



15 February 2021

**Attention: The Acting-Director-General**

Department of Communications and Digital Technologies  
Block A3, IParioll Office Park, 1166 Park Street, Hatfield, Pretoria  
Private Bag X860  
Pretoria  
0001  
By email: [aacs@dtps.gov.za](mailto:aacs@dtps.gov.za)

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Dear Acting Director General

**Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020**

**1. Introduction**

- 1.1 We refer to the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: *A New Vision for South Africa 2020* (the "**White Paper**"), which was published by the Department of Communications and Digital Technologies (the "**DOC**") on 9 October 2020 under Government Gazette No. 43797.
- 1.2 In the White Paper, the DOC invited members of the public and interested persons to submit written representations on the White Paper by 16h00 on 30 November 2020. This date was subsequently extended by the DOC to 15 February 2021. We thank the DOC for the opportunity to participate in this process and trust that this submission will be helpful.
- 1.3 We note that the White Paper seeks to (amongst other things) align South Africa's policy, legislative and regulatory framework with the changes that come with, or will come with, the fourth industrial revolution, and new trends and also seeks to promote investment in the audio and audiovisual content industries within, amongst other things, the National Development Plan 2030. In terms of the White Paper, the changes that come with these technological developments will require policy interventions to ensure that the disruptions and changes will not reinforce current disparities in access to information communication technology and services and widen the digital divide. Amongst the many proposals made in the White Paper is the proposal to formulate new statutory definitions that will underpin





the new policy framework to address a broader market of audio and audio visual content services that include traditional linear broadcasting services, online linear broadcasting services, non-linear on-demand services and video sharing platforms. The proposals made in the White Paper may therefore have far reaching consequences for the South African broadcasting industry.

- 1.4 While the White Paper focuses mainly on the broadcasting industry, some of the proposals made therein are also of relevance to the South African Rugby Union ("**SARU**") and indeed other sports federations. In particular, we refer to the proposals made in the section entitled "*Competition and Access to events and sports of national interest on free-to-air platforms*" (paragraphs 5.2.9.1-5.2.9.21 of the White Paper).
- 1.5 The aforementioned section of the White Paper proposes (amongst other things) the following:
  - 1.5.1 that the Electronic Communications Act, 2005 ("**ECA**") be amended to include a criteria to be used by the Independent Communications Authority of South Africa ("**ICASA**") to identify a national sporting event whose free to air broadcasting a pay-tv operator should not prevent. The criteria proposed by the DOC is as follows:
    - 1.5.1.1 the event must involve the South African senior national team (i.e. the most senior official South African team) or an individual representing the Republic;
    - 1.5.1.2 the event must be in a major sport, taking into consideration the number of South Africans who play it and/or watch it at the venue or on television, or listen to radio coverage;
    - 1.5.1.3 the event must be of major importance to South African society, and not just to those who ordinarily follow the sport;
    - 1.5.1.4 the event is appropriate to list, given its structure and duration; and
    - 1.5.1.5 the event takes place in South Africa. The only events which take place outside South Africa and which should be eligible for listing are international confederation sporting events such as a World Cup or Olympic event in which a South African team or individual is representing the Republic; and



- 1.5.2 to ensure fair competition, sports broadcasting rights of listed events must be granted after an open, transparent and non-discriminatory bidding process for a period not longer than five years to allow broadcasters a reasonable time to recoup their investment.
- 1.6 Due to SARU's key role in the local rugby industry, we have a material interest in the proposals discussed in the above sections of the White Paper. We expand on this below:
- 1.6.1 as the DOC may be aware, SARU, in its capacity as the custodian of rugby in South Africa, is responsible for, and oversees, all aspects of the game. Amongst other things, SARU is responsible for:
- 1.6.1.1 the development and management of all national teams;
  - 1.6.1.2 brand building and intellectual property rights protection;
  - 1.6.1.3 licensing and merchandising;
  - 1.6.1.4 the licensing of broadcasting rights and sponsor procurement;
  - 1.6.1.5 the hosting and management of tournaments and tours; and
  - 1.6.1.6 the general marketing of the game of rugby.
- 1.6.2 furthermore, SARU has 14 provincial unions for which it is responsible, namely the Blue Bulls, Boland, Border, Eastern Province, Free State, Golden Lions, Griffons, Griqualand West, Kwazulu-Natal, Leopards, Mpumalanga, South Western Districts, Falcons and Western Province. It is the responsibility of SARU to ensure that the above provincial unions are sufficiently funded;
- 1.6.3 in terms of the National Sport and Recreation Act 110 of 1998 (the "**Sports and Recreation Act**"), sports federations, including SARU, are under a legal obligation to support South African high-performance sports, which includes rugby. The Sports and Recreation Act also requires sports federations to be creative in their fundraising initiatives, be financially self-reliant and to set aside funds to implement various development programmes.
- 1.6.4 section 6(2) of the Sports and Recreation Act states as follows:



*"National federations must actively participate in and support programmes and services of Sport and Recreation South Africa and the Sports Confederation, in so far as high performance sport is concerned".*

1.6.5 section 10(1)(b) of the Sports and Recreation Act states further that:

*"Sports and Recreation South Africa must, in accordance with its funding policy encourage creativity and self-reliance on the part of the national federations regarding funding".*

1.6.6 to meet its various obligations prescribed by the Sports and Recreation Act and its obligations towards the 14 provincial unions, SARU requires significant funding. Although SARU derives its mandate from the Sports and Recreation Act, it is important to note that the funds received from the National Department of Sports and Recreation only assist in meeting approximately 0.3% of SARU's financial obligations. SARU meets its extensive statutory mandate through a mix of private fund-raising initiatives, including the licencing of broadcasting rights. It is these broadcasting rights which are the subject of paragraphs 5.2.9.1-5.2.9.21 of the White Paper.

1.6.7 we note that approximately 53% of SARU's revenue is derived from the licensing of broadcasting rights while sponsorships represent approximately 28% of SARU's revenue mix. In this regard, we note that SARU's ability to exploit complementary sources of funding such as sponsorships is inextricably linked to the appropriate licensing of broadcasting rights. Therefore, the two sources of funding are indivisibly linked. Without the income generated from the licensing of broadcasting rights and related sponsorships, SARU would not be financially self-reliant and would not be able to support a host of laudable initiatives currently undertaken by it, including its various grassroots and development programmes. Its inability to do so would of course be contrary to the provisions and legal requirements of the Sports and Recreation Act.

1.7 It is against this background that SARU makes this submission in response to the White Paper.

1.8 First, we wish to commend the DOC for some of the progressive proposals advanced in the White Paper, including the following:



- 1.8.1 the recognition of the importance of the revenue earned from the licensing of sports broadcasting rights to the survival of sports federations, including SARU;
  - 1.8.2 the recognition of the importance of licensing sports broadcasting rights on an **exclusive** basis to the revenues and survival of sports federations; and
  - 1.8.3 the importance of prescribing a sound and balanced criteria - which is on par with international best practice - to be used by ICASA when identifying sports of national interest.
- 1.9 Despite the progressive proposals outlined above, SARU is nevertheless concerned about other proposals and assertions made in the White Paper, including the following:
- 1.9.1 that sports broadcasting rights of listed events should be granted only after an open, transparent and non-discriminatory bidding process and for a period not longer than 5 years so as to allow broadcasters a reasonable time to recoup their investment; and
  - 1.9.2 the suggestion that the lack of access to SARU content by any particular broadcaster has led to anti-competitive effects in the structure of TV markets.
- 1.10 Our concerns are discussed in more detail below.

## 2. SARU's Concerns

- 2.1 SARU is concerned about the following proposals:
  - 2.1.1 **Proposal that rights be acquired only through an open, transparent and non-discriminatory bidding process**
    - 2.1.1.1 While SARU is not, in principle, opposed to following a bidding process in certain specific circumstances, we are nevertheless concerned that the White Paper has not advanced any reasons or offered any evidence to support the proposal that broadcasting rights be acquired **only** through an open, transparent and non-discriminatory bidding process, even when commercial considerations might dictate otherwise. Put differently, the White Paper has not provided any evidence to demonstrate that to the extent that there are concerns as to the state of competition in the South African broadcasting market, that this is due to the procurement methods followed by sports



federations and in particular SARU. Absent this proof or evidence, the proposal in question is not justified and falls to be characterised as an unjustified violation of the freedom to contract to which SARU is entitled.

2.1.1.2 On the question of freedom of contract, a legally protected right which our courts have jealously sought to protect, we note that our courts have made the following important pronouncements:

2.1.1.2.1 in *Sasfin (Pty) Ltd v Beukes (149/87) [1988] ZASCA 94; [1989] 1 All SA 347 (A)* the court stated the following: *In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom, public policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject matters” (per INNES, CJ, in Law Union and Rock Insurance Co Ltd v Carmichael’s Executor (supra) at p 598).*

2.1.1.2.2 in *Barkhuizen v Napier 2007 (5) SA 323 (CC) 325* the court reaffirmed the notion of freedom of contract when it held that *“our constitutional values allow individuals the dignity and freedom to regulate their affairs”*; and

2.1.1.2.3 in *Shoredits Construction (Pty) Ltd v Pienaar NO and Others [1995] 4 BLLR 32 (LAC)* the court stated that subject to principles of public policy or good morals our common law accepts complete freedom of contract.

2.1.1.3 It follows from the above, that until such time that the DOC has practically demonstrated that other procurement methods (for example bilateral negotiations) of licencing broadcasting rights are against public policy (for example in that they contribute to uncompetitive markets) the proposal in question is susceptible to challenge on the basis that it constitutes an unwarranted interference with SARU’s legally protected freedom to contract on its own terms.

2.1.1.4 As already indicated, SARU is not opposed to following a bidding process in licensing its broadcasting rights. However, as counterintuitive as it may seem,



following a bidding process is not always appropriate or beneficial in all circumstances. In determining the suitable procurement method, SARU is guided by a number of key considerations which, for reasons which are hopefully self-evident, serve to either increase or decrease the pool of potentially suitable broadcasters::

- 2.1.1.4.1 the type of competition/event in question;
- 2.1.1.4.2 **the “footprint” of the available broadcasters. An allied consideration is their existing general rugby broadcasting mix (ie rugby magazine programming in addition to live match broadcasting)**
- 2.1.1.4.3 **the production capacity of the available broadcasters;**
- 2.1.1.4.4 **the capacity of the available broadcasters to broadcast all matches live;**
- 2.1.1.4.5 **the willingness of the available broadcsaters to purchase other rugby rights as part of the package. This can be particularly critical (by way of example) in the context by SARU's developmental initiatives; and**
- 2.1.1.4.6 **the experience (competence), tenure and financial capacity of the available broadcasters as service providers. It will be appreciated in this regard that a proper risk assessment is always an essential element in any procurement assessement process.**
- 2.1.1.5 It follows from that above that in many instances, the following procurement methods are more suitable:
  - 2.1.1.5.1.1 bilateral negotiations with potential broadcasting partners; or
  - 2.1.1.5.1.2 the appointment of a sports rights agency who acts as a liaison between the sports federation and the potential broadcasting partners.
- 2.1.1.6 The above aside, in our view, the proposal in question also does not take into account the potentially serious disadvantages associated with a bidding



process. It needs to be appreciated in this regard that there is no guarantee that an open bidding process will attract the participation of all the desired potential broadcasting partners. Leading broadcasters may not participate in the bid for several reasons, including the expense associated with participating in a bidding process. For example, participating in a bid often involves significant costs that are not reimbursed to the bidder. If the leading broadcasters do not submit a bid, the sports federation concerned can only consider bids from those broadcasters which have submitted proposals. The following are illustrative of the potentially unintended negative consequences associated with a bidding process:

2.1.1.6.1 recently in Australia, Fox (a leading pay-tv operator in that country) declined to submit a bid for the rights having been the licensee for 20 years. This was to the significant disadvantage of the sports federation in question who no longer had the benefit of considering a bid from a well-resourced and experienced potential broadcaster);

2.1.1.6.2 when negotiating a licensing agreement for sports broadcasting rights, open communication between a sports federation and a potential broadcasting partner is in most instances crucial. Competitive bidding is not always conducive to open communication and may indeed even discourage dialogue. For example, bidder A may avoid asking certain questions of clarity because the questions or answers may help other bidders by revealing Bidder A's approaches and strategy;

2.1.1.6.3 following a bidding process can be extremely slow. By comparison and when justified, the use of direct sourcing/bilateral negotiations can take a fraction of that time; and

2.1.1.6.4 it entails very high administrative costs.

2.1.1.7 It follows from the above, that it is critical that SARU, in its capacity as the custodian of rugby continues to be afforded the discretion and the flexibility to select the most appropriate procurement method at any given time. Without this discretion and/or flexibility, our ability to conclude the most commercially beneficial agreements on behalf of local rugby is likely to be undermined. This



would have a negative impact on our ability to deliver on our extensive yet unfunded rugby mandate and our ancillary and contractual obligations.

## 2.1.2 **Proposal that sports broadcasting licensing agreements should not exceed 5 years**

2.1.2.1 As with the choice of procurement method, it is our submission that the White Paper has not provided any evidence which serves to demonstrate that any perceived reduction in competition in the broadcasting market is due to the terms of the licensing agreements concluded by SARU. We assert that without such evidence, the proposal in question, which will have the effect of severely limiting the discretion and flexibility required by sports federations, cannot be justified and is accordingly susceptible to legal challenge.

2.1.2.2 Furthermore, we note that the proposal in question does not take into account the dynamism, technological advancements and fast-paced nature of the broadcasting market. These characteristics of the broadcasting market lend further support for the need for sports federations to be afforded the flexibility and discretion to determine for themselves the most appropriate duration of licensing agreements. We note in this regard the following:

2.1.2.2.1 Over-The-Top players have revolutionised how sports federations package and sell their rights. For example:

2.1.2.2.1.1 in 2019, Facebook partnered with the International Cricket Council ("**ICC**"), the global governing body of cricket, to secure exclusive digital content rights until 2023 for global ICC events in the Indian subcontinent;

2.1.2.2.1.2 in 2019, Facebook partnered with the National Basketball Association ("**NBA**") to stream highlights to several NBA professional leagues through Facebook Watch; and

2.1.2.2.1.3 in 2019, Vodacom secured the rights to livestream the 2018/19 FA Cup through its video play platform.

2.1.2.3 What emerges from the above is that it is essential that SARU enjoys the flexibility to be able to periodically review and where possible, maximise its



position. This may include concluding agreements with emerging players (as highlighted above) or proceeding directly to market as some sports federations have done.

2.1.2.4 While SARU generally does not enter into agreements which are longer than 5 years, we submit that this may be necessary in certain limited circumstances. For example, less popular competitions (for example those competitions involving women or junior teams) may require longer commitments (beyond 5 years) from SARU and the relevant broadcasting partner. As less popular competitions are not *marquee events*, it may take a number of years to commercialise these rights (in the form of marketing and the development of the associated production effects) in order to attract the requisite sponsorship spend.

2.1.2.5 Viewed cumulatively, the fast-paced nature of this industry and the need to make provision for the unique requirements presented by popular competitions, it is critical that SARU, guided by the prevailing market conditions, should be afforded the discretion and flexibility to determine the appropriate duration of licensing agreements at any given time.

### 2.1.3 **Assertion that the lack of access to rugby content has led to anti-competitive effects in the structure of TV markets**

2.1.3.1 At paragraphs 5.2.9.3 and 5.2.0.4 of the White Paper, it is suggested (without reference to any evidence) that the lack of access to sports broadcasting rights has led to anti-competitive effects and has negatively impacted the structure of TV markets.

2.1.3.2 While SARU is not a broadcaster, this assertion is simply not true with regards to rugby. We note in this regard that there are a number of broadcasters or providers of audio-visual services (such as Netflix and Etv) who have enjoyed significant market growth without access to rugby content as part of their offering to consumers. The growth of these broadcasters demonstrates that it is possible to attract and retain an audience without access to rugby related content. It would be remiss to not observe that stakeholders (for example E Media Investments) during recent public hearings conducted by the Independent Communications Authority of South Africa ("**ICASA**") regarding



the inquiry into subscription television broadcasting services made the following submissions:

- 2.1.3.2.1 local content drives audiences;
- 2.1.3.2.2 the top shows on DSTV are all local content;
- 2.1.3.2.3 the fact that DSTV is increasingly focussing on local content is also indicative of the fact that local content is premium.
- 2.1.3.3 It is significant that E Media did not make the same claims regarding rugby related content. Furthermore, E Media presented evidence that the SABC 1 and Etv (who do not carry significant amounts of rugby related content) free to air channels are the most watched channels on the DSTV platform and accordingly drive audience numbers.
- 2.1.3.4 The entry and subsequent success of Netflix in South Africa supports the submission that rugby related content is not a requirement for audience acquisition and retention. In this regard, we note that according to recent remarks of senior executives of Netflix (such as Maria Ferras), in the foreseeable future, Netflix intends to increase the amount of localised, non-drama content produced for international audiences through global partnerships **and that any interest in sport does not extend beyond documentaries**. [Emphasis added].
- 2.1.3.5 In light of the above, the unavoidable conclusion one is driven to is that if sports (and in particular rugby) was indispensable to audience acquisition and retention, Netflix would have had to acquire sports content at the point of entry into the South African market. The focus by Netflix on general entertainment has proved to be a sound commercial strategy and is in line with recent remarks by the Independent Communications Authority of South Africa ("**ICASA**") to the effect that general entertainment drives the lion's share of network profitability.<sup>1</sup> Related to this, research published by the Broadcast Research Council of South Africa demonstrates that the most watched shows

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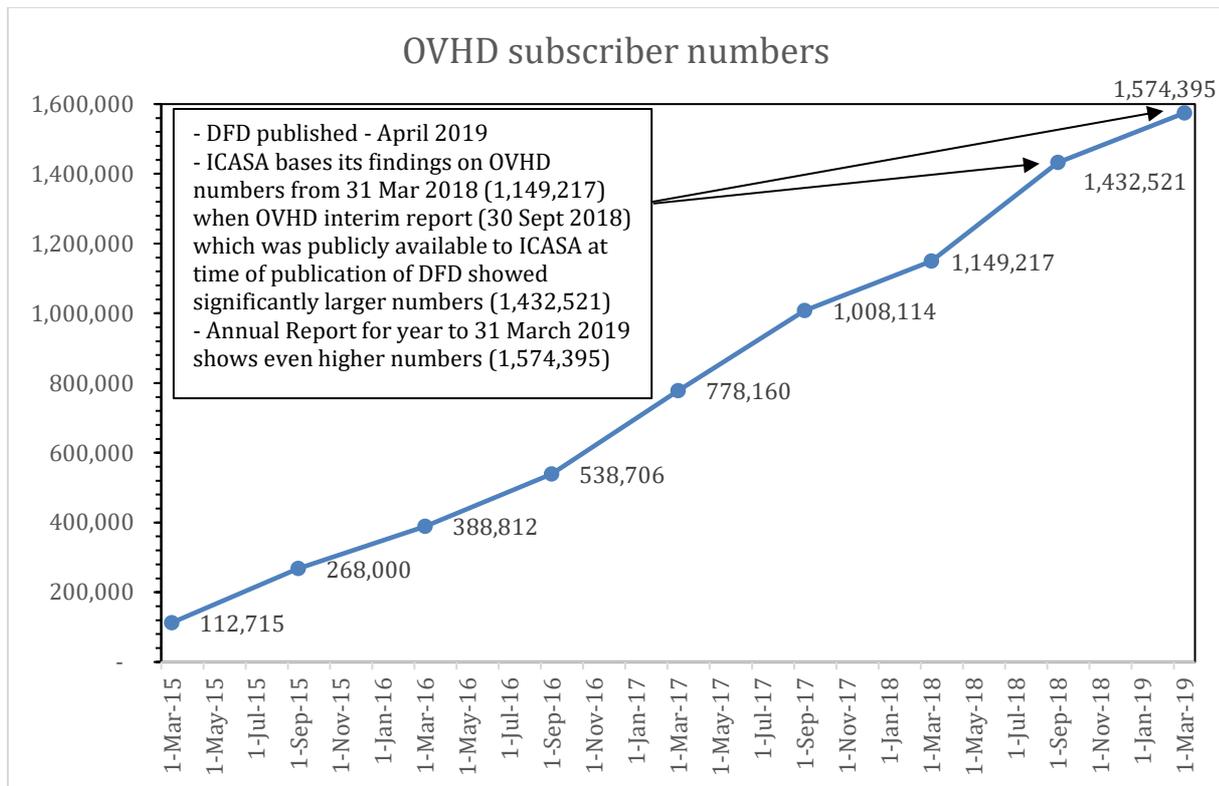
<sup>1</sup> Government Gazette No. 4239. *Notice to Publish the Draft Findings Document on "Inquiry into Subscription Television Broadcasting Services"* at paragraph 5.8.2.

on all the platforms of ICASA licensed broadcasters is of a general entertainment nature.

2.1.3.6

Lastly, we note that local free-to-air broadcaster, e.tv does not carry any rugby related content on its OVHD platform. Despite this, the OVHD service has enjoyed spectacular growth since its launch as reflected in Figure 1 below.

**Figure 1: OVHD growth since launch**



2.1.3.7

Figure 1 demonstrates that in the period between March 2018 and March 2019, OVHD grew by 420,000 subscribers which equates to an average of 35,000 new subscribers per month. Notably, this significant growth has been achieved without any rugby content. Indeed, the growth of OVHD has been on the back of general entertainment content such as the recent investments in a news channel, Afrikaans content and an eReality channel.<sup>2</sup>

<sup>2</sup>



2.1.3.8 In view of the above, we submit that there is no basis or evidence to support the assertion that the lack of access to sports broadcasting rights and in particular rugby related content has led to anti-competitive effects in the structure of TV markets.

### 3. Conclusion

3.1 In conclusion, we reiterate that, SARU, as the custodian of rugby in South Africa is best placed to determine how best to licence its broadcasting rights in a manner that achieves the sustainability of rugby. Should there be a need to revise licensing methods followed to date, this must be driven by market dynamics and not unwarranted policy interventions which are not supported by evidence.

3.2 We trust that this submission will be of assistance to the DOC. We look forward to contributing further to this process and record our intention to participate in any subsequent public hearing that the DOC may arrange.

3.3 We are available should the DOC wish to discuss any aspect of this submission.

Yours faithfully,

**Jurie Roux**  
**Chief Executive Officer**