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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**NOTICE 1879 OF 2023****Independent Communications Authority of South Africa**

350 Witch-Hazel Avenue, Eco Point Office Park

Eco Park, Centurion

**ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIP
REGULATIONS 2023**

The Independent Communications Authority of South Africa hereby publishes the Advertising, Infomercials and Programme Sponsorship Regulations set out in the Schedule, in terms section 4(3)(j) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) read with sections 4 (1) and 55 (1) of the Electronic Communications Act, 2005 (Act No. 36 of 2005).

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

Yolisa Kedama**Acting Chairperson****Date:** 27/06/2023

SCHEDULE

1. Definitions

In these Regulations, any word or expression has the meaning assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005), unless otherwise specified:

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

"advertisement" means any material broadcast, in visual and/or audio form, for which a broadcasting service licensee receives a consideration, in cash or otherwise, and which promotes the interests of any person, product or service, provided that:

- (a) The following shall be regarded as being advertisements:
 - spot commercials, public service announcements for which a broadcaster receives a consideration, any material that would constitute an infomercial but for the fact that it is of two minutes' duration or less, that part of sponsorship packages which is constituted by spot commercials and commercial features;
- (b) The following shall not be regarded as being advertisements:
 - public service announcements in respect of which the broadcaster does not receive any consideration, supply agreements, infomercials exceeding two minutes in duration, branded filler material which receives no consideration and is of a public service nature, sponsorship elements which form part of in-programme material, presenters' credits and (in relation to competitions and self-promotions) programme competitions, branded promotional spots and self-promotion promos;

"Advertising Regulatory Board" means the entity that replaces the Advertising Standards Authority of South Africa in terms of the Act;

"Advertising Standards Authority of South Africa" has the same meaning given to that term in the Act;

"Authority" means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No.13 of 2000);

"branded filler" means a visual and/or audio announcement transmitted by a broadcasting service licensee and aimed at imparting knowledge the dissemination of which is in the public interest, regardless of whether such announcement has the effect of promoting the interests of a commercial entity;

"branded promotional spot" means a promotional announcement transmitted by a broadcasting service licensee regarding a forthcoming programme or regarding a channel or station and which mentions or refers to an advertiser or a commercial entity;

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

"BSL" means broadcasting service licensee;

"commercial feature" means a stand-alone feature, unrelated to a programme, and which may take the form of (but is not limited to) a commercial competition, advertising feature or advertising programme which is primarily intended to promote the interests of one or more persons, product, service or sponsor, regardless of duration, and excludes any programme competition;

"Complaints and Compliance Committee" has the meaning assigned to it in the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

"current affairs programme" means programming that is not a news bulletin, which focuses on and includes comment on and interpretation and analysis of current socio-political issues;

"infomercial" means material of more than two minutes' duration, broadcast in visual and/or audio form, for which the broadcasting service licensee receives a consideration, in cash or otherwise, which is usually (but not necessarily) presented in a programme format, which promotes the interests of any person, product or service, which entails a direct offer of a product or service to a member or members of the public in return for payment, and which usually (but not necessarily) contains a demonstration of the use of the product or service concerned and includes material known as tele-shopping, home shopping, direct marketing and/or direct sales;

"news" means programming broadcast by a BSL, in which it reports on news events of immediate social, political or economic relevance and on matters of international, national and local significance, but which is not a current affairs programme;

"performance period" means the period between 05h00 and 23h00 every day;

"presenters' credits" means any acknowledgement of the provision of hair products, clothing, accessories, make-up or other goods or services to a production company or BSL by a third party;

"prime time" in relation to a person who provides a television broadcasting service, means the period between 18h00 and 22h00 every day;

"product placement" means the depiction of, or a reference to, a product or service in material (other than an advertisement) broadcast, in visual and/or audio form, in respect of which the BSL and/or the producer of the material concerned receives payment or other consideration, and which promotes the interests of any person, product or service;

"programme competition" means a competition that forms part of, or is linked to, a programme by way of a competition window, insert or slot, and which does not have the promotion of the commercial interests of a person, product, or service as its primary purpose;

"programme sponsorship" means the direct or indirect financing, whether partial or total, of the production or transmission of broadcast programme material by an advertiser or person with a view to promoting its own or another person's name, trademark, image, activities or product;

"public service announcement" means a visual and/or audio announcement transmitted by a broadcaster and aimed at imparting knowledge or information the dissemination of which is in the public interest and/or which attempts to solicit support for, or create awareness of, any non-profit organisation or any other organisation which conducts activities in the public interest;

"self-promotion promo" means a promotional announcement that focuses on programming to be transmitted on the BSL's channels;

"sponsorship element" means marketing material which forms part of, or is superimposed on, broadcast programme material such as on-screen corner logos, opening middle and closing billboards, stings, squeeze backs, the on-air depiction of, or referral to, any brand, product or name, ribbons and crawls, naming rights, and product placements with a view to promoting a sponsor's name, trademark, image, activities or product;

"spot commercial" is an advertisement found in an advertising break;

"supply agreement" means any agreement that forms part of a programme purchasing contract concluded between a broadcasting service license and a content provider and which usually, but not necessarily, specifies the amount and frequency of promotional material

which the broadcasting service licensee is obliged to transmit before, during or after the transmission of the purchased programme material.

2. Scope

These Regulations are binding on a BSL.

3. Code of Advertising Practice

To the extent that there may be inconsistencies between these Regulations and the Code of Advertising Practice of the Advertising Regulatory Board in respect of any matter which falls within the jurisdiction of the Authority, these Regulations shall prevail.

4. Advertising

- (1) The definition of "advertisement" shall be used to distinguish between programme material, advertisements, infomercials, and programme sponsorship transmitted by BSL for the purposes of:
 - (a) ensuring compliance by BSL with these Regulations;
 - (b) determining whether jurisdiction in respect of complaints concerning material transmitted by BSL vests in the Complaints and Compliance Committee or the Advertising Regulatory Board; and
 - (c) regulating the scheduling of adverts, infomercials and programme sponsorship.
- (2) Any BSL who transmits a programme competition, a branded promotional spot, branded filler material, a self-promotion promo or a sponsorship element in the form of the on-air depiction of, or referral to, any brand, product or name, must

ensure that the primary purpose of the broadcast is to promote the BSL or the programme concerned, rather than the commercial interests of the person, product or service referred to in the course of such transmission.

- (3) Transmission elements such as continuity announcements and station identification, in the form of on-screen logos, signature tunes and the like, do not constitute advertisements.

5. Infomercials

- (1) A BSL must not transmit any infomercials during prime time or during the transmission of, or in breaks during the transmission of, any children's programme.
- (2) Every BSL must ensure that all infomercials transmitted by it are presented and labelled in such a manner that it will be clear to the consumers that such infomercials do not constitute programme material.
- (3) No channel may transmit infomercials for more than two (2) cumulative hours during the performance period in any one day.
- (4) The provisions of regulation 5 shall not apply to any dedicated infomercial channel provided by a BSL.

6. Programme Sponsorship

- (1) Every BSL who derives benefit from a programme sponsorship must ensure that, in relation to the relevant sponsored programme, editorial control remains with that BSL.
- (2) Every BSL must:

- (a) in respect of every programme sponsorship obtained or accepted by it, enter into a written sponsorship contract with the sponsor which shall provide that the sponsor shall not be entitled in any way to influence the content or scheduling of the sponsored programme; and
 - (b) on the Authority's request, furnish the Authority with copies of sponsorship contracts concluded by that BSL.
- (3) A BSL who provides a television broadcasting service must not obtain or accept any programme sponsorship from any person in respect of any news or current affairs programme.
- (4) Notwithstanding sub-regulation (3), a BSL who provides a television broadcasting service shall be entitled to obtain or accept a programme sponsorship in respect of a weather forecast or sports results bulletin which constitutes part of a news programme broadcast by that BSL.
- (5) Any depiction of, or referral to, the name, logo, product or service of a person who provides a programme sponsorship to a BSL, whether before, during or after the broadcast of the relevant programme, shall be subordinate to the content of the programme material to ensure that undue prominence is not given to that name, logo, product or service.
- (6) A BSL must not permit any product placement in any news or current affairs programme transmitted by it.
- (7) Product placement in programming other than news and current affairs shall be subordinate to the content of the programme material.
- (8) Product placement must be signalled clearly at the end of the programme in which the placement appears.

- (9) A BSL must not accept any programme sponsorship from any person who is prohibited by any legislation from procuring the transmission by a broadcasting service licensee of any advertisement, infomercial or other marketing material.
- (10) In all cases of programme sponsorship, a BSL must, before and after the transmission of the sponsored programme, state clearly the nature of the sponsor's association with the relevant sponsored programme. Preference should be given to descriptions such as "sponsored by" or "in association with" as opposed to descriptions such as "brought to you by" or "with compliments of".

7. Contraventions and penalties

A licensee that contravenes regulations 4 (2), 5 (1) to (3), 6 (1) to (3) and/or 6 (5) to (10) is liable to a fine not exceeding one million rand (R1 000 000).

8. Repeal

These Regulations repeal, in their entirety, the Independent Broadcasting Authority (Advertising, Infomercials and Programme and Sponsorship) Regulations, 1999 published in Notice No. R. 426 (Government Gazette No. 19922) of 1 April 1999.

9. Short title and Commencement

These Regulations are called the Advertising, Infomercials and Programme Sponsorship Regulations, 2023 and shall come into operation after six (6) months from the date of publication of these Regulations.



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

REASONS DOCUMENT

ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIP REGULATIONS

June 2023

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1. ACKNOWLEDGEMENTS

1.1 The Independent Communications Authority of South Africa (“the Authority/ICASA”) hereby acknowledges and thanks all stakeholders who participated in the process aimed at reviewing the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999 (“the Regulations”).

1.2 The following stakeholders submitted written representations to the Authority on the ICASA’s Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022¹:

1.2.1 African Media Entertainment Limited (“AME”),

1.2.2 eMedia Investments (“eMedia”),

1.2.3 MultiChoice,

1.2.4 National Association of Broadcasters (“NAB”); and

1.2.5 South African Broadcasting Corporation (“SABC”).

¹ ICASA, 2022, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, published in Government Gazette 46211, of 8 April 2022.

2. INTRODUCTION

- 2.1 The Authority is empowered by section 55 of the Electronic Communications Act, 2005 (Act No. 36 of 2005), ("ECA") to develop Regulations in respect of scheduling of adverts, infomercials and programme sponsorship. Therefore, the Authority is reviewing the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999 in line with section 55 of the ECA. Furthermore, section 4 (3)(j) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("ICASA Act") provides that the Authority may make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority.
- 2.2 On 26 March 2021, the Authority published a Notice of its intention to conduct an inquiry into the review of the Regulations in terms of section 4B of the ICASA Act².
- 2.3 Subsequent to the section 4B process ("Discussion Document"), the Authority published a Notice in terms of section 4C (6) of the ICASA Act, Findings Document and Draft Regulations in Government Gazette 46211 of 08 April 2022, inviting written representations on the Draft Regulations. The closing date for written submissions on the Draft Regulation was 01 June 2022. The Findings Document contained the findings of the Authority in terms of the inquiry into the review of the Regulations.
- 2.4 The Authority received five (5) written submissions from stakeholders namely: SABC, MultiChoice, eMedia, AME and the NAB. Three (3) stakeholders being; SABC, MultiChoice and eMedia made oral representations at the public hearings on 11 July 2022. Post hearings, stakeholders were afforded an opportunity to submit supplementary information as noted at the hearings.

² ICASA, 2021, Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, published in Government Gazette No.44333, of 26 March 2021.

- 2.5 The Authority analysed the written and oral representations and developed a Reasons Document and Final Regulations. The purpose of the Reasons Document is to provide reasons for decisions made by the Authority with respect to the submissions and the final Regulations.
- 2.6 The following sections contain the analysis of the written and oral submissions, and the Authority's positions.

3. ANALYSIS

3.1 LEGISLATIVE FRAMEWORK

- 3.1.1 The Regulations are being reviewed in line with section 55 (1) of the ECA, which gives ICASA the mandate to prescribe regulations in respect of scheduling of adverts, infomercials and programme sponsorship. The submissions herein provide stakeholders' interpretation of the Authority's mandate with regards to section 55 of the ECA.
- 3.1.2 AME submits that section 55 of the ECA provides that broadcasting service licensees must adhere to the "Code", which is a general reference to the rules developed by an advertising authority (formerly the ASASA). However, the Complaints and Compliance Committee ("CCC"), an internal committee of ICASA, is empowered under subsection 55 (2) to hear complaints concerning alleged breaches of this Code despite the fact that its enforcement is entrusted to another authority.³
- 3.1.3 AME is of the view that the CCC's jurisdiction can only derive from the fact that a licensee has not adhered to section 55 (1), which refers to "*advertising regulations prescribed by the Authority in respect of scheduling of adverts,*

³ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 7.

infomercials and programme sponsorship", rather than any infractions of a Code that ICASA is not authorised to administer. AME indicates that despite the provisions of subsections (1) and (3), ICASA's jurisdiction is limited to enforcing its own regulations and therefore the jurisdiction of the CCC must be similarly limited. AME suggests that it is likely that this question will have to be determined by an amendment to the ECA, or by a court.⁴

- 3.1.4 AME states that its comments in this regard are therefore limited to considering only ICASA's jurisdiction under the ECA, and its powers to make and enforce regulations. It further states that this is the case because it does not have sight of the "MOU" to which ICASA refers in paragraph 3.10.2 of the Findings Document.⁵
- 3.1.5 eMedia raises a concern that the Authority's focus on section 55 of the ECA did not consider its suggestion to the Discussion Document regarding limiting advertising time for subscription broadcasters. eMedia also complains that the Authority's scope of the inquiry was restricted to section 55 of the Act instead of investigating all the issues pertaining to advertising. eMedia expands that "the Authority's rigid focus on section 55 of the ECA and subsequent exclusion of the submissions it believed fell outside its parameters, limited the drafting of the regulations".⁶
- 3.1.6 NAB submits that according to the Authority's Findings Document, section 55 of the ECA empowers the Authority to regulate scheduling of Advertising, Infomercials and Programme Sponsorship. Further, NAB submits that ICASA notes the role of the Advertising Standards Authority (which was dissolved in 2018 and replaced by the Advertising Regulatory Board (ARB)) which is to administer the Code of Advertising Practice by considering the content of

⁴ Ibid, page 7.

⁵ Ibid, page 7.

⁶ Ibid, page 1.

advertisements. It acknowledges the memorandum of understanding which sets out how both entities should cooperate.⁷

3.1.7 NAB advises the Authority that it should focus on strengthening the drafting of the Draft Regulations to ensure that they are appropriate and implementable⁸.

3.1.8 **The Authority's Position**

3.1.8.1 **Section 55 (1) of the ECA gives the Authority the mandate to regulate the scheduling of Advertising, Infomercials and Programme Sponsorship. On the other hand, the role of ASASA, as contemplated in section 55 (1) of the ECA, is with regards to content of Advertising. ICASA and the ARB have a Memorandum of Understanding which sets out how the entities will work together. Section 55(2) empowers the CCC to adjudicate on complaints related to breach of the Code of Advertising Practice. Section 55(3) provides that where a broadcasting licensee, irrespective of whether or not he or she is member of ASASA, is found to have breached the code or advertising regulation, such broadcasting licensee must be dealt with in accordance with applicable provisions of sections 17A to 17H of the ICASA Act⁹.**

3.1.8.2 **The Authority notes the assertion by AME that the CCC should not have jurisdiction in terms of the Code of Advertising Practice. The Authority's position is that the provisions of section 55 of the ECA are clear. All broadcasting service licensees are required to comply with the Code of Advertising Practice, irrespective of whether or not they are a member of the ARB. The CCC is enjoined in terms of**

⁷ NAB, 2022, Written Submission on ICASA's Findings Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 1 June 2022, pages 2 -3.

⁸ Ibid, page 3.

⁹ Electronic Communications Act, Act no.36 of 2005 as amended

section 55(2) of the ECA to adjudicate complaints regarding breaches of the Code of Advertising Practice by broadcasting service licensees who are not members of the ARB. Section 55(3) of the ECA requires that where a broadcasting licensee (irrespective of whether or not such a broadcasting licensee is a member of ARB) has been found to have breached the Code of Advertising Practice, such licensee must be dealt with in terms of the applicable provisions of the ICASA Act.

3.1.8.3 The Authority's position with regard to limiting advertising time for subscription broadcasters is that advertising on subscription television services is already regulated by Regulation 1.4 of the Subscription Television Regulations of 2006¹⁰. In terms of Regulation 1.4, subscription broadcasting services are required to ensure that their largest source of revenue is not advertising or sponsorship, or a combination thereof. To the extent that Regulation 1.4 would need to be reviewed, this will be undertaken in a separate process. The Authority will limit its scope to review the Regulations within the boundaries of its legal mandate as stipulated in section 55 of the ECA.

3.2 FUNDING MODEL AND ADVERTISING REVENUE

3.2.1 SABC submits that the Draft Regulations should be cognizant of the SABC funding model, with the view to develop regulations which safeguard and allow free-to-air services to access advertising revenue so as to enable delivery of public service obligations.

3.2.2 Furthermore, SABC highlights that section 8 (b) of the Broadcasting Act, 1999 (Act No.4 of 1999) provides that the SABC should be funded through

¹⁰ ICASA, 2006, Subscription Broadcasting Services Regulations, published in Government Gazette 28452, of 31 January 2006

advertisements, subscription, sponsorship, licence fees or any other means of finance. SABC is largely funded by advertising and sponsorship revenue, as this constitutes over 70% of its annual income.¹¹

3.2.3 SABC points out that section 2 (t) of the ECA provides that when the Authority develops regulations it should also protect the integrity and viability of public broadcasting services.¹² It also states that clause 3.2 of the Broadcasting Policy White Paper of 1998 states that *"revenues for private broadcasting should come primarily from advertising and sponsorship for free-to-air broadcasters whereas the primary source of revenues for subscription services should come from subscription fees"*.¹³

3.2.4 SABC states that MultiChoice speaks of advertising revenue decline, and the public broadcaster requests a total revenue review and then a view of advertising revenue over the last few years. SABC is of the view that advertising revenue is as much a barrier of entry (as content acquired for years by subscription broadcasters) and discriminator to success in broadcasting. Further, SABC points out that new channels cannot simply enter into the market without attracting audiences and revenue. According to SABC, the Authority should review this area with the view to assess the effectiveness of section 60(4) of the ECA.¹⁴

3.2.5 In response to the above assertion by the SABC, MultiChoice states that it supports the Authority's position that the Authority's mandate in terms of section 55(1) of the ECA is to regulate the scheduling of advertising, infomercials, and programme sponsorship in order to protect consumers. MultiChoice states that it further supports the Authority's position that the content of advertising is the role of the Advertising Regulatory Board ("ARB"

¹¹ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercial and Programme Sponsorship 2022, 01 June 2022, page 3.

¹² Ibid, page 4.

¹³ Ibid.

¹⁴ SABC, 2022, Supplementary submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 3 August 2022, page 10.

(formerly ASASA)). It further indicates that licence conditions are separate from this process and that section 60 (4) of the ECA falls outside the scope of this inquiry.¹⁵

3.2.6 AME submits that the increase in the number of community and commercial radio stations and the number of subscribers now paying to watch television like DStv, as well as the attraction of the free-to-air SABC stations means that traditional media's advertising revenue remains under pressure.¹⁶

3.2.7 AME further submits that according to the Broadcasting Research Council's Annual Financial Statements for the year ended 31 March 2020, levy collections which are theoretically 1% of revenue (excluding subscriptions), are indicative of the fact that two-thirds of all advertising spend is on TV and less than one-third is on radio.¹⁷

3.2.8 AME notes that both commercial and community sound broadcasters are competing for less than 33% of the overall advertising revenue. Therefore, it suggests that it is critical that ICASA keeps this in mind while attempting to regulate advertising and sponsorship in the context of commercial radio broadcasting.¹⁸

3.2.9 AME submits that it supports MultiChoice's statement in which it was referring the Authority to the European AVMS Directive 2010 whose aim was to protect consumers from excessive advertising and set rules to ensure such. As a result, television advertising, teleshopping and sponsorship have been updated in line with the market realities. AME indicates that MultiChoice suggests that the Authority's regulations should be in line with the market realities. AME further supports regulatory intervention that might be needed to protect consumers

¹⁵ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 3.

¹⁶ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 2.

¹⁷ Ibid, page 3

¹⁸ Ibid, page 3.

from excessive advertising, particularly in the context of television broadcasting.¹⁹

3.2.10 AME states that it made a submission on the definition of the word “**advertisement**” to ensure that all forms of advertising including infomercials and promotional spots, sponsorship and product placements are properly defined to be “advertisements”. AME is of the view that it is currently possible for subscription television broadcasters to use the definition of “advertisement” to exclude some of these items and so to increase the amount of advertising above the regulated threshold.²⁰

3.2.11 AME submits that the Authority’s finding that stakeholders are of the view that the advertisement revenue is earned from advertising, sponsorship, infomercials and product placement is confusing. AME states that another confusing statement is that the revenue is determined by the advertiser’s ability to spend which is influenced by market forces including target market, platform, and demographics amongst others.²¹

3.2.12 AME states that it is obvious that in the commercial sound broadcasting, revenue is earned from advertising and sponsorship, but not from infomercials and product placement which by their nature are only relevant to television broadcasting. AME argues that it does not understand what is meant by the statement that the amount of revenue earned by a broadcaster is determined by the advertiser’s ability to spend, since this ability is somehow within ICASA’s power to determine. It alludes that an advertiser will have a budget which will be affected by the macro- and micro-economics of the market in general, but this is not influenced by the target market, platform or demographics. AME is of the view that it is important for the Authority to understand this difference as it can ensure that subscription television broadcasters do not earn more

¹⁹ Ibid, pages 3 – 4.

²⁰ Ibid, page 4.

²¹ Ibid, page 4.

revenue from advertising and sponsorships (or infomercials and product placements) than they do from subscriptions.²²

3.2.13 The Authority's Position

3.2.13.1 When regulating the scheduling of advertising, infomercials and programme sponsorship, the Authority aims to ensure a balancing act between sustainability of broadcasters relating to revenue generation through sponsorship, infomercials and advertising, with the need to protect the consumers. The Authority is cognisant and considerate of the necessity for broadcasters to create revenue as alluded by the submissions above. The Authority is also committed to protect the integrity and viability of public broadcasting services as contemplated in section 2 (t) of the ECA.

3.2.13.2 The Authority emphasises its position from the Findings Document that this process focuses on section 55 of the ECA, which is about scheduling of advertising, infomercials, and programme sponsorship. Therefore section 60 (4) of the ECA falls outside the scope of this review process.²³

3.2.13.3 The Authority notes AME's contentions regarding limiting advertising time for subscription broadcasters. The Authority would like to refer AME to the position in paragraph 3.1.8.3 above, which outlines how the Authority addresses this issue.

3.3 IMPACT OF OVER THE TOP (OTT) SERVICES

²² Ibid, pages 4 – 5.

²³ ICASA, Authority's Findings Document on the review of the IBA (Advertising, Infomercials, and Programme Sponsorship) Regulations 1999, published in Government Gazette 46211 of 8 April 2022, page 9.

3.3.1 SABC states that it supports the Authority's continuous monitoring of the impact of online services on broadcasting services, to create a conducive regulatory environment for broadcasters. It raises a concern that the emerging of online services have brought several challenges to the broadcasters such as, part of advertiser's budgets being directed to online content providers. As a result, SABC proposes that there is a need to regulate online services to ensure regulatory parity.²⁴

3.3.2 SABC submits that it does not have a comparative study of advertising revenue on the OTT and free-to-air broadcasting services. However, according to Price Water Coopers, Media and Entertainment Outlook 2019-2023, an Africa Perspective study, advertising revenue for TV and Video had a decline of 3.2% between 2015 and 2018. The study projected a decline of 1.8% in 2023. The study further shows that Radio Advertising revenue has increased by 2.8% between 2016 and 2018 and projected an increase of 2.1% in 2023. Furthermore, the study generally shows that the total advertising revenue had a decline from 6.1% in 2015 to 2.8% in 2018 and projected growth of 3.4% in 2023.²⁵ Therefore, SABC states that the above forecasts dictate that broadcasting services should be protected more through enabling regulatory frameworks.²⁶

3.3.3 SABC states that MultiChoice in its submission mentioned that the issue is more around foreign OTT players entering and taking revenue. SABC points out that prior to OTTs entering into the market, similar challenges were experienced between subscription broadcasters and free-to-air services. According to the SABC, the subscription broadcaster had the unfair advantage of subscription revenue added in, which allowed for deep pockets, negotiation strength to acquire content, and the ability to create many channels and

²⁴ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 06.

²⁵ SABC, 2022, Supplementary submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 3 August 2022, page 09.

²⁶ *ibid*

platforms. SABC submits that MultiChoice also has, as part of its model, OTT platforms which it is now asking ICASA to protect. The SABC states that all these contributing factors need to be taken into account when looking into a decline in advertising revenue.²⁷

3.3.4 MultiChoice states that it complies with the regulatory requirements applicable to subscription broadcasting, including section 60 (4) of the ECA, which ensures that its advertising and sponsorship revenue does not exceed its subscription revenue. MultiChoice points out that it does not enjoy any unfair advantage, and that OTTs fall outside the Authority's broadcasting licensing and regulatory framework. It indicates that it is merely requesting regulatory parity between broadcasters and OTT services.²⁸

3.3.5 MultiChoice is of the view that there is no basis for the SABC to draw an analogy between the OTT/broadcasting regulatory disparity and pay/FTA TV, and that this question is misconstrued and falls outside this process.²⁹

3.3.6 The Authority's Position

3.3.6.1 The Authority would like to reiterate its position outlined in the Findings Document³⁰ that it does not have jurisdiction over online media. The Authority is following the process emanating from the Draft White Paper³¹, and any changes that may result from the Draft White Paper being made law will be addressed accordingly at that point.

²⁷ SABC, 2022 Supplementary submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 3 August 2022 page 10.

²⁸ MultiChoice, 2022, Second Supplementary submission Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 20 August 2022, unnumbered page 6

²⁹ Ibid, page 6

³⁰ ICASA, Authority's Findings Document on the review of the IBA (Advertising, Infomercials, and Programme Sponsorship) Regulations 1999, published in Government Gazette 46211 of 8 April 2022, page 69.

³¹ Department of Communications and Digital Technologies, Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published in Government Gazette 43938 of 26 November 2020.

3.3.6.2 **With regards to unfair advantage of subscription revenue, the Authority again refers to its position outlined in the Findings Document that it will continue to ensure that subscription broadcasters comply with the legislative requirement in section 60 (4) of the ECA, until such time that the legislation is amended³².**

3.4 AUDIO AND AUDIO-VISUAL CONTENT SERVICES (“AAVCS”) – DRAFT WHITE PAPER

3.4.1 NAB submits that the review of the Regulations coincides with a revision of the policy framework by the Department of Communications and Digital Technologies (“DCDT”), as the DCDT is currently amending its AAVCS Draft White Paper (Draft White Paper). This policy process is of relevance to the Authority considering the importance of regulatory parity, legal certainty and the promotion of increased investment.³³

3.4.2 NAB continues to state that it welcomes the Authority’s aim of aligning the Draft Regulations with the current legislation, however with the ever-changing nature of the broadcast sector, the Authority should consider how best to future-proof the Draft Regulations to address possible concerns that could arise in respect of Draft White Paper and other areas. This is also to circumvent the need (in the future) for a lengthy and detailed process of amending the Draft Regulations which may take considerable time to conclude.³⁴

3.4.3 AME states that it agrees entirely with ICASA’s statements in paragraphs 5.13.3, 5.13.4 and 6.4.3 of the Findings Document³⁵ in relation to the Audio and Audio-Visual Draft White Paper. It substantiates that the Regulations can

³² Ibid, page 34

³³ NAB, 2022, Written Submission on ICASA’s Findings Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 1 June 2022, page 3

³⁴ Ibid, page 3

³⁵ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, Page 2.

only deal with the matters in front of ICASA and unless ICASA had input from the Minister regarding the timing of the publication of the final White Paper, ICASA cannot put its obligations on hold, and neither can it anticipate what the final White Paper or any theoretical amendments to legislation might say.³⁶

3.4.4 The Authority's Position

3.4.4.1 **The Authority reiterates its position outlined in the Findings Document that it must consider policy made by the Minister in terms of section 4(3A) of the ICASA Act and section 3(4) of the ECA. The Authority advises that it is reviewing the Regulations in line with the current legislation³⁷. Therefore, any changes that may result from the White Paper Policy or subsequent amendments to the current legislation will be addressed at such point.**

3.5 DEFINITIONS

3.5.1 Definition of "advertisement"

3.5.1.1 AME submits that it does not agree with the definition of "advertisement", which appears to ignore the commercial nature of certain types of what is considered to amount to advertising in that they attract revenue for broadcasters (specifically television broadcasters). AME proposes that clauses 1.2.1 and 1.2.2 of the draft Regulation be amended as shown below:

- "1.2 "advertisement" means any material broadcast, in visual and/or audio form, for which a broadcasting service licensee receives a consideration, in cash or otherwise, and which promotes the interests of any person, product or service other than the broadcaster itself, provided that:

³⁶ Ibid, page 2

³⁷ ICASA, Authority's Findings Document on the review of the IBA (Advertising, Infomercials, and Programme Sponsorship) Regulations 1999, published in Government Gazette 46211 of 8 April 2022, page 13

- "1.2.1 spot commercials, public service announcements for which a broadcaster receives a consideration, any material that would constitute an infomercial, sponsorship and product placements shall be regarded as being advertisements; but
- "1.2.2 public service announcements in respect of which the broadcaster does not receive any consideration, branded filler material which receives no consideration and is of a public service nature, sponsorship which form part of in-programme material, and self-promotions or in-programme competitions, continuity announcements, and station identification shall not be regarded as being advertisements."³⁸

3.5.1.2 The Authority's Position

3.5.1.2.1 **The Authority's position is that the definition suggested by AME ignores a maximum of two (2) minutes duration that is used to determine if a material is an advertisement. The Authority uses two (2) minutes duration to differentiate an advertisement from an infomercial. The current definition provides distinction that if a commercial feature is less than two (2) minutes then it falls under the definition of advertisement. AME also proposed the insertion of the phrase "product placement" in the definition of advertisement without providing a reason. Furthermore, the ECA, in the definition of community broadcasting service and section 60 (4) recognises the need to differentiate between advertisement and sponsorship when determining the source of income for community and subscription broadcasting. The Authority's position is that the definition of advertisement in the 1999 Regulations will remain unchanged.**

3.5.2 Definition of "Advertising Standards Authority of South Africa"

³⁸ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 8 and 16.

3.5.2.1 AME states that the definition of “Advertising Standards Authority of South Africa” is not necessary since it is defined in primary legislation in section 1 of the ECA, but also because it no longer exists. AME points out that to the extent that such an entity no longer exists, practice is to accept the entity’s legal replacement.³⁹

3.5.2.2 MultiChoice suggests that Advertising Regulatory Board should mean “the entity that replaced, and performs the same functions as the Advertising Standards Authority of South Africa”⁴⁰.

3.5.2.3 **The Authority’s Position**

3.5.2.3.1 **“Advertising Regulatory Board” has the same meaning given to the definition of ASASA in the Act. This is because the definition in the Act recognises the entity that replaces the ASASA and performs the same functions. The Authority will retain the definition of ASASA and add the definition of Advertising Regulatory Board to the Regulations.**

3.5.3 **Definition of “branded filler”**

3.5.3.1 AME states that the definition of “branded filler” is at odds with the way in which it is used in the definition of “advertisement”. According to AME, in the latter, the term is further defined as “*branded filler material which receives no consideration [and] is of a public service nature*” whereas a “branded filler” is defined as “... *a visual and/or audio announcement transmitted by a broadcasting service licensee and aimed at imparting knowledge the dissemination of which is in the public interest, regardless*

³⁹ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 9.

⁴⁰ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 12

*of whether such announcement has the effect of promoting the interests of a commercial entity”.*⁴¹

3.5.3.2 AME states that in the first case the term defines the item as being in the public interest, while in the second, it is the “dissemination” of it which is in the public interest. It further argues that more importantly, in the first case, the item has no commercial value, but in the second case, it may well have commercial value since it may have the effect of “*promoting the interests of a commercial entity*”. AME indicates that it seems that leaving the two (2) conflicting provisions as they are, will result in confusion and ultimately, it is more likely that a branded filler will have commercial value, than not. AME states that its argument is substantiated by the usage of the word “branded”. AME argues that for example, if 94.7, a Gauteng-based commercial sound broadcaster was to broadcast a branded filler for its sister station 702, the two (2) entities cannot be considered as “self-promoting” as each station has its own advertisers, brand, character and format, and as a result, its own listener base. They are in competition with each other. Therefore, even if 94.7 refers to a news story which was reported on by 702 which may be of interest to the public, it should still be treated as an advertisement for 702.⁴²

3.5.3.3 **The Authority’s Position**

3.5.3.3.1 **The Authority notes the concern from AME regarding the definition of branded filler that it may cause confusion and it is more likely that it will have commercial value, than not. However, the Authority’s position is that branded fillers are intended primarily to disseminate information that is in the public interest, regardless of whether such announcement has the effect of promoting the**

⁴¹ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 9

⁴² Ibid, page 9

interests of a commercial entity in the process. The commercial value that might be derived, if any, is secondary. As such, the Authority has decided to retain the current definition of branded filler.

3.5.4 Definition of "commercial feature"

3.5.4.1 AME states that the definition of commercial feature is unclear because it says, *"commercial feature means a stand-alone feature, unrelated to a programme, and which may take the form of (but is not limited to) a commercial competition, advertising feature or advertising programme which is primarily intended to promote the interests of one or more persons, product, service, or sponsor, regardless of duration, and excludes any programme competition"*. AME points out that it does not see any difference between the meaning of this term and the meaning of the word "advertisement". According to AME, both result in revenue streams for the broadcaster, and the term "commercial feature" is included in the amended definition of "advertisement". AME suggests that this term be omitted from the definition of "advertisement". AME states that its suggested amendment to the definition of "advertisement" takes this into account, and the definition of "commercial feature" can therefore be deleted.⁴³

3.5.4.2 The Authority's Position

3.5.4.2.1 The Authority will retain the definition of "commercial feature" in the Regulations since it has a specific meaning and is part of terminology used in advertising. Further, the duration of a commercial feature extends beyond an advertisement or may exceed two (2) minutes or 120 seconds.

3.5.5 Definition of "current affairs" programme

⁴³ Ibid, page 10.

- 3.5.5.1 MultiChoice submits that it agrees with the Authority's decision to separate the definition of news and current affairs.
- 3.5.5.2 However, MultiChoice raises two concerns that firstly, it does not believe that it is necessary or appropriate for the Authority to prohibit programme sponsorship and product placement in respect of a current affairs programme. Secondly, MultiChoice points out that the definition of current affairs as defined in the draft Advertising Regulations is too broad.⁴⁴
- 3.5.5.3 MultiChoice points out that it noted the Authority's explanation to align the definition of current affairs in these Regulations to the definition in the Local Television Content Regulations of 2016⁴⁵. However, MultiChoice submits that the definition of current affairs programming serves a different purpose in the Local Content Regulations which impose minimum local content quotas in respect of amongst others, current affairs programming⁴⁶. MultiChoice insists that it is therefore appropriate to define current affairs programming widely so as to ensure the production and broadcast of a wide range of local content current affairs programming⁴⁷.
- 3.5.5.4 Multichoice argues that the inclusion of language such as "social...or economic relevance" and "international, national, regional and local significance" might increase the scope of what will constitute current affairs programming. MultiChoice states that such a definition may have the unintended consequence of capturing a variety of programming such as breakfast shows, talk shows, shows focusing on arts and culture, events of national importance, and even some comedy, sports and reality shows which

⁴⁴ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 5

⁴⁵ Ibid, page 7

⁴⁶ Ibid, page 7

⁴⁷ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 7

sponsorship and product placement prohibition would otherwise not be necessary.⁴⁸

3.5.5.5 Furthermore, MultiChoice submits that there is a danger that far too many programmes will fall within the proposed definition of current affairs, and because the draft Regulations in their current form prohibit programme sponsorship and product placement in current affairs programme, there is a danger that this proposed definition could negatively affect the funding of a wide range of programmes.

3.5.5.6 MultiChoice states that if programme sponsorship and product placement are to be prohibited during current affairs, then the definition of current affairs programme should be appropriately narrowed to avoid stifling the funding of current affairs programmes⁴⁹. MultiChoice points out that such a wide definition of current affairs programmes could cut off the lifeline of such programmes and have the unintended adverse consequences of stifling the viability and survival of the programming which the Authority values and seeks to protect⁵⁰.

3.5.5.7 MultiChoice recommends that programme sponsorship and product placement should not be prohibited in respect of a current affairs programme and that the phrase 'current affairs programme' should be deleted from Regulations 6.3 and 6.6⁵¹.

3.5.5.8 Alternatively, MultiChoice recommends that the Authority amends the definition of current affairs programme. According to MultiChoice, the definition should state that "current affairs programme" means the programming that is not news bulletin, but which is factual in nature and

⁴⁸ Ibid, page 6.

⁴⁹ Ibid, page 7

⁵⁰ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 7

⁵¹ Ibid, page 7

the primary purpose of which is to inform viewers of socio - political issues and matters of current interest and significance⁵².

3.5.5.9 NAB states that the definition of "current affairs programme" in Regulation 6.3 is too broad. It further states that it could be damaging to broadcasters as it will prevent any possible sponsorship of this kind of programming.

3.5.5.10 NAB recommends an amendment of the definition of current affairs, by removing "immediate social, political, economic relevance and national, regional and local significance", reasoning that it makes the definition too broad. It proposes that the definition should read as follows:
*"current affairs programme" means programming that is not a news bulletin, which focuses on and includes comment on and interpretation and analysis of issues of current socio-political issues*⁵³.

3.5.5.11 AME states that ICASA purports to redefine "news" in its proposed amendments to the Standard Terms and Conditions Regulations, published on 16 March 2022, to remove the reference to "current affairs". AME points out that the draft Regulation contains a definition of "current affairs programme" as follows; *"current affairs programme" means programming that is not a news bulletin, which focuses on and includes comment on and interpretation and analysis of issues of immediate social, political or economic relevance and matters of international, national, regional and local significance*⁵⁴.

3.5.5.12 AME submits that the proposal to amend the definition of news in this draft Regulation to exclude "current affairs" is confusing. According to AME, the only distinction between the two (2) phrases is the use of the word

⁵² Ibid, page 7

⁵³ NAB, 2022, Written Submission on ICASA's Findings Document on the review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 1 June 2022, page 6

⁵⁴ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, pages 10 – 11.

“programme” in this draft Regulation. AME argues that news can mean new information, especially about recent events, or noteworthy information and in particular, information not previously known, and according to AME’s research, news includes current affairs. AME states that it does not understand why ICASA would seek to distinguish current affairs from news. AME’s recommendation in relation to the amendments to the Standard Terms Regulations is to continue to include current affairs in the definition of news. Therefore, AME recommends the same in relation to the definition of news in this draft Regulation for consistency, that is, retaining the reference to “current affairs” in the definition of “news”. AME points out that it does not believe a definition of “current affairs programme” is at all necessary and ICASA does not explain why it is. AME therefore recommends that it be deleted from these Draft Regulations.⁵⁵

3.5.5.13 The Authority’s Position

3.5.5.13.1 The Authority considered the concerns from stakeholders regarding the proposed definition of *current affairs* in the draft Regulations that it may include programming which may ordinarily not require the prohibition of sponsorship and product placement. Therefore, the Authority has decided to amend the definition of current affairs to reflect the views of stakeholders, and has adopted the definition provided by the NAB which defines current affairs programme as “*programming that is not a news bulletin, which focuses on and includes comment on, interpretation and analysis of issues of current socio-political issues*”.

3.5.5.13.2 The prohibition of sponsorship and product placement in current affairs will remain unchanged.

⁵⁵ Ibid, page 11.

3.5.6 **Definition of "news" programme**

3.5.6.1 MultiChoice proposes that the definition of news should read as follows:

"News' means programming broadcast by a BSL, in which it reports on news events of immediate social, political or economic relevance and on matters of international, national and local significance, but which is not a current affairs programme". MultiChoice are of the view that the word "broadcast" appears to be missing from the definition in the Draft Regulations⁵⁶.

3.5.6.2 **Authority's position**

3.5.6.2.1 **The Authority will adopt the revised definition of news as proposed by MultiChoice. This does not change the intention of the Regulation but makes the definition more clear.**

3.5.7 **Definition of "performance period"**

3.5.7.1 AME states that the definition of "performance period" comes from the South African Local Music Regulations, 2016, and is intended to be the period during which the mandated amount of local music must be played by broadcasting licensees. AME states that performance period has no place in these Regulations and recommends that it be deleted.⁵⁷

3.5.7.2 **The Authority's Position**

3.5.7.2.1 **The performance period is a broadcasting term which refers to a daily period starting from 05h00 and ending at 23h00 as per the Advertising, Infomercials and Programme Sponsorship Regulations, 1999. This is the time when majority of audiences are watching television or listening to radio and therefore care should**

⁵⁶ Ibid page 20.

⁵⁷ Ibid, page 11.

be taken in terms of programming allowed during that period to ensure that it entertains, informs and educates. Performance period is important in these Regulations to protect consumers from excessive advertising. Licensees should avoid scheduling advertisements in such a way that they end up superseding daily programming. The Authority has decided to retain the definition of performance period.

3.5.8 **Definition of "presenters' credits"**

3.5.8.1 AME states that the objective of this draft Regulation is to address the scheduling of advertisements by broadcasting licensees. AME points out that with this in mind, it does not understand why it is necessary to have a definition of "*presenters' credits*" which means "*any acknowledgement of the provision of hair products, clothing, accessories, make-up or other goods or services to a production company or BSL by a third party*". AME is of the view that the definition refers to "a production company" which is not subject to regulation under the ECA by ICASA and this reference should be deleted. The use of products provided by third parties is almost invariably going to require acknowledgement by the broadcaster of the source of those products, which amounts to advertising. This will have the effect of a revenue equivalent for the broadcaster and should therefore constitute part of the definition of "advertisement".⁵⁸

3.5.8.2 **The Authority's Position**

3.5.8.2.1 **Presenters' credits are not regarded as advertisements as they do not benefit the broadcaster. Broadcasters are advised to devise policies to ensure that advertisements are not presented as presenters' credits. As a result, the Authority has decided to retain the definition of presenters' credits.**

⁵⁸ Ibid, pages 11 - 12

3.5.9 **Definition of "product placement"**

3.5.9.1 MultiChoice states that its understanding of product placement is in line with the definition provided in the Draft Regulations. According to MultiChoice, product placement is a type of sponsorship element which depicts a product or service within programming material (other than an advertisement) and so provides exposure for that product or service.⁵⁹

3.5.9.2 AME highlights that the definition of "product placement" states that it is not an advertisement. AME argues that it cannot understand on what basis this can be distinguished from an advertisement. According to AME, product placement is a presentation of a product designed to promote the commercial interests of the source of that produce, which will invariably result in revenue for the broadcaster. AME states that it must therefore form part of the definition of "advertisement" and it has amended this definition. According to AME, the definition of "product placement" should be amended as follows, "product placement" means the depiction of, or a reference to, a product or service in material broadcast, in visual and/or audio form, in respect of which the BSL and/or the producer of the material concerned receives payment or other consideration, and which promotes the interests of any person, product or service".⁶⁰

3.5.9.3 **The Authority's Position**

⁵⁹ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 2.

⁶⁰ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 12.

3.5.9.3.1 The Authority will retain the definition of product placement as it means the depiction of, or a reference to, a product or service in material (other than an advertisement) broadcast, in visual and/or audio form, in respect of which the BSL and/or the producer of the material concerned receives payment or other consideration, and which promotes the interests of any person, product or service. Product placement should be subordinate to the content of the programme in that it must not be depicted to the extent that it takes centre stage and overshadows the content of the actual programming. The Authority emphasise such prohibition and the extent of placement and signalling are important to ensure editorial independence and also ensure that the placement does not supersede programming.

3.5.9.3.2 With regards to merging the definition of product placement to that of advertising, the Authority is of the view that it is not necessary as the definition is clear that product placement takes place within a programme as opposed to normal advertisement which takes place during programme breaks.

3.5.10 Definition of "programme competition"

3.5.10.1 MultiChoice raises a concern that the amendment to the definition of programme competition is difficult to understand and will be challenging to implement.⁶¹ Programme competition is defined in the 1999 Regulations⁶² as "a competition that forms part of, or is linked to, a programme by way of a competition window, insert or slot, and which does not have the promotion of the commercial interests of a person, product or service as its primary purpose".

⁶¹ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 12

⁶² ICASA, 1999, Regulation relating to the definition of Advertising and the Regulation of Infomercials and Programme Sponsorship in respect of broadcasting services, published in Government Gazette 19922 of 01 April 1999

3.5.10.2 According to MultiChoice, the definition of programme competition in the 1999 Regulations seeks to restrict the extent of commercial interests of a person, product or service in a programme competition. The Draft Regulations amended the definition to delete the words “as its primary purpose”. MultiChoice states that the deletion of “as its primary purpose” suggests that the Authority completely prohibits the promotion of the commercial interests of a person, product or service in a programme competition. Such a prohibition would undermine one of the imperatives for programme competition and would certainly have a negative effect on the revenue of the broadcaster. MultiChoice alludes that it is not clear what the Authority is trying to achieve as regulation 4.2 has been left unchanged and still provides that the primary purpose (not the sole purpose) of a programme competition should be to promote the broadcasting licensee or programme rather than any commercial interests.⁶³

3.5.10.3 MultiChoice believes that programme competition is intended to;

- heighten audience awareness of, and engagement with a programme, channel or broadcaster, and
- to create brand exposure for a marketer associated with the programme competition and gain revenue.⁶⁴

3.5.10.4 Therefore, MultiChoice advises the Authority to retain the existing definition of “programme competition”, including the phrase “as its primary purpose” or define it as follows;

“programme competition means a competition that forms part of, or is linked to, a programme by way of a competition window, insert or slot and which

⁶³ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, pages 13-14

⁶⁴ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 12

*may include the promotion of the commercial interests of a person, product or service provided that is not the primary purpose of the competition”.*⁶⁵

3.5.10.5 eMedia argues that the definition of “programme competition” in the Draft Regulations is overly restrictive as it limits competition which forms part of or is linked to a programme by way of a competition window, insert or slot, and which does not have the promotion of the commercial interests of a person, product, or service.⁶⁶ In other words, competition in a sponsored programme would not be allowed in terms of the Regulations. It further advances an argument that the definition of a programme competition should be aligned with the definition of programme competition in the Consumer protection Act, No. 68 of 2008⁶⁷.

3.5.10.6 NAB submits that “programme competition” has been amended, and questions whether this amendment implies that programme competition must not have commercial interests. It states that, if the intention of the Authority is that it cannot promote a commercial interest, this is not feasible for broadcasters and will cause a loss of revenue for broadcasters⁶⁸.

3.5.10.7 AME submits that the definition of “programme competition” be clarified by the insertion of the word “in”, so that the term reads “in-programme competition”. According to AME, this ensures that the competition must be related directly to the programme in order to fall outside the definition of “advertisement”. AME states that it has made the necessary amendment to the definition of “advertisement”.⁶⁹

⁶⁵ Ibid, page 14

⁶⁶ eMedia, 2022, Comments on the Findings Document and Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 2

⁶⁷ Ibid, page 3

⁶⁸ NAB, 2022, Written Submission on ICASA’s Findings Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 1 June 2022, page 6

⁶⁹ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 13.

3.5.10.8 **The Authority's Position**

3.5.10.8.1 **The Authority will retain the phrase "as its primary purpose" within the definition of programme competition. The reason for the retention of this phrase is that having it in the definition still serves the purpose of ensuring that the promotion of the commercial interest of a person, product or service in the programme competition remains secondary to the programme. Excluding such will have the effect of completely removing the commercial interest of a person, product or service which may have unintended adverse effect on the revenue of broadcasters. The Authority agrees that the purpose of programme competition, is to heighten audience awareness of and engagement with a programme and also create brand exposure for a marketer associated with the programme.**

3.5.11 **Definition of "programme sponsorship"**

3.5.11.1 MultiChoice indicates that the definition of programme sponsorship is too wide, and it must be reduced. MultiChoice maintains that the definition should not extend to (a) indirect financing or (b) the financing of the transmission of a broadcast programme.⁷⁰

3.5.11.2 MultiChoice contends that even though the Authority's Findings Document substantiates that indirect funding and financing of the transmission of a broadcast programme is considered sponsorship as it is intended to promote the sponsor's own or another person's name, trademark, image, activities or product, it still does not address the difficulty of the overly wide definition. MultiChoice concedes that it is true that programme sponsorship aligns with particular programmes in order to achieve their marketing goals. MultiChoice further admits that there will be a frequent resonance

⁷⁰ Ibid, page 9

between what the sponsor's brands stands for and the values and content of the production being sponsored.⁷¹

3.5.11.3 MultiChoice submits that there are other sorts of contributions made to a production which are not about promoting a sponsor's brand per se, but which could still potentially fall within the bounds of indirect funding / financing⁷². MultiChoice makes an example of a programme such as Master Chef, where SMEG might provide the appliances, but not financial payments but still gains exposure, nonetheless. MultiChoice argues that even though they will be captured by the overly broad definition, the parties making these contributions such as SMEG cannot be said to be programme sponsors and should not be treated as such⁷³.

3.5.11.4 MultiChoice is concerned that the overly broad definition could mean that the service providers, e.g., caterers, security personnel, said to be involved in the indirect financing of the production or transmission of a programme and are credited for providing those services to a production, either through a logo or name in the credits, will automatically be sponsors and will be treated in the same way as authentic programme sponsors⁷⁴.

3.5.11.5 MultiChoice proposes that the definition of programme sponsorship should read; "Programme sponsorship means a commercial arrangement between a sponsor and a BSL wherein the sponsor pays a BSL to be associated with a programme with a view to promoting the sponsor's name, trademark, image, activities or product"⁷⁵.

⁷¹ Ibid, page 10

⁷² MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 10

⁷³ Ibid, page 10

⁷⁴ Ibid, page 10

⁷⁵ Ibid, page 8

3.5.11.6 **The Authority's Position**

3.5.11.6.1 **The Authority notes MultiChoice's submission, however, emphasises that the aim of this provision is to capture all arrangements where there is a sponsorship agreement between the broadcaster/producer and the sponsor to provide financing or valuable consideration in exchange for exposure. The examples provided by MultiChoice constitute product placement which is a form of sponsorship from which the sponsor, broadcaster and/or producer is deriving value. This arrangement ought to be captured within the definition. The Authority accordingly maintains the definition in the 1999 Regulations.**

3.5.12 **Definition of "public service announcement"**

3.5.12.1 MultiChoice submits that public service announcement is defined in the Draft Regulations as an announcement broadcast by a broadcasting service licensee aimed at providing information concerning a disaster or immediate grave danger to the public or in the interests of public welfare⁷⁶.

3.5.12.2 MultiChoice states that it is not clear what mischief the Authority seeks to address by amending this definition, other than to align the definition with the Standard Terms and Conditions Regulations. It is of the view that it is appropriate to define the term narrowly in the Standard Terms and Conditions. This was meant to narrowly tailor the matters on which the Authority may compel a broadcasting licensee to broadcast a public service announcement. It argues that in the Advertising Regulations it is appropriate to define public service announcement broadly, to prevent restricting or disincentivizing broadcasting licensees from making public service announcements in the public interest. MultiChoice's view is that the deleted portion of the definition could inhibit broadcasters from making

⁷⁶ Ibid

such announcements, for fear that they will not be considered an announcement "in the interests of public welfare" in the new regulation 1.20, in which event they would count as advertisements.⁷⁷

3.5.12.3 MultiChoice submits that, if the Authority confirms that the deleted portions in the current Regulations, namely, "aimed at imparting knowledge or information the dissemination of which is in the public interest and/or which attempts to solicit support for, or create awareness of, any non-profit organisation or any other organisation which conducts activities in the public interest", fall within the ambit of an announcement then it has no objection to the amended definition.⁷⁸

3.5.12.4 MultiChoice expands that, if no public service announcements will be excluded by the new definition, then the Authority should retain the proposed definition with the following amendment: "Public service announcement" means an announcement broadcast by a broadcasting service licensee aimed at providing information concerning a disaster or immediate grave danger to the public and/or announcements in the interests of public welfare. However, if the proposed definition will result in the exclusion of certain public service announcements which are currently included, then the Authority should revert to the current provision in Regulation 1.18 of the 1999 Regulations⁷⁹.

3.5.12.5 eMedia argues that a public service announcement is a message in the public interest which is aimed at providing members of the public with information relating to matters which are of public importance. The definition of public service announcement should not be limited only to announcements concerning disasters or immediate grave danger to the

⁷⁷ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, pages 8-9

⁷⁸ Ibid, page 9

⁷⁹ Ibid, page 9

public or which are in the interests of public welfare.⁸⁰ eMedia further argues that as long as the public announcement falls within the definition proposed in the draft regulations, there is no legal basis that it cannot be paid for.⁸¹

3.5.12.6 eMedia states that the definition of “*public service announcement*” is overly restrictive as it limits itself to disasters or immediate grave danger to the public or something which is in the interest of public welfare. It points out that public service announcements may be such that they constitute neither an announcement in relation to a disaster, grave danger or one which is in the interest of public welfare. It submits that the words “*public service announcement for which a broadcaster receives a consideration*”, as it appears in regulation 1.2.1 should be deleted. This should be done for consistency and there is no need for the auto elaborate on the nature of “public announcement” and should be excluded from the definition of “advertisement.”⁸² eMedia provides an example that, a public service announcement calling upon people to register for Set Top Boxes or registering to be on the voter’s roll do not constitute disasters, grave dangers, or issues to do with public welfare. As a result, eMedia suggests that the definition contained in the 1999 Regulations should be retained⁸³.

3.5.12.7 AME submits that it is unclear why in the context of section 55 of the ECA it is necessary to refer to a “public service announcement”. However, to the extent that ICASA believes that it is, AME has the same response as that made in relation to the draft amendments proposed to the Standard Terms and Conditions Regulations, published in March 2022. AME states that a quick scan of internet resources suggests that a useful definition could be,

⁸⁰ eMedia, 2022, Supplementary submission on the Findings Document and Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 3

⁸¹ Ibid, page 3

⁸² eMedia, 2022, Comments and submissions on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 5

⁸³ Ibid, page 5

"a message in the public interest disseminated without charge, with the objective of raising awareness of, and changing public attitudes and behaviour towards a social issue". If ICASA is mindful to include reference to "disasters" and "grave danger" it could do so, but it is not necessary since a traffic incident could have no impact on anyone's safety, but still requires motorists to avoid the area, and thus constitute subject matter for a "public service announcement".⁸⁴

3.5.12.8 **The Authority's Position**

3.5.12.8.1 The Authority has considered the views of stakeholders regarding the proposed definition of public service announcement in the draft Regulations. Stakeholders state that the definition excludes some elements of public service announcement, and those should have to be paid for. Further, stakeholders state that the current definition is sufficient and effective, hence, no need to amend it. The Authority agrees with the submission from stakeholders given that the current definition is more comprehensive and achieves its intended effect. Therefore, the Authority has decided to retain current definition of public service announcement from the 1999 Regulations as they are still relevant.

3.5.13 **Definition of "self-promotion promo"**

3.5.13.1 AME submits that the definition of "self-promotion promo" seems completely unnecessary in this form, specifically as it refers to being broadcast, which is obvious in the circumstances. AME states that anything which is made available by a broadcaster that is purely about its own programmes or offerings and has absolutely no independent commercial value to a third party, could constitute self-promotion and does not need

⁸⁴ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 12.

then to also be referred to as a "promo". AME states that this is unnecessary, however, if ICASA intends on keeping this term, AME recommends that it be amended as follows, "self-promotion" means an announcement by a broadcaster concerning itself or its programmes which is of no value to a third party.⁸⁵

3.5.13.2 **The Authority's Position**

3.5.13.2.1 **The Authority agrees that 'promotion' and 'promo' have the same meaning and may not be used in the same phrase. However, the two words are not intended to have the same meaning when used in the context of 'self-promotion promo'. In this context, the first part of the phrase being 'self-promotion' is intended to mean the type of promotion since there are different kinds of promotions. On the other hand, the word 'promo' is normally used as the name of a promotional insert, especially on radio and television. For example, there are many promotional inserts such as 'food promo', 'channel promo', 'drama promo', and so on. Therefore, the Authority has decided to keep the term 'self-promotion promo'.**

3.5.14 **Definition of "sponsorship element"**

3.5.14.1 MultiChoice proposes that sponsorship element should be defined as "marketing material which forms part of, or is superimposed on, broadcast programme material such as on-screen corner logos, opening, middle and closing billboards, stings, squeeze backs, the on-air depiction of, or referral to, any brand, product or name, ribbons and crawls, naming rights and product placements, with a view to promoting a sponsor's name, trademark, image, activities or product."⁸⁶

⁸⁵ Ibid, page 12.

⁸⁶ Ibid, page 12.

3.5.14.2 MultiChoice submits that the proposed definition of sponsorship element lists items that may constitute a sponsorship element. While the items listed in this clause may constitute a sponsorship element, they do not necessarily. For example, a "squeeze back" could be a sponsorship element, but it could also be an advertisement.⁸⁷ MultiChoice has added "*with a view to promoting a sponsor's name, trademark, image, activities or product*" at the end of the definition in the 1999 Regulations and they have replaced "*and includes*" with "*such as*" in their proposed definition.

3.5.14.3 AME points out that the drafting in relation to "sponsorship element" creates confusion and would like to know the necessity to have the word "element" linked to "sponsorship". AME states that the definition of "advertisement" as it stands in the draft Regulations already deals with "sponsorship". According to AME there is no other definition of "sponsorship". It therefore recommends that ICASA deletes the word "element". Furthermore, AME submits that all sponsorships have commercial elements to them, or they would not be necessary, and all sponsorships are offered by third parties in order to promote their own commercial interests by associating themselves with a product, programme, team (in the case of sport) or licensee. AME argues that only in-programme sponsorship such as branding at rugby stadiums which is visible during televised matches, should not be considered to be sponsorship that benefits the broadcaster commercially in the sense that the broadcaster will be paying the stadium for that sponsorship, rather than earning the revenue from the sponsorship itself. AME points out that it has amended the definition of "sponsorship" and "advertisement" and the relevant sub-regulation accordingly.⁸⁸

⁸⁷ Ibid, page 12.

⁸⁸ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 13

3.5.14.4 The Authority's Position

3.5.14.4.1 The Authority has decided to define sponsorship element as marketing material which forms part of, or is superimposed on, broadcast programme material such as on-screen corner logos, opening, middle and closing billboards, stings, squeeze backs, the on-air depiction of, or referral to, any brand, product or name, ribbons and crawls, naming rights, and product placements with a view to promoting a sponsor's name, trademark, image, activities or product. The addition of the last part being "with a view to promoting a sponsor's name, trademark, image, activities or product" makes the definition complete with regards to the impact/intention of a sponsorship element and is already included in the definition of programme sponsorship. Replacing "include" with "such as" do not change the intention of the definition but makes it clearer.

3.5.14.4.2 The Authority notes the view that the definition of advertisement already deals with sponsorship. However, it should be noted that there is a distinction between an advertisement that takes place between breaks of programming, and sponsorship that is embedded within the programme.

3.5.14.4.3 The Authority notes the proposal from AME's to delete the word element from "sponsorship element". The Authority's position is that the use of the term element, refers to indicators of sponsorship such as those outlined in the definition of sponsorship element. In any event the term sponsorship element is an accepted phrase within the broadcasting space to identify the presence of sponsorship in the programme.

3.6 REGULATION 2: SCOPE

3.6.1 Regulation 2 states that “these Regulations are binding on every BSL who provides a television broadcasting service and a sound broadcasting service.” The explanatory memorandum explains that “this provision is intended to indicate the persons that will be subject to the Regulations.”

3.6.2 MultiChoice submits that the word "and" could be construed as meaning that the Regulations apply only to a broadcasting service licensee which provides both a television and a sound broadcasting service, which it doubts was the Authority's intention.⁸⁹

3.6.3 AME states that there is a fundamental drafting error in regulation 2, namely that it applies only to those entities that hold both a television and a sound broadcasting licence. As a result, AME suggests that the regulation 2 should be rephrased as follows:

*“These Regulations are binding on every BSL”.*⁹⁰

3.6.4 eMedia argues that section 55 of the ECA does not empower the Authority to regulate advertising in relation to the matters set out in both the 1999 Advertising, Infomercials and Programme Sponsorship Regulations and the current Draft Regulations. eMedia does not believe that the 1999 Regulations as well as the current Draft Regulations deal with issues relating to the amount of advertising that may be transmitted by the broadcasters⁹¹. eMedia is of the view that the 1999 Regulations and the current Draft Regulations have nothing to do with the ASASA Rules or Code. However, eMedia sustains that the ASASA

⁸⁹ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 12.

⁹⁰ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 13.

⁹¹ eMedia, 2022, Supplementary submission on the Findings Document and Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 2

Code deals with the content of advertising and with issues such as offensive advertising, misleading advertising, and competitive advertising.⁹²

3.6.5 The Authority's Position

3.6.5.1 The Authority has considered the views from the stakeholders to amend regulation 2 in the Draft Regulations. As a result, the Authority has decided to amend regulation 2 to read as follows: "These Regulations are binding on every BSL". This does not change the intention of the Regulation but provides clarity so that the provision is not interpreted differently.

3.6.5.2 ICASA's 1999 Regulations and the current Draft Regulations do not focus on the amount of advertising that may be transmitted by the broadcasters. ICASA's Regulations only regulate the scheduling (not the amount) of advertisements, sponsorship and infomercials. The license conditions provide for the amount of advertising that the broadcasters should carry or those that do not have specific limitations in their licence conditions. The Authority would like to clarify that the two (2) minutes in the definition of advertisements is meant for the scheduling of commercial messages, to ensure that they are arranged in a manner that will distinguish an advert from an infomercial. The two (2) hours for infomercials in regulation 5.3 seeks to ensure that infomercials are scheduled to fit in with programming that is more focused on entertaining, educating and information than oversupplied with commercial messages.

⁹² Ibid, page 3

3.7 REGULATION 3: CODE OF ADVERTISING PRACTICE

3.7.1 MultiChoice cautions that there is no explanation provided in the explanatory memo on regulation 3.⁹³ MultiChoice submits that regulations 1.3, 3.1 and 3.2 refer to the Advertising Standards Authority of South Africa and its Code of Advertising Practice. The ASASA has been replaced by the Advertising Regulatory Board. MultiChoice therefore recommends replacing all references to ASASA with references to the Advertising Regulatory Board. Similarly, MultiChoice submits that it is aware that "Advertising Standards Authority of South Africa" is the term used and defined in section 1 of the ECA and that the term is defined to include "any entity that replaces it but has the same functions".⁹⁴

3.7.2 MultiChoice suggests that should the Authority wish to retain the term in the ECA, then the Authority should (a) retain the definition of the Advertising Standards Authority of South Africa in Regulation 1.3, and (b) inserts another definition for the "Advertising Regulatory Board", which could be defined as "the entity that replaced and performs the same functions as the Advertising Standards Authority of South Africa". Regulations 3.1 and 3.2 could then refer to the "Code of Advertising Practice of the Advertising Regulatory Board".⁹⁵

3.7.3 MultiChoice submits that regulation 3.2 should be amended to read; "To the extent that there may be inconsistencies between these Regulations and the Code of Advertising Practice of the Advertising Regulatory Board in respect of any matter which falls within the jurisdiction of the Authority, these Regulations shall prevail".⁹⁶

⁹³ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 12

⁹⁴ MultiChoice, 2022, Submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 21.

⁹⁵ Ibid, page 21.

⁹⁶ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 13

3.7.4 AME states that regulation 3.1 repeats the provisions of section 55 and should be deleted, since Regulations need not repeat primary law.⁹⁷

3.7.5 The Authority's Position

3.7.5.1 The Authority agrees that the ECA refers to any entity that replaces ASASA but has the same functions. Therefore, the Regulations will be amended to reflect that ASASA has been replaced by the ARB in terms of the ECA.

3.7.5.2 The Authority agrees that regulation 3.1 of the draft Regulations is a repetition of what is already in the ECA and therefore should be deleted. Regulation 3.1 states that "every BSL must, in addition to complying with these Regulations, comply with the Code of Advertising Practice of the Advertising Standards Authority of South Africa, as required by section 55 (1) of the Act".

3.8 REGULATION 4: ADVERTISING

3.8.1 Regulation 4.1

3.8.1.1 AME proposes that regulation 4.1 which states that the "*definition of advertisement shall be used by the Authority to distinguish between programme material, advertisements, infomercials, and programme sponsorship transmitted by BSL*" should be deleted as it is not useful and constitutes "fluff" which is not recommended in regulatory drafting. AME is of the view that including a provision that explains how ICASA will interpret the Regulations and its terminology will simply confuse the reader. AME

⁹⁷ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 13.

further explains that the language and terms of the Regulations should speak for themselves.⁹⁸

3.8.1.2 **The Authority's Position**

3.8.1.2.1 The Authority will retain regulation 4.1 to ensure that Regulations are comprehensible and clear and that stakeholders can easily understand the intention of the Regulations.

3.8.2 **Regulation 4.1.2: Jurisdiction of complaints**

3.8.2.1 Multichoice proposes an amendment to regulation 4.1.2 which states that *"determining whether jurisdiction in respect of complaints concerning material transmitted by BSL vests in the Complaints and Compliance Committee or the Advertising Standards Authority of South Africa"*, by replacing the Advertising Standard Authority of South Africa with the Advertising Regulatory Board. MultiChoice suggests that regulation 4.1.2 should read as follows: "The definition of advertisement shall be used by the Authority to distinguish between programme material, advertisements, infomercials, and programme sponsorship transmitted by BSL, for the purposes of determining whether jurisdiction in respect of complaints concerning material transmitted by BSL vests in the Complaints and Compliance Committee or the Advertising Regulatory Board".⁹⁹

3.8.2.2 **The Authority's Position**

3.8.2.2.1 The Authority's position is that it will amend regulation 4.1.2 to refer to the Advertising Regulatory Board as ASASA is no longer in existence, ASASA has since been replaced by the Advertising

⁹⁸ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 13

⁹⁹ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 13

Regulatory Board. This is in line with the definition in the ECA that ASASA means any entity which regulates the content of advertising or any entity that replaces it but has the same functions.

3.8.3 **Regulation 4.1.3: Regulating the amount/scheduling of advertising**

3.8.3.1 MultiChoice submits that the purpose of the Regulations has not changed, whereas the empowering provision in the legislation has changed to allow the Authority to regulate the scheduling of advertisements. MultiChoice points out that the Draft regulation 4.1.3 contains a purpose being “*in the case of BSL who provides a television broadcasting service, regulating the amount of advertising that may be transmitted*”, whereas this is outside the mandate of the Authority as per section 55(1) of the ECA.¹⁰⁰

3.8.3.2 MultiChoice suggests that regulation 4.1.3 be amended to reflect the wording in the ECA. The amendment should be through the deletion of the text “in the case of BSL who provides a television broadcasting service,” and “the amount of advertising that may be transmitted”. As a result, MultiChoice proposes that regulation 4.1.3 should read as follows;
“... *regulating the scheduling of adverts, infomercials and programme sponsorship.*”¹⁰¹

3.8.3.3 **The Authority’s Position**

3.8.3.3.1 **The Authority will amend regulation 4.1.3 to align with section 55 (1) of the ECA. The amended regulation stipulates that “the definition of advertisement shall be used by the Authority to distinguish between programme material, advertisements, infomercials, and programme sponsorship transmitted by BSL, for**

¹⁰⁰ MultiChoice submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 11

¹⁰¹ MultiChoice supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 12

the purposes of regulating the scheduling of adverts, infomercials and programme sponsorship". The reason for the Authority's position is that it is not regulating the amount of advertising through these Regulations, but it has jurisdiction over the scheduling of advertisements, infomercials and programme sponsorship.

3.8.4 Regulation 4.2: Transmission of programme competition, branded promotional spot, branded filler, self-promotion promo and sponsorship element

3.8.4.1 AME suggests that regulation 4.2 should be amended to clarify that only those elements included in the definition of "advertisement" will be treated as "advertisements". Regulation 4.2 states that "*Any BSL who transmits a programme competition, a branded promotional spot, branded filler material, a self-promotion promo or a sponsorship element in the form of the on-air depiction of, or referral to, any brand, product or name, must ensure that the primary purpose of the broadcast is to promote the BSL or the programme concerned, rather than the commercial interests of the person, product or service referred to in the course of such transmission*". As a result, AME proposes that the amended regulation 4.2 read as follows; "Any BSL who transmits an in-programme competition or other advertisement, or self-promotion must ensure that its primary purpose is to promote the BSL or the programme concerned, rather than the commercial interests of any person including the BSL."¹⁰²

3.8.4.2 The Authority's Position

3.8.4.2.1 The Authority's position is to retain the regulation 4.2. The proposed insertion includes the word "advertisement" and

¹⁰² AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 14.

therefore will change the intention of the clause as advertisements are meant for commercial interest of the advertiser. The clause seeks to ensure that the primary purpose of the material mentioned for broadcast is to promote the BSL or the programme concerned, rather than the commercial interests of the person, product or service referred to in the course of such transmission.

3.9 REGULATION 5: INFOMERCIALS

3.9.1 Regulation 5.1: Prime time and children's programme

3.9.1.1 SABC advocates for the deregulation of prime time as it is of the view that prime time regulation is outdated and needs to be changed to suit the current situation since the regulation was introduced to cater for the majority of audiences available to watch content during prime time. It submits that prime time is determined or dictated by the audience.¹⁰³ Some programmes which are broadcast during prime time and repeated during daytime, perform well during daytime, as audiences watch and track content at their convenient time.¹⁰⁴

3.9.1.2 SABC argues that whilst the Authority seeks public interest content during prime time, it should equally be taken into account that the standard has already been set by audience's needs. Audiences expect appealing content during prime time from broadcasters. It is submitted that prime time restrictions should be repealed so as to allow broadcasters to source revenue for content production. It submits that additionally, SABC News research shows appetite for news broadcasts during the entire day and throughout the entire week. According to SABC, a timeslot performance changes with the nature of programme broadcast. SABC states that prime time is

¹⁰³ SABC, 2022, Supplementary submission on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 03 August 2022, page 2

¹⁰⁴ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercial and Programme Sponsorship 2022, 01 June 2022, page 6

becoming redundant through catchups, repeats and various ways of selecting content to watch at any time.¹⁰⁵

3.9.1.3 SABC proposes the application of light touch regulation due to the advent of the online services.¹⁰⁶ SABC states that some advertisers' budgets are also directed to online content providers and as such, there is a need to regulate online services to foster regulatory parity. The SABC calls for the deregulation of prime-time restrictions, to bring about regulatory parity which enables broadcasters to compete with online content service providers.¹⁰⁷

3.9.1.4 SABC points out that audiences have a myriad of content available at their fingertips, i.e. analogue and digital television, satellite TV and online content. However, the playing fields of all these content providers are not levelled, even though broadcasters compete with online content service providers for the same audiences.¹⁰⁸

3.9.1.5 **The Authority's Position**

3.9.1.5.1 **The Authority's position is to retain the regulation of prime time. Prime time is a period when most of the audience are available to watch or listen to their broadcasting stations, and therefore, normal programming that is in the public interest should not be overly interrupted. Commercial messages should not supersede programming during prime time.**

¹⁰⁵ SABC, 2022, Supplementary submission on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 03 August 2022, page 4-5

¹⁰⁶ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercial and Programme Sponsorship 2022, 01 June 2022, pages 5

¹⁰⁷ SABC, 2022, Supplementary submission on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 03 August 2022, page 2

¹⁰⁸ Ibid, page 3

3.9.1.5.2 **The fact that the audiences are expected to be at work or at school during the day cannot be overlooked as these audiences are not expected to be watching television and listening to radio whilst at work or school. The Authority will continue not to allow infomercials during prime time.**

3.9.2 **Regulation 5.3: Duration of Infomercials**

3.9.2.1 MultiChoice submits that the Authority should clarify whether the two-hours during the performance period is a total of two hours or a consecutive duration of a single infomercial.¹⁰⁹

3.9.2.2 **The Authority's Position**

3.9.2.2.1 **Regulation 5.3 states that "no channel may transmit infomercials for more than two (2) hours during the performance period in any one day". The Authority would like to clarify that the two-hour period refers to a total of two (2) hours during the performance period, and not consecutive two (2) hours in order to ensure that audiences are not inundated with commercial messages.**

3.10 **REGULATION 6: PROGRAMME SPONSORSHIP**

3.10.1 **Regulation 6.2.1: Editorial control**

3.10.1.1 MultiChoice is of the view that using the word "influence" the content or scheduling of a sponsored programme, is too wide. MultiChoice argues that it is not necessarily negative or undesirable for a sponsor to influence a sponsored programme if it is not a bad influence. Preventing an undue

¹⁰⁹ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 21.

interference will be more appropriate for sponsorship of news and this is already covered in the Regulations.¹¹⁰

3.10.1.2 MultiChoice believes that this provision could potentially be construed as preventing a sponsor from having any say or effect whatsoever on the content or scheduling of the sponsored programme.¹¹¹ As a result, MultiChoice proposes that regulation 6.2.1 read as follows; "*Every BSL must: in respect of every programme sponsorship obtained or accepted by it, enter into a written sponsorship contract with the sponsor which shall provide that the sponsor shall not be entitled in any way to ~~influence~~ control the content or scheduling of the sponsored programme.*"¹¹² MultiChoice reiterated the same sentiments in their supplementary submission.¹¹³

3.10.1.3 The Authority's Position

3.10.1.3.1 The Authority acknowledges the concern raised regarding the word "influence". The Authority would like to state that it is crucial to maintain editorial integrity of sponsored programmes. A party that does not have control can have power to influence, which can result in change, or affecting desirable outcomes. It is the responsibility of the broadcasters to ensure that editorial integrity is not influenced by the presence of sponsorship. Therefore, the Authority emphasizes that the word influence is appropriate as the sponsor should not influence editorial control or be unduly prominent. The acknowledgement of the sponsor is necessary although the Authority cannot allow the sponsor to

¹¹⁰ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 14

¹¹¹ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, pages 14-15

¹¹² Ibid, page 15

¹¹³ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 14

influence the intended message for a certain programme. The Authority would like to ensure that programmes are not biased towards the sponsor. Therefore, the Authority's position is to retain the word "influence" in regulation 6.2.1 which states that *"in respect of every programme sponsorship obtained or accepted by it, enter into a written sponsorship contract with the sponsor which shall provide that the sponsor shall not be entitled in any way to influence the content or scheduling of the sponsored programme"*.

3.10.2 Regulation 6.3 and 6.4: Sponsorship of news and current affairs

3.10.2.1 SABC supports the Authority's position of permitting sponsorship for news and current affairs programming on radio broadcasting services. SABC submits that radio services require sponsorship revenue for content production and for financial sustainability, and therefore advises the Authority to conduct a regulatory impact assessment prior to phasing-out sponsorship on radio news and current affairs. On the other hand, SABC states that the sponsorship restrictions on TV news and current affairs should not apply or extend to soft news, such as sports and weather. It further submits that the relaxation of restrictions will enable broadcasters to fund content production for its audiences.¹¹⁴

3.10.2.2 SABC submits that safeguarding of editorial integrity and control is vital, hence it has systems in place, which are provided in its Editorial Policies to ensure editorial independence of its content, including the newsroom, and to protect the editorial integrity of SABC News and all content of the Corporation. In addition, SABC indicates that the lack of content integrity

¹¹⁴ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 8

and editorial independence will irritate audiences and lead to a tune out factor which will translate into a decline in advertising revenue.¹¹⁵

3.10.2.3 MultiChoice urges the Authority to be mindful of the current economic climate as the genre of news programmes is often a loss leader and because of its critical public interest importance and revenue loss, it therefore requires commercial funding. Otherwise, broadcasters will have to compromise the quality of such programming.¹¹⁶

3.10.2.4 Further, MultiChoice states that it is crucial that some commercial funding of news is permitted, without which there is a risk that news programming is cut, or its quality compromised. MultiChoice suggests that the prohibition on news sponsorship should be relaxed to allow non-contentious segments such as lifestyle, financial/business and human-interest news to be sponsored. MultiChoice argues that news regarding lifestyle such as the Ndlovu Youth Choir winning a SAMA Award, financial or business news such as interest rate hikes, inflation rates, stock market developments, and human-interest news such as a teenager who invented a robot, or the introduction of new panda bears to a zoo are not controversial and can be sponsored. MultiChoice submits that, to create sufficient funding for news programming, the Authority should allow for sponsorship of what they call soft news or non-contentious news segments.¹¹⁷ MultiChoice proposes that in "order "to safeguard the protection of "hard" news, these non-contentious items should be packaged as stand-alone segments within a news bulletin, with the sponsorship provided for the permissible stand-alone segment/s only".¹¹⁸ It believes that this can be done without

¹¹⁵ Ibid, page 9

¹¹⁶ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 15

¹¹⁷ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 4

¹¹⁸ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 4

undermining editorial integrity. Therefore, MultiChoice proposes that regulation 6.4 reads as follows;

"Notwithstanding sub-regulation 6.3, a BSL who provides a television broadcasting service shall be entitled to obtain or accept a programme sponsorship in respect of a weather forecast or sports result bulletin, lifestyle, financial or business news and human-interest segments which constitutes part of a news programme or channel broadcast by that BSL".¹¹⁹

3.10.2.5 MultiChoice submits that the Authority should not prohibit the sponsorship of current affairs programmes for television broadcasting service. They suggest that regulation 6(4) should read as follows; A BSL who provides a television broadcasting service must not obtain or accept any programme sponsorship from any person in respect of any news ~~or current affairs programme~~.¹²⁰ MultiChoice reasons that such prohibition is unnecessary as it is addressed or remedied under regulation 6.1. According to MultiChoice, regulation 6.1 provides that every broadcasting licensee who receives benefit from a programme sponsorship must ensure that, in relation to the relevant sponsored programme, editorial control remains with that broadcasting licensee. Further, regulation 6.7 provides that product placement in programming other than news and current affairs shall be subordinate to the content of the programme material. MultiChoice states that it recommends the deletion of the phrase "or current affairs" on regulations 6.3 and 6.6 respectively.¹²¹

3.10.2.6 NAB submits that it supports the Authority's position to continue to allow sponsorship on radio news and current affairs, as the financial viability of the radio industry is in a precarious state. The NAB submits that it indicated

¹¹⁹ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 16

¹²⁰ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 14

¹²¹ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 5-6.

that ICASA should engage with radio broadcasters on the financial implications of phasing out of programme sponsorship for news in respect of radio broadcasters. The income from such sponsorship assists licensees with content production and acquisition¹²².

3.10.2.7 Tying to the above, the NAB submits that licensees understand the importance of maintaining editorial control and control across all their news and current affairs content as integrity of news and current affairs is key in audience retention. In that regard NAB recommends that regulation 6.6. of the Draft Regulations be removed in its entirety, and further suggest the removal of words "*other than news and current affairs*" in regulation 6.7 and suggests that it reads "*product placement in programming shall be subordinate to the content of the programme material*"¹²³.

3.10.2.8 The NAB notes that sponsorship revenue primarily assists licensees with content production and acquisition.¹²⁴ It further states that the current wording of the definition of current affairs could be damaging to broadcasters as it will prevent any possible sponsorship of this kind of programming¹²⁵.

3.10.2.9 **The Authority's Position**

3.10.2.9.1 **The Authority notes the submissions that support the permission of sponsorship for news and current affairs programming on radio broadcasting services and acknowledgement of the importance of editorial independence.**

¹²² NAB submission 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 4

¹²³ Ibid, page 5

¹²⁴ Ibid, page 4

¹²⁵ Ibid, page 6

3.10.2.9.2 The Authority will continue to allow sponsorship of news and current affairs on radio until the Regulations are reviewed. The Authority will reassess the impact of sponsorship of news and current affairs on radio during the next review of the Regulations, and not in twenty-four (24) months after publishing the Regulations as indicated in the Findings Document¹²⁶, as this will be a short time frame to revisit Regulations after publication.

3.10.2.9.3 The Authority's position is that the prohibition of sponsorship of current affairs on television remain unchanged. Current affairs programme consists of discussions that are supposed to be fair and impartial and therefore sponsorship might affect editorial independence of current affairs. Further, the explicit prohibition of sponsorship and product placement is necessary to protect editorial independence in relation to both news and current affairs. Regulations 6.1 and 6.7 respectively put responsibility in the hands of broadcasters and therefore such explicit prohibition will ensure editorial independence, considering the significance and informative nature of news and current affairs. It should be noted that weather forecasts and sport bulletins that form part of television news bulletin may be sponsored.

3.10.3 Regulation 6.8: Product placement disclaimer

3.10.3.1 SABC submits that programmes come pre-recorded, therefore, it would be impractical to have the labelling prior to the broadcast of the programme material. SABC proposes that it would be practical to have labelling of product placement at the end of the programme (end credits) rather than

¹²⁶ ICASA, 2022, Findings Document: The review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, published in government gazette 46211 of 8 April 2022, page 78

at the beginning of the programme, so as not to interrupt the story or the programme material.¹²⁷

3.10.3.2 SABC is of the view that the Authority's new regulation 6.8 has the potential to be disruptive and could easily become a tune-out factor for audiences. Therefore, SABC cautions the Authority to not prescribe regulations which will result in unintended consequences. It further advises that the Authority should only intervene where necessary.¹²⁸

3.10.3.3 SABC explains that when products are used within a production as part of a commercial arrangement, they are acknowledged in the end credits of the programme as a standard process. SABC further explains that the beginning is not feasible from a storyline and creative perspective, as audiences will tune out if they are subjected to too much text or brand information within the opening title sequence of the programme concerned. This is the same reason why only the main cast is included in the opening.¹²⁹

3.10.3.4 SABC submits that the inclusion of advertiser information in a programme is empirically based on a commercial relationship. In addition, SABC conveys that in the event that the advertiser has not spent any money in the creation of the programme, the advertiser will not be credited by the production company.¹³⁰

3.10.3.5 SABC submits that it places in-content advertising or digital brand integration into all commissioned programmes. It would be impossible to have labels for all in-content advertising or digital brand integration programmes because there could be more than one placement per episode, in a form of billboards, instore tabletop posters, indoor posters and digital

¹²⁷ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 15

¹²⁸ SABC, 2022, Supplementary submission on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 03 August 2022, page 6

¹²⁹ Ibid, page 6

¹³⁰ Ibid, page 6

product placement. All this is done postproduction and the episodes or programmes are only available to SABC Channels forty-eight (48) hours prior to broadcast. It would then be impractical to implement the proposed labelling, given the dynamics and work that must be factored in prior broadcast. Therefore, it is not advisable to include advertiser information in the beginning of the programme, based on the above-mentioned reasons. SABC suggests that the status quo should remain, and the labelling of product placement should be placed at the end of the programme (end credits) rather than at the beginning of the programme, so as not to disrupt the programme material.¹³¹

3.10.3.6 MultiChoice expresses appreciation for the Authority's endeavours to ensure that product placement is properly signalled but has further raised its concerns regarding the requirements in regulation 6.8 as it is of the view that such requirements "are impractical and difficult for broadcasters to implement". It cites an example of cooking shows and product placements in order to illustrate the difficulty with regulation 6.8. It states that there could be numerous product placements by multiple brands in a single programme and it is not always possible to display a logo because of its design specifications. There could be a multitude of logos and trademark law considerations which could preclude a broadcaster from displaying a logo.¹³² MultiChoice points out that goods are provided, and a saving is made on production expenses, and this leads to an incidental exposure of the product.¹³³

3.10.3.7 Another difficulty identified by MultiChoice with regulation 6.8 is the requirement that product placement must be identified at the beginning and at the end of the programme. According to MultiChoice this

¹³¹ Ibid, page 7

¹³² MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 16.

¹³³ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 2.

requirement is excessive and could disrupt the flow of a programme and irritate viewers.¹³⁴ Further, MultiChoice cautions that by requiring the logo to be displayed both at the beginning and the end of a programme, the regulation is effectively requiring more (not less) commercial exposure for a product or service and further suggests that “this seems to run counter to what the Authority is actually trying to achieve”.¹³⁵ MultiChoice proposes that regulation 6.8 should read; “Product placement must be signalled clearly at the end of the programme in which the placement appears.”¹³⁶

3.10.3.8 MultiChoice points out that according to its experience, the commercial arrangements around product placement differ. MultiChoice states that in one scenario, marketers may pay broadcasters and / or producers to include specific products in programme material. According to MultiChoice, in another type of product placement, the broadcaster / producer may solicit from marketers the use of certain products or services which are required for a particular programme. MultiChoice states that in this scenario, the marketer will provide the product in exchange for the incidental exposure it receives from having its product depicted on air. It makes an example of a cooking show, and states that kitchen appliances will be required. Further, MultiChoice states that product placement might therefore provide for a certain brand of kitchen appliances to be used and shown during the programme. It points out that in this way, product placement assists the producer / broadcaster (as goods are provided and a saving is made on production expenses) and provides a return to the marketer by providing incidental exposure of their product.¹³⁷

3.10.3.9 MultiChoice submits that in both scenarios where broadcasters enter a commercial relationship with marketers on product placement, they always

¹³⁴ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, page 16.

¹³⁵ Ibid, page 17.

¹³⁶ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 15

¹³⁷ Ibid, page 2.

strive to ensure that the placement integrates seamlessly with the subject matter of the programme, is not overly intrusive and does not compromise editorial integrity. According to MultiChoice, there would be no sense in undermining a programme's resonance with its audiences. It states that broadcasters will always ensure that the product placement does not interfere with the content or compromise its editorial integrity, as that would simply lead to viewers tuning out.¹³⁸

3.10.3.10 MultiChoice proposes that product placement should be prohibited only in news and should be allowed in current affairs programmes. Furthermore, they propose that product placement should be signalled at the end of the programme in which it appears.¹³⁹

3.10.3.11 eMedia suggests that regulation 6.8 should be deleted in its entirety, reasoning that the inclusion of this regulation shows a misunderstanding of the nature of broadcasting. It argues that it is impossible to administer what would be required in terms of this provision. There are multiple executions of active and passive placements as well as digital brand integration which often happens at the last minute¹⁴⁰.

3.10.3.12 eMedia submits that regulation 6.8 dealing with product placement ought to be deleted and the only requirement in as far as product placement is concerned is that it must be subordinate to the content of the programme material as this is adequately catered for within regulation 6.7. Therefore, the need to signal such product placement is not necessary, and it is unrealistic and practically impossible¹⁴¹.

¹³⁸ Ibid, page 2.

¹³⁹ Ibid, page 3

¹⁴⁰ eMedia, 2022, Comments and submissions on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 6

¹⁴¹ eMedia, 2022, Supplementary submission on the Findings Document and Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 3

3.10.3.13 NAB raises a concern with regulation 6.8. on product placement that requires signalling by means of a logo before and after a programme. It submits that this is extremely onerous for broadcasters. The NAB suggests that the Draft Regulations be amended to only require broadcasters to signal product placement at the end of the programme /closing credits.¹⁴²

3.10.3.14 **The Authority's Position**

3.10.3.14.1 **The Authority has considered stakeholders' submissions and has decided that product placement must be signalled clearly only at the end of the programme in which the placement appears. The reason for such provision is to provide certainty and transparency to audiences so that they can differentiate normal programming from product placement, given that in certain circumstances it cannot be easy to identify. The Authority has also taken into consideration the submission from stakeholders that double exposure could be at the expense of a BSL. Furthermore, broadcasters are not obliged to use a logo to signal product placement, nevertheless they should ensure that product placement is clearly signalled at the end of the programme.**

3.10.3.14.2 **Having outlined the importance of signalling above, the Authority is not in agreement that product placement disclaimer in Regulation 6.8 be deleted in its entirety.**

3.10.3.14.3 **As indicated in the Explanatory Memorandum on the Draft Regulations, regulation 6.8 seeks to ensure that the audiences are not confused when seeing certain products and services as part of the storyline, to confuse such with material that is paid**

¹⁴² NAB, 2022, Written Submission on ICASA's Findings Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 1 June 2022, page 6.

for. This will also add to transparency and accountability. In this way broadcasters can separate editorial content from commercial messages. The Authority will be able to clearly monitor the number of commercial messages within programmes to ensure that commercial messages do not overtake editorial content, and that audiences are not oversupplied with such material.¹⁴³

3.10.3.14.4 The Authority notes MultiChoice’s submission that product placement should be prohibited in news and allowed in current affairs. The Authority has amended the definition of current affairs to include narrower scope of the issues. The narrower definition of current affairs programme will limit the scope of the prohibition in a manner that will address the concerns raised by Multichoice. The Authority believes that the amended definition will zoom onto the pertinent aspects that this regulation intends to address.

3.10.4 Regulation 6.10: Nature of the sponsor’s association

3.10.4.1 AME submits that ICASA has not explained why the proposed wording in regulation 6.10 is preferable to the wording “with compliments of” or “brought to you by”. AME states that there is no reason it can think of from a regulatory point of view, why ICASA ought to be able to dictate the language that might be used to describe a sponsored programme and suggests that the second sentence of this sub-regulation be deleted.¹⁴⁴

¹⁴³ ICASA, 2021, Explanatory memorandum on Advertising, Infomercials and Programme Sponsorship Draft Regulations, published in government gazette 46211 of 8 April 22, page 116.

¹⁴⁴ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 14.

3.10.4.2 The Authority's Position

3.10.4.2.1 **The Authority's position is that the proposed wording in regulation 6.10 has been borrowed from regulation 5.9 of the 1999 Regulations. The Authority's view is that regulation 6.10 is relevant and necessary as descriptions such as "sponsored by" or "in association with" are sufficiently clear, unambiguous, and does not affect editorial control.**

3.11 REGULATION 7: CONTRAVENTION AND PENALTIES

3.11.1 SABC raises a concern with regulation 7 of the Draft Regulations that the proposed three-million-rand (R3 000 000) fine for contraventions is exorbitant when compared to one-million-rand (R1 000 000) fines imposed by other ICASA Regulations, such as Must Carry Regulations of 2022 and Sports Broadcasting Services Regulations of 2021. SABC maintains that such hefty fines should be applicable in very extreme circumstances, such as repeat offenders and very substantial contraventions. Therefore, SABC proposes that the Authority should provide reasons for such a fine and under what conditions it will be applied.¹⁴⁵

3.11.2 SABC submits that it recognizes that the Authority has the power to prescribe fines for contraventions of regulations, as per section 17E (1) (2) (b) of the ICASA Act of 2000, as amended. Consequently, SABC suggests that the Authority should consider applying the principle of proportionate penalties. SABC further suggests that the Authority's determination of the penalties should be guided by the following factors, but not limited to;¹⁴⁶

- The nature and gravity of non-compliance: For serious contraventions the Authority may order that a licensee pays a fine (i.e., R50K- R100K). On

¹⁴⁵ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 8

¹⁴⁶ SABC, 2022, Supplementary submission on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 03 August 2022, pages 7-8

the other hand, for very serious contraventions the Authority may order a licensee to pay a maximum fine. A steep fine should only be applicable in very extreme circumstances of continuous and substantial contraventions. For example, in cases wherein a broadcaster repeatedly refuses to comply with the CCC order, a maximum fine of five hundred thousand rands (R500 000) should be imposed.

- The consequences of non-compliance: Provisions related to penalties should be predictable to give stability and certainty to broadcasters.
- Measures to deter future contraventions: Order a licensee to refrain from further contraventions.
- Circumstances under which the non-compliance occur: To take remedial steps to correct the identified contravention.

3.11.3 MultiChoice submits that regulation 7 is problematic in several respects. Firstly, MultiChoice states that the penalties provision provides a one size fits all approach. The subscription broadcaster suggests that a proportionate approach should be applied in the circumstances instead of a blanket approach and the punishment should be appropriate in the circumstances. To illustrate its concern MultiChoice provides an example where an infomercial is broadcast during prime time for 2 hours and 10 minutes and that the proposed penalty fine would be unreasonably harsh.¹⁴⁷

3.11.4 Secondly, MultiChoice submits that the penalty provision is not clear, and argues that it is doubtful that the Authority intended to impose a maximum fine of 10% of turnover plus three-million-rand (R3 000 000). Thirdly, MultiChoice submits that the proposed penalty is too high, and that none of the offences in the Draft Regulations warrant the imposition of a 10% fine of the annual turnover and three-million-rand (R3 000 000). MultiChoice further submits that the penalties are not in line with section 17H of the

¹⁴⁷ MultiChoice, 2022, Submission on Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 2022, 01 June 2022, pages 17 - 18.

ICASA Act and any penalty provision should not exceed a maximum fine of one-million-rand (R1 000 000).¹⁴⁸

3.11.5 MultiChoice proposes a proportionate approach to the penalties provision and is of the view that the Authority is not obliged to set out penalties in the Regulations. To illustrate its view, MultiChoice draws a comparison between the 1999 Advertising Regulations, the Subscription Broadcasting Services Regulations and Code of Conduct for Broadcasting Service Licensees Regulations which do not have a penalty provision.¹⁴⁹

3.11.6 MultiChoice is of the view that the penalties provision should apply only where a broadcasting licensee has knowingly contravened the regulation in question. MultiChoice adds that attention should be paid to all the prevailing circumstances. MultiChoice submits that it agrees with the Authority that the stipulated penalties should be the maximum penalties that may be imposed in respect of the respective contraventions.¹⁵⁰ As a result, MultiChoice has proposed the following new regulation 7 for contravention and penalties:

"7 Contravention and penalties

7.1 A licensee that contravenes regulations 5.1, 6.3, 6.6 and/or 6.9 is liable to a fine not exceeding two hundred and fifty thousand rands (R250 000).

7.2 A licensee that contravenes regulations 4.2, 6.2, 6.5 and/or 6.7 is liable to a fine not exceeding one hundred thousand rands (R100 000)."¹⁵¹

3.11.7 MultiChoice states that regulations 5.1, 6.3, 6.6 and/or 6.9 are provisions designed to safeguard the integrity of news and to protect children and therefore a maximum fine of two hundred and fifty thousand rands

¹⁴⁸ Ibid, page 18 - 20.

¹⁴⁹ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 5.

¹⁵⁰ Ibid, page 6.

¹⁵¹ Ibid pages 6 - 7 and page 15.

(R250 000) would be appropriate. Regulations 4.2, 6.2, 6.5 and 6.7 are provisions that are designed to ensure that sponsorship is subordinate to the content of the program and therefore a maximum fine of one hundred thousand rands (R100 000) would be appropriate.¹⁵²

3.11.8 eMedia's view is that contraventions and penalties are overly punitive especially because there is no guidance provided by the Authority. Moreover, the Authority did not provide substantive arguments for the suggested fine of up to 10% annual turnover. eMedia is concerned that the proposed clause will cripple the industry.¹⁵³

3.11.9 eMedia opposes the manner in which the provision on contraventions and penalties is phrased in the Regulations. It submits that the Authority should expand on the said provision to cater for and distinguish between minor and major contraventions of the regulations and further distinguish between first time and repeat offenders of provisions of the Regulations. The free to air broadcaster adds that the Authority ought to prescribe how offenders in each specific case must be treated and how such penalties should be attached to different offences. eMedia submits that first time offenders need to be given lenient penalties as opposed to repeat offenders. Furthermore, eMedia proposes that the offences need to be classified considering whether such offences were intentional or negligent.¹⁵⁴

3.11.10 AME states that it is concerned that ICASA has given no reason for the considerable fines and penalties it proposes for the contravention of these Regulations as proposed in regulation 7. According to AME, in fact, it is not clear on what basis ICASA determines the amount of any fine and the nature of any penalty in relation to any of its Regulations. AME points out that this

¹⁵² Ibid, page 6.

¹⁵³ eMedia, 2022, Comments and submissions on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 6

¹⁵⁴ eMedia, 2022, Supplementary submission on the Findings Document and Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 16

is a fundamental aspect of ICASA's powers and duties and should be explained. AME proposes that ICASA issue an explanatory note or guidelines detailing how it arrives at penalties and fines for regulations, given the nature of each regulation or a group of Regulations.¹⁵⁵

3.11.11 AME submits that it is noteworthy that despite the obligations on ICASA under section 55 in relation to "scheduling" of advertisements, the scheduling provisions contained in the Draft Regulations are very limited. According to AME, in other countries, on-demand services such as DStv Catch-Up are significantly more constrained as to the amount of advertising they can carry. Thus, AME considers this to be entirely appropriate given that they are earning subscription revenue.¹⁵⁶

3.11.12 **The Authority's Position**

3.11.12.1 **The Authority has revisited the contraventions and penalties section and has taken a decision to amend regulation 7 so as to reflect a fine not exceeding one-million-rand (R1 000 000) as a maximum fine, which the Authority deems reasonable under the circumstances.**

3.11.12.2 **The Authority's position is that the CCC will make decisions on the appropriate penalty for contraventions, not exceeding one-million-rand (R1 000 000), taking into consideration whether it is a minor or serious contravention. Therefore, the penalty imposed will be proportionate to the contravention. The fine is meant to indicate the seriousness for which the Authority views the Regulations and is meant to serve as a deterrent for non-compliance.**

¹⁵⁵ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 14.

¹⁵⁶ Ibid, page 14.

3.11.12.3 **Regulations 5.1, 5.3, 6.1, 6.3, 6.6 and 6.9 are intended to safeguard the integrity of the news and to protect children, whilst regulations 4.2, 5.2, 6.2, 6.5, 6.7, 6.8 and 6.10, seek to ensure that sponsorship is subordinate to the content of the programme. As a result, contravention of these regulations will attract a penalty.**

3.11.12.4 **The Authority is of the view that the said provisions adequately cover the contraventions and penalties. Providing for a maximum penalty allows for the imposition of appropriate fine based on the contravention. Therefore, the Authority would consider the gravity of the contravention and the surrounding mitigating or aggravating circumstances to make such a determination as opposed to fixing an exact amount of penalty on a specified contravention in the Regulations.**

3.12 REGULATION 9: SHORT TITLE AND COMMENCEMENT

3.12.1 MultiChoice recommends that the Authority should allow for a grace period to phase in the amendments. Also, the amended regulations should come into effect six months after their publication in the Government Gazette.¹⁵⁷

3.12.2 The Authority's Position

3.12.2.1 **The Authority's position is that the Regulations will come into effect six (6) months after the publication in the Government Gazette. The Authority considers six (6) months as sufficient for broadcasting service licensees to get their affairs in order.**

¹⁵⁷ MultiChoice, 2022, Supplementary submission, Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 8

3.13 GENERAL DISCUSSION

3.13.1 SABC submits that it supports the Authority's position to prescribe that product placement targeted at children's programming should be age specific and relevant to children, so as to safeguard and ensure that children are not exposed to inappropriate content.¹⁵⁸ SABC indicates that it has incorporated protective mechanisms in its Editorial Policies to ensure that content is suitable for children, across all platforms. SABC ensures that:¹⁵⁹

- a) exceptional care is exercised when reporting about children,
- b) harmful and disturbing content is not broadcast during times when a large number of children are likely to be part of the audience,
- c) great care, sensitivity and caution is exercised when interacting with children on all platforms, and
- d) editorial staff are encouraged to familiarise themselves with the various laws aimed at protecting children and the SABC's legislative, regulatory and policy frameworks.

3.13.2 eMedia states that in regulating advertising, the Authority should adopt a light touch approach to commercial broadcasters but introduce stricter regulations to subscription broadcasting. eMedia is advancing this position due to the fact that eMedia and Open view solely depend on advertising as their only source of revenue, whereas subscription broadcasting has subscription fees and advertising as their revenue stream. eMedia further suggests that the Authority should investigate how to create greater flexibility through deregulation while imposing certain restrictions on subscription broadcasters.¹⁶⁰

¹⁵⁸ SABC, 2022, Submission on the ICASA Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 8

¹⁵⁹ Ibid, page 7

¹⁶⁰ eMedia, 2022, Comments and submissions on the Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 01 June 2022, page 3

3.13.3 eMedia is of the view that the Draft Regulations replicate the 1999 Regulations, and it is disappointed as it believes that this goes against the Authority's intent to review the Regulations as they are outdated. eMedia argues that the Draft Regulations should have been revamped instead of replicating the 1999 Regulations since by the Authority's admission, the 1999 Regulations are outdated.¹⁶¹

3.13.4 eMedia argues that the Findings Document sets out the summary of submissions made by various parties in relation to the Discussion Document. Thereafter, the Authority briefly states its position in relation to each issue dealt with in the Discussion Document. eMedia is of the view that the position taken by the Authority is often not explained or in cases whereby the Authority rejects views raised by the submitter, the Authority fails to provide reasons why it rejects such views. eMedia further raises a concern that in their Discussion Paper submission, it has requested the Authority to limit the amount of advertising for free to air and MultiChoice. However, eMedia is of the view that their request was ignored without the Authority providing reasons for the rejection.¹⁶²

3.13.5 NAB states that in its previous submission it highlighted the need of an independent economic review to be conducted in advance as to gauge the appropriateness of any further regulatory intervention on the revenue streams of the broadcasting sector. This was meant to assist the Authority in determining appropriate regulatory interventions that will enable financial sustainability for licensees. It further states that, as previously highlighted, it is concerned about the proliferation of online content distribution platforms, whose advertising has significantly eroded traditional broadcasters advertising market share. Studies anticipate that online advertising will surpass television advertising in 2022.¹⁶³

¹⁶¹ Ibid, page 3

¹⁶² Ibid, pages 3 - 4

¹⁶³ NAB, 2022, Written Submission on ICASA's Findings Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, 1 June 2022, page 5

3.13.6 The Authority's Position

3.13.6.1 **In making Regulations, the Authority applies its mind to issues raised by stakeholders and has to strike a balance between commercial and public interest imperatives. The Authority has consulted with stakeholders throughout the process of developing the Regulations on Advertising, Infomercials and Programme Sponsorship and the changes to the Regulations are a result of such consultation. The process is undertaken in line with section 55 of the ECA. Therefore, the Authority could not address other issues outside section 55 of the ECA. The Authority is satisfied with the amendments that result from the consultation and believe that the final Regulations will provide certainty to the sector and the public. The Authority's position is that matters relating to limiting the amount of advertising for free to air and subscription broadcasters are not part of this process.**

3.14 BENCHMARKING STUDY

3.14.1 AME submits that paragraph 2.5.4 of the Findings Document states that ICASA has considered "*relevant legislation*" in preparing the Findings Document and presumably therefore, the Draft Regulations. However, ICASA does not say what this is. AME is of the view that this is a material omission. AME further states that without knowing what else ICASA has considered, aside from submissions by interested parties, it is difficult to determine if ICASA has considered relevant, related, or even alternative ways of dealing with the subject matter.¹⁶⁴

3.14.2 AME points out that ICASA does not mention any international papers or sources and therefore AME assumes that ICASA has not considered any,

¹⁶⁴ AME, 2022, Response to Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship 2022, 1 June 2022, page 6

despite a reference to “benchmarking” or “internal desktop research” in paragraphs 2.5.1, 8.1.11.2, 8.20.5.2 and 8.21.6 of the Findings Document. AME further states that this is unfortunate since South Africa has its own market for broadcasting services and its own advertising industry. Therefore, there are doubtless similarities in the issues that both are facing worldwide, and it is always helpful to look elsewhere for potentially helpful approaches to equivalent problems.¹⁶⁵

3.14.3 AME adds that if ICASA has considered international sources, then it should indicate which these are. AME further submits that in paragraph 8.21.6, *ICASA says, “the Authority’s position is that lessons taken from benchmarking on advertising, infomercials, programme sponsorship and product placement regulations should take into consideration the local conditions such as the impact of online media on traditional broadcasters, local market forces and revenue trends.”* AME agrees, but also questions, what those lessons are. AME further points out that to simply refer to statements made by respondents in the consultation phase (e.g. ‘the impact of online media on traditional broadcasters’) is not helpful. AME further questions what ICASA considers the impact to be and why ICASA consider this impact to be different in South Africa from the benchmarks it refers to.¹⁶⁶

3.14.4 **The Authority’s Position**

3.14.4.1 The Authority refers AME to the Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999, published in Government Gazette 44333 on 26 March 2021. The Discussion Document provides lessons on the Regulation of Advertising, Infomercials and Programme Sponsorship. The

¹⁶⁵ Ibid, page 6

¹⁶⁶ Ibid, page 6

Discussion Document is available on the Authority's website and library for public consumption.

3.15 CAP ON MINUTES OF ADVERTISING

3.15.1 eMedia submits that there should not be a cap on advertising in any given hour and such must be regulated by the broadcaster in conjunction with audience needs and tolerance. eMedia is of the view that such intervention will level the playing field between free-to-air broadcasters and subscription television broadcasters. While eMedia acknowledges that the limitation on the amount of advertising which it is able to broadcast in any one hour is contained in its Licence Conditions, the Regulations can override this.¹⁶⁷

3.15.2 The Authority's Position

3.15.2.1 The Authority is reviewing the Regulations in terms of section 55 of the ECA. The empowering section does not give the Authority the mandate to regulate the amount of advertising in any given hour. The Authority will not be reviewing the cap of minutes through this process. This process focuses on section 55 (1), which mandates the Authority to prescribe Regulations in respect of scheduling of adverts, infomercials and programme sponsorship.

4 CONCLUSION

4.1 This concludes the process of reviewing Regulations on Advertisements, Infomercials and Programme Sponsorship, 1999. The Authority would like to thank all stakeholders for their contributions. The Authority believes that the repealed Regulations will provide certainty to the broadcasters and the

¹⁶⁷ eMedia, 2022, Supplementary submission on the Findings Document and Draft Regulations regarding Advertising, Infomercials and Programme Sponsorship, 03 August 2022, page 4

Advertising industry in terms of radio and television broadcasting regulation on Advertising, Infomercials and Programme Sponsorship.

- 4.2 The Authority acknowledges the issues raised by stakeholders that could not form part of this process such as those related to section 60(4) of the ECA and those related to the DCDT process of the Draft White paper on AAVCS. This process of reviewing the Regulations on Advertisements, Infomercials and Programme Sponsorship is only concerned with section 55(1) of the ECA.

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