



Suite No.2, Art Centre, 22 6th St, Parkhurst, Johannesburg, 2193
PO Box 1560, Parklands, 2121 | Tel: +27 11 788 1278 | Fax: +27 11 788 1289
Email: info@mma.org.za | www.mediamonitoringafrica.org



Suite 1, Art Centre, 22 4th Ave, Cnr 4th Ave & 6th Street, Parkhurst, Johannesburg, 2193
Tel: +27 11 788 1278 | Email: info@soscoalition.org.za | www.soscoalition.org.za

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TO: THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
C/O V Molete and P Cokie
Email: vmolete@icasa.org.za and pcokie@icasa.org.za

**DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2018:
JOINT SUBMISSION BY MEDIA MONITORING AFRICA AND THE SOS COALITION:
SUPPORT PUBLIC BROADCASTING TO THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

For more information, please contact:

William Bird, Director, Media Monitoring Africa

E-mail: williamb@mma.org.za

Tel: +27 11 788 1278

Duduetsang Makuse, National Coordinator, SOS Coalition

Email: duduetsang@soscoalition.org.za

Tel: +27 11 788 1278

LIST OF ACRONYMS

ABC	Australia Broadcasting Corporation
ACMA	Australia Communications and Media Authority
BBC	British Broadcasting Corporation
ECA	Electronic Communications Act 36 of 2005
FTA	Free-to-Air
ICASA	Independent Communications Authority of South Africa
MMA	Media Monitoring Africa
Ofcom	Office of Communications (United Kingdom)
SABC	South African Broadcasting Corporation
SEIAS	Socio-Economic Impact Assessment System
SOS	SOS Coalition: Support Public Broadcasting

INTRODUCTION

1. Media Monitoring Africa (MMA) and the SOS Coalition: Support Public Broadcasting (SOS) provide this joint submission on the Draft Sports Broadcasting Services Amendment Regulations, 2018 (the Draft Regulations), in response to the call for submissions by the Independent Communications Authority of South Africa (ICASA or the Authority). MMA and SOS welcome this opportunity to make submissions to ICASA.
2. National sports and events play a key role in uniting South Africans under a common purpose and goal. National sports enjoy widespread support and generate public interest, and at the same time can also serve to promote inclusivity and diversity. This much was recognised by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,¹ in which it was held, in respect of the 1995 Rugby World Cup, that:

“President Mandela gave his wholehearted support to the South African side and illustrated this by attending the final game, which South Africa won, wearing the captain’s jersey. This event was welcomed by many both as a symbol of the possibility for racial reconciliation in South Africa and as a harbinger of a new racially inclusive ethos in South African rugby.”²
3. Access to the broadcast of national sporting events is generally expensive and requires paid subscription services in order to receive quality viewing experiences. While the legitimate pursuit of commercial interests in broadcasting national sporting events must be recognised, there is an equal and compelling imperative that the broadcasting of certain national sporting events be made accessible to the broader public – including those whose socio-economic circumstances may not permit access to subscription broadcasting services – given the unique role of national sports in promoting unity and social inclusivity. As such, MMA and SOS submit that any rules and regulations that govern the broadcasting of national sporting events must be developed with due regard to public interest considerations and the impact on national unity that such events may have.
4. This submission has a particular emphasis on the impact of the Draft Regulations on the South African Broadcasting Corporation (SABC) as the public broadcaster and a free-to-air (FTA) licensee, and the proposed obligations that the Draft Regulations would impose. The beleaguered SABC, particularly in recent years, is facing a number of challenges, and MMA and SOS therefore urge that due consideration should be paid to the technical and financial demands that the Draft Regulations may impose on the SABC beyond its available means. While MMA and SOS wholeheartedly support the objectives of the Draft Regulations to have national sporting events in the public interest reach a wider audience, this needs to be balanced against other considerations that are particular to the SABC as the public broadcaster that does not have the same profit motive that other licensees would have. The submissions below suggest measures to assist ICASA in striking this balance.

¹ [1999] ZACC 11.

² Id at para 5.

5. This submission is structured as follows:
 - 5.1. **First**, an overview of MMA and SOS.
 - 5.2. **Second**, our concerns regarding the absence of a socio-economic impact assessment.
 - 5.3. **Third**, our concerns regarding draft regulation 5.
 - 5.4. **Fourth**, our concerns regarding the failure to address gender considerations.
6. We deal with each of these in turn below.

I OVERVIEW OF MMA AND SOS

MMA

7. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.
8. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 20 years' experience in media monitoring and direct engagement with media, civil society organisations and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.
9. For more about MMA, please visit: www.mediamonitoringafrica.org.

SOS

10. SOS is a civil society coalition that is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is our primary focus – as the key site of and the institution established to drive public interest broadcasting – SOS also engages in the advancement of community broadcast media in South Africa. SOS is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, script-writers, film makers, producers and directors).
11. For more about SOS, please visit: www.soscoalition.org.za.

II THE NEED FOR A SOCIO-ECONOMIC IMPACT ASSESSMENT

12. Following the establishment of the socio-economic impact assessment system (SEIAS) by the Cabinet in February 2007, from 1 October 2015 any Cabinet Memoranda seeking approval for draft policies, bills or regulations must include a socio-economic impact assessment compiled and approved by the SEIAS Unit.³ At this stage, MMA and SOS have neither had sight of any socio-economic impact assessment for the Draft Regulations, nor have we been made aware that an impact assessment has been completed and made publicly available.
13. As set out in the SEIAS Guidelines, SEIAS aims to: (i) minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes; and (ii) anticipate implementation risks and encourage measures to mitigate them.⁴ The SEIAS Guidelines state further that one of the key ways in which regulations or other legal instruments can lead to unintended consequences is “where stakeholders face excessive cost from complying with the regulation”.⁵
14. In the present circumstances, MMA and SOS submit that the Draft Regulations will have significant cost implications for licensees. In respect of the SABC, in particular, the Draft Regulations in their current form impose obligations on the SABC well beyond their available means, without contemplating other appropriate measures that can be put in place to ameliorate this financial burden while still achieving the desired objectives. We submit that this is similarly true for e-TV. It is for this precise reason that a socio-economic impact assessment should be seen as an imperative.
15. MMA and SOS submit if an impact assessment has been completed, it should be made public without undue delay and stakeholders should be permitted the opportunity to make submissions thereon. However, in the event that it has not been completed, further deliberations on the Draft Regulations should be halted until such time as stakeholders have had the opportunity to consider, and the public has had the opportunity to provide submissions on, the socio-economic impacts of the Draft Regulations.

III SUBMISSIONS REGARDING REGULATION 5: LISTED SPORTING EVENTS

Overarching concerns

16. As a general note, MMA and SOS are concerned that the Draft Regulations do not contain express mention of the public interest guiding the application of the provisions, which we submit is essential to properly frame the development and implementation of the Draft Regulations. Furthermore, the Draft Regulations also seemingly fail to take into account

³ Department of Planning, Monitoring and Evaluation, *Socio-Economic Impact Assessment System (SEIAS): Guidelines* (May 2015) at page 3:
<http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf>

⁴ Id.

⁵ Id.

the changing digital environment and how this is impacting sports rights and viewership trends. There does not appear to have been appropriate regard to the shift to mobile and pay-per-views for niche sports or pop-up channels. Of critical importance, the Draft Regulations need to be responsive to the reality of FTA broadcasters moving towards online digital broadcasts, and the likelihood that in time online digital broadcasts may command larger audiences than other mediums. The Draft Regulations need to contend with how best to safeguard local licensees against threats from bigger global players that move into the realm of content provisions. These are challenging issues, and it is imperative that ICASA and other stakeholders grapple with them appropriately in order to achieve satisfactory outcomes.

17. In respect of the wording of draft regulation 5, as indicated above, MMA and SOS are concerned that the Draft Regulations impose significant – and potentially detrimental – obligations on FTA licensees, including the SABC. Draft regulation 5.1, in particular, imposes the most direct and expansive obligations on FTA licensees. We emphasise the following key concerns:
 - 17.1. **Applicability to all FTA licensees:** It appears from the wording of draft regulation 5.1 that it applies to all FTA licensees. This will lead to a potentially unnecessary duplication in the broadcasting of sports events that fall within Group A, to the detriment of other programming that the FTA licensees may otherwise want to broadcast in the interests of those viewers who may not want to watch the sporting events.
 - 17.2. **Imposition of mandatory measures with significant financial implications:** The Draft Regulations seek to impose mandatory obligations on FTA licensees, that such licensees are required to comply with on full commercial terms. At the present time, this would likely be impossible for the SABC given the financial predicament in which the SABC currently finds itself. However, even beyond the present financial difficulties, this is in any event an undesirable position to be imposed on the SABC, given its role as the public broadcaster, its objectives set out in the Broadcasting Act,⁶ and that it does not share the same profit motives as other licensees.
 - 17.3. **Requirement to broadcast on full live coverage:** The requirement set out in draft regulation 5.1 is for FTA licensees to broadcast the Group A events on full live coverage. This may result in a total disruption in the ordinary programming, particularly for sporting events (such as the Olympics) that span over weeks at a time with multiple concurrent events. Even with the criteria set out in regulation 4 that circumscribes the extent of the obligation, this is nevertheless unlikely to be technically and financially possible for FTA licensees such as the SABC to meet. While the Draft Regulations seek to reverse the current state of affairs where only subscription broadcasting service licensees broadcast such events on full live coverage, this fails to take into account the exigencies of the

⁶ No. 4 of 1999.

availability of channels and other resources that may render it not possible or not desirable for FTA licensees to comply.

18. Given the socio-economic divide in the country, and the significant portion of the population that is solely reliant on FTA licensees to provide access to sporting events, it is undoubtable that the Draft Regulations should seek to facilitate as many people as possible being provided with the opportunity to view national sporting events in the public interest. However, as it currently stands, MMA and SOS submit that the obligations of the Draft Regulations are untenable for FTA licensees, in particular the SABC, to meet. In turn, if FTA licensees cannot meet these obligations, the Draft Regulations will consequently not be able to achieve the desired outcomes and the public interest concerns. MMA and SOS submit that this can be remedied by certain practical amendments to the Draft Regulations, including the following:
 - 18.1. To make clear that it is not required that all FTA licensees broadcast all sports events contained in Group A, provided that such FTA licensees enter into agreements with each other to ensure that the events will be broadcast by at least one FTA licensee. This therefore avoids unnecessary duplication, and enables FTA licensees to select those sporting events that they consider of greatest interest to their viewership. It is important, however, that the SABC remain conscious of its role as the public broadcaster that provides content for all South Africans, including content for niche and marginalised audiences.
 - 18.2. To remove the requirement of full live coverage, and permit FTA licensees to broadcast sports events on a delayed live or delayed basis, if full live coverage is not technically possible and would result in undue disruption to the ordinary programming of the licensee.
 - 18.3. In the event that a FTA licensee is not able to meet the obligation of full live coverage, it is proposed that such licensee should be required to publish reasonably in advance, for the attention of ICASA and the broader public, its reasons and proposed broadcasting plan for the sports event. For example, with the Olympics, this may include an indication of which events will be broadcast by the licensee and whether this will be on a delayed or delayed live basis. This will provide ICASA and the broader public with an opportunity to offer input to the licensee on the proposed broadcasting plan, including on whether other events should also be included and for this to be broadcast on a live basis.

Suggested measures to improve the financial feasibility of the proposed amendments for the public broadcaster

19. As indicated above, MMA and SOS are of the firm view that the SABC is currently not in a financial position to meet the obligations set out in the Draft Regulations, and that it would in any event not be desirable to impose such a financial burden on full commercial terms on the SABC. MMA and SOS therefore propose a sub-licensing regime that provides for more appropriate and feasible financial terms that apply in the public interest to the public

broadcaster, given its role as the public broadcaster, its objectives set out in the Broadcasting Act,⁷ and that it has broader public service mandate.

20. The position contemplated at present involves FTA licensees, such as the SABC, concluding sub-licensing agreements with broadcasting service licensees to acquire the rights to broadcast certain sporting events, including those listed in Group B. This is typically a commercial arrangement, based on a negotiated fee, and subject to the financial resources available to the FTA licensee.
21. Instead, MMA and SOS urge ICASA to develop a dispensation in which this financial burden is alleviated from the SABC, in order to enable the SABC and the Draft Regulations to more fully meet the desired objectives and enable a wider audience to be able to access sporting events. In particular in this regard, MMA and SOS submit that for certain national sporting events in the public interest in which broadcasting service licensees have acquired rights, such broadcasting service licensees should be required to sub-license to the SABC on a free or reduced financial basis, for example at a fee of 20% of the commercial rate. This proposal is informed by the following:
 - 21.1. The acknowledgement that national sports events are important for national unity and in the public interest, and should not be the preserve of only those who have the means for subscription services.
 - 21.2. The role of the SABC as the public broadcaster, established by statute, and in light of its public objectives contained in the Broadcasting Act.
 - 21.3. The unique position of the SABC in that it does not share the same profit motive as other licensees in the fulfilment of its public service mandate.
 - 21.4. The extent of the audience of the SABC across the country, and the dependence of the public on the SABC as a main source of news and entertainment.
 - 21.5. The geographic reach of the SABC across the country.
22. It is not the intention to create an undue financial burden on subscription service licensees. Rather, in our submission, the proposed dispensation will not cost the broadcasting service licensee anything additional, and can further be readily incentivised for subscription broadcasting licensees. This may include, for example:
 - 22.1. Determining this as a licensing condition for subscription broadcasting licensees.
 - 22.2. Offering a reduction in the licensing fee for subscription broadcasting licensees who facilitate the proposed dispensation.

⁷ No. 4 of 1999.

- 22.3. Agreeing a percentage split with the subscription broadcasting licensee of any advertising revenue paid to the SABC through the broadcast of the sports events.
- 22.4. Agreeing that the SABC will only broadcast the sporting event on a delayed or delayed live basis, while the broadcasting service licensee broadcasts the sporting event live.

Comparative jurisdictions

23. There are important lessons that can be garnered from other jurisdictions. For example:

23.1. United Kingdom Office of Communication Regulation of Sports Broadcasting

- 23.1.1. The United Kingdom's Office of Communication's (Ofcom) *Code on Sports and Other Listed and Designated Events* (Ofcom Code) provides for a dual group list of sports events.⁸ The first group – Group A – includes sporting events which may not be covered live on an exclusive basis unless certain criteria are met.⁹ Full live coverage must be offered to qualifying broadcasters for Group A events, i.e. to broadcasters whose channels are available without payment (similar to FTA licensees) to at least 95% of the United Kingdom's population.¹⁰ These channels include BBC1, BBC2, ITV1, Channel 4, and Channel 5.¹¹
- 23.1.2. The second group – Group B – includes sporting events that may not be broadcast live on an exclusive basis unless adequate provision has been made for secondary coverage to qualifying broadcasters.¹² In large part, FTA licensees will be regarded as qualifying if they are accessible to 95% of the population and if their services are offered to the public without any consideration (payment).¹³ Broadcasting rights must be offered to such broadcasters on “fair and reasonable terms”, and they need not bid for these broadcasting rights.¹⁴ The objective is to ensure that listed sporting events are made available to as many people as possible.
- 23.1.3. There are two particular matters of interest in terms of the Ofcom regime: (i) both subscription broadcasting licensees and FTA licensees can broadcast listed events; and (ii) FTA licensees, characterised as qualifying broadcasters, must be offered (and need

⁸ Ofcom Code, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0029/35948/ofcom_code_on_sport.pdf.

⁹ Id at para 1.3.

¹⁰ Section 98 of the United Kingdom Broadcasting Act, 1998.

¹¹ Ofcom Code above n 9 at Annex 2.

¹² Id at para 1.3.

¹³ Section 98(2)(a)–(b) of the United Kingdom Broadcasting Act.

¹⁴ See Department for Digital, Culture, Media and Sport *Coverage of sport on television* (undated) at paras 2.3 and 5, available at: https://webarchive.nationalarchives.gov.uk/http://www.culture.gov.uk/PDF/sport_on_television.pdf.

not bid for) broadcasting rights for listed events. In this regard, Ofcom directs that this offer must be made on fair and reasonable terms. Further, sub-licensing agreements would be concluded on fair and reasonable terms with qualifying FTA licensees. The criteria for determining the qualifying FTA licensees takes into consideration the extent of the coverage of the licensee (in this instance, with there being a 95% threshold), in an effort to ensure that as wide an audience as possible is reached.

23.2. Australian Communications and Media Authority

- 23.2.1. Australia's Communications and Media Authority (ACMA) has adopted an anti-siphoning scheme whose objective is to give FTA broadcasters a chance to cover major events included on an anti-siphoning list. This list is set out in the Broadcasting Services (Events) Notice (No. 1) 2010.¹⁵
- 23.2.2. In terms of the anti-siphoning scheme, subscription broadcasters are prohibited from acquiring the right to televise an event on the anti-siphoning list, unless: (i) national or commercial television broadcasters have not obtained these rights by 26 weeks before the start of the event; (ii) the rights are held by commercial television licensees who have the right to televise the event to more than 50% of the Australian population; (iii) the rights are held by either the Australian Broadcasting Corporation (ABC) or the Special Broadcasting Service (SBS).¹⁶
- 23.2.3. Importantly, the anti-siphoning scheme does not reserve the broadcast rights to listed events solely for FTA broadcasters.¹⁷ FTA broadcasters are not obliged to buy broadcasting rights to events on the anti-siphoning list.¹⁸ ACMA does not guarantee FTA broadcasters exclusive rights to events on the anti-siphoning list, nor does it compel FTA broadcasters to acquire broadcasting rights to listed events to broadcast the events live, in full or at all.¹⁹
- 23.2.4. Again, what is noteworthy is that listed events may be broadcast both by subscription broadcasting licensees and FTA broadcasters and that broadcasters – whether subscription-based or FTA – must be accessible to at least 50% of the population. This latter requirement of access mirrors the approach taken by Ofcom, aimed at promoting

¹⁵ Made under sub-section 115(1) of the (Federal) Broadcasting Services Act 1992, available at: <https://www.legislation.gov.au/Details/F2017C00987>.

¹⁶ See <https://www.acma.gov.au/Industry/Broadcast/Television/TV-content-regulation/sport-anti-siphoning-tv-content-regulation-acma>.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

the public interest, and serves as a criterion for determining which FTA broadcasters should be granted rights to broadcast listed events.

24. In sum, the key lessons that MMA and SOS seek for ICASA to draw from these comparative jurisdictions is the need to be restrained in the mandatory obligations imposed on FTA licensees, and to facilitate licensing arrangements between licensees that take place on a fair and reasonable basis.

Minority and developmental sporting events

25. MMA and SOS welcome the measures taken in the Draft Regulations to include minority and developmental sporting events. However, we wish to note several concerns that we propose be addressed to ensure the provisions meet the desired outcomes:

- 25.1. It is unclear the way in which the sports events listed under Group C have been identified. Certain sports – including tennis, golf and motor sports – are, in our view, not within the realm of minority and developmental sporting events. The purpose of the sports listed in Group C should be more directly targeted at the development of sports that do not enjoy significant attention in order to truly promote and develop such sports.

- 25.2. In this regard, we would propose amending the definition of ‘minority sports’ to read as follows: “any sport that does not have majority of the population’s following or a sport having a less distinctive presence within a larger society, and in which the National Sporting Representative or National Senior Team is not highly ranked internationally as a leading participant in the sport.”

26. In giving effect to this provision, it is necessary to ensure that appropriate measures are in place to ensure that licensees cover the genuine minority sports. The concern is that the proposed model is likely to lead to those minority sports that have some – albeit minimal – sponsorship being the favoured minority sports that are broadcast, leading to the others being even further marginalised. As such, licensees should be encouraged towards greater coverage and diversity of minority sports, and it is essential that any new framework that looks at this takes the emerging digital shifts into consideration. MMA and SOS would be happy to work towards developing such a framework together with ICASA.

IV GENDER CONSIDERATIONS

27. MMA and SOS note that the Draft Regulations do not take the opportunity to expand the objects of the Draft Regulations to include combatting of gender discrimination. Globally, women’s participation in sport is increasingly recognised. In South Africa, both the women’s national soccer team and cricket team continue to gather support and prominence, and there is growing interest in these sports globally. In identifying and listing national sporting events under the groups identified in draft regulation 5, ICASA should make specific mention of female National Sporting Representatives or National Senior Teams, where applicable. In line with section 9 of the Constitution, gender considerations should be promoted in the development of the Draft Regulations.

28. Accordingly, MMA and SOS propose the following:
 - 28.1. That draft regulation 2 be amended to include an objective to “promote gender equality and combat gender discrimination in sports”.
 - 28.2. That draft regulation 5 be amended to make clear that the listed sporting events apply to both male and female competitors.

CONCLUDING REMARKS

29. As an overarching note, MMA and SOS emphasise that the Draft Regulations need to take into account the changing nature of viewing sporting events brought about by on-demand digital services and streaming capabilities which are increasingly offered through web-based platforms. These services are flexible both in terms of content and affordability, and are therefore appealing to a wide range of audiences. It is necessary not only to be cognisant of this evolving landscape, but also to consider the ways in which this can assist in achieving the desired outcomes of the Draft Regulations, for instance through the broadcast of certain events by licensees through their online platforms.
30. MMA and SOS are available to assist ICASA in any ongoing efforts to amend and finalise the Draft Regulations, and would like the opportunity to make oral submissions during this process. Please do not hesitate to contact us should you require any further information.

Media Monitoring Africa and SOS Coalition
15 March 2019