

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Vol. 669

26

**March
Maart**

2021

No. 44338

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GOVERNMENT NOTICES • GOEWERMENSKENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**NO. 273****26 March 2021**

NOTICE IN TERMS OF SECTION 4C (6) OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT 13 OF 2000

FINDINGS AND POSITIONS DOCUMENT
ON THE REVIEW OF THE ICASA MUST CARRY REGULATIONS, 2008

1. On 13 December 2019, the Independent Communications Authority of South Africa ("the Authority") published a Discussion Document on the Inquiry into the review of the Must Carry Regulations, 2008 ("the Discussion Document")¹. The purpose of the Discussion Document was to generate comments from stakeholders on the review of the ICASA Must Carry Regulations, 2008 ("the Regulations"). The Authority received two (2) written submissions from stakeholders.
2. The Authority advises that it has concluded its Inquiry into the review of the Regulations and hereby, in line with section 4C (6) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("ICASA Act"), publishes the Authority's Findings and Positions Document which outlines the Authority's findings. The Authority's Findings and Positions Document is published on the Authority's website at <http://www.icasa.org.za> and in the Authority's Library at No. 350 Witch-Hazel Avenue, Eco Point Office Park, Centurion between 09h00 and 16h00, Monday to Friday.

¹ Published in General Notice No 650, Government Gazette No.42902.

3. In summary, the Authority's findings are:

Findings on the rationale and benefit of Must Carry Regulations

- 3.1 The Authority finds that there is no consensus between the stakeholders on the rationale of Must Carry, whereas there are various benefits ascribed to Must Carry by different stakeholders. On one hand, Must Carry is ascribed to the need to resolve coverage constraints for the Public Broadcasting Service Licensee ("PBS"), as well as enabling it to reach a wider audience, on a subscription broadcasting platform/s than it would if there was no Must Carry. On the other hand, the benefit for Must Carry to Subscription Broadcasting Licensees ("SBS") is that they obtain additional subscribers who have no access to freely available PBS services.
- 3.2 It is argued by some stakeholders that Must Carry rules are used by regulators to promote universal access to public service broadcasting programming and to ensure media diversity and plurality of views which are beneficial for consumers. The Authority finds that, without paying subscription fees, the public does not have access to the SBS channels and consequently no access to the Must Carry channels.
- 3.3 The Authority finds that the stakeholders identified burdens in fulfilling the Must Carry Regulations, and these include;
- 3.3.1 the delivery of Must Carry channels;
 - 3.3.2 ensuring that those channels reach subscribers; and
 - 3.3.3 disregard of the value of PBS channels and content.

The Cost of implementing the Must Carry Regulations

- 3.4 The Authority finds that there is no consensus between stakeholders on the issue of costs associated with implementing the Must Carry Regulations. The SBS is of the view that the current arrangement should persist, as per the Regulations, with each licensee being responsible for its own costs, while the PBS is of the view that all costs including

incidental costs to Must Carry should be subject to commercial negotiation instead of as prescribed in the Regulations on a no cost basis.

Programmes to be carried

- 3.5 The Authority finds that there are different views on what programmes should form part of Must Carry. One view is that the status quo should remain, and all PBS channels be carried, whilst the other view is that only public interest programmes should be carried.

Monitoring Compliance and Dispute Resolution

- 3.6 The Authority finds that the current monitoring provisions in the Regulations are necessary and sufficient to meet regulatory compliance requirements for Must Carry, while any disputes regarding compliance with section 60(3) of the ECA and the Regulations that may arise should be addressed in line with the ICASA Act.

Application in the digital broadcasting environment

- 3.7 The Authority finds that the Must Carry Regulations will continue to be necessary and relevant in a digital broadcasting environment until all audiences are guaranteed access to the PBS channels.
4. The Authority refers stakeholders to the Findings and Positions document for detailed findings and positions on the review of the Regulations.



DR KEABETSWE MODI MOENG
CHAIRPERSON
ICASA
DATE: 25/03/2021



Independent Communications Authority of South Africa
350 Witch-Hazel Avenue, Eco Point Office Park
Eco Park, Centurion

DRAFT MUST CARRY AMENDMENT REGULATIONS, 2021

The Independent Communications Authority of South Africa ("ICASA or Authority") hereby intends amending the ICASA Must Carry Regulations, 2008 to the extent reflected in the schedule.

A copy of the Draft Regulations will be made available on the Authority's website at <http://www.icasa.org.za> and in the Authority's Library at No. 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion between 09h00 and 16h00, Monday to Friday.

Written representations on the Draft Regulations must be submitted to the Authority by no later than 16h00 on 21 May 2021 by post, hand delivery or electronically and marked specifically for attention: Mamedupe Kgatshe. Delivery address: No. 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion. Where possible, written representations should also be e-mailed to: mkgatshe@icasa.org.za and kmotaung@icasa.org.za. Enquiries should be directed to 012 568 3259 between 10h00 and 16h00, from Monday to Friday.

Written representations received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library.

At the request for confidentiality by any person who submits written representations pursuant to this notice, the Authority may determine that such representations or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential. Where the request for confidentiality is refused, the person who

made the request will be granted an opportunity to withdraw such representations or portion(s) thereof.

Persons submitting written representations are further invited to indicate, as part of their submissions, whether they require an opportunity to make oral presentations.



.....
DR KEABETSWE MODI MOENG
CHAIRPERSON
DATE: 25/03/2021

The Independent Communications Authority of South Africa has, under section 4 read with section 60(3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended, made the regulations in the schedule.

SCHEDULE

1. DEFINITIONS

In these regulations "the Regulations" means the regulations published by Government Notice No. 1271 (Government Gazette No. 31500) of 10 October 2008.

2. AMENDMENT OF REGULATION 1 OF THE REGULATIONS

2.1 Regulation 1 of the Regulations is hereby amended by the insertion of the following definitions after the definition of "Agreement":

"'Bouquet' means a collection of video and/or audio channels marketed as a single package, often transmitted in a single data stream, or a thematic environment where channels are devoted to a specific programming genre;

'Channel' means a single defined television programming service of a licensee other than a video on demand programming service;"

3. AMENDMENT OF REGULATION 2 OF THE REGULATIONS

Regulation 2 of the Regulations is hereby amended by the insertion of the following paragraph after paragraph (a):

"(aA) provide for terms and conditions under which the PBS Licensee will offer its television programmes to the SBS licensee;"

4. SUBSTITUTION OF REGULATION 3 OF THE REGULATIONS

The following is hereby substituted for regulation 3 of the Regulations: –

“ 3. TELEVISION PROGRAMMES TO BE CARRIED

(1) All the free-to-air PBS programmes comprising a channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations.

(2) The PBS and the SBS Licensees must negotiate the carriage of PBS channels.”

5. AMENDMENT OF REGULATION 4 OF THE REGULATIONS

5.1 Regulation 4 of the Regulations is hereby amended by the insertion of the following sub-regulation after sub-regulation (1):

“(1A) The SBS licensee must ensure that the Must Carry channels are available on its bouquet at all times.”

5.2 Regulation 4 of the Regulations is hereby amended by the deletion of sub-regulations (4) and (7).

6. AMENDMENT OF REGULATION 6 OF THE REGULATIONS

6.1 Regulation 6 of the Regulations is hereby amended by the substitution of sub-regulations (1) and (2) of the following sub-regulations:

“(1) The PBS Licensee must offer its television programmes, subject to commercially agreeable terms, to a SBS Licensee upon a request from the SBS Licensee.”

"(2) The PBS Licensee must offer its television programmes to a SBS Licensee within three (3) months from the date of conclusion of the commercial negotiations"

6.2 Regulation 6 of the Regulations is hereby amended by the insertion of sub-regulation (2A) after sub-regulation (2):

"(2A) The commercial negotiations contemplated in regulation 6(2) above must be concluded within 90 days from the date of receiving a request for the Must Carry channels."

7. SUBSTITUTION OF REGULATION 7 OF THE REGULATIONS

The following regulation is hereby substituted for regulation 7 of the Regulations: –

"7. TRANSMISSION OF TELEVISION PROGRAMMES

The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes that are identified as Must Carry programmes."

8. SUBSTITUTION OF REGULATION 9 OF THE REGULATIONS

The following regulation is hereby substituted for regulation 9 of the Regulations –

"9. MONITORING COMPLIANCE WITH THE REGULATIONS

Licensees must submit a compliance report annually no later than six (6) months after the end of their financial year."

9. AMENDMENT OF REGULATION 10 OF THE REGULATIONS

The following regulation is hereby substituted for regulation 10 (1)(a) of the Regulations:

"10. CONTRAVENTION AND PENALTIES

1(a) Any person that contravenes regulations 4(2), 4(3), 4(6), 5(2), 6, 7 and 9 is liable to a fine not exceeding R1 000 000,00."

10. SHORT TITLE AND COMMENCEMENT

These regulations are called the Must Carry Amendment Regulations, 2021 and will come into force upon publication thereof in the Gazette.



Independent Communications Authority of South Africa
350 Witch-Hazel Avenue, Eco Point Office Park
Eco Park, Centurion

EXPLANATORY MEMORANDUM

ON THE REVIEW OF THE ICASA MUST CARRY REGULATIONS, 2008

1. INTRODUCTION

This explanatory memorandum stipulates the amendments proposed by the Authority to the 2008 Must Carry Regulations and reasons for such amendments. The explanatory memorandum needs to be read in conjunction with the ICASA Must Carry Regulations, 2008 and the Findings and Positions document.

2. THE PROCESS

- 2.1 During the process of developing the 2021 Draft Must Carry Amendment Regulations, the Authority conducted a Regulatory Impact Assessment. Thereafter, the Authority undertook a fact-finding exercise by conducting internal desktop research to formulate a Discussion Document and requesting written presentation from interested parties. The SABC and MultiChoice were the only parties which made submissions to the Discussion Document. The Authority, based on information received in response to the Discussion Document, developed a Findings and Positions Document and the Draft Must Carry Amendment Regulations, 2021 ("Draft Regulations").
- 2.2 The Authority will hold public hearings on the Draft Regulations. The process to review the Regulations is envisaged to be finalised in 2022 by publication of the final Regulations. However, the Authority might amend the timelines and deliverables for this process and will notify stakeholders to this effect.

3. PROPOSED DRAFT MUST CARRY AMENDMENT REGULATIONS 2021

3.1 Regulation 1: Amendment of regulation 1 of the 2008 Regulations

The definitions contained in the 2008 Regulations are amended as follows:

- A definition of "Bouquet" is inserted to refer to a collection of video and/or audio channels marketed as a single package, often transmitted in a single data stream, or a thematic environment where channels are devoted to a specific programming genre.

The definition is inserted to provide clarification for the term used in the Draft Regulations.

3.2 Regulation 2: Amendment of regulation 2 of the 2010 Regulations

Regulation 2 of the Regulations is hereby amended by the insertion of the following paragraph after paragraph (a):

"(aA) provides for terms and conditions under which the PBS Licensee will offer its programmes to the SBS licensee".

The purpose of inserting regulation (aA) is to give full effect to section 60(3) of the Electronic Communications Act 36 of 2005 ("ECA"), which requires the SABC and the subscription broadcasting service licensee (SBS) to enter into commercially negotiated contracts on Must Carry obligations. This is also to strengthen the provision by providing the terms and conditions for offering programmes of the public broadcasting service licensee (PBS) and transmission by the SBS.

3.3 Regulation 3: Substitution of Regulation 3 of the Regulations

The following is hereby substituted for regulation 3 of the Regulations: –

" 3. Television programmes to be carried

(1) All the free-to-air PBS programmes comprising a channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations.

(2) The PBS and the SBS must negotiate the carriage of PBS channels."

The purpose of this regulation is to ensure that South African Must Carry Regulations are in line with international practice, by ensuring universal access

to PBS channels. The amendment of this regulation is also in line with Section 60(3).

It should be noted that Section 60(3) of the ECA refers to programmes of the PBS and not channels of the PBS which are to be carried by SBS licensees. To align the language used in the legislation, Must Carry obligations will apply to television programmes that comprises a channel of the PBS.

3.4 Regulation 4: Amendment of Regulation 4 of the Regulations

Regulation 4 of the Regulations is hereby amended by the insertion of the following sub-regulation after sub-regulation (1):

"(1A) The SBS licensee must ensure that the Must Carry channels are available on its bouquet at all times."

The purpose of this regulation is to ensure that there is universal access to PBS channels at all times.

Regulation 4 of the Regulations is hereby amended by the deletion of sub-regulations (4) and (7).

The purpose of deleting regulation 4(4) and 4(7) is to give the SBS and PBS the avenue to negotiate Must Carry contracts.

3.5 Regulation 6: amendment of regulation 6 of the 2008 Regulations

Regulation 6 of the Regulations is hereby amended by the substitution of sub-regulations (1) and (2) of the following sub-regulations:

"(1) The PBS Licensee must offer its television programmes, subject to commercially agreeable terms, to the SBS Licensee upon a request from the SBS Licensee."

The purpose of this regulation is to do away with the old Regulation compelling the PBS to offer its television programmes to the SBS at no costs. The Authority appreciates that section 60(3) provides for implementing Must Carry through commercially negotiable terms.

"(2) The PBS Licensee must offer its television programmes to the SBS Licensee within three (3) months from the date of conclusion of the commercial negotiations".

The purpose of this regulation is to provide a clear time frame for offering of PBS Must Carry channels to the SBS after concluding commercial negotiations. This clause will ensure that the concluded negotiations are implemented, and within a reasonable timeframe.

Regulation 6 of the Regulations is hereby amended by the insertion of sub-regulation (2A) after sub-regulation (2):

"(2A) The commercial negotiations contemplated in regulation 6(2) above must be concluded within 90 days from the date of receiving a request for the Must Carry channels."

The purpose of this regulation is to provide a clear time frame for negotiation and conclusion on commercial agreements to provide certainty to the SBS and PBS on what is expected of them in terms of time frames.

3.6 Regulation 7: Substitution of Regulation 7 of the 2008 Regulations

The following regulation is hereby substituted for regulation 7 of the Regulations:

"7. Transmission of television programmes

The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes that are identified as Must Carry programmes."

The current Regulations require that all channels of the PBS be transmitted simultaneously and without any alteration. The proposed amendment to Regulation 7 recognises that the requirement only applies to the programmes identified as Must Carry programmes in the Draft Regulations.

3.7 Regulation 9: Substitution of Regulation 9 of the 2008 Regulations

The following regulation is hereby substituted for regulation 9 of the Regulations –

"9. Monitoring compliance with the Regulations

Licensees must submit a compliance report annually no later than six (6) months after the end of their financial year."

The purpose of this Regulation is to recognise different financial year end of broadcasters.

3.8 Regulation 10: Amendment of regulation 10 of the 2008 Regulations

Substitution of Regulation 10 of the 2008 Regulations

The following regulation is hereby substituted for regulation 10(1)(a) of the Regulations:

"10. Contravention and penalties

Any person that contravenes regulations 4(2), 4(3)), 4(6), 5(2), 6, 7 and 9 is liable to a fine not exceeding R1 000 000,00."