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Independent Communications Authority of South Africa

General Notice

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GENERAL NOTICE

NOTICE 1659 OF 2009



Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton

Private Bag X10002, Sandton, 2146

**FINDINGS DOCUMENT ON THE REVIEW OF THE 1999 REGULATIONS RELATING
TO ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIP IN TERMS
OF THE INDEPENDENT BROADCASTING AUTHORITY ACT No. 153 of 1993**

I, Mr. Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("the Authority"), acting on behalf of the Council of the Authority hereby approve the publication of this findings document as a culmination of the process of reviewing the 1999 Regulations on Advertising, Infomercials and Programme Sponsorship in terms of the Independent Broadcasting Authority Act No. 153 of 1993.



**PARIS MASHILE
CHAIRPERSON**



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

**FINDINGS DOCUMENT REGARDING THE DRAFT
REGULATIONS ON ADVERTISING, INFOMERCIALS AND
PROGRAMME SPONSORSHIP FOR BROADCASTING
SERVICE LICENSEES, 2009**

2009

ACKNOWLEDGEMENTS

The Independent Communications Authority of South Africa (“the Authority”) would like to acknowledge all stakeholders who participated in the process aimed at reviewing the Regulations on Advertising, Infomercials and Programme Sponsorship for Broadcasting Service licensees.

The following stakeholders participated in the consultation process:

- 1) M-NET and Multichoice
- 2) On Digital Media (ODM)
- 3) South African Broadcasting Corporation (SABC)
- 4) Walking On Water Television (WOWtv)
- 5) e.TV
- 6) eSat
- 7) Yfm
- 8) National Association of Broadcasters (NAB)
- 9) Marketing Association of South Africa (MASA)
- 10) The Industry Association for Responsible Alcohol Use (ARA)
- 11) Innovative Medicines South Africa (IMSA)
- 12) Association for Communication and Advertising (ACA)
- 13) South African Breweries (SAB)
- 14) Print Media Association of South Africa (PMSA)
- 15) Trudie Blanckenberg
- 16) Advertising Standards Authority of South Africa (ASA)

The consultation was undertaken by a Committee of Council comprising the following ICASA officials:

- 1) Mr. Fungai Sibanda Councillor (Chairperson)
- 2) Mr. Robert Nkuna Councillor (co-Chairperson)
- 3) Ms Mamedupe Kgatshe Project leader
- 4) Ms Refilwe Ramatlo Manager: Policy
- 5) Mr. Sphiwe Hlongwane Researcher
- 6) Ms Shelley Majola Consumer Officer
- 7) Mr. Victor Grootboom Licensing Officer
- 8) Ms Ndondo Dube Licensing Officer
- 9) Mr. Fumani Baloyi Legal Adviser

SECTION A: INTRODUCTION AND BACKGROUND

1. BACKGROUND

1.1 This findings document constitutes the conclusion of a public consultation process on the Draft Regulations on Advertising, Infomercials and Programme Sponsorship for Broadcasting Service Licensees, 2009 (Draft Regulations), in accordance with Section 4 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("the Act"). The findings document summarises the views expressed by interested persons and seeks to highlight key decisions taken by the Authority with respect to the regulation of advertising, infomercials and programme sponsorships by broadcasting service licensees.

1.2 The explanatory memorandum accompanying the Draft Regulations stated that the Draft Regulations constituted a review of the 1999 Regulations Relating to the Definition of Advertising and the Regulation of Infomercials and Programme Sponsorship in Respect of Broadcasting Activities, published in terms of the Independent Broadcasting Authority Act No. 153 of 1993 (IBA Act). The review was also undertaken in accordance with Section 95 of the Act which requires that all regulations made in terms of the IBA Act, among others, remain valid until amended or repealed.

1.3 A summary of the written and oral views expressed by interested persons are reflected below. The summary is not exhaustive, but reflects on salient issues raised by interested parties. The rest of the findings document can be divided into two main sections; Submissions and Findings. The Submissions section summarises the written and oral submissions and the Findings section deals with the decisions of the Authority.

2. THE PUBLIC PROCESS

2.1 As part of the public consultation process, the Authority published the draft regulations in Government Gazette No. 31903 (Notice No. 172) dated 13 February 2009 inviting interested parties to make written representations on the notice of its intention to prescribe the Draft Regulations. The Draft Regulations were published in accordance with section 4B of the ICASA Act and pursuant to the sections quoted above.

2.2 The Authority received seventeen (17) written submissions by the closing date of 30 April 2009. The submissions received are available on request at the Authority's library in Block 'D' Pinmill farm in Sandton, Johannesburg. Eight (8) stakeholders indicated their willingness to make oral presentations during the public hearings which took place on 4 June 2009, at the Authority's offices in Sandton, Johannesburg.

SECTION B: SUBMISSIONS

3. Jurisdictional and General concerns

3.1 In its submission Yfm questions the drafting of the regulations at a period when advertising revenue is declining due to the global economic recession. The Gauteng based broadcast service licensee also questions the jurisdiction of the Authority in regulating advertising. Thus it "... submits that sections 4, 55 and 95 of the Act [given by the Authority as empowering provisions] do not empower the Authority to enact the Draft Regulations. In the circumstances, the regulations would be ultra vires and unlawful if prescribed."¹ e.tv and e.sat share similar views with Yfm.²

3.2 Print Media South Africa (PMSA) posits that the Authority does not have a mandate to regulate advertising. PMSA strongly believes that the Authority should withdraw the advertising regulation process, given the fact that the latter has no mandate, did not follow proper consultative mechanisms in drafting the regulations and the fact that the regulation "... will result in anomalies and a lack of certainty in the interpretation and application of the ASA's Code."³ The Association for Communication and Advertising (ACA) is also of the view that the Authority does not have an empowering legislation that mandates it to regulate advertising, and should thus consider withdrawing the project.⁴

3.3 The South African Broadcasting Corporation (SABC) is of the view that the Authority has no mandate to regulate advertising. The public broadcaster posits that the provisions given by the Authority as empowering it to regulate advertising have not been read correctly. The SABC argues that "Section 55(1) of the Act

¹ Yfm Submission on the Draft Regulations

² e.tv and e.sat Submission on the Draft Regulations

³ PMSA Submission on the Draft Regulations

⁴ ACA Submission on the Draft Regulations

empowers ASA and not ICASA to determine a Code that would bind all broadcasters. Section 55(2) of the Act then compels the Authority to adjudicate complaints by the broadcasters who are not members of ASA.”⁵ In relation to section 95 of the Act, the public broadcaster states that “...it is not mandatory for the Authority to amend or repeal the regulations unless there are compelling reasons or grounds to do so. There seems to be little or no grounds for the Authority to amend the existing regulations published in 1999 as suggested in the notice.”⁶

3.4 On Digital Media (ODM) is concerned about what it terms ‘cosmetic’ changes in the current draft regulations. The main concern for ODM is “... that the regulations and code in their current form do not recognise the obvious and striking differences between multichannel broadcasting services and those that offer single/stand alone television channels...and the current regulations... do not align with the Authority’s more recent policy determinations and regulations that recognise the existence of multichannel broadcasters.”⁷ The policy determinations and regulations stated preference for self regulation, and light touch regulation when it comes to subscription broadcasting services.”⁸ ODM further argues that no justifications have been given to the changes in these regulations.⁹

3.5 Similar to ODM’s submission, M-Net and MultiChoice have expressed “... concern[s] that some provisions of the draft regulations are inappropriate for subscription broadcasting services and are fundamentally inconsistent with the Authority’s position in this regard.”¹⁰ The submission by the two subscription broadcasting services licensees states that limitations in section 60(4) of the Act

⁵The SABC submission on the Draft Regulations

⁶ Ibid.

⁷ ODM submission on the Draft Regulations

⁸ Ibid.

⁹ Ibid

¹⁰ M-Net and MultiChoice Submission on the Draft Regulations

and the ASA Code as acknowledged by section 55 of the Act already address advertising policy concerns in their respect. The two subscription broadcasting services also state that nothing justifies the shift in advertising policy by the Authority. They argue that the 2005 Position Paper on Subscription broadcasting services recognized that “[s]tipulating advertising limits would also restrict subscription broadcasting service licensees’ freedom of placing advertisements on channels of their choice.”¹¹ Mnet and Multichoice are of the view that the Authority does not have jurisdiction to prescribe these regulations.

3.6 The National Association of Broadcasters submits “... that the Authority has no legal grounds for the proposed [Draft Regulations] amendment... [thus] proposes that this process be struck off.”¹² The association argues that section 95 of the Act gives the Authority powers to amend existing regulations prior to April 2008, and that opportunity has been missed.¹³ Furthermore, the inclusion of the phrase “other forms of commercial promotions by radio and television broadcasting licencees” in the title of the draft regulations is problematic, as it is open-ended, and unduly widens the Authority’s powers to areas outside the Authority’s mandate and hence *ultra vires* the provisions of section 95.¹⁴ The argument is that the 1999 regulations are still sufficient and do not have to be changed or augmented.¹⁵

4. Definitions and application

4.1 M-Net and MultiChoice suggest that the Authority should realign the overlapping definitions of sponsorship and programme sponsorship.¹⁶ They recommend that the term ‘programme sponsorship’ be replaced with ‘sponsorship’ as one

¹¹ Ibid.

¹² NAB Submission on the Draft Regulations.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ M-Net and MultiChoice Submission on the Draft Regulations

standard term and the definition used for the former be used for the latter. They also state that the Authority should swap the definitions to ensure that "sponsorship" is defined as the direct or indirect financing, whether partial or total financing, 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, trade mark, image, activities or product."¹⁷

4.2 "The NAB on the other hand would like the Authority to provide a distinguishing factor between product placement and advertisement."¹⁸ The NAB proposes that the Authority should define spot commercials to enhance clarity.¹⁹ Furthermore, the NAB believes that the rationale used in the 1999 regulations, to provide conditional application to sound broadcasting service licencees, is still applicable.²⁰

4.3 Trudie Blanckenberg²¹ states that the omission of radio in the regulations is unacceptable and shows little respect towards listeners' trust.

5. Advertising

5.1 M-Net and MultiChoice suggest that "[t]he definition of "advertisement" in draft regulation 1... be amended to clarify that the definition is subject to regulation 4."²² The subscription broadcasting service licensees also suggest that the phrase "spot commercials" be deleted from the beginning of draft regulation 4(1), as it falls within the definition of "advertisement."²³ In addition, M-Net and MultiChoice further recommend "... that the term "sponsorship element"... be

¹⁷ Ibid.

¹⁸ NAB Submission to the Draft Regulations

¹⁹ Ibid.

²⁰ Ibid.

²¹ Trudie Blanckenberg is a member of the broadcast media audience, and commenting as a listener to commercial radio and public service.

²² M-Net and MultiChoice Submission on the Draft Regulations

²³ Ibid.

referred to as an in programme element,” as there are items in the definition of “sponsorship element” that do not constitute sponsorship, but are part of in-programme material.²⁴ The subscription broadcasting service licensees further propose that draft regulation 4(3) be deleted as it is too restrictive.

6. Placement, duration and Identification of advertisements

6.1 A general view amongst the broadcasting service licensees is that draft regulation 5 which deals with placement and duration is too restrictive, and interferes with the broadcasting service licensees’ programming and scheduling independence and control, and is a threat to their viability. NAB cites that the regulations do not allow for changes if the viewers show low tolerance to the Authority’s rules. Generally this kind of limitation will mean limited demand for television advertising and search for other forms of media to advertise. e-tv is of the view that the limitations will impact negatively on the viewer experience and the number of breaks preferred by advertisers to maximize the “... four opportunities per hour for first/last positioning in an advertising break.”²⁵

6.2 SABC argues that scheduling advertisements once in an hour will increase the duration of advertising segments beyond an acceptable limit for viewers. Advertisers pay more money if their advert appears first during a commercial break and therefore one or two breaks per hour will undermine this additional revenue in an industry where ad-spend is declining. This could mean that competitor products are scheduled during the same break.²⁶ Of major concern is “... the limit on the number of advertising breaks per half-hour during movies, news, current affairs, children’s programmes and religious programmes, which would fundamentally alter e.tv’s relationship with advertisers and its ability to

²⁴ *Ibid.*

²⁵ e.tv Submission on the Draft Regulations

²⁶ SABC submission on the Draft Regulations

generate advertising revenue.”²⁷ The Advertising Media Forum (AMF) supports the broadcasting service licensees by arguing that “young audiences are more fickle than adult audiences and would be even less likely to view a longer commercial break in excess of 3 minutes in duration ... whilst the children’s programming is not financially viable.”²⁸

6.3 e.sat shares similar views expressed by e.tv regarding the limitations on placement and duration of advertisement. e.sat argues that in a twenty four hour dedicated news channel like e.news, several advertising “... breaks are necessary not only from a commercial point of view, but also for operational reasons – for example, to move cameras, bring guests onto the set, change anchors, update stories, etc.”²⁹

6.4 WOWtv is against the prohibition of advertising or teleshopping during religious services, arguing that this interferes with their commercial viability. The subscription broadcast service licensee posits that “there will be a channel dedicated to the market that still prefers church services or what could be defined as a religious service. This would mean that WOWtv will never be permitted to air any advertisements or teleshopping on this particular channel.”³⁰ The SABC would like the Authority to define ‘religious programming’ or ‘religious service.

7. Infomercials

7.1 “WOWtv proposes that the Authority should allow for transmission of infomercials during children’s programme.”³¹ The subscription broadcast service licensee posits that “[d]uring school holidays, a broadcaster may change its customary

²⁷ Etv Submission on the Draft Regulations

²⁸ AMF Submission on the Draft Regulations

²⁹ e.sat tv Submission on the Draft Regulations

³⁰ WOWtv Submission on the Draft Regulations

³¹ Ibid

programme schedule to accommodate school kids who are at home because of school holidays but at the same time the broadcaster might have obligations to fulfil with the advertisers who have secured time slots for infomercials. This usually takes place before noon.”³²

7.2 In relation to draft regulation 7 (3) which states that, the provisions on scheduling of infomercials may not apply to any dedicated infomercial channel which may obtain a broadcasting licence from the Authority in accordance with the applicable provisions of the Act, M-Net and MultiChoice posit that “[s]ince an individual infomercial channel is unlikely to apply for a broadcasting licence, ... it would be more appropriate to refer to a “dedicated infomercial channel broadcast by a licensed broadcasting service”.³³

8. Teleshopping

8.1 M-Net and MultiChoice suggest that the draft regulation on teleshopping be deleted for reasons similar to those given on limitations on placement, duration and identification of advertisements. “Alternatively, in the event that it is retained, we propose that it be amended to provide for far greater flexibility and to remove duplication”³⁴.

9. Programme sponsorship

9.1 Yfm argues that opening commercial programme sponsorship contract to the third party might not be acceptable to sponsors, as the latter always seeks confidentiality in such agreements.³⁵ There is also the possibility of added

³² Ibid.

³³ M-Net and MultiChoice Submission on the Draft Regulations

³⁴ Ibid.

³⁵ Yfm Submission on the Draft Regulations

bureaucratic cost, which will have "... direct impact on the bottom line through additional personnel costs."³⁶

9.2 M-Net and MultiChoice argue that they do not understand why programme sponsorship contracts concluded by broadcasters have to be furnished to the Authority, and suggest that in the absence of any compelling rationale thereof, draft regulation 9 (1) ought to be deleted. They also posit that draft regulation 9 (2) is unclear, as the idea behind programme sponsorship is to give prominence to the name, logo, product or service of the sponsor.³⁷

³⁶ Ibid

³⁷ M-Net and MultiChoice Submission the Draft Regulations

SECTION C: FINDINGS AND CONCLUSIONS

10. Jurisdictional concerns

- 10.1 After extensive consultation with interested persons, the Authority has noted different interpretations of the Act in so far as the Authority's powers to regulate advertising are concerned. In particular, the Authority has noted suggestions that it cannot use Section 55 of the Act and Section 4 (3) of the ICASA Act, 2000 (Act No 13 of 2000) to review the current regulations. Stakeholders pointed out that Section 55 of the Act empowers the Advertising Standards Authority of South Africa (ASA) to regulate advertising.
- 10.2 With respect to Section 95 (1) of the Act, interested persons argued that the twenty-four months period for reviewing regulations has elapsed. However this view does not take into account that section 95 (2) of the Act says that "the regulations referred to in subsection (1) remain in force until they are amended or repealed in terms of this Act".
- 10.3 The Authority is of the view that by implication section 95 (2) permits the amendment or repeal of regulations beyond the twenty-four months period stipulated in subsection (1).
- 10.4 Some interested parties further argued that the Authority can only invoke Section 4(3) of the ICASA Act if there was an empowering provision in the Act. The Authority is not in agreement with such propositions, however given the need for legislative clarity on such matters, a recommendation in terms of section 4(3)(a) of the ICASA Act will be tabled before the Minister of Communications for a possible amendment of the relevant section to provide such clarity.

10.5 As part of the possible review of the legislation, the Authority will also make representations regarding the need to clarify its regulatory mandate with the self regulatory mandate of the Advertising Standards Authority.

10.6 Accordingly, the Authority has decided not to amend or repeal the current regulations until the Act has been amended to enhance clarity and certainty.

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