioner.

ODM 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:<sup>11</sup>

- (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.<sup>2</sup> (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".

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

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<sup>11</sup> 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 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 has no bearing on the sport events of national interests.

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 markets 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.<sup>12</sup>

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<sup>12</sup> 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;

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.<sup>13</sup>

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.<sup>14</sup> 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.

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- 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;
  - And other categories of rights.

<sup>13</sup> 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).

<sup>14</sup> 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.

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

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 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.<sup>15</sup>

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 ICASA 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 agrees 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 federation's 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 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 17C(50) 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 suggest 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 broadcaster to free-to-air broadcaster, 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 mediator, if fails the last resort will be the 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:<sup>16</sup>

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

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<sup>16</sup> Pgs 9 to 15 of the Multichoice's representations on the Authority's review of the Sports Broadcasting Rights dated 21 November 2008.

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 believe 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 Authority should appoint one on their behalf. Telkom Media recommend 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 event, the Authority should appoint the Arbitrator who is knowledgeable on sport issues. This approach is generally followed in arbitration sections contained in most commercial agreements.

### C. DECISIONS AND CONCLUSIONS

As mentioned in the beginning of this document, the Authority engaged on a public consultation process with the intention to consider written and oral submissions from stakeholders before reaching final conclusions. It is within that understanding that the Authority wishes to highlight its preliminary considerations which informed the draft regulations herewith attached. **[The final position paper will be published after consultation with the Ministers, industry and the general public].**

With regard to the list of national sporting events, the Authority is of the view that national sporting events should be confined to those sports 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.

As an example, having more people attend the Kaizer Chiefs – Pirates derby than Bafana-Bafana games, does not make the former a national sporting event. 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.

National sporting events should remain so irrespective of the number of people who attend or watch them. Related to this conclusion, 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 proposes the inclusion of Boxing where all international bouts featuring a South African boxer are listed as national sporting events. The Authority also supports a view that all new competitions replacing any listed competition or event should be automatically listed.

Notwithstanding the overview presented above, 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. Additionally, the Authority takes a view that the delisting of any sporting event will require substantive discussion, and therefore would prefer such discussions to be raised in 2010 during a window allowing interested parties to make recommendations on which sport should be listed or delisted.



With regard to confederations sport, involving various countries or national confederations, the Authority takes a view that these should be considered. 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) Olympic Games;
- (b) Commonwealth Games;
- (c) All Africa Games;
- (d) FIFA World CUP;
- (e) African Cup of Nations;
- (f) IRB Rugby World Cup
- (h) ICC Cricket World Cup
- (i) T20 Cricket;
- (j) Comrades Marathon;
- (k) Two Oceans Marathon

The Authority proposes that all official confederation sporting activities 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 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 will allow all national sporting events to be shown live on the 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 Regulation 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 sixty working days. 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.

The Authority will not interfere with the content of the Alternative Dispute Resolution mechanism as long as it is acceptable to both parties. Where parties to the agreement fail to resolve their disputes as stipulated to their agreements, the Authority reserves a right to intervene. In other words, the Authority will treat the failure to resolve a dispute as a commercial matter, requiring direct intervention. Interventions by the Authority will include referring the matter to the Complaints and Compliance Committee, which will make recommendations for final decision by the Authority within the period specified in the regulations. Given the significant nature of national sporting events in the socio-economic lives of South African, the Authority proposes that non-compliance should be punishable by a fine of not less than R 1 000 000.00.

#### **D. ANNEXURES**

The draft Sport Broadcasting Rights Regulations, 2009

## **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

### **DRAFT ICASA SPORT BROADCASTING RIGHTS REGULATIONS, 2009**

I, Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("the Authority") acting on behalf of the Council of the Authority hereby approve and publish the draft Sport Broadcasting Rights Regulations set out in the schedule and made by the Authority in terms of section 60(1) and (2), read with section 4(1) of the Electronic Communications Act, 2005 (Act No.36 of 2005) for public comment.

## SCHEDULE

### 1. DEFINITIONS

In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act, has the meaning so assigned.

**“Act”** means the Electronic Communications Act, 2005 (Act No.36 of 2005);

**“CAF”** means the Confederation of African Football;

**“CCC”** means the Complaints and Compliance Committee established by the Authority in terms of section 17A of the ICASA Act;

**“Confederation sporting activity”** means an official sporting activity which involves national federations and does not include friendly games.

**“delayed”** means broadcasting the full sporting event after the completion of the event;

**“delayed live”** means commencing broadcasting the full sporting event after it has commenced;

**“dispute”** means a disagreement or difference that arises in connection with the entering into, renewing or revising a collective agreement and in respect of which arbitration or conciliation may be requested;

**“FIFA”** means the Federation of International Football Associations;

**“free-to-air television broadcasting licensee”** means a licensee who, at all times, provides a television broadcasting service capable of being received without payment of subscription fees;

**"ICASA Act"** means the Independent Communications Authority of South Africa Act, 2000 (Act No.13 of 2000);

**"live"** means broadcasting the sporting event in full as it happens ;

**"Ministers"** means the Minister responsible for Communications and the Minister responsible for Sports and Recreation;

**"national sporting events"** means listed sporting events as identified in the public interest from time to time by the Authority in consultation with the Ministers and in accordance with the regulations determined by the Authority;

**"National team"** means a any team made of South African players drawn from various local teams to represent the country in confederation sporting activities and include both men and women sport;

**"Subscription television broadcasting licensee"** means a licensee who provides broadcasting service to an end user upon the payment of a fee;

**"the ICC"** means the International Cricket Council;

**"the list"** means the list of national sporting events set out under regulation 5;

**"the IRB"** means the International Rugby Board;

## **2. OBJECT OF THE REGULATIONS**

The object of these regulations is to:

- (a) identify and list national sporting events;

- (b) regulate the broadcasting of national sporting events in South Africa; and
- (c) Provide a dispute resolution mechanism

### **3. APPLICATION**

These Regulations will only apply to licensees issued with a broadcasting service licence in the Republic in terms of section 5 of the Electronic Communications Act.

### **4. CRITERIA FOR DETERMINING NATIONAL SPORTING EVENT OF PUBLIC INTEREST**

(1) The Authority has used the following criteria in determining national sporting events that are of public interest:

- (a) the event must be a confederation sporting event featuring a South African national senior team and/or an individual representing South Africa (in the case of an individual sport)); or
- (b) the event must be a semi final, quarterfinal and final of a national knockout competition; or
- (c) the event must be a semi final and final of confederation knockout competition featuring a South African team or an individual (in the case of an individual sport); or
- (d) The event must be an opening game, quarter final, semi-final and final of a confederation sporting event even if there is no South African national team taking part in the event

(2) An event that satisfies the above criteria will be automatically listed.

## 5. LISTED NATIONAL SPORTING EVENTS

The following sporting events are hereby declared national sporting events of public interest:

- (1) Where applicable, opening games, one quarterfinal, one semi final and final of the following confederation sporting events even if there is no South African taking part in the event:
  - (a) Olympic Games;
  - (b) Paralympics
  - (c) Commonwealth Games;
  - (d) All Africa Games;
  - (e) FIFA World CUP;
  - (f) African Cup of Nations;
  - (g) IRB Rugby World Cup
  - (h) ICC Cricket World Cup
  - (i) T20 Cricket;
  - (j) Comrades Marathon;
  - (k) Two Oceans Marathon
- (2) All games featuring a South African team or an individual (in case of an individual sporting activity) in the confederation sporting events listed above
- (3) One semi final and finals of the following confederation sporting events featuring a senior South African national team
  - (a) Super 14 Rugby
  - (b) COSAFA Cup



- (4) One semi final and finals of the following confederation sporting activity featuring a South African team
  - (a) CAF Champions League
  - (b) CAF Confederations Cup
- (5) On Semi Final, One quarterfinal and Finals of all national knockout competitions

## **6. PROCEDURE OF LISTING EVENTS**

- (1) All subscription broadcasters who have acquired rights to national sporting events of public interest will inform all free-to-air broadcasting service licensees, within two (2) days of acquiring the rights, of the opportunity to tender for that national sporting event using whatever process it has in place.
- (2) Listed national sporting event of public interest must be broadcast live by a free-to-air television broadcasting service licensee.
- (3) Where a free to air broadcaster does not broadcast a national sporting event in terms of regulation 6 (2), the circumstances regarding the failure to broadcast on time will be submitted to the Authority as part of the report mentioned in regulation 9.
- (4) No broadcasting service licensee must prohibit another broadcaster from advertising a national sport of public interest, which the concerned free-to-air broadcaster intends to broadcast following the process in subsection (1).

## **7. REMOVAL AND ADDITION OF EVENTS**

(1) Any listed sport can be removed from the list or a new sport added to the list subject to the following conditions:

- (a) The review of national sporting events will take place annually from the date of publication of these regulations;
- (b) Any interested stakeholder can submit an application asking the Authority to remove or add a national sporting event
- (c) Any application to remove or add a national sporting event will be subjected to a public process.

## **8. DISPUTE RESOLUTION**

- (1) Commercial agreements entered into between free-to-air services licensees and subscription broadcasting service licensees must include an Alternative Dispute Resolution clause, providing for any commercial dispute to be resolved within sixty (60) days;
- (2) Broadcasting service licensees entering into a commercial agreement regarding the broadcast of national sports of public interest must within ten (10) days of entering into an agreement provide the Authority with the details of their Alternative Dispute Resolution mechanism;
- (3) Where a dispute arises and parties to a dispute are unable to resolve the dispute on their own, in terms of the agreement entered into by the parties, any party to the dispute may notify the Authority of the dispute in writing and must set out the details of the alleged dispute within seven (7) days of the failure to resolve the dispute as stipulated in the agreement;
- (4) In considering the dispute the Authority will, within a period not exceeding fourteen (14) days refer the matter to the Complaints and Compliance

Committee (CCC) which must make a recommendation to the Authority within forty-five (45) days;

- (5) Upon receipt of the recommendations of the CCC, the Authority will within seven (7) days inform the parties to the dispute of its final decision which will be binding

## **9. MONITORING AND COMPLIANCE**

- (1) Public and Commercial Free-to-air television broadcasting licensees and subscription broadcasting licensees, broadcasting national sporting events, must keep records of all national sporting . These records must include:
  - (a) full particulars of all listed national sporting events broadcast during each quarter by the licensee; and
  - (b) whether the listed sporting event was broadcast live, delayed live, or delayed;
  - (c) where applicable, reasons for the failure to broadcast a national sporting event
- (2) All broadcasters, involved in broadcasting national sporting events, shall file the records of their broadcasts after every hundred and twenty (120) days from the date of the publication of these regulations

## **10. PENALTIES**

- (1) A broadcasting service licensee who contravenes or fails to comply with the provisions of these regulations is liable to a fine as follows:

- a. A fine not exceeding Five Hundred Thousand (R500 000) for the breach of regulations 6 (1),(2),(3) or 8 (1) and (2) or 9 (1) and (2)
- b. A fine not exceeding Five Hundred Thousand (R500 000) in addition, to any other sanctions as prescribed in terms of section 17E of the ICASA Act, 2000 (Act No 13 of 2000) for the repeated breach of any of the regulations mentioned above.

#### **11. AMENDMENT OF EXISTING REGULATIONS**

These Regulations amend the Sport Broadcasting Rights Regulations, 2003

#### **10. SHORT TITLE AND COMMENCEMENT**

These regulations are called the Sport Broadcasting Rights Regulations, 2010 and will come into force upon publication in the Government Gazette.