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**GENERAL NOTICES • ALGEMENE KENNISGEWINGS**

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**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA****NOTICE 163 OF 2021**

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**SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2021**

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The Independent Communications Authority of South Africa (“**ICASA**” or “**the Authority**”) hereby amends the Sports Broadcasting Services Regulations, 2010 to the extent reflected in the Schedule.

A copy of the Regulations will be made available on the Authority’s website at <http://www.icasa.org.za>.

A handwritten signature in black ink, appearing to read 'K. Modimoeng', written over a horizontal line.

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**Dr. Keabetswe Modimoeng****Chairperson****Date: 30/03/2021**

## SCHEDULE

### 1. Definitions

In these Regulations, "the Regulations" means the Sports Broadcasting Services Regulations, 2010 as published under Government Notice No. R275 in Government Gazette No 33079 of 7 April 2010.

### 2. Amendment of regulation 1 of the Regulations

Regulation 1 of the Regulations is hereby amended –

2.1 by the substitution for the definition of "Act" the following definition:

**"Act"** means the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended;"

2.2 by the insertion, after the definition of "Act", of the following definition:

**"broadcasting service licensee"** means a person to whom a broadcasting service licence has been granted in terms of the Act;"

2.3 by the substitution for the definition of "Confederation sporting event" of the following definition:

**"Confederation sporting event"** means an official sporting event arranged by a recognised international sports governing body that administers a particular sport which involves two or more National Federations and does not include friendly games;"

2.4 by the insertion, after the definition of "Confederation sporting event", of the following definition:

“**COSAFA**’ means Council of Southern Africa Football Associations;”

2.5 by the insertion, after the definition of “Ministers”, of the following definition:

“**National Federation**’ means a national governing body of a code of sport or recreational activity in the Republic recognised by the relevant international controlling body as the only Authority for the administration and control of the relative code of sport or recreational activity in the Republic;”

2.6 by the substitution for the definition of “National Sporting Event” of the following definition:

“**National Sporting Event**’ means a sporting event that is deemed to be of national interest and includes the South African Senior National Team or National Sporting Representative;”

2.7 by the insertion, after the definition of “National Sporting Event”, of the following definition:

“**National Sporting Representative**” means any individual representing South Africa in a confederation sporting event;”

2.8 by the substitution for the definition of “National Team” of the following definition:

“**Senior National Team**” means the highest-ranking adult national team in a specific sporting code;”

2.9 by insertion of the following definitions;

“**Subscription broadcasting service licensee**’ means a licensee that provides a broadcasting service to a subscriber upon payment of a fee;

“**TAFISA**” means “The Association for International Sports for All.”

### **3. Amendment of regulation 2 of the Regulations**

Regulation 2 of the Regulations is hereby amended by the substitution for sub-regulation (a) of the following sub-regulation:

“(a) Regulate the broadcasting of national sporting events, as identified in the public interest, within the Republic”.

### **4. Amendment of regulation 4 of the Regulations**

Regulation 4 of the Regulations is hereby amended by the substitution for paragraph (a) of sub-regulation (1) of the following paragraph:

“(a) a confederation sporting event involving a senior national team or a national sporting representative;”

### **5. Substitution of regulation 5 of the Regulations**

The following regulation is hereby substituted for regulation 5 of the Regulations:

## **“5. LISTED NATIONAL SPORTING EVENTS**

- (1) The following National Sporting Events may be broadcast live, delayed-live, or delayed by free-to-air Broadcasting Service Licensees:
- a) Africa Cup of Nations;
  - b) All Africa Games;
  - c) CAF Champions League;
  - d) CAF Confederations Cup;
  - e) Commonwealth Games;
  - f) COSAFA Cup;
  - g) Currie Cup;
  - h) FIFA Women’s World Cup;
  - i) FIFA World Cup;
  - j) IAAF World Athletics Championships;
  - k) ICC Cricket World Cup;
  - l) ICC T20 Cricket World Championships;
  - m) ICC Women's Cricket World Cup;
  - n) MTN 8;
  - o) Nedbank Cup;
  - p) Netball World Cup;
  - q) Paralympics;
  - r) Rugby World Cup;
  - s) Summer Olympic Games;
  - t) Super Rugby; and
  - u) TAFISA World Sport for All Games

## **6. Amendment of regulation 6 of the Regulations**

Regulation 6 of the Regulations is hereby amended by the substitution for sub-regulation (4) of the following sub-regulation:

“(4) Consistent with sub-regulation 6(3), the actual periods or scheduling of advertisements of national sporting events shall be determined by the parties in their commercial agreement on fair, open and non-discriminatory terms.”

## **7. Substitution of regulation 7 of the Regulations**

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

### **“7. REVIEW OF LISTED EVENTS**

- (1) A national sporting event may be removed from or added to the list subject to one or more of the following conditions:
  - (a) following the publication, on such date as determined by the Authority, of the current list for public comment;
  - (b) An application by an interested stakeholder, with reasons, provided in support of such application, to the Authority to add or remove a national sporting event;
  - (c) Following a review of the Regulations in terms of section 4 of the Act.
- (2) The criteria used in the listing of national sporting events and, consequently, the list of national sporting events will be reviewed after



every five years from the date of publication of the Sports Broadcasting Services Amendment Regulations, 2021.

- (3) The application contemplated in 7(1)(b), to add or remove a national sporting event, shall be subjected to a public process;
- (4) Consistent with section 60 (1) of the Act, any changes to the criteria used in the listing of national sports events and the list itself shall be effected after consultation with the Ministers.”

## **8. Amendment of regulation 8 of the Regulations**

Regulation 8 of the Regulations is hereby amended -

8.1 by the insertion of sub-regulation (3A) after sub-regulation (3):

“(3A) A broadcasting service licensee entering into a commercial agreement in terms of these Regulations may report any unresolved dispute and/or non-compliance with regulation 8(1) and 8(2) to the Authority.”

8.2 by the substitution of sub-regulation (4) of the following sub-regulation:

“(4) The Authority may refer any failure to comply with regulation 8 (1) and (2) or any unresolved dispute as contemplated in sub-regulation (3A) to the CCC.”

## **9. Amendment of regulation 9 of the Regulations**

Regulation 9 of the Regulations is hereby amended:

9.1 by the substitution for sub-regulation 1 of the following sub-regulation:

“(1) a free-to-air broadcasting service licensee and subscription broadcasting service licensee must keep records of all national sporting events broadcast by such licensee. These records must include:

- (a) full particulars of all listed national sporting events broadcast during each quarter by the broadcasting service licensee;
- (b) whether the listed sporting event was broadcast live, delayed live, or delayed;
- (c) full particulars of all listed national sporting events acquired but not broadcast by such free-to-air broadcasting services licensee; and
- (d) where applicable, set out the circumstances which resulted in the failure to broadcast a national sporting event.”

#### **10. Substitution of regulation 10 of the Regulations**

The following regulation is hereby substituted for regulation 10 of the Regulations

#### **“10. PENALTIES**

(1) A broadcasting service licensee that contravenes any of the following regulations:

- a) regulation 6(1);
- b) regulation (2);
- c) regulation (3);
- d) regulation (4);
- e) regulation 8(1);
- f) regulation (2);
- g) regulation 9(1);
- h) regulation (2);

shall be liable to a fine not exceeding one million rand (R 1 000 000.00)

**11. SHORT TITLE AND COMMENCEMENT**

These Regulations are called the Sports Broadcasting Services Amendment Regulations, 2021, and shall come into force upon publication in the Government Gazette.

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**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

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**REASONS DOCUMENT:****SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2021**

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**A. ACKNOWLEDGEMENTS**

**The Authority thanks the following organisations and individuals who made written submissions in relation to the first draft regulations published on 14 December 2018:**

1. BMi Sport Info
2. Boxing South Africa
3. Cell C Ltd
4. Commonwealth Games Federation
5. Competition Commission
6. Confederation Africaine de Football (CAF)
7. Cricket South Africa
8. Department of Sports and Recreation
9. eMedia
10. Federation Internationale de Football Association (FIFA)
11. Golden Gloves (Pty) Ltd
12. International Cricket Council
13. International Olympic Committee
14. International Paralympic Committee

15. Jeremy D Griffiths-Evans – School of Applied Management: University of Cape Town
16. Kwese Free TV
17. Lagardère Sports and Entertainment
18. Media Monitoring Africa and SOS Coalition
19. M-Net
20. MultiChoice (Pty) Ltd
21. My Players (Pty) Ltd (South African Rugby Players' Association)
22. National Association of Broadcasters
23. National Heritage Council of South Africa
24. National Soccer League /the Premier Soccer League
25. Netball South Africa
26. Rugby World Cup Limited
27. Sanda Mgedezi
28. SANZAAR
29. South African Broadcasting Corporation
30. South African Cricketers' Association and Cricket South Africa
31. South African Football Association
32. South African Football Players Union
33. South African Hockey Association
34. South African Rugby Union
35. South African Sports Confederation and Olympic Committee
36. South African Women and Sport Federation
37. South African Youth Council
38. Tenox Management Consulting Inc.
39. Victoria University of Wellington and University of South Africa: Bronwyn E Howell and Petrus E Potgieter

**Second Draft Regulations:**

**By the closing date of the second draft regulations published on 9 November 2020, the Authority had received comments from the following stakeholders.**

1. BMi + SSN
2. Consumer Advisory Panel
3. eMedia
4. International Olympic Committee
5. Jeremy D. Griffiths-Evans - School of Applied Management: University of Cape Town
6. MMA and SOS
7. MultiChoice
8. Netball SA
9. NSL/PSL
10. Rendani Pharamela
11. SA Rugby
12. SABC
13. Squash SA

**B. GLOSSARY**

|         |   |
|---------|---|
| CAF     | Confederation Africaine de Football               |
| CSA     | Cricket South Africa                              |
| FIFA    | Federation Internationale de Football Association |
| ICC     | International Cricket Council                     |
| IOC     | International Olympic Committee                   |
| IPO     | International Paralympic Committee                |
| MCA     | MultiChoice (Pty) Ltd                             |
| MMA/SOS | Media Monitoring Africa and SOS Coalition         |
| NAB     | National Association of Broadcasters              |
| NHCSA   | National Heritage Council of South Africa         |
| NSA     | Netball South Africa                              |
| NSL     | National Soccer League                            |
| OC      | Olympic Committee                                 |
| PSL     | Premier Soccer League                             |
| RWC     | Rugby World Cup Limited                           |
| SABC    | South African Broadcasting Corporation            |
| SACA    | South African Cricketers' Association             |
| SAFA    | South African Football Association                |
| SAFPU   | South African Football Players Union              |
| SAHA    | South African Hockey Association                  |
| SANZAAR | South African, New Zealand and Australian Rugby   |
| SARU    | South African Rugby Union                         |
| SASPCF  | South African Sports Confederation                |
| SAWSF   | South African Women and Sport Federation          |
| SAYC    | South African Youth Council                       |

## C. INTRODUCTION

1. When the Authority makes or amends regulations, it acts in accordance with the empowering framework established by the Constitution of the Republic of South Africa, 1996, the Broadcasting Act, 4 of 1999, the Independent Communications Authority of South Africa Act, 13 of 2000 (the ICASA Act) and the Electronic Communications Act, 36 of 2005 ("**ECA**").
2. In particular, the Authority is specifically empowered by the provisions of section 60 read with 4 of the ECA to regulate the broadcasting of national sporting events. Section 60(1) of the ECA provides that:  
  
*"Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority".*
3. The Independent Communications Authority of South Africa ("**the Authority**" or "**ICASA**") initiated a process to review and amend Sports Broadcasting Services Regulations, 2010 ("**the 2010 Regulations**") by publishing the initial version of draft Sports Broadcasting Services Regulations ("**First Draft Regulations**")<sup>1</sup>.
4. Pursuant to the publication of the First Draft Regulations, the Authority received written representations from 39 different stakeholders (both juristic entities and private individuals). Subsequent thereto, the Authority conducted public hearings on 27 to 31 May 2019.

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<sup>1</sup> Government Gazette No. 42115 volume 1388 of 14 December 2018.



5. Following the above process of public hearings and written representations, the Authority published the further revised draft regulations on 9 November 2020 ("**the Second Draft Regulations**"). Pursuant to the publication of the Second Draft Regulations, the Authority received written representations from 13 stakeholders (both juristic entities and private individuals) by the stipulated deadline of 15 December 2020. In addition to the abovementioned written representations, the Authority requested supplementary information from various stakeholders to address various issues arising out of the Authority's analysis of the written representations. The Authority also consulted with the Minister of Communications in February 2020 and both the Minister of Communications and the Minister of Sports, Arts, and Culture in October 2020.
  - 5.1 The Authority has considered the additional information provided and written representations made in relation to the Second Draft Regulations and hereby publishes final Regulations which have taken into account the Authority's underlying mandate in terms of section 60 of the ECA, the information and representations received during the process as well as the outcomes of the Authority's analysis thereof.
6. This Reasons Document sets out the relevant considerations and reasons which informed the Authority's decision to publish the final regulations.

#### **D. AIMS OF THE REGULATIONS**

7. This document is the culmination of a review of the Sports Broadcasting Services Amendment Regulations, 2010 in line with the provisions of section 4 (3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000 ("ICASA Act "), as

amended and section 60(1) and (2) of the Electronic Communications Act No. 36 of 2005 ("the ECA").

## **E. BACKGROUND**

8. South Africa is a country which is characterised by inequalities which play a role in, *inter alia*, how television is accessed by people and the nature of the services available to individuals. For instance, Stats SA 2020, the general household survey showed a total number of households with television sets to be 14 024 million, 8 665million being pay television subscribers. It should be noted that even though there are 8 665million pay television subscribers, the majority of the South African population still rely on FTA for sports and other programmes.
9. Notwithstanding the existence of the 2010 Regulations, the Authority has observed a trend whereby national sporting events are mostly broadcast live on Subscription television, resulting in the majority of South Africans being unable to access such events on a live basis due to the costs associated with such subscription service.
10. Nevertheless, the Authority is keenly aware that the sports industry relies on the sale of broadcasting rights as the biggest source of their revenue. Sporting bodies that submitted representations contended that the best commercial offers for their rights were often made by subscription broadcasters. This situation contributes to the majority of South Africans being denied access to sports of national interest. In light of the above considerations, the Authority has in the final Regulations published herewith, sought to give effect to the provisions of section 60 of the ECA whilst considering the competing concerns of the financial sustainability of broadcasters and ensuring increased

access to national sporting events is provided to most of the South African population.

## F. THE PUBLIC PROCESS

11. During the process of developing the 2018 Draft Regulations, the Authority undertook a fact finding exercise by conducting internal desktop research and holding one on one meetings with broadcasters (SABC, ETV, Kwesé and Multichoice), sports bodies (SAFA, PSL, Netball SA, Boxing SA, SARU and Athletics SA amongst others), the Department of Sport and Recreation ("**DoS**") and the Department of Communications ("**DoC**") to obtain their views on the existing framework established in terms of the 2010 Sports Broadcasting Services Regulations. Officials of the Authority also travelled to Ghana and the United Kingdom to conduct benchmarking studies in order to supplement the internal desktop research which had previously been conducted in relation to this process and to learn more about their sporting rights acquisition and regulatory frameworks.
12. Subsequent to the process outlined above, the Authority published the 2018 Draft Regulations on 14 December 2018 for comment by stakeholders on issues arising therefrom. Pursuant to the publication thereof, 38 submissions were received from a wide variety of stakeholders. Public hearings were then held from 27 to 31 May 2019. During these hearings, the Authority requested additional information from several stakeholders. The additional information was received on 4 August 2019.
13. After considering the submissions, additional information received, and embarking on the international benchmarking study, the Authority published the Second Draft Regulations on 9 November 2020 with a stipulated deadline of 15 December 2020.

14. By the above deadline, the Authority received written representations from 13 stakeholders in response to the Second Draft Regulations. Following the conclusion of its initial analysis of the written representations on the Second Draft Regulations, the Authority directed correspondence to various stakeholders for additional information and/or documents in relation to issues arising from the written representations submitted by such stakeholders.
15. Having considered both the written representations and the supplementary information received in relation to the Second Draft Regulations, the Authority decided that further public hearings would not be required.
16. All written representations received from the public hearings, during the above process are available on the Authority's website and can be accessed using the following hyperlink:  
<https://www.icasa.org.za/legislation-and-regulations/regulations-underway/sports-broadcasting-services>.

## **G. REGULATORY FRAMEWORK**

17. ICASA is governed by the provisions of the Independent Communications Authority of South Africa Act, 13 of 2000 ("**ICASA Act**") and other underlying statutes<sup>2</sup>, as defined in the ICASA Act.
18. The ICASA Act, in conjunction with the underlying statutes, prescribes the framework that governs the Authority's powers, functions, and aspects of how it operates.

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<sup>2</sup> "underlying statutes" means the Broadcasting Act, Postal Services Act and Electronic Communications Act.

19. The amendment of the 2010 Regulations is undertaken by the Authority in terms of section 4 read with 60 of the ECA.

20. Section 4(1) of the ECA provides that:

*"The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation.*

*Without derogating from the generality of this subsection, the Authority may make regulations with regard to—*

- (a) any technical matter necessary or expedient for the regulation of the services identified in Chapter 3;*
- (b) any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation;*

21. Section 60 (1) of the ECA governs the interface between subscription broadcasting services and the public interest insofar as the broadcasting of national sporting events is concerned. Section 60(1) expressly provides as follows:

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

22. The publication of the final regulations is therefore undertaken by the Authority in terms of the mandate conferred upon it pursuant to the statutory framework outlined above.

## **H. SUBMISSIONS**

### **First Draft Regulations**

The Authority sets out below a summary of the themes highlighted in the representations received from various stakeholders in response to the publication of the First Draft Regulations in 2018.

#### **1. Process followed by the Authority**

- 1.1. M-net, Multichoice, SABC, NAB, and e.tv all raised concerns regarding the process that the Authority followed in developing the First Draft Regulations.
- 1.2. M-Net highlighted the fact that no discussion document was published prior to the publication of the First Draft Regulations. M-Net further stated that the publication of a discussion document had been the common approach when the Authority was conducting an inquiry and, even though the Authority published an explanatory memorandum, it was of the view that the explanatory memorandum was not comprehensive enough in providing the context in which the first draft regulations were developed and did not adequately explain the rationale for the proposed amendments.

## 2. Legislative framework

- 2.1. The Department of Sports and Recreation contends that, by prohibiting subscription broadcasting services from the acquisition of exclusive rights that prevent or hinder free-to-air broadcasting of national sporting events, section 60 of the ECA is intended to ensure that South Africans are not denied the opportunity of access to the broadcasting of national sporting events identified in the public interest<sup>3</sup>.
- 2.2. MultiChoice submits that section 60(1) seeks to ensure that the free-to-air broadcasting of national sporting events identified by ICASA in the public interest is not prevented or hindered by subscription broadcasters acquiring exclusive broadcasting rights to listed events that have that effect. It further states that this section does not preclude subscription broadcasters from acquiring exclusive broadcasting rights. In MultiChoice's view, Section 60(1) deals with the removal of a hindrance to the free-to-air broadcasting of listed events<sup>4</sup>. Section 60(1) does not require – or permit ICASA to compel – one or more broadcasting licensees (whether the public broadcaster or otherwise) to broadcast listed events or other sporting events.
- 2.3. MultiChoice further argued that determining whether a subscription broadcaster has prevented or hindered the free-to-air broadcasting of a listed event will depend on the specific factual circumstances and variables of each case. Industry practices, trends, and market realities will need to be taken into account in the determination of a hindrance or prevention by subscription broadcasters.

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<sup>3</sup> Department of Sports and Recreation written representations on the 2018 Draft Regulations at page 8.

<sup>4</sup> MultiChoice submissions on the First Draft Regulations at page 5.

### **3. Sub-licensing**

- 3.1. SABC urged the Authority to develop a framework for sublicensing, it argued that subscription broadcasting licensees through sublicensing conditions prevent free-to-air broadcasting licensees from acquiring rights for sporting events including those deemed of national interest.
- 3.2. Multichoice contended that section 60(1) does not empower ICASA to impose positive obligations upon either subscription broadcasters or free-to-air broadcasters to broadcast particular sporting events.
- 3.3. SARU was of the view that the Government should not be involved in the regulation of sports and that the draft regulations would have the effect of infringing upon constitutionally-protected rights.
- 3.4. Netball SA argued that section 60(1) is an obligation on the subscription licensees and that the Authority does not have a mandate to regulate sporting bodies. It further contended that due to exposure granted to Netball by Multichoice, Netball SA had seen a growth in its revenue.
- 3.5. SABC was of the view that the Authority should intervene in the sale of rights by developing sub-licensing conditions. NAB urged the Authority to outline sub-licensing conditions for Group B sports.

### **4. Exclusivity vs Non-exclusivity – Commercial Impact**

- 4.1. Most sporting federations such as FIFA, UEFA, SARU, CSA, and Netball SA argued that exclusivity is an accepted commercial practice and has a direct impact on the revenue that broadcasting rights generate.
- 4.2. For instance, SANZAAR argued that the rugby union depends on maximising the value of the Rights for Super Rugby and The Rugby



Championship as most of the value of rights is derived from such rights being acquired on an exclusive basis<sup>5</sup>.

- 4.3. In addition to this, SARU has raised a concern that the Authority did not conduct a regulatory impact assessment nor explain its reasons for proposing radical changes from the framework established by the 2010 regulations.
- 4.4. Most parties raised significant concerns about the non-exclusivity proposals contained in the Draft Regulations, and several stakeholders, including MultiChoice, PSL, and CSA, contended that exclusivity is an accepted commercial practice, which section 60(1) of the ECA does not prohibit.
- 4.5. MultiChoice in their additional submission argued that many parties also stated that the Draft Regulations will not benefit audiences, because they will not result in more broadcast coverage of listed events instead, the Draft Regulations would if passed, seriously undermine the viability and sustainability of South African sport and sports bodies.

## 5. Listing categories

- 5.1. MMA/SOS submitted that in terms of listing of events, Regulation 5.1 (sic) applies to all FTA broadcasters and would lead to potentially unnecessary duplication of sports that fall within Group A. In addition to the above, MMA/SOS argued that the Authority should make it clear that not all events in group A need to be broadcast by every FTA, instead suggest that FTA broadcasters amongst themselves need to enter into agreements that ensure events are broadcast by at least one FTA Licensee.

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<sup>5</sup> Paragraph 8 of the SANZAAR submission on the First Draft Regulations.

- 5.2. With regards to the broadcast of events on live, delayed live, and delayed, MMA/SOS was of the view that full live coverage would lead to the disruption of ordinary programming and suggested that the proposed regulations should have an exemption to live coverage in those cases where it is not technically possible and would result in undue disruption to the ordinary programming of the licensees. MMA/SOS further alluded to the fact that the current listing in the First Draft regulations would impose a financial burden on the SABC that it was not in a financial position to meet the obligations set out in the First Draft Regulations.
- 5.3. My Player contends that there is little research regarding how many more people will watch the events listed under Group A and believe that the First Draft regulations amount to anti-competitive behavior and will undermine all the objects of the Competition Act. In addition, My Player contended that the First Draft Regulations, if implemented, would violate the intellectual property rights of ruby players as they would be “compelled” to dispose of their intellectual property rights without achieving fair value.
- 5.4. South African Youth Council (SAYC) supports the Draft Regulations and argues that South Africans should not be deprived of viewing sports matches from all the identified groups based on affordability, especially those who live in rural areas.
- 5.5. SAYC is also of the view that sports contribute to social cohesion and nation-building especially if all the people are granted an opportunity to support sporting codes at the comfort of their homes. As a result, the First Draft Regulations provide a balance in that, should a free-to-air licensee be unable to acquire the rights such provides an opportunity for subscription providers an opportunity to bid.

- 5.6. With regards to regulation 5.3.2 [sic], SAYC is of the view that instead of showing two minority and developmental sports, this should be increased to four.
- 5.7. Moreover, the Regulations will make it impossible for player's employers, SARU, and the various franchises and provinces, to meet their commitments to the players.
- 5.8. During the hearings, which were held in May 2019, the Authority requested stakeholders to submit additional information. This was received in August 2019, based on the oral submission held in May 2019, and after receiving and analysing additional information, the Authority published the second draft regulations in November 2020. During the public hearings, stakeholders raised concerns regarding the three Groups (Group A, B, and C) which were proposed in the initial set of draft regulations.
- 5.9. The draft 2019 Regulations proposed that Group A's sporting events should be broadcast by Free to air broadcasters, Group B by Subscription Broadcasting Service, and Group C was to be broadcast by both Free to Air and Subscription Broadcasters and for the purposes of showcasing and promoting minority and developmental sports.

## **2nd Draft Regulations Process**

- 5.10. Having considered the arguments proffered as well as concerns raised by stakeholders during the first round of public consultations in relation to the First Draft Regulations, the Authority published the Second Draft Regulations in November 2020 in order to give stakeholders a second opportunity to comment on the draft regulations.

- 5.11. During the second consultation process, the Authority received thirteen (13) submissions from stakeholders. The above submissions were supplemented by the provision of additional information pursuant to requests directed by the Authority to certain stakeholders.
- 5.12. The response to the Second Draft Regulations has been more positive as a large number of stakeholders such as MultiChoice, Netball SA, PSL, SARU *etcetera* expressed their support for the regulations proposed by the Authority.

## **I. ISSUES RAISED IN THE SUBMISSIONS**

### **1. Delayed live**

- 1.1 Mr. Rendani Pharamela made submissions in relation to delayed-live broadcasting and expressed the view that technological advances have made delayed-live impractical. In his view, delayed or delayed live should not be considered, and listed sporting events should be broadcast live by Free-To-Air broadcasters ("FTA").
- 1.2 He further proposed an alternative to delayed or delayed live and argue that FTAs should explore other means, such as streaming whereby FTA can have collaboration with telecommunications companies whereby telecommunications companies can offer bundles for sports as this will play sports to be more accessible to the majority of South Africans.<sup>6</sup>
- 1.3 Mr. Jeremy Evans agrees on changes made from the initial 2018 Draft to the current 2020 Draft. Further, the submitter expressed that sports

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<sup>6</sup> Page 2 of Mr. Rendani Pharamela on additional submission on 2<sup>nd</sup> draft regulations.

federations have seen growth due to their contracts and the revenue obtained from deals with the subscription broadcasters.

## **2. Unbundling of rights**

2.1 Both Mr. Jeremy Evans and Mr. Rendani Pharamela, argue that sports rights should be unbundled. Mr. Evans implored the Authority to adopt the UK model regarding sports broadcasting. The UK model has different groupings and conditions such as 95% coverage of the population. And in the UK, there are different packages due to unbundling.

## **3. Listing of Events**

3.1 The submitter (Mr. Jeremy Evans) states that the regs are unclear of what criteria will be used to determine whether a sporting event is in the public interest and who will make the decision. The regulations do not indicate that the sporting body will be consulted regarding the listing/de-listing of events.

## **4. Sub-licensing**

4.1 Mr. Jeremy Evans welcomes the changes in section 6 of the 2020 regulations to the sublicensing agreements protecting free-to-air broadcasters in their negotiations with subscription broadcasters over the secondary rights to listed events. However, he is of the view that they will not be enough to "circumvent" section 60 of the ECA "...giving subscription broadcasters the legal right to buy the tv rights to national sporting events"<sup>7</sup>.

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<sup>7</sup> Page 7 of Mr. Evans submissions on the Second Draft Regulations.

- 4.2 He further argued that both the Ministers and the Authority's failure to address sub-licensing conditions in the regulations will not assist in developing a new framework with the scope and vision to adapt to the technological innovations transforming consumers' viewing habits in the market. Another issue raised by Mr. Evans was that the Second Draft Regulations did not give due consideration to the digitisation and how that will impact and reshape the way sports are consumed.
- 4.3 He further proposed that a completely new set of regulations that takes into account the competing interests of sports federations, broadcasters, and consumers in the new digital era of sports broadcasting and where traditional contracts relating to the ownership, acquisition, and distribution of tv and content rights and their market values have been turned upside down by the pandemic, should be designed. The said design process should start with a vibrant and properly funded SABC because it has the viewership numbers to increase the market's size and scale and this benefits all of its stakeholders from a social and economic perspective<sup>8</sup>.

## **5. Exclusivity**

- 5.1 Mr. Jeremy Evans is of the view that the Authority should adopt the UK model regarding sports broadcasting. The UK model has different groupings and conditions, such as 95% coverage of the population. And in the UK, there are other packages due to unbundling.
- 5.2 CAP appreciates the balancing act between the sale of broadcasting rights as a source of revenue for the sports industry against access to free-to-air broadcasting services

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<sup>8</sup> Page 11 of Mr Evans submissions on the Second Draft Regulations.

## 6. Regulatory Impact assessment

- 6.1 eMedia and MMA/SOS argued that the Authority should have conducted a Regulatory Impact Assessment on the effectiveness of current regulations and concluded the Subscription Broadcasting Services inquiry before amending the Regulations.
- 6.2 eMedia Investments submits that the Sports Broadcasting Regulations should guarantee the public's right to information and preserve free access to major national and international sporting events. Furthermore, the Regulations should aim to balance the commercial priorities of broadcasters and sports organisations with broader sociocultural citizens gains from free to air sports broadcasting.
- 6.3 eMedia further contended that from oral presentations and written submission to the 2018 draft Sports Regulations there is a move to favour the commercial interests of dominant pay-tv broadcasters and sporting bodies, seeking to maximise their income from the sale of broadcast rights. The result of this shift is that citizens often face either the loss of access to TV coverage of key sporting events and competitions and/or rising fees from pay-TV services.<sup>9</sup>
- 6.4 With regards to the review of listed events by the Authority, eMedia submits that the process for adding or removing a national sporting event may take a long time and maybe unduly delayed and suggests a more flexible approach to be adopted<sup>10</sup>.
- 6.5 eMedia submits that it supports the strengthening of regulation 8, which empowers the broadcasting service licensee entering into

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<sup>9</sup> eMedia Investments, Written submission draft sport broadcasting services amendment regulation, 2020, page 5

<sup>10</sup> eMedia Investments, Written submission draft sport broadcasting services amendment regulation, 2020, page 10

commercial agreements to report any unresolved dispute and/or non-compliance to ICASA.<sup>11</sup>

- 6.6 eMedia submits that it is concerned that the amendment to Regulation 9 by the insertion of regulation 9 (1) (bA) only covers sporting events broadcast by free to air broadcasters. It suggests that the regulation should be extended to require all SBS broadcasters to provide full particulars of national sporting events acquired but not broadcast.<sup>12</sup>
- 6.7 IOC, eMedia, SARU, and Netball SA are satisfied with the regulations and appreciate that the Authority has considered the submissions made during the first draft regulations and has effected the proposals to be included in the final regulations. In particular, Netball SA stated that it is pleased that there are no overly onerous or restrictive requirements placed on netball, the listing of the Netball World Cup is, however, supported, and the consistency applied by the Authority in recognising criteria for the sport of national interest and national sporting events is commended and supported.
- 6.8 SARU, in particular, is encouraged by the fact that the amendments to the Draft Regulations reflect that the Authority has been responsive to the concerns raised by all stakeholders. It is further encouraged by ICASA's efforts to try and strike a balance between the interests of television viewers, sports fans, sports federations, broadcasters, and ICASA's mandate in terms section 60(1) of the ECA
- 6.9 SARU states that the Draft Regulations will, similar to the 2010 Regulations, fulfil the objects set out in section 2 of the ECA, including the following:

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<sup>11</sup> eMedia Investments, Written submission draft sport broadcasting services amendment regulation, 2020, page 11

<sup>12</sup> eMedia Investments, Written submission draft sport broadcasting services amendment regulation, 2020, page 1



- 6.9.1 the regulation of electronic communications in the Republic in the public interest;
  - 6.9.2 encouraging investment and innovation in the communications sector, and promoting stability in the ICT sector;
  - 6.9.3 protect the value of the intellectual property rights of sports federations; and
  - 6.9.4 preserve the ability of sports federations to exercise their discretion (as this relates to the licensing of sports broadcasting rights) in the best interests of the sporting codes under their care.
- 6.10 The PSL states that the criteria used to determine if a sport would be of national interest was clear and was quintessential of national interest.
- 6.11 The PSL argues that the 2020 Regulations (the Second Draft Regulations) have reverted to the reasonable compromise of the 2010 Regulations is in support of them, particularly the freedom provided of not restricting the sale of broadcasting rights, which they argue is in line with the Authority's powers, the PSL supports the publication of the 2020 Regulations as they are with respect to itself, with the small exclusion of the Telkom Cup, since the said tournament no longer exists contractually between the PSL and Telkom.
- 6.12 BMI/SSN argued that to date many of the listed events have not been broadcast by free-to-air broadcasters and as a result, it draws the following conclusions:
- 6.12.1 The Authority has failed to fully enforce the regulations
  - 6.12.2 In instances whereby there was a contravention, the Authority has failed to impose fines.

6.12.3 By the Authority's own admission, it does not have the mandate to interfere in the commercial activities of the licensees.

6.12.4 Due to the financial constraints of the SABC, the proposed list is viewed as an unfunded mandate.

6.13 BMI/SSN argues that the language used in Regulation 5.7 [sic] remains vague and leaves room for interpretation. In addition to the above, BMI/SSN submitted that the Authority did not include women and youth sports in the Second Draft Regulations.

6.14 CAP, MMA/SOS raised concerns regarding the exclusion of minority, development, youth, and women sports in the regulations. CAP appreciates the ICASA's acknowledgment of inequalities as reflected in the 12.6% of South Africans who use subscription television services relative to the 82% television penetration percentage. They further argue that the most vulnerable groups, namely the elderly, persons with disabilities, and those living in underserved areas, rely on both radio and television services offered by free-to-air broadcasters to watch sports content. CAP further proposes that the Authority consider mandating broadcasters to promote broadcasts of smaller sporting codes and disability sports through a fair regulation of sponsorship and advertising of sports broadcasts.

6.15 MultiChoice notes that the Authority has grappled meaningfully with the evidence and views submitted to it in the first round of the consultation process and commends the Authority on its endeavours to discharge its regulatory mandate pursuant to meaningful consultation. Furthermore, it welcomes the Authority's recognition "*that the sports industry relies on the sale of broadcasting rights as the biggest source of their revenue*".

- 6.16 MultiChoice notes that the Second Draft Regulations are in line with the principles articulated in the recently published draft White Paper on Audio and Audio-visual Content Services Policy Framework to keep sports of national interest as free-to-air and acknowledging exclusive sports as key to the subscription model.
- 6.17 Furthermore, they submit that the Second Draft Regulations are a substantial improvement on the first draft and reflect the Authority's consideration of the evidence before it.
- 6.18 SABC has raised dissatisfaction with the proposed amendments to the regulations and states that the Authority has failed in discharging its mandate of protecting the public interest. They are of the view that the Draft Sports Regulations, in their current form, do not promote or foster an effective and efficient competitive broadcasting industry and heavily disadvantage
- 6.19 The SABC points out that Authority has failed, ignored, and/or neglected to consider the SABC'S reasonable and justifiable submissions on the Draft Sports Regulations, 2018 and has also failed to provide reasons for its failure to adequately respond to the SABC'S reasonable and justified submissions.
- 6.20 The SABC demands that the Authority reviews the Draft Sports Regulations in the interest of the South African public by considering and incorporating the SABC's proposed submissions in the Regulations before the adoption of the Regulations.

## **7. Other issues**

### **7.1 Review of Local content:**

BMI/SSN, MMA/SOS, and Jeremy Evans argue that local sports are excluded from the current local content regulations. They also argue that grassroots sports should be included in the list.

### **7.2 Must Carry Regulations:**

Jeremy Evans argued that the Draft White Paper has proposed a repeal of these regulations.

### **7.3 Digitisation:**

Jeremy Evans, Rendani Pharamela, and eMedia argued that the current draft regulations do not address the issue of OTTs and as a result, the Authority should revisit the draft regulations and include streaming services.

### **7.4 Parallel Processes:**

MMA/SOS, eMedia, and SABC have raised concerns regarding the parallel processes embarked on by the Authority. They argue that the Authority has not completed its inquiry into Subscription Television Broadcasting Market and that this process has an impact on the listing of National Sporting Events.

## **J. THE AUTHORITY'S REASONS**

### **1. The Impact of the White Paper**

1.1 The Authority has considered the impact of the White Paper and provided an official response thereto, which encapsulates the Authority's position on the proposals and/or principles set out therein.

## 2. The process followed by the Authority

- 2.1 The Authority refers to the concerns raised by Mnet and SABC, in particular regarding the process undertaken by the Authority followed. The principal contention made by the aforementioned stakeholders was that the Authority departed from its normal practise of publishing a discussion document, position paper, and calling for submissions on the discussion paper before publishing regulations.
- 2.2 The Authority disagrees with the above contention. There is no requirement in the statutory framework, which requires the Authority to publish a discussion document or position paper when it makes regulations. The process undertaken in relation to the amendment of the 2010 Regulations was adopted by the Authority in compliance with the stipulations of section 4 of the ECA.
- 2.3 It is clear that the framework established by section 4 read with section 60 of the ECA requires that the amendment of the 2010 Regulations contemplated by the Authority must be undertaken in terms of a consultative and public process. The Authority is satisfied that the current process is in accordance with its obligations under the statutory framework set out above.
- 2.4 The process that the Authority followed is distinct to the process contemplated by section 67 of the ECA, which requires the Authority to first undertake an inquiry before, *inter alia*, implementing measures to remedy ineffective competition in a defined market. This is not the appropriate process to be followed in the present instance.
- 2.5 The Authority is empowered by section 60(1) to list national sporting events as identified in the public interest from time to time. However, the Authority has always interpreted section 60(1) to mean that

subscription broadcasters may acquire exclusive broadcasting rights as long as they do not prevent or hinder the free-to-air broadcasting of national sporting events identified in the public interest.

- 2.6 On the issue of sub-licensing, the Authority is of the view that although some stakeholders made submissions that this practice is sometimes used to preclude FTA from accessing broadcasting rights to national sporting events, the Authority is not convinced that the argument advanced by these stakeholders warrant the sort of drastic regulatory intervention sought by such stakeholders. In addition to the above, the Authority requested stakeholders to provide documentary evidence of subscription broadcasting service licensees imposing draconian or unsustainable terms in relation to sub-licensing arrangements.
- 2.7 Despite the Authority's request, the information requested was not provided by stakeholders alleging improper conduct by the subscription broadcasters when negotiating terms for the sub-licensing of exclusive rights to FTA broadcasting service licensees. Free-to-air broadcasters were requested to provide evidence of sub-licensing contracts to be interrogated by the Authority to ascertain whether such contracts amount to hindering or prevention of access to sporting events.
- 2.8 Unfortunately, such evidence was not provided and, as a result, put the Authority in an invidious position concerning its ability to determine the extent to which it could intervene in relation thereto. In light of the lack of evidence and the dictates of section 2(y) of the ECA, which cautions the Authority to refrain from undue interference in the commercial activities of licensees, the Authority is of the view that the mandate conferred upon it by section 60(1) of the ECA does not empower it to impose price limits and other commercial terms in relation to the aspect of sub-licensing.

- 2.9 However, the Authority has taken into account the submissions of various stakeholders regarding disputes pertaining to advertising of national sports events that have been sub-licensed. In order to address the above concerns, the Authority has amended the 2010 Regulations to insert wording that requires the contracting parties to conclude their commercial agreement regarding the actual time periods and scheduling of advertisements of national sporting events on fair, open, and non-discriminatory terms.
- 2.10 The Authority notes the concerns raised by stakeholders regarding the conducting of a Regulatory Impact Assessment before embarking upon the review and/or eventual promulgation of the amended Regulations. The Authority is of the view that regulatory impact assessment is not a requirement by law but rather a good regulation-making process.

### **3. Provision of sporting events on exclusivity vs non-exclusivity basis**

- 3.1 With regards to the provision of sporting events on a non-exclusive basis, Section 60(1) of the ECA merely states that subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority. The Authority is, therefore of the view that section 60(1) of the ECA does not prohibit the acquisition of exclusive rights. Instead, the ECA qualifies the parameters within which such acquisition may be effected i.e. such acquisition of exclusive rights must not have the effect of preventing or hindering the free-to-air broadcasting of national sporting events.

- 3.2 The Authority notes the submissions by the SABC in relation to the Second Draft Regulations. Shorn of the hyperbole contained therein, the SABC's contentions may be summarised as follows:
- 3.2.1 The Second Draft Regulations do not address competition in the market;
  - 3.2.2 The Second Draft Regulations do not address issues of funding in sport;
  - 3.2.3 Sector-specific regulations dealing with subscription should be promulgated;
  - 3.2.4 The Second Draft Regulations do not contain a dispute resolution mechanism;
  - 3.2.5 The Second Draft Regulations do not contain provisions that establish a sub-licensing framework;
  - 3.2.6 Exclusivity of rights within an unbundled framework i.e. FTA broadcasters should be able to hold or acquire exclusive FTA rights.
- 3.3 The Authority notes the SABC's contentions regarding competition concerns arising from this process. The Authority wishes to reiterate that this process is undertaken within the ambit of a specific legislative framework, which is section 60 read with section 4 of the ECA. Accordingly, the Authority cannot address the SABC's concerns in relation to competition through the medium of this regulatory process.



- 3.4 Similarly, the Authority is not empowered by its applicable statutes to address the SABC's concerns regarding funding in sports through this regulatory process.
- 3.5 The Authority is aware of the importance of exclusivity insofar as the broadcasting rights are concerned and has sought to strike the right balance in ensuring the final regulations are consistent with the objects of the ECA both in respect of the access to national sporting events contemplated by section 60 and ensuring the sustainability of its licensees.

#### **4. Must Carry Regulations and Minority and Developmental Sports**

- 4.1 The Authority notes the submissions made by stakeholders recommending the inclusion of provisions in the Final Regulations that will regulate the impact of Must Carry Regulations and promote Minority and Developmental Sports. In particular, notwithstanding the SABC's contentions to the contrary, the Authority considered the issues raised by the SABC as set out above. However, in relation to the revision of the Must Carry Regulations, the Authority reiterates its view that this process cannot concern itself with the revision or review of the Must Carry Regulations as contended for by the SABC. That process is underway under the aegis of another committee of the Authority. However, insofar as this process, the Authority is constrained to act within the confines of the applicable legislative framework established by section 60 read with section 4 of the ECA.
- 4.2 The above considerations apply with equal force to the issue of Minority and Development Sports. Whilst the promotion of Minority and Developmental Sports is indeed a positive initiative, and this process cannot be utilised for that purpose. The Authority is a creature of statute and bound by the principle of legality to act in accordance with

the diktats of its empowering legislation. The transplantation of minority and developmental sports into this process, undertaken under section 60 of the ECA, would not be an appropriate approach.

- 4.3 Similarly, the Authority does not have the mandate to include so-called "grassroots sports" contended for by various stakeholders. The Authority's mandate is circumscribed by the provisions of section 60 of the ECA, and the grassroots sports contended for by multiple stakeholders do not appear to fall within the ambit of "national sporting events" as contemplated in terms of section 60 of the ECA.

## **K. ANALYSIS OF INDIVIDUAL AMENDMENTS**

### **5. Regulation 2: Amendment of regulation 1 of the 2010 Regulations**

- 5.1 The definitions contained in the 2010 Regulations are amended as follows:
- 5.1.1 The definition of "Act" is amended by addition of the words "as amended" to take into account the subsequent amendments to the Act;
  - 5.1.2 The definition of "Confederation sporting event" is amended to effect editorial changes;
  - 5.1.3 A definition for "COSAFA" is inserted to refer to the Council of Southern Africa Football Associations;
  - 5.1.4 A definition of "TAFISA" is inserted to refer to the Association for International Sport for All.

- 5.1.5 A definition for "National Sporting Representative" is inserted to mean any individual representing South Africa in a confederation sporting event. This definition was derived from the definition of the terms "Olympian" and "Paralympian" in the SASCOC Constitution<sup>13</sup>. The term *National Sporting Representative* was chosen to incorporate all athletes as well as sporting events in one definition.
- 5.1.6 A definition of "National Federation" as contemplated in terms of section 1 of the National Sport and Recreation Act, 110 of 1998 is inserted for ease of reference;
- 5.1.7 A definition for "Senior" is inserted to mean the highest-ranking team in a specific sporting code.
- 5.1.8 A definition for "Subscription broadcasting service licensee" is inserted to mean a licensee who provides a broadcasting service to a subscriber upon payment of a fee.

## **6. Regulation 3: Amendment of regulation 2 of the 2010 Regulations**

- 6.1 Regulation 2 (a) is amended to align the object of the Regulations with section 60(1) of the ECA and section 2 of the ICASA Act, by the addition of the words "*as identified in the public interest*".
- 6.2 The proposed insertion is to bring the wording of regulation 2(a) in line with the provisions of section 60(1) of the ECA.

## **7. Regulation 4: Amendment of regulation 4 of the 2010 Regulations**

- 7.1 Regulation 4(1)(a) of the 2010 Regulations is amended to substitute the term “an individual” with “a national sporting representative” in relation to a confederation sporting event. A national sporting representative means any individual representing South Africa in a confederation sporting event.

## **8. Regulation 5: Amendment of regulation 5 of the 2010 Regulations**

- 8.1 Regulation 5 of the 2010 Regulations is amended to insert “TAFISA World Sport For All Games”, “ICC Women’s Cricket World Cup” and “Netball World Cup” and to delete “International Boxing Federations” and “Telkom Knockout” from the list.

## **9. Regulation 6: amendment of regulation 6 of the 2010 Regulations**

- 9.1 The Authority has taken into account representations regarding advertising of sub-licensed national sporting events and has sought to address this by the amendment of regulation 6(4) to insert wording **that requires the parties to conclude their commercial agreement** regarding the actual time periods and scheduling of advertisements of national sporting events on fair, open and non-discriminatory terms.

## **10. Regulation 7: Amendment of regulation 7 of the 2010 Regulations**

- 10.1 Regulation 7 of the 2010 Regulations is substituted in its entirety. The Authority has extended the period for review of the list of national sporting events to every five years instead of the previous four-year period. Furthermore, the Authority has introduced wording to the effect that the list of sporting events may also be reviewed as and

when the Authority determines or upon application (supported by reasons) by any interested stakeholder.

### **11. Regulation 8: Amendment of regulation 8 of the 2010 Regulations**

11.1 Regulation 8 of the 2010 Regulations is amended to insert a new provision empowering a broadcasting service licensee entering into a sports broadcasting commercial agreement in terms of these Regulations to report any unresolved dispute and/ or non-compliance with regulations 8(1) and 8(2) to the Authority. This provision provides an avenue for licensees to obtain redress on an expedited basis by the Authority in relation to a dispute arising under this section.

### **12. Regulation 9: amendment of regulation 9 of the 2010 Regulations**

12.1 Regulation 9 is amended to effect editorial changes and introduces a requirement for licensees to keep records which include full particulars of all listed national sporting events acquired but not broadcast by free-to-air broadcasting services licensees. This amendment is intended to address representations made regarding the acquisition by free-to-air broadcasters of rights to sporting events which are then not broadcast.

### **13. Regulation 10: Amendment of regulation 10 of the 2010 Regulations**

13.1 Regulation 10 of the 2010 Regulations is amended to ensure alignment with sections 17(E) and (H) of the ICASA Act.

## **L. CONCLUSION**

1. The Authority has considered the submissions made during the process for the amendment of the 2010 Regulations. It is of the view that some of the issues raised are policy-related whilst others pertaining to the more granular commercial activities of its licensees fall outside the mandate of the Authority as conferred by section 60 of the ECA.
2. The Authority is also aware of the several parallel processes which could have an impact on these final regulations and is keeping abreast with the developments in that regard. Should it become necessary, the Authority shall conduct a review of the Final Regulations in terms of the applicable provisions of the ECA.
3. Lastly, the Authority wishes to reiterate that the steps embarked upon in terms of this process pertains to Section 60(1). As such, any pronouncements contained in this Reasons Document are in terms of the mandate conferred in terms thereof.



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