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## GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

## DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

NO. 1081

09 OCTOBER 2020

**DRAFT THE WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES  
POLICY FRAMEWORK: A NEW VISION FOR SOUTH AFRICA 2020**

I, Ms Stella Ndabeni-Abrahams, the Minister of Communications and Digital Technologies, hereby publish, in accordance with section 85 (2) (b) of the Constitution of the Republic of South Africa, 1996, the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 that was approved by Cabinet on 09 September 2020, for public comment.

Members of the public and interested persons are invited to submit their comments/inputs/written representations on this draft White Paper, within 08 weeks of the date of publication of this notice, 30 November 2020, 16h00pm. Late submissions may not be considered.

All written comments and enquiries on this publication should be directed to:

<b>The Acting-Director-General, Department of Communications and Digital Technologies</b>
<b>Block A3, IParioll Office Park, 1166 Park Street, Hatfield, Pretoria</b>
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Kindly write draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 in the subject field of your email.

A copy of the revised set of the draft White Paper is available at [www.gov.za](http://www.gov.za) or [www.dcdt.org.za](http://www.dcdt.org.za)



**MS STELLA NDABENI-ABRAHAMS, MP**  
**MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES**  
**DATE: 07-10-2020**

**DRAFT WHITE PAPER  
AUDIO AND AUDIOVISUAL CONTENT SERVICES  
POLICY FRAMEWORK: A NEW VISION FOR SOUTH  
AFRICA**

**September 2020**

Draft White Paper Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa (September 2020)

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## ABBREVIATIONS

<b>5G</b>	5 <sup>th</sup> generation wireless networks
<b>AAVCS</b>	Audio and Audiovisual Content Services
<b>ACS</b>	Audio Content Service
<b>AM</b>	Amplitude Modulation
<b>ASO</b>	Analogue Switch-Off
<b>AU</b>	African Union
<b>AVMSD</b>	Audiovisual Media Services Directive
<b>DAC</b>	Department of Arts and Culture
<b>DSAC</b>	Department of Sports, Arts and Culture
<b>DED</b>	Department of Economic Development
<b>DTI</b>	Department of Trade and Industry
<b>DoC</b>	Department of Communications
<b>DCDT</b>	Department of Communications and Digital Technologies
<b>DIRCO</b>	Department of International Relations and Cooperation
<b>DSBD</b>	Department of Small Business Development
<b>DTT</b>	Digital Terrestrial Television
<b>DTH</b>	Direct-to-Home satellite
<b>DTPS</b>	Department of Telecommunications and Postal Services
<b>ECA</b>	Electronic Communications Act, 2005, as amended
<b>ECTA</b>	Electronic Communications and Transactions Act, 2002, as amended
<b>ECNS</b>	Electronic Communications Network Service
<b>ECS</b>	Electronic Communications Service
<b>FM</b>	Frequency Modulation
<b>FPB</b>	Film and Publication Board
<b>GSM</b>	Global System for Mobile communications
<b>HDTV</b>	High-definition television
<b>IBA</b>	Independent Broadcasting Authority
<b>ICASA</b>	Independent Communications Authority of South Africa
<b>OCS</b>	On-demand Content Services
<b>ICT</b>	Information and Communications Technology

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<b>IDC</b>	Industrial Development Corporation
<b>IoT</b>	Internet of Things
<b>IP</b>	Internet Protocol
<b>IPTV</b>	Internet Protocol Television
<b>ISP</b>	Internet service provider
<b>ITU</b>	International Telecommunication Union
<b>LTE</b>	Long-term evolution
<b>MDDA</b>	Media Development & Diversity Agency
<b>NDP</b>	National Development Plan 2030
<b>NFVF</b>	National Film and Video Foundation
<b>NGO</b>	Non-Governmental Organisation
<b>NPC</b>	National Planning Commission
<b>Ofcom</b>	Office of Communications: The Independent Regulator in the UK
<b>OTT</b>	Over-the-top
<b>SABC</b>	South African Broadcasting Corporation
<b>SADC</b>	Southern African Development Community
<b>SARS</b>	South African Revenue Service
<b>SMME</b>	Small Medium and Micro Enterprises
<b>SOE</b>	State-owned Entity
<b>STB</b>	Set-top box
<b>UK</b>	United Kingdom
<b>USA</b>	United States of America
<b>USAASA</b>	Universal Service and Access Agency of South Africa
<b>VOD</b>	Video on Demand
<b>VSPS</b>	Video Sharing Platform Services

## ACKNOWLEDGEMENTS AND THANKS

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There is also sincere appreciation for the valuable participation and written representations by individuals, organisations, government departments and entities throughout the various phases of the policy review process which has culminated in this draft white paper.

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## DEFINITIONS

**“audio and audiovisual content service”** means a service where the principal purpose of the service or a dissociable section thereof is devoted to providing audio and/or audiovisual programming to inform, entertain and educate the public and is distributed over electronic communications networks under the editorial responsibility of a recognised natural or juristic person.

**“audio broadcasting”** means a linear free to air or subscription audio content service provided by a licensee for the simultaneous listening of programmes by the public based on a programme schedule<sup>1</sup>.

**“broadcasting”** means the distribution of linear audio or audiovisual content services over the broadcasting radio services frequency bands or any electronic communications network intended for the public, sections of the public or subscribers to that service having appropriate receiving facilities, ‘broadcast’ is construed accordingly.

**“broadcasting service”** means a linear audio or audiovisual content service distributed to the public, sections of the public or subscribers to that service whether conveyed using the broadcasting services radio frequency bands or any electronic communications network.

**“editorial responsibility”** means the exercise of effective control by either a natural or legal person over both the selection of the programmes and their organisation in a catalogue.

**“Events of national interest”** means events of major public importance or cultural significance, such as presidential inaugurations or state funerals, which are identified in the public interest from time to time, by the regulator, after consultation with the Minister of Communications and Digital Technologies, and which the regulator must

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ensure are broadcast free-to-air and not exclusively by subscription audiovisual content services.

**“on-demand content service”** means a non-linear audio and audiovisual content service carried by an electronic communications network for the listening and/or viewing of programmes at the moment chosen by the user and at the user’s individual request based on a catalogue of programmes selected by the content service provider.

**“on-demand audiovisual content service”** means a non-linear audiovisual content service carried by an electronic communications network for the viewing of programmes at the moment chosen by the user and at the user’s individual request based on a catalogue of programmes selected by the content service provider.

**“on-demand audio content service”** means a non-linear audio content service carried by an electronic communications network for the listening of programmes or musical works at the moment chosen by the user and at the user’s individual request based on a catalogue of programmes and music selected by the content service provider.

**“On-demand content service licence”** means a licence granted and issued by the Authority in terms of the ECA, to a person to provide a defined category of non-linear audio or audiovisual content service or deemed by the ECA to have been so granted and issued.

**“Sports of national interest”** means national sporting events, as identified in the public interest from time to time, by the regulator, after consultation with the Minister responsible for Communications and Digital Technologies and the Minister responsible for Sport, and which the regulator must ensure are broadcast free-to-air and not exclusively by subscription audiovisual content services.

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**“television broadcasting” or “television broadcast”** means a linear free to air or subscription audiovisual content service provided by a licensee for the simultaneous viewing of programmes by the public based on a programme schedule.

**“user-generated video”** means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video sharing platform by that user or any other user.

**“video sharing platform service”** means a service that meets the following requirements:

- the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility;
- the organisation of the stored content is determined by the provider of the service, including by automatic means or algorithms, in particular hosting, displaying, tagging and sequencing;
- the principal purpose of the service, a dissociable section of that service or an essential functionality of that service, is devoted to providing programmes or user-generated videos to the general public, to inform, entertain or educate; and
- the service is made available by electronic communication networks.

## EXECUTIVE SUMMARY

1. In the past twenty-five years South Africa's legal framework for broadcasting regulation has become out of tune with the rapid technological developments and the inevitable forces of the 4<sup>th</sup> Industrial Revolution (4IR).
2. The 4IR has already begun disrupting society, business models and traditional ways of distributing goods and services through digitisation, the Internet of Things (IoT), cloud computing and storage, artificial intelligence (AI), robotics and advances in nanotech and bio-tech. These changes will require policy interventions to ensure that the disruptions and changes will not reinforce current disparities of access in South Africa to ICT technologies and services thereby widening the digital divide.
3. This draft white paper seeks to create an enabling environment for the provision of inclusive audio and audiovisual content services (AAVCS) to all South Africans in a manner that promotes social-economic development and investment.
4. Beyond the Constitutional principles, the draft white paper is located within the policy goals of the National Development Plan (NDP) 2030, which identifies the creative industries sector as critical levers to economic *growth and* nation-building. It furthermore builds on the foundation set by the Broadcasting Digital Migration Policy (2008) and the National Integrated ICT White Paper (2016).
5. The proposals made herein, seeks to align South Africa's policy, legislative and regulatory framework with the 4IR, new trends and promote investment in the audio and audiovisual content industries within the NDP 2030 vision, seven (07) pillars and priorities for 2019-2024, and the re-imagined industrial strategy and its master plans and social compacts.

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6. This draft white paper is based on overarching policy principles and objectives including: freedom of expression; diversity; transparency; independence; universal access; access to information; regulatory parity; economic growth; social inclusion; accessibility by persons with disabilities; promotion of fair competition, protection of children; promotion of South African content and consumer protection.
7. The scarcity rationale, the public interest rationale and the pervasiveness/influence rationale are still valuable principles that assist in determining the level of regulation that should apply to different types of AAVCS and platforms providing services to citizens in South Africa.
8. This draft white paper believes that because of the interpenetration of the world's technological systems, regulatory parity and fair competition need a technology neutral approach to ensure, growth and investment.
9. Market and consumer behaviour is shifted by the increased availability of on-demand content services (OCS) and video sharing platform services (VSPS), although linear television remains the largest medium used to access video content in South Africa,
10. Most Governments fundamentally re-imagine the policy, legislative and regulatory architecture so that "audio and audiovisual content services" properly integrate into the new framework
11. The current statutory definition of broadcasting services is too narrow and too platform-specific in its application by the regulator to capture the range of new audiovisual content services proliferating online beyond the borders of nation states.
12. The proposed South African policy framework for AAVCS has at its core new definitions and thresholds for regulating these services.

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13. These include new definitions for “audio and audiovisual content services”; “broadcasting”; “on-demand content service”; “on-demand audiovisual content service”; “on demand audio content service”; “user-generated video” and “video sharing platform service”.
14. Legacy analogue broadcasters must be migrated on no less favourable terms and should be accommodated on DTT multiplexes with regards to frequency spectrum licences. The licensing of new DTT multiplexes should require the issue of the radio frequency spectrum licence to only the ECNS. The ECNS would then be legally obliged to carry AAVCS licensed by the regulator and assigned capacity on the DTT multiplex.
15. In the proposed licensing framework, the regulator will still issue Individual and Class licences. The broader category of AAVCS will replace the current licence category of broadcasting services. Certain types of AAVCS may be exempt from applying for a service licence.
16. This draft white paper proposes to distinguish between broadcasting services (linear) and non-linear services in a graduated fashion and create a level playing field between competing services by imposing regulations and public interest obligations on licensees.
17. The initial threshold proposed for an Individual licence for linear AAVCS (broadcasting services) and OCS is R100 million annual turnover in the previous financial year. This draft white paper proposes that legislation will give the Minister the power to consider amending this initial threshold every three years to account for inflation, macro-economic shifts in the economy, or any legislation affecting SMMEs. As is the case now in section 5(3)(e) of the Electronic Communications Act the regulator may prescribe other criteria of a socio-economic nature or include the measurement of audience size which can be utilised to require a licensee to apply for an Individual licence even if they

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are below the R100 million threshold. This threshold, in the interests of fair competition, will also apply to international (foreign-based) AAVCS who are actively targeting South African audiences and extracting revenue in terms of advertising, subscription fees or other sources from South Africa. In such a case, if the global size of the international (foreign-based) business is capable of affecting economic activity, the regulator may issue a licence irrespective of size of its South African annual turnover.

18. In the case of OCS the entry threshold requirement to hold a Class licence will be set at an annual turnover of R50 million in the previous financial year and below the entry level threshold an OCS will be exempt from applying for a licence.
19. This category of licence will apply to on-demand audiovisual content services, including those offered on the public Internet. On-demand audio content services that are available on the public Internet must be exempt from licensing.
20. VSPS will be exempt from licensing. However, these services will not be exempt from regulation concerning hate speech, the protection of minors and related matters and will need to set up a self-regulated code of conduct or be subject to a statutory code.
21. This draft white paper proposes that Government must put in place in legislation provisions for a transitional framework for conversion of existing licences to the new AAVCS licensing framework where required. Where any person before the change in the licensing framework lawfully provided a service without requiring a licence they will have permission to continue to do so until the regulator has granted or refused a licence application.
22. The draft white paper proposes maintaining the 3tier broadcasting system which a stronger public broadcaster must anchor. However, all the broadcasters irrespective of their tier, have a responsibility towards fulfilling

public service programming. ICASA must strictly maintain adherence to the 3tier system to ensure fairness, competition and sustainability within this tier system.

23. The cultural policy toolkit used in the past has included public service programming, promotion of South African television content, South African music and languages, ensuring diversity of content, must carry of public service programming and facilitating access to sports of national interest on free-to-air broadcasting services for all citizens.
24. While Must Carry rules served their intended universal access objective, they may distort the market going forward in a changing environment of intense competition for audiences and content. Particularly, for the public broadcaster who currently has to offer its content to subscription broadcasters for free. To allow the public broadcaster to negotiate retransmission consent agreements on commercial terms with other AAVCS in South Africa and internationally, the enabling provisions in law for Must Carry regulation will be repealed. However, in the public interest, the retransmission consent agreements for public broadcasting services broadcast free-to-air may not be offered exclusively to a single subscription audio or audiovisual content service in South Africa.
25. This draft white paper supports Sentech's continued key role in the audio and audiovisual content service sector as the common carrier for electronic communication network services for broadcasting services on the terrestrial and satellite platforms.
26. Rules ensuring the findability or 'discoverability' of public interest content are seen as the logical next step beyond Must Carry rules to ensure that South African programmes and services which are seen as being of particular value for society, for democratic, cultural or social reasons, can be found easily and accessed on relevant platforms, whether they are linear or on-demand.

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27. South African content quotas should remain in place for broadcasting services (including those offered online) and be extended to all AAVCS, with an emphasis on the need to continue to reinforce South African content and music in all genres and formats. However, the current approach of specifying a minimum percentage of total broadcasting time per channel for the public broadcaster by the sector regulator reflects an analogue mind-set that is not appropriate in a digital broadcasting multichannel environment where a broadcasting service licensee will have multiple channels.
28. A linear broadcasting service licensee's South African content quotas can be measured across the total bouquet of channels and where it is not possible to meet the South African content quota due to the nature of the service, the licensee can be offered the opportunity to pay a specified sum of money or minimum percentage of gross revenue into a fund which supports the creation of audio and audiovisual South African content. This new multichannel measurement would apply equally to the public broadcaster's bouquets.
29. The broadcasting system needs to accommodate the fact that South Africa has eleven official languages and sign language is a twelfth language to ensure access for persons with disabilities, particularly those with visual and hearing impairments. To realise this objective, the regulator, must put in place regulatory measures. AAVCS licensees must submit Annual reports on compliance with this policy objective.
30. Sport of national interest has become a thorny issue not just for accessibility by the public, but also for the promotion and development of these sporting codes. To ensure the public continues to enjoy free-to-air and free-to-view access to listed events the listing of national sporting events which are in the public interest will be extended to include the broader AAVCS market. The regulator will have clear guidance in legislation on the criteria to use in determining the list. The listing of events in legislation will now also include events of major

public importance or cultural significance for example, presidential inaugurations or state funerals.

31. This draft white paper proposes that ICASA should remain the 'content regulator' for South Africa, in particular for newly-defined audio and audiovisual content services, including broadcasting services. ICASA's governance will require reviewing to stabilize it, strengthen its capacity, and improve its efficiency as an agile regulator in this complex environment.
32. This draft white paper proposes that legislation requires a code of conduct for on-demand content services, in addition to the existing code of conduct for broadcasting services. The current codes applicable to broadcasting services need to include broadcasting services offered on the Internet and the catch-up services offered by broadcasting services. These services will be subject to the code of conduct administered by regulator, unless the provider thereof is a member of a body which has proved to the satisfaction of the regulator that it subscribes and adheres to a code of conduct enforced by that body using its own disciplinary mechanisms, provided that such code and disciplinary mechanisms are acceptable to the regulator.
33. This draft white paper proposes that the regulator must review whether the current share of advertising revenue by subscription services is appropriate and what the impact of online advertising will be on the TV advertising market in the short and long term. If it is detrimental to the survival and viability of free-to-air services, the regulator must make regulations to protect the sustainability and viability of free-to-air services in South Africa.
34. This draft white paper proposes that mechanisms to strengthen protection against signal piracy and co-operation between government departments are needed to ensure that statutory prohibitions against piracy and circumvention of technological protection measures are regularly reviewed to ensure they

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remain effective against the evolving technology solutions employed by persons engaging in the piracy of South African audio and audiovisual content.

35. The multichannel digital environment requires the adoption of different regulatory tools to address concerns regarding economic concentration and abuse of dominance. This draft white paper recommends that plurality of voices and diversity of programming in the public interest be ensured by the guiding principles and provisions of competition law, together with content regulation and other licence conditions. This will effectively require the Competition Commission to continue to exercise concurrent jurisdiction with ICASA in addressing concerns of market concentration and media plurality.
36. This draft white paper also seeks to create an enabling policy environment for increased foreign direct investment, as a stimulus to the growth and development of the ICT sector as a whole. The draft white paper recommends that the limitations on foreign ownership in respect of linear individual audiovisual content services (broadcasting services) increases to a maximum of 49%. Also, the cross-media ownership, including the distinction between AM and FM licenses and the other prescribed restrictions which are currently applicable to commercial sound and television broadcasting services are obsolete and need removal. In an environment where markets are disrupted by technology developments, where print media companies are no longer the largest media companies and with the proliferation of on demand content services, this proposed policy intervention will allow consolidation and creation of synergies by various firms.
37. The Competition Commission is capable of dealing with any uncompetitive behaviour arising from this policy intervention to remove limitations on cross media ownership. To ensure that the increased foreign ownership does not dilute the South Africanness of the audiovisual content services will require close monitoring of licensees by the regulator.

38. To support South Africa's commitment to promote investment in a reciprocal manner in the African Union, it is recommended that a foreign person or persons from an African Union member country be able to, whether directly or indirectly, exercise control over a commercial broadcasting licensee; or have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding forty-nine (49) percent: Provided this must be subject to a reciprocal agreement between South Africa and the relevant African Union country.
39. All licensed OCS shall continue to be subject to the FPB content classification requirements. This will therefore require the OCS licence granted to be subject to compliance with the Films and Publications regulations. This draft white paper recommends that there be a closer working relationship between the FPB and ICASA to ensure a coordinated approach to the regulation of these services and avoid duplication and any possibility of regulatory forum shopping.
40. The development and promotion of a digital skills system geared towards supporting the digital media economy and the Fourth Industrial Revolution (4IR) must be prioritised. In this regard, the government will work with key skills partners across the spectrum to develop digital skills in the areas of television, film, animation, games, radio, advertising, applications development and other digital skills required for this changing environment. These partners will support and invest in the workforce to keep content relevant and the creative industries competitive so that they can compete globally. This draft white paper proposes that Government needs to further investigate measures around digital skills interventions, including a multimedia digital skills institute.
41. Women, youth, rural and poor urban communities, persons with disabilities, the illiterate and other vulnerable groups still require particular attention. These groups need education and vocational job training to promote job quality and address digital skill needs to promote empowerment.

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42. This draft white paper proposes that Government must support the establishment, definition and actions that must contribute to the development of digital media literacy in South Africa. The regulator must focus on media literacy, set the goals and trends in the field of media literacy, analyse and define good practices, develop concrete action plans and strategic vision, report on the levels of media literacy and promote proposals for measures in this area for a more competitive audiovisual and content industry and an inclusive 4IR.
43. This draft white paper proposes that the Minister must be responsible for spectrum policy - making, planning and allocation functions, and coordination of spectrum for the AAVCS sector.
44. This draft white paper proposes that in support of the draft policy the Minister should initiate a review of all state-owned companies and entities within its portfolio to determine the relevance of their mandate, and duplication. As announced during various State of the Nation Addresses, state-owned companies and entities with outdated mandates will be done away with and those with overlapping mandates can either be merged into other entities or have their mandates clarified. This draft white paper proposes that this review process be prioritised as soon as possible to create policy certainty and ensure that limited resources can be used for implementation of the draft policy and developmental areas.

## 1. INTRODUCTION

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### 1.1 CONTEXT TO THE NEW POLICY FRAMEWORK

- 1.1.1 The rapid and unprecedented changes occurring both in society and communications have brought a period of volatility, complexity and unprecedented disruptive change. Propelled by the pervasiveness of social media platforms and the proliferation of different broadcasting-like, on-demand and video sharing platform services using the Internet as a means of distribution and many of which operate on global scale.
- 1.1.2 The whole media system is experiencing a digital revolution and is in transition. As many analysts have correctly put it, this is a period of unprecedented disruptive change. The driving force behind this revolution as in other sectors is the Internet. The change it brings is not merely more content and more content providers, it is the overthrowing of the current broadcasting distribution ecosystem and a change in the way that viewers consume audio and audiovisual content.
- 1.1.3 Mobile operators are rapidly deploying next generation networks and the cost of data has been declining. The telecommunications providers are testing 5<sup>th</sup> generation wireless networks (5G) which will dramatically change the consumption of content. The expansion and/or modernisation of telecommunications infrastructure together with the gradual reduction in data prices has led to increased uptake of Internet-based audio and audiovisual services (AAVCS).
- 1.1.4 The 1<sup>st</sup> Industrial Revolution mechanised production using steam engines, the 2<sup>nd</sup> Industrial Revolution drove mass production using electricity, and the 3<sup>rd</sup> Industrial Revolution driven by the computer, the Internet and information was digital. Now there is a 4<sup>th</sup> Industrial Revolution (4IR) that will disrupt society, business models and traditional ways of distributing

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goods and services using digitisation, the Internet of Things (IoT), cloud computing and storage, artificial intelligence (AI) and robotics and advances in nanotech and bio-tech.

- 1.1.5 These changes will require policy interventions to ensure that the disruptions and changes will not reinforce current disparities in access in South Africa to information communication technology (ICT) and services and widen the digital divide. Especially, as these changes are occurring at a rate outpacing any policy development.
- 1.1.6 This is problematic for a country like South Africa which has taken over 20 years to modernise its policies. In this case, such policies are not only archaic, they are unable to cope with the rigours of this complex communications world, resulting in a knee-jerk response to the environment. In an era of enhanced transparency and disclosures, heightened stakeholder expectations and shareholder activism, and the centrality of the judiciary as an arbiter in policy making, the industry will resist such kneejerk actions. Depending on how government handles such resistance, it may create unnecessary uncertainty in the sector, thus inhibiting growth and investment.
- 1.1.7 Since 1993, with the inception of the Independent Broadcasting Authority Act (IBA Act), our statutes and regulations have focused primarily on one type of content service, namely broadcasting services and included related definitions on “broadcasting service” and “broadcasting services radio frequency bands”. These definitions are foundational to the Broadcasting Act, 1999 and core to both the Independent Communications Authority Act of South Africa Act (ICASA Act), 2000 and the Electronic Communications Act (ECA), 2005.
- 1.1.8 The ECA was a step forward in that it brought the regulation of electronic communications networks, electronic communication services as well as

broadcasting services under one statutory roof for the first time. ICASA had been regulating both broadcasting and telecommunications services since 2000 but the ECA gave more coherence to the drive for statutory convergence and repealed the IBA Act, 1993 and the Telecommunications Act, 1996.

- 1.1.9 The ECA also provided for the regulation and licensing of networks (e.g. intermediaries and hosts in the Internet economy). But 2005 was very 'early days' as many of the global on-demand services, video sharing platforms and social media networks were either nascent or did not exist at all. So instead of updating the broadcasting regulatory framework many of the IBA Act provisions on broadcasting-specific regulation found their way into the ECA, namely "Chapter Nine: Broadcasting Services".
- 1.1.10 In 2008, the Broadcasting Digital Migration Policy created a major turning point in the development of the entire broadcaster sector as it set the country on a digital path, migrating broadcasting transmission systems from analogue to digital transmissions as per the International Telecommunication Union (ITU) agreements. However, it did not deal with what would happen after the analogue switch-off (ASO) or deal with the digital audiovisual environment outside of traditional broadcasting services.
- 1.1.11 It was only in March 2015, after a broad panel of experts drafted the National Integrated ICT Policy Review Report (Hereinafter the ICT Policy Review Report) that it became clear that the South African regulatory framework for broadcasting was set for a significant policy overhaul. In particular, chapter 5 on "Audio and Audiovisual Services" made key recommendations for a new South African policy on broadcasting and new broadcasting-like services. The policy views articulated in this draft white paper have drawn on recommendations made in the ICT Policy Review Report.

- 1.1.12 This draft white paper seeks to answer the questions posed in the 2015 Report, including the formulation of the new statutory definitions that will underpin the new Policy Framework to address a broader market of AAVCS that include traditional linear broadcasting services, online linear broadcasting services, non-linear on-demand services and video sharing platforms.
- 1.1.13 This draft white paper is informed by developments in other jurisdictions who recently dealt with similar questions, as well as market trends in South Africa, including increased access to broadband Internet, free Wi-Fi and the entry of global players. Radio remains the most accessed media platform in South Africa with a reach of 90% and the challenge for government is to expand the reach of other electronic communication platforms.
- 1.1.14 The traditional radio set remains the primary listening device, but there is a youth market who listen to radio on their mobile phones and with many radio stations now being available on satellite TV platforms there has also been an increase in people who listen to radio on their television sets. Many South African radio stations are now also available via live audio streaming on the Internet. Market and consumer behaviour is being shifted by the increased availability of on-demand content services and video sharing platforms, although linear television remains the largest medium used to access video in South Africa. There has also been rising market, political and societal pressure to see reduced mobile data prices – which are necessary conditions for 4IR and the goals of National Development Programme (NDP) 2030.
- 1.1.15 Globally, the Internet as a media platform has transformed electronic media and communication markets. Online content provision and over-the-top (OTT) content services had impact on traditional markets in the United States of America, as well as in Western Europe. Consequently, the policy,

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legislative and regulatory environments in those jurisdictions have adapted to address the impact of these new online providers and services. This trend has reached Africa and South Africa and there are a variety of local market players and international OTT providers who have launched these online audio and video services.

- 1.1.16 Audio and audiovisual content consumption via the Internet are fundamentally transforming the South African audio and audiovisual landscape creating a broader content market than traditional broadcasting. The purpose of this draft white paper is to proactively address this change so that it delivers on the vision and objectives of the South African government and people in this rapidly changing environment, to bring certainty, while protecting and promoting the South African cultures.
- 1.1.17 The proposed policy changes in this draft white paper will align South Africa's policy, legislative and regulatory framework with the 4IR and promote investment in the audio and audiovisual content industries, repositioning the industry for further growth, and encourage investment, capital, infrastructure and skills development.
- 1.1.18 This draft white paper therefore intends to modernize the South African broadcasting landscape, by reviewing the current policies, *White Paper on Broadcasting* (1998) and policy captured in subsequent legislation which have proved to be inadequate in this rapidly technologically changing world, with the purpose to reposition and grow the sector for the new environment and attract investment.
- 1.1.19 In particular, the policy aims to create a new policy environment where the sector can grow in a manner that:
- ensures access to broadcasting services by all the citizens, including people with disabilities;

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- creates certainty and stability, by improving regulatory capacity;
- facilitates competition and allows market entry by new entrants; and
- strengthens the public broadcaster.

## 1.2 KEY PRINCIPLES AND VISION FOR THE NEW POLICY FRAMEWORK

1.2.1 The NDP, the Broadcasting Digital Migration Policy (2008) and the National Integrated ICT White Paper (2016), fundamentally anchor this framework.

1.2.2 In addition to prioritizing employment, improving the quality of education, skills development and innovation; and building the capability of the State (and institutions) to play a developmental, transformative role, the NDP has identified the potential of ICT's to deliver on policy goals to reduce economic exclusion and facilitate job growth. For this purpose, it highlights that access to information is vital for building an informed citizenry. It also contributes to education and economic development. The media plays a core role in nation-building and are critical for democracy to function. The NDP notes that while existing policy and legislation supports electronic media in promoting the constitutional values, it has *"become outdated and narrow, given changes in technology and media platforms."*<sup>2</sup>

1.2.3 The NDP advised that the review process for media had to ensure that the mandate to build the nation and promote constitutional values was strengthened. In particular, the continued protection of the independence and autonomy of media institutions and regulatory bodies.<sup>3</sup> An important part of the NDP's 2030 vision is that *"All South Africans will be able to use core ICT services and enjoy access to a wide range of entertainment, information and educational services..."*. This draft white paper will facilitate this vision of the availability and access to a wide range of entertainment, information and educational content services by 2030.<sup>4</sup>

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- 1.2.4 The Broadcasting Digital Migration Policy (2008) targeted a wide range of developmental challenges that continue to face South Africa, such as the digital divide, building social cohesion and a common national identity. The policy focused on digital broadcasting as tool to significantly address these challenges and identified digital migration as a national priority. This draft white paper aims to continue the work of the Broadcasting Digital Migration Policy after the analogue switch-off (ASO) and in a digital audio and audiovisual content environment To address these challenges not only on traditional broadcasting platforms, but also online.
- 1.2.5 The National Integrated ICT Policy sets out government's choices about principles, rules and guidelines to achieve the long-term goals and objectives set out in the NDP and the South African Constitution.”<sup>5</sup>
- 1.2.6 The National Integrated ICT Policy White Paper stated that the *“cultural and freedom of expression objectives which have underpinned the policy and regulatory framework for broadcasting continue to require a specific policy focus. South African content promotion and facilitating access by audiences to a diverse range of television and radio programming will...remain essential objectives of broadcasting policy – and could become increasingly important as audiences access content from elsewhere in the world via the Internet.”*<sup>6</sup>
- 1.2.7 However, the National Integrated ICT Policy White Paper does not go into further detail on policy about audio and audiovisual content (including broadcasting) other than to state that it requires a separate policy process to *“review existing policies that remain very specific to the broadcasting sector”* and that one of the key considerations in this review *“will be how to define ‘broadcasting’ in the future, recognizing that broadcasting-like audio and audiovisual content is increasingly being distributed over the Internet (for example, video on demand services).”*<sup>7</sup>

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1.2.8 In support of the NDP 2030 vision, the aim of this draft white paper is to create an enabling environment for the provision of inclusive AAVCS to all South Africans in a manner that promotes social-economic development and investment through broadcasting, new media, print media and innovative electronic communication technologies. This will require the South African government to put in place a stable regulatory environment that:

- facilitates investment and competition in a converging audio and audiovisual content market;
- supports the growth of local creative industries;
- supports consumer choice and consumer protection; and
- provides consumers with the right tools and frameworks to be able to safely navigate AAVCS provided using electronic communications.

1.2.9 Equally drawing from the National Integrated ICT Policy, this draft white paper is based on the following overarching policy principles and objectives:

- **Promotion of SA identity and content** – to ensure the preservation of South African national identity and culture and that South African creative industries benefit from expenditure on programming by AAVCS providers who target South African consumers.
- **Freedom of expression** – facilitate and extend the right of all South Africans to freedom of expression.
- **Values** – supporting Constitutional principles of non-racialism, non-sexism and equality before the law.
- **Diversity** – ensure all South Africans have access to a diverse range of AAVCS on a national, regional and local level that cater for all language and cultural groups and provide entertainment, education and information. This is in addition to diversity in ownership.

- **Transparency** – there must be openness and transparency in law-making and the development of regulations to ensure accountability to citizens.
- **Independence** – the independence and autonomy of media institutions and regulatory bodies in the sector should continue to be enshrined in the Constitution and protected.
- **Universal Access** – promote an environment of open, fair and non-discriminatory access to AAVCS. Lowering the cost of data will be a critical element in ensuring that all South Africans have access to online AAVCS.
- **Access to Information** – ensure access by all South Africans to a broad range of information, opinion, news and analysis of relevance to their communities and lives.
- **Regulatory Parity** – adopt a technology-neutral approach that ensures regulation of similar services in the same manner irrespective of the platform or device on which they provide a service. However, the level of regulation may be based on a distinction between services which use radio frequency spectrum that requires a competitive licensing process and whether the content provided is linear or on-demand.
- **Economic Growth** – stimulating growth and innovation in AAVCS by driving domestic and foreign investment in the sector, especially in promoting job creation, facilitating ease of market entry and ensuring development of applications and South Africa content.
- **Social Inclusion** - ensure actions to enable our people and communities to use audio and audiovisual content platforms to fully participate in society and that AAVCS promote the values and bonds that bring people together in the context of cultural diversity and nation-building. Digital literacy programmes will be essential to ensure that all South Africans can use and access AAVCS.
- **Accessibility by persons with disabilities** – promote access by all South Africans to platforms and devices that enable them to

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consume AAVCS and ensure that in particular technology is available to assist persons who are visually, hearing and cognitively impaired to have access to AAVCS.

- **Promotion of fair competition** – facilitate fair competition between AAVCS providers and prevent anti-competitive actions or abuses of dominance.
- **Protection of children** – ensure the protection of children from harmful content that may impair their physical, mental or moral development
- **Consumer protection** – ensure the continued protection that consumers enjoy in broadcasting and extend it to other electronic communication platforms, including the Internet, when they consume audio and audiovisual content.

1.2.10 Government is committed to the NDP vision of the State playing a transformative and developmental role. In line with this the following specific objectives will guide and direct the implementation of this draft white paper:

- Universal access to public audio and audiovisual content service on all electronic media platforms that provides a wide range of South African programming, in all South African official languages that:
  - reflects South African attitudes, opinions, ideas, values and artistic creativity;
  - displays South African talent in education and entertainment programmes;
  - offers a plurality of views and a variety of news, information and analysis from a South African point of view; and
  - advances the national and public interest.
- Protects the integrity and viability of the public broadcaster as the nerve centre of broadcasting in South Africa and a vehicle for nation building and social cohesion;

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- Refrain from undue interference in commercial activities in the AAVCS market, unless there is market failure, or it is in the public interest for government or the regulator to intervene;
- Promote Broad-Based Black Economic Empowerment (B-BBEE) and the economic transformation of ownership patterns in AAVCS and local creative industries in the sector.
- Ensure that AAVCS cater for the needs of children, women, the youth and persons with disabilities.
- Encourage the development of South African audio and audiovisual content, as well as the development of an innovative and sustainable South African Small Medium and Micro Enterprises (SMME) production sector. Encourage the carriage of African content, as well, to promote continental goals of the African Union.

## 2. EVOLVING AUDIO AND AUDIOVISUAL CONTENT SERVICES LANDSCAPE IN SA

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### 2.1 EVOLUTION OF BROADCASTING AND REGULATION GLOBALLY

2.1.1 Broadcasting - simply described as the distribution of sound or video content to the public via an electronic medium - has existed for approximately 100 years. Broadcasting began with AM radio broadcasts which came into popular use in the 1920s and the electronic medium used was the radio frequency spectrum. The transmission of radio and television programmes to television and radio sets using radio frequency spectrum is referred to as “over-the-air” or “free-to-air” broadcasting.

2.1.2 In many countries throughout the world, and with the initial development of broadcasting technology, one of the key rationales for regulating radio (FM/AM) and television (VHF/UHF) services transmitted via terrestrial radio frequency spectrum was that radio frequency spectrum is a scarce resource and that there is a high degree of competition between applicants for terrestrial radio frequency spectrum used by radio and television. This principle for the regulation of broadcasting became known as the **Scarcity Rationale**. The basic premise is that there is a fixed natural limitation upon the number of services that may operate in these bands without causing interference with one another. To prevent interference governments determine through authorisation or licensing who may have the privilege of using this radio frequency spectrum.

2.1.3 In exchange for this privilege governments impose obligations and restrictions on the content carried by licensed broadcasters. This includes providing for balanced debate, education, the promotion of local content, diversity of programming, the protection of children from harmful content, and prohibitions against owners of other mass media (e.g. newspapers) from controlling broadcasters. So, in conjunction with the Scarcity Rationale,

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which justified authorisation or licensing the usage of radio frequency spectrum for broadcasting purposes governments also developed a **Public Interest or Public Trust rationale**. In terms of this rationale, radio frequency spectrum is a public resource and a government its custodian.

2.1.4 However, Cable radio (from 1928) and Cable television (from 1932) provided via coaxial cable originally (most have now converted from analogue to digital delivery over fibre optic cables), despite not using radio frequency spectrum to reach the public or sections of the public is also seen as being broadcasting. Although, there are a few jurisdictions where Cable services are treated as a telecommunications service instead. As these services did not use scarce radio frequency spectrum there had to be a third rationale for the regulation of broadcasting in addition to the scarcity rationale and the public trust rationale.

2.1.5 The third main rationale for the regulation of broadcasting is the **Pervasiveness or Influence Rationale**. As broadcasting was replacing print media as the main means of mass communication in the world at the time, it attracted a higher level of policy attention. Broadcasting services provided education and entertainment, with the result that people spend many hours listening and watching this mass medium. The view of policymakers was that given the pervasive nature or influence of broadcasting services, whoever controls that content is in a unique position to influence how listeners and viewers view the world and their own culture. This rationale also served to underpin government's original decision using the Public Trust rationale to impose obligations and restrictions on broadcasters to encourage certain content (e.g. local content), and to restrict other content (e.g. content harmful to children), as well as prohibitions against owners of other mass media (e.g. newspapers) from controlling broadcasters.

- 2.1.6 Broadcasting did not remain terrestrial only, as Direct-to-home (DTH) analogue satellite broadcasts began in 1974 and enabled direct TV reception by the public, without the use of terrestrial spectrum. Importantly, satellite was capable of broadcasting multiple channels. Some of the services provided on the satellite platform were free-to-view and supported the universal access principles by providing access to rural areas where free-to-air terrestrial television/radio was not available, other services catered for an audience who are prepared to pay for access to exclusive content or more channels than were available on free-to-air terrestrial television. Although, DTH Satellite does use radio frequency spectrum for uplink and downlink, the radio frequency spectrum used does not fall within the terrestrial radio frequency spectrum bands for which there is a lot of competition and which are highly valued.
- 2.1.7 The most recent evolution is the shift from analogue to digital transmission technologies on all platforms, including online digital audio and audiovisual content streaming. Digital transmission has several advantages over analogue transmissions, the most important being that digital channels take up less bandwidth, which means that digital broadcasters can provide more digital channels in the same space required for a single analogue channel. This digital transmission technology was first rolled out on the terrestrial platform in 1998, as Digital Terrestrial Television (DTT), and it marked the end of frequency spectrum scarcity as a limiting factor for the introduction of terrestrial television services.
- 2.1.8 However, as we approach the end of the second decade of the 21<sup>st</sup> Century and the beginning of 4IR, sector regulators throughout the world are now grappling with the impacts of globalisation, convergence and digital disruption and considering whether these 3 rationales still apply and if they do in what fashion. This is especially relevant as broadcasting as the main means of mass communication is being gradually replaced by mostly unregulated social media and OTT audiovisual content service providers using

the delivery medium of the internet to deliver “broadcasting-like” content to a multiplicity of receiving devices – including, gaming consoles, tablets, mobile phones, laptops and smart Digital TV sets.

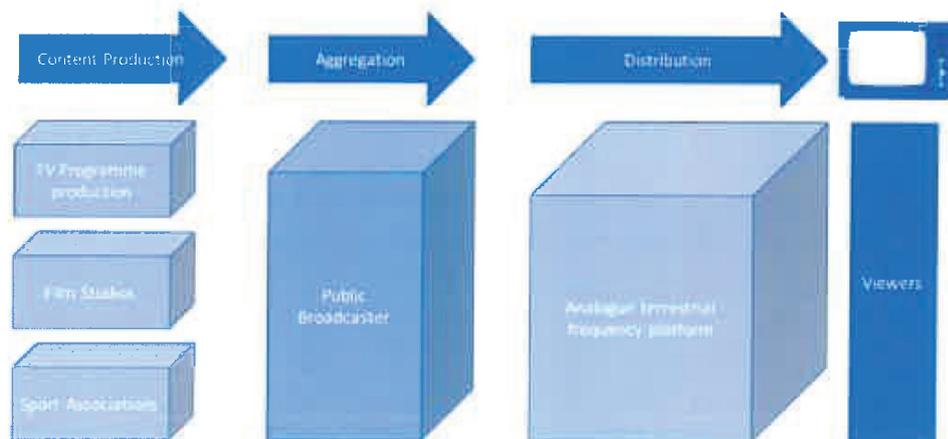
- 2.1.9 Online audio and audiovisual content is streamed either “linear” (as a scheduled channel) or “on-demand” (non-linear where the viewer chooses what and when to watch). Developments in technology have led to the creation of video sharing websites and global video on-demand (VOD). VOD has contributed to the decline in rental video stores and with its forays into exclusive pay TV deals with several studios it has led to cord-cutting as audiences shift away from traditional Pay Television offerings to OTT TV and VOD players on broadband Internet platforms. Broadcasters are also increasingly simultaneously retransmitting their television and radio channels as audio or video streams on the Internet platform.
- 2.1.10 Digital disruption and the Internet have lowered the costs of entry and are changing the business models of providing goods and services. In this new economy, platforms have become the name of the game. What this means is that scarce radio frequency spectrum is no longer an issue for broadcasting and broadcasting no longer has to originate in the country whose audience it is targeting. Attempting to regulate broadcasting as one did in the past no longer makes sense in an era of diverse content available on multiple platforms, as satellite and the Internet can deliver local and international content from anywhere in the world.
- 2.1.11 Government acknowledges that global developments means that there needs to be change in policy approaches to broadcasting and the broader AAVCS market in South Africa. However, the **scarcity rationale**, the **public interest rationale** and the **pervasiveness/influence rationale** are still valuable principles that assist in determining the level of regulation that should apply to different types of AAVCS and platforms providing services to citizens in South Africa.

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## 2.2 POLICY APPROACHES TO DEALING WITH THE CURRENT AUDIO AND AUDIOVISUAL LANDSCAPE

2.2.1 As mentioned earlier, when only public broadcasting and a few commercial offerings were available to households using terrestrial radio frequency spectrum, viewers lacked choice and the power of people who controlled the media was increased. All players understood the persuasive power of broadcasting and its impact on opinion forming in a democratic society. The scarcity of spectrum and transmission infrastructure was also a significant challenge (see Figure 1) and the broadcaster/s became “gatekeepers” on what content consumers could access. These factors led to the current broadcasting regulation framework which ensured no-one, including government, could abuse this power of influence and that there were obligations on broadcasters to provide diversity of content.

**Figure 1: Broadcasting Value Chain in the “early years”**

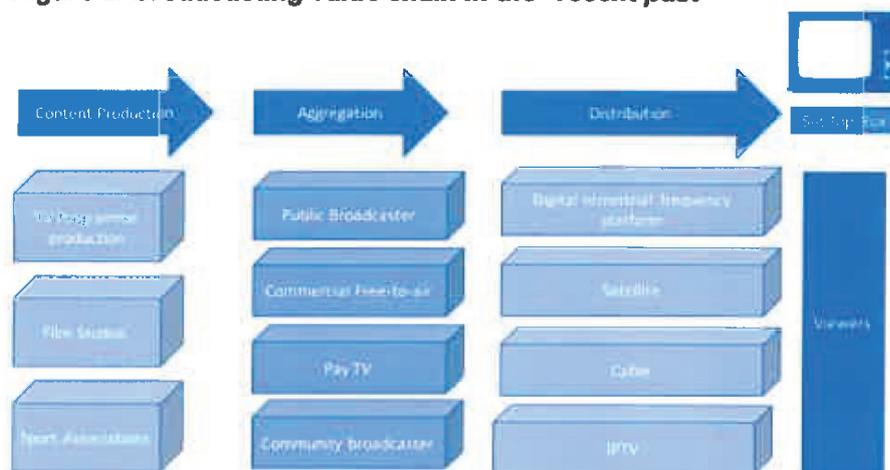


2.2.2 Technological developments such as digitalisation improved the efficiencies of transmission technologies and the introduction of new broadcasting delivery methods improved access to transmission systems and multiplied

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the content available (see Figure 2). This placed the viewer potentially with access to hundreds of channels which exceeded the viewing ability of the average viewer and introduced a new scarcity, namely the capacity of the viewer to consume the content available. This meant that where in the past broadcasters competed for transmission capacity and radio frequency spectrum, now they compete for the attention of the viewer.

**Figure 2: Broadcasting value chain in the “recent past”**



**2.2.3** Today the whole media system is experiencing a digital revolution and is in a perpetual transition. The driving force behind this revolution as in other sectors is the Internet. The change it is bringing is not merely more content and more content providers, it is the overthrowing of the current broadcasting distribution ecosystem and a change in the way that viewers consume audio and audiovisual content and creating a new audiovisual content value chain.

**2.2.4** In the same way that countries responded to cable and satellite technology developments in broadcasting at policy level, similar policy developments continue to occur in other countries in response to the influence of the Internet and the introduction of broadcasting-like services on this platform.

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Other jurisdictions, notably Europe, have taken the lead in approaches to the regulation of broadcasting-like content on the Internet.

- 2.2.5 The European Commission conducted a large-scale public consultation process between 2002 and 2005. The Commission identified that broadcasters had to compete with an increasing number of other linear services and also non-linear services on the Internet which offered the same content but were subject to a different regulatory environment. The Commission considered that this could create a non-level playing field in the delivery of content. As a consequence, the Commission concluded that regulation of broadcasting and broadcasting-like services be relaxed (e.g. by easing advertising restrictions) and a basic set of minimum rules be introduced for non-linear services (e.g. to protect minors and prevent incitement to racial hatred) to create a level playing field for competition. One of the arguments for relaxing regulation for television broadcasting was the significant increase in the number of broadcasters and channels and therefore choice of content for consumers.
- 2.2.6 In December 2005 the Commission adopted a proposal for a new Audiovisual Media Services Directive (AVMSD). The rules apply in a platform neutral way. In other words, the same rules apply to the same kind of services (rather than platforms). The AVMSD distinguishes between a linear audiovisual service (i.e. "broadcasting" which would include IPTV, streaming and web-casting, which "pushes" content to viewers) and non-linear audiovisual services (i.e. "video on-demand" services, where the viewer "pulls" the content). There is a two-tier approach with a basic set of rules applying to all audiovisual media services and additional rules that apply only to television broadcast services.
- 2.2.7 A revision of the Audiovisual Media Services Directive has been underway since 2016. The focus of the revision has been to extend the scope of the AVMSD or at least parts of the directive to include the regulation of VSPS

to protect children, deal with terrorism, hate speech and prohibit incitement to violence or racism.

- 2.2.8 The draft white paper adopts a similar policy approach of treating the same services in the same way to ensure regulatory parity and fair competition irrespective of the platform on which they are offered. This will strengthen the technological neutral policy which, although adopted in 2005 with the enactment of the Electronic Communications Act, was not consistently applied in regulation.

### 2.3 DEVELOPMENT OF THE SOUTH AFRICAN BROADCASTING SECTOR

- 2.3.1 Before democratic elections in 1994 the Broadcasting Act, 1976, regulated broadcasting. This Act gave the then “apartheid” government exclusive control over the formulation of broadcasting policy and regulation and exclusive rights over the provision of broadcasting services through the SABC which operated as a state monopoly in radio and television. The main goal of media activism after the unbanning of the African National Congress and other political movements in 1990 was to shift the SABC from being a state broadcaster under political control to become a public service broadcaster providing impartial and objective coverage of all parties before South Africa’s first elections in 1994.

- 2.3.2 The introduction of the Independent Broadcasting Authority Act, 1993, which established an Independent Broadcasting Authority (IBA) and proclaimed a new system of regulating broadcasting in South Africa achieved this goal. The Act enabled three tiers of broadcasting, namely public, commercial and community broadcasting. The regulator’s first step was to conduct a wide-ranging policy inquiry known as the Triple Inquiry which focused on the viability of the public broadcaster, South African content rules for radio and television, as well as cross-media rules

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prohibiting cross ownership of broadcasting and print interests. The immediate focus of the new regulator was the transformation of the SABC from state broadcaster into a public broadcaster and the introduction of commercial and community radio stations to address the dominance of the SABC in radio broadcasting where even today it is still the terrestrial broadcasting platform with the largest audience. Following the recommendations of Triple Inquiry, the SABC sold 6 regional radio stations which became the building blocks of privately-owned commercial radio in South Africa.

2.3.3 It was only in 1998, that the IBA after its initial focus on securing radio diversity licensed South Africa's first free-to-air commercial television channel. This step did away with the SABC's monopoly in free-to-air television and provided the first local news television service outside of the SABC News for free-to-air television viewers. In the same year, government released the White Paper on Broadcasting Policy which set out the policy stance on several issues not covered in the Independent Broadcasting Authority Act, 1993, such as roles and responsibilities about policy formulation and regulation, as well as, future public policy goals such as the migration of broadcasting from analogue to digital and the regulation of converged networks. This resulted in the introduction of new broadcasting legislation, namely the Broadcasting Act, 1999, followed by the Independent Communications Authority of South Africa Act, 2000. This new legislative framework resulted in the merging of the IBA with the telecommunications regulator, the South African Telecommunications Regulatory Authority (SATRA) to form the Independent Communications Authority of South Africa (ICASA) in June 2000.

2.3.4 Despite legislation providing for three tiers of broadcasting, public, commercial and community, and the licensing of many community radio, initially community television was limited to temporary event licences of up to four weeks in duration. It was only after ICASA published its position

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paper on community television in 2004, that longer term licences of up to one year were enabled. Later this became a class licence for seven years. Issues of frequency scarcity to licence community TV were complicated by the need to make frequency available for the migration from terrestrial analogue terrestrial television transmissions to digital terrestrial television (DTT) transmissions. This led to ICASA declaring a moratorium on considering any new community TV licence applications in March 2010.

2.3.5 The Broadcasting Act, when it was promulgated in 1999, gave satellite broadcasting services in operation at that time permission to continue providing a service until the regulator put in place a regulatory framework for satellite broadcasting. ICASA dealt with this deeming provision when it put in place its Position Paper on Subscription Broadcasting Services in 2005. In the same year, the Minister of Communications tabled two Bills in the National Assembly, the Convergence Bill (B09-2005) and the ICASA Amendment Bill (B32-2005) aimed at changing the regulatory framework to meet the needs of convergence. The aim was to consolidate legislation governing the telecommunications and broadcasting sectors, as well as promote the convergence of network services and technologies in these sectors. The Convergence Bill became the ECA, 2005, and led to the repeal of the IBA Act and the amendment of the ICASA Act and Broadcasting Act. The fundamentals of three tiers of broadcasting, namely public, commercial and community remained in place in Chapter 9 of the ECA without any changes from the initial policy positions on broadcasting taken in 1993 and 1998.

2.3.6 Government put in place a Broadcasting Digital Migration Policy in 2008 to migrate the existing analogue terrestrial broadcasters, from analogue transmissions to digital transmission by the International Telecommunication Union (ITU) deadline of 17 June 2015. This has been a long drawn out process due to several factors and is still underway intending to complete in 2021/22 financial year. This policy specifically dealt with the

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process of digital broadcasting migration of the existing terrestrial broadcasters. It did not contemplate how licensing and regulation would take place in the digital broadcasting environment after the analogue switch-off (ASO). Building on the provisions of the Broadcasting Digital Migration policy, the post ASO policy approach and framework is being dealt with in this draft white paper.

2.3.7 Unfortunately, ICASA proceeded in the absence of national policy guidance on a new digital licensing framework to prescribe the Promotion of Diversity and Competition on Digital Terrestrial Television Regulations in 2014 that envisage ICASA licensing new free-to-air and subscription broadcasting entrants on the DTT Mux 3. The regulator will allocate 45% of the capacity on this third multiplex to one or more commercial subscription broadcasting television licensees and 55% to one or more commercial free-to-air television broadcasting service licensees. A policy concern is that when the new audio and audiovisual content service licensing framework is in place, this will create more legacy broadcasters that will need transitioning.

2.3.8 It is clear that the South African broadcasting system has come a long way since the drafting of the 1999 White Paper. At that time there was many inequalities in the broadcasting sector, including:

- inequality in access,
- inequality in resource allocation
- inequality in language, cultural and educational programming;
- lack of diversity of choice, in services and programmes; and
- lack of empowerment for the historically disadvantaged.

2.3.9 In 1998, the majority of South Africans relied on a single service, usually radio, to meet their broadcasting needs. There was a lack of availability of services to historically disadvantaged individuals and under-developed regions. In rural areas, a single radio station and a single television service might, at best, define the choice of services. Moreover, the services were

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not inclusive of all South African languages and culture. South African content played a secondary role to foreign programming and even though there was a small independent production sector, policies of the apartheid era had ensured that this sector drew talent mainly from one segment of the population.

- 2.3.10 The ownership patterns in the sector did not reflect all segments of the population. In contrast, twenty years later there are now three broadcast categories of South African radio - public, commercial and community - in metro and rural areas that collectively deliver all 11 of South Africa's official languages, as well as German, Hindi, Portuguese and the San Bushman languages of !Xu and Khwe. Radio is available via terrestrial, satellite and the Internet. The same is true for television where collectively television is broadcast in all 11 official languages, as well as in German, Hindi, Portuguese and sign language. There is now public, commercial and subscription television across South Africa available via terrestrial, satellite and the Internet. South Africans now have access to a wide spectrum of local and international drama, comedy, sports and news.
- 2.3.11 There is diversity in content and plurality in ownership and in the South African production sector all segments of the population are involved in creation and ownership. This raises the question of what the policy focus should now be going forward to 2030 considering the vision espoused by the NDP, the digital path set by the Broadcasting Digital Migration Policy in 2008 and the volatile, uncertain, complex and ambiguous technological world rapidly changed by 4IR.
- 2.3.12 To answer this question, one needs to consider that the evolution and trends in AAVCS observed globally are now also taking place in South Africa. Fixed broadband (VDSL, FTTH and LTE) together with free Wi-Fi are rapidly rolling out. However, a unique African spin is that currently most of the delivery of online audio and audiovisual content is taking place over mobile

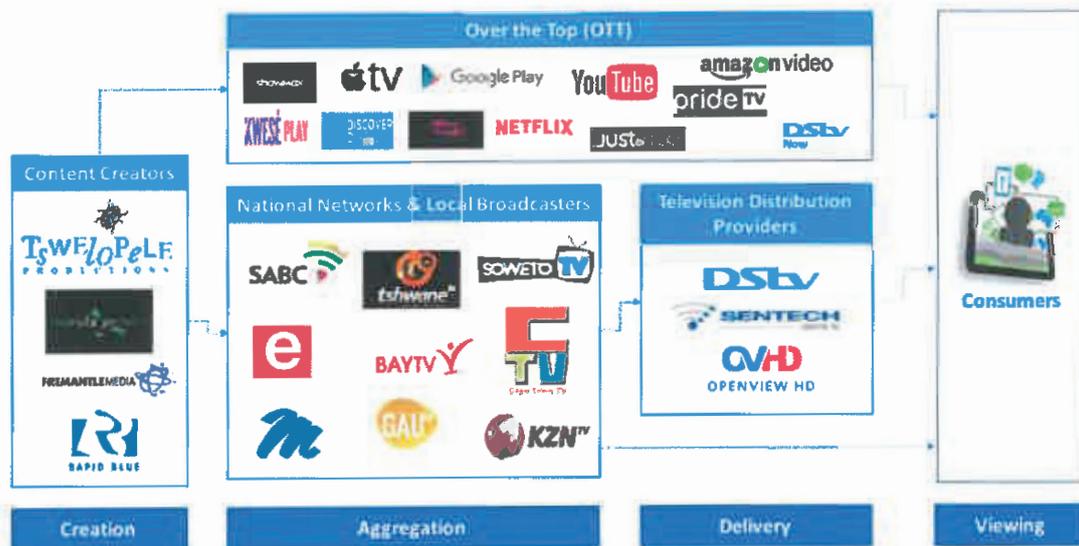
telecommunications networks. Mobile operators are rapidly deploying next generation networks and the cost of data has been declining.

- 2.3.13 The expansion and/or modernisation of telecommunications infrastructure together with the gradual reduction in data prices has led to increased uptake of Internet-based audio and audiovisual services.
- 2.3.14 The mass availability of connected smart devices (phones, tablets and TVs) and tools for personalisation of video entertainment has aided the growth in online content services. Smart phone penetration has been growing rapidly with mobile data being the key driver of growth and traffic. The exponential growth in data usages across networks and devices is evidence of this trend.
- 2.3.15 On the consumer side, there is a significant shift in the way consumers access and enjoy audiovisual entertainment services. Consumers are moving away from linear TV to on-demand and multi-screen viewing.
- 2.3.16 The rise of OTT services is changing the production, sale, distribution and consumption of video content. Online players are using different models such as subscription video-on-demand (SVOD), transactional video-on-demand (TVOD) and advertising video-on-demand (AVOD) which provides the service for free to consumers provided they spend some time watching adverts.
- 2.3.17 The world's leading OTT providers have already entered the South African market and are selling their services directly to subscribers or in partnership with providers of complementary services. Similarly, traditional telecommunications providers are bundling these services together with their telecommunications services and offering reduced data prices for such bundles. Also, the traditional telecommunications service providers

themselves have introduced their own OTT services which they bundle and/or supply to consumers at reduced data prices.

2.3.18 The leading OTT players are investing in commissioning and creating original content which they include in their services. Competition around original series production and programming is replacing the old concept of premium content from Hollywood studios. The global OTT players have set aside budgets of more than \$150 billion in 2017 and this figure is likely to continue to grow over the next decade. They are also acquiring studios and becoming vertically integrated businesses. The content offerings of the OTT providers, both global and local are continuing to grow in terms of breadth and depth of content as well as the offerings available to consumers e.g., standalone, bundled offerings and technology (standard definition, high definition, ultra-high definition etc). It is only a matter of time before content owners start supplying their content directly to consumers. This is already a trend in other countries across the world. This is primarily because entry into such services faces little entry requirements with no regulatory requirements, no need to build telecommunications infrastructure and the content rights owners already possess vast content libraries which they can just package and provide to consumers via applications.

2.3.19 In South Africa, the number and types of platforms over which AAVCS are offered has increased significantly. The diversity of players has also grown, and these are increasingly regional and global companies participating in the South African AAVCS market. This has resulted in the audio and audiovisual value chain in South Africa changing to be similar to the new value chain observed in other international markets (see Figure 3).

**Figure 3: New South African Audio and Audiovisual Value Chain**

(Examples shown are only to illustrate each part of the value chain and are not exhaustive)

2.3.20 In approaching the new audio and audiovisual content value chain many of Government's original policy objectives in the broadcasting sector remain relevant, namely addressing the inequality in access to content services provided on the Internet, ensuring that the new AAVCS cater for all 11 languages and persons with disabilities, that cultural goals (e.g. availability of South African content) are being achieved on the new audio and audiovisual platforms, that there is diversity in choice, that there is job creation and that black economic empowerment is taking place in terms of the prescribed ownership and control rules supported by Black Economic Empowerment legislations.

2.3.21 Based on the above developments, it is important to deal with the vexing question of what should be the new vision for South Africa's future industry.

### 3. LICENCE FRAMEWORK AND THRESHOLDS FOR AUDIO AND AUDIOVISUAL CONTENT SERVICES

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#### 3.1 CONTEXT FOR THE LICENSING FRAMEWORK

3.1.1 South Africa's current licensing framework is set out in Chapter 3 of the Electronic Communications Act (ECA) wherein it defines what constitutes electronic communications and an electronic communications network and then sets out in legislation the three types of services that use electronic communications networks, and which require licensing by the regulator. These service licence categories are:

- Electronic Communications Network Services;
- Broadcasting Services; and
- Electronic Communication Services.

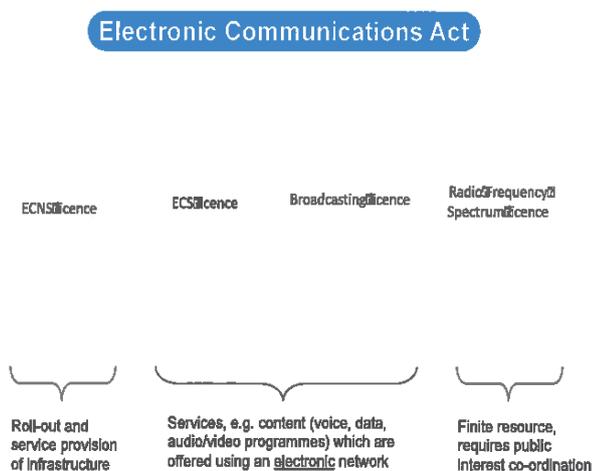
3.1.2 It then divides these licences into Individual and Class licences. Individual licences are of national scope or compete for scarce frequency resources or have a significant impact on socio-economic development and therefore require a higher level of regulation and attention. Whereas, Class licences may be regional or local in scope, or use frequencies which are not scarce or are less significant in socio-economic impact and do not require a high level of attention or regulation.

3.1.3 Legislation also provides for another type of licence, the radio frequency spectrum licence, where the regulatory differentiation between high or low regulation is based on whether the spectrum is high demand or scarce and will require a competitive process for licensing and radio frequency spectrum which is not in high demand or scarce and licensing happens on an administrative basis.

- 3.1.4 Legislation further allows the regulator to prescribe electronic communication services, electronic communication networks and electronic communication network services and radio frequency spectrum that do not require a licence. This does not exclude such an exempted service from the ambit of regulation as the regulator may make regulations applicable to exempted services, but it does mean exempted services do not have to apply for licence before they are allowed to operate their services.
- 3.1.5 The current licence framework for services requiring a licence is set out in legislation as illustrated in Figure 4 below.

**Figure 4: Services requiring a licence in the ECA**

### Current Licence Framework



- 3.1.6 The current Broadcasting Act, (1999) and the ECA (2005) defines broadcasting as “unidirectional” and therefore linear. Whilst, the current definitions of broadcasting and broadcasting service are potentially already broad enough to capture all linear AAVCS offered on electronic communication services, including the Internet, ICASA did take a narrower policy position in 2010 that Internet protocol television (IPTV) offered on

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managed networks in South Africa would be regarded as broadcasting services for which an individual or class licence would be required, however Internet TV or Web TV programming offered on the public Internet (un-managed network) falls outside the regulator's jurisdiction and would not require a licence.

- 3.1.7 The position taken by the regulator in 2010 also extended to VOD services. VOD provided to households over managed networks in South Africa were determined to be electronic communication services (bi-directional nature meant they were not broadcasting services) which would require a Class Electronic Communication Service licence even if offered on a national basis. A VOD service offered over the public Internet did not require a licence as it was seen as falling outside of the jurisdiction of the regulator.<sup>8</sup>
- 3.1.8 The narrowness of the current statutory definition of broadcasting services and the overly platform-specific approach to its application by the regulator is failing to capture the range of new audiovisual content services proliferating online beyond the borders of nation states. Taking into consideration the policy history and sector developments, government has to develop a new policy, legislative and regulatory architecture to integrate AAVCS into a new licensing framework.
- 3.1.9 Broadcasting has always been a type of audiovisual content service, defined primarily by the distribution of unidirectional services using broadcasting technology over the radio frequency spectrum bands and electronic communication networks. However, an 'audio or audiovisual content service' is a much broader regulatory definition than 'a broadcasting service' and covers all content services carried over electronic communication networks, including fixed and mobile broadband networks, digital satellite broadcasting networks and terrestrial broadcasting distribution networks.

- 3.1.10 The updating of the licensing framework in South Africa requires distinguishing between linear and non-linear services, while at the same time creating a level playing field between competing services. This starts with a new statutory definition of AAVCS to cover both linear (traditional broadcasting and online linear streaming channels) and non-linear broadcasting-like content (on-demand video and video sharing platforms), regardless of the distribution platform used.
- 3.1.11 The draft white paper proposes replacing the current licence category of broadcasting services, with the broader category of AAVCS. The draft white paper defines AAVCS as follows:  
*“a service where the principal purpose of the service or a dissociable section thereof is devoted to providing audio and/or audiovisual programming to inform, entertain and educate the public and is distributed over electronic communications networks under the editorial responsibility of a recognised natural or juristic person.”*
- 3.1.12 Within the broader category of AAVCS, three sub-categories will require regulatory attention:
- **“broadcasting service”** meaning a linear audio or audio-visual content service distributed to the public, sections of the public or subscribers to that service whether conveyed using the broadcasting services radio frequency bands or any electronic communications network;
  - **“on-demand content service”** meaning a non-linear audio and audiovisual content service carried by an electronic communications network for the listening and/or viewing of programmes at the moment chosen by the user and at his or her individual request based on a catalogue of programmes selected by the content service provider; and a

- **“video sharing platform service”** meaning a service that consists of the storage of a large number of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility carried by an electronic communications network.

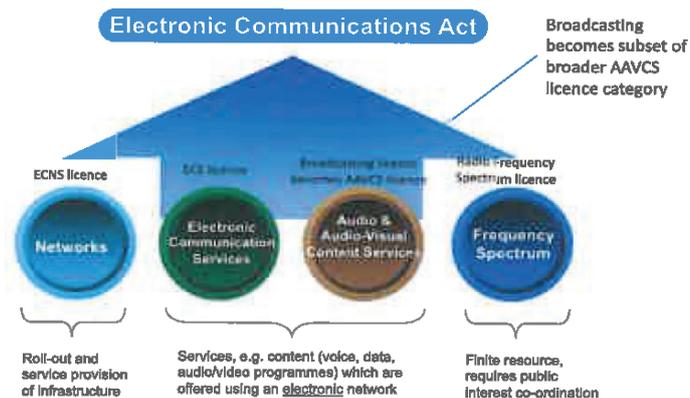
3.1.13 While broadcasting services on the Internet platform and on-demand content services will generally have less regulation than traditional over-the-air broadcasters, those online broadcasting services and on-demand content services with more influence will have increased obligations, for example to air increased amounts of South African audio and content.

## 3.2 THE PROPOSED NEW LICENCE FRAMEWORK

3.2.1 The proposed policy framework will still clearly differentiate between the regulation of e-commerce or ECS on the one hand and AAVCS on the other just as it did previously between ECS and Broadcasting Services. In essence the main change to the current licensing framework is the replacement of traditional “broadcasting services” with the broader category of AAVCS (see Figure 5 below).

**Figure 5: Broadcasting becomes a subset of Audio and Audiovisual Content Services**

ECA Licence Framework Amendment – only Broadcasting Licence changes



3.2.2 The regulatory distinction between Individual and Class licences remains a critical element as it allows the regulator to make distinction between these two types of licences to impose a higher level of regulation and public interest obligations on Individual Licensees versus a lower level of regulation and obligations on Class licensees. Similarly, the regulatory distinction between the three tiers of broadcasting namely public broadcasting, commercial broadcasting (free-to-air and subscription) and community broadcasting continues to remain relevant as a tool for the regulator to determine the level of public interest obligations that need to apply to an audio and audiovisual content service licensee.

3.2.3 Although the three tier broadcasting system should remain in place, the definitions of commercial broadcasting and public broadcasting need to change. The proposed changes to the definitions are to make the publicly-owned and privately-owned services more distinct from each other. The proposed definitions are: "**commercial broadcasting**" means a privately-owned broadcasting service operating for profit; and **public broadcasting**

**service**" means any broadcasting service provided by the South African Broadcasting Corporation.

3.2.4 The two statutes that govern public broadcasting in South Africa, the Broadcasting Act and the ECA, currently provide for the possibility that public broadcasting services may be provided by other "statutory bodies" or "public-owned state enterprises". These definitions are however not exactly the same:

3.2.5 The Broadcasting Act provides that:

*"A public broadcasting service means -*

*(a) any broadcasting service provided by the South African Broadcasting Corporation;*

*(b) a broadcasting service provided by any other statutory body; or*

*(c) a broadcasting service provided by a person who receives his or her revenue, either wholly or partly, from licence fees levied in respect of the licensing of persons in relation to sound radio sets and in relation to television sets, or from the State,*

*and must include a commercially operated broadcasting service provided by a person referred to in paragraph (a), (b) or (c) of this definition;"*

3.2.6 The Electronic Communications Act provides that:

*"public broadcasting service" means any broadcasting service provided by the South African Broadcasting Corporation or other public state-owned enterprise;"*

3.2.7 The current definitions are flawed in that they propose that any service funded by the State or a State-Owned entity, even if it was a commercial service, would constitute a public broadcasting service. Academic literature in the field of public broadcasting is clear about the difference between 'public broadcasting' and 'state broadcasting'. The key element is that public

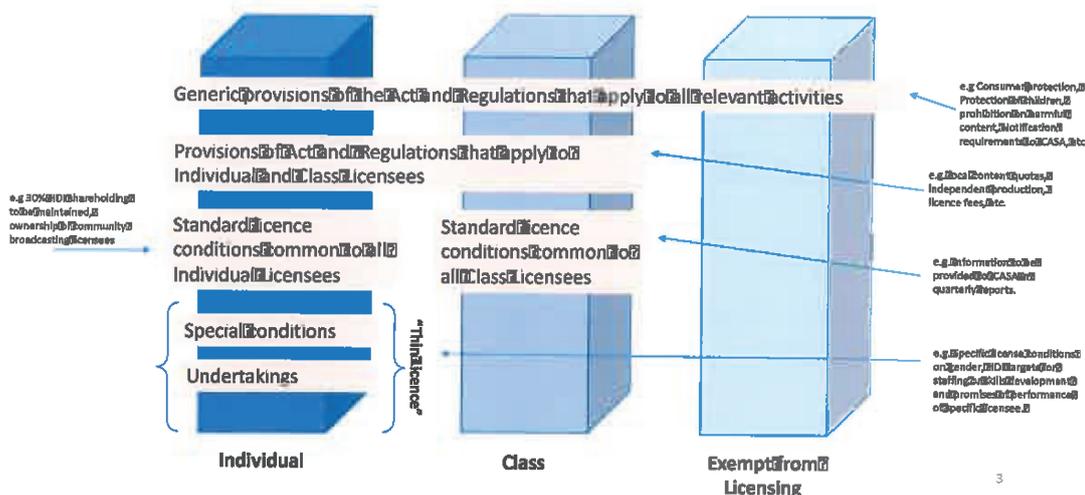
broadcasting provides a non-profit, independent public service, hence the decision that public broadcasting services should be redefined as “any broadcasting services provided by the SABC” for the following reasons:

- 3.2.7.1 In the 25 years since the inception of our democracy and new broadcasting dispensation the SABC has been the public broadcaster and the regulator has not used the existing definitions as a basis to licence additional public broadcasters;
  - 3.2.7.2 At the colloquium on review of public broadcasting, none of the delegates raised the question of establishing additional public broadcasters, outside of the SABC. It did not feature at all in the final report, rather the focus was on how to create a sustainable SABC;
  - 3.2.7.3 Given the funding model challenges of the SABC itself, the fiscal priorities of government and the specific governance and accountability framework already in place for the SABC, the creation of additional public broadcasters at either a national, regional or provincial level would be detracting from the challenges facing the SABC and other priorities of the DCDT, such as creating a framework that would be ready for the 4IR.
- 3.2.8 The proposed new definition would require the amendment of the existing definitions in legislation as set out above and would create clarity, simplicity, certainty and focus on ensuring that the SABC can provide services on a national and regional basis, in all South African languages. Furthermore, the advent of multichannel digital broadcasting on DTT/DTH and OTT, allows the SABC to better meet its obligations concerning audiovisual content, given its current constraint operating with three analogue channels. The role of SABC expands to a public mandate for radio, television and other electronic media outlets.

3.2.9 The current approach of the generic provisions of legislation applying to individual, Class and Exempt services, provisions of the Act and regulations that apply to Individual and Class licensees, and special conditions and undertakings being set out in the licence will continue to operate in the same fashion (Illustrated in Figure 6).

**Figure 6: Licence Framework Approach**

**Same Licence Framework approach envisaged**



3.2.10 In approaching the licensing and regulation of AAVCS, this Draft white paper proposes taking a new approach that will differ from how the licensing and regulation of broadcasting services took place over the past two decades. This Draft white paper proposals on AAVCS follows an integrated approach that considers international benchmarking, in particular:

- the graduated or scaled system approved by the European Parliament in their Audio Visual Media Services Directive (AVMSD) of 2010, as amended in 2016 and 2018, provides for greater regulation on linear services using radio frequency bands in comparison to less regulation for on-demand services and self-regulation for video sharing platforms; and

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- the system outlined in the Australian Convergence Review of 2012 which proposed regulating only significant audiovisual content services which can influence the public and are under the editorial control of AAVCS providers. This system requires a definition of what 'significant' means and would be subject to specific thresholds to give this meaning.

3.2.11 This proposed policy will distinguish between broadcasting services (linear) and non-linear services in graduated fashion and create a level playing field between competing services by imposing regulations and public interest obligations on licensees.

3.2.12 In addition to criteria such as use of scarce terrestrial radio frequency spectrum, government proposes also applying thresholds based on annual turnover to determine what type of licence an AAVCS needs to apply for, Individual or Class. The threshold will act as a "trigger" event that lets the regulator and the applicant know that they most likely require an Individual or Class licence. The Individual or Class licence will be issued for a defined period irrespective of fluctuations below the annual turnover threshold during the licence period, but the licensee may apply mid-term and again at the renewal of the licence for a licence re-categorisation based on annual turnover performance during the licence period.

3.2.13 For the regulator to properly monitor thresholds and audience size, all AAVCS conducting a business in South Africa must provide the regulator, each year, with annual audited financial records and user/subscriber/audience numbers which is in line with the regulators powers as currently set out in legislation for broadcasting services and electronic communication services.

### 3.3 INDIVIDUAL LICENCE, CLASS LICENCE AND EXEMPT CRITERIA FOR AAVCS

#### *Individual Licence*

- 3.3.1 Currently, broadcasting services that require an individual licence are commercial broadcasting and public broadcasting of national or provincial scope whether provided free-to-air or by subscription or such other services prescribed by the regulator that it finds have significant socio-economic impact.
- 3.3.2 The proposed approach in this draft white paper, going forward, is to regulate platforms providing AAVCS similarly, regardless of the platform used. This may entail relaxing or introducing more flexibility in some aspects of regulation for traditional broadcasting platforms while simultaneously bringing new audio and audiovisual content platforms into the regulatory framework in an appropriate manner.
- 3.3.3 In determining the AAVCS which require an Individual Licence it is useful to apply the scarcity rationale, the public interest rationale and the pervasiveness/influence rationale to update the current criteria for broadcasting services in legislation.
- 3.3.4 The **scarcity rationale** would suggest that scarce terrestrial radio frequency spectrum that uses a competitive licensing process for licensing would be one of the key indicators of the type of AAVCS which would require an Individual licence. Scarcity, in a non-traditional sense, could also potentially include carriage on managed wired or wireless electronic communication networks operated by State-Owned Entities (SOEs) and funded by government where carriage is determined through a competitive process. The **public interest rationale** coupled with the scarcity rationale would

suggest that a higher level of public interest obligations may be necessary as the licensees are using a scarce public resource.

- 3.3.5 In line with this proposed licensing framework a community broadcaster who wants to broadcast terrestrially using radio frequency spectrum would have to apply in a competitive licensing process for an individual licence, if the community broadcaster does not use scarce terrestrial spectrum e.g. online TV streaming, low power broadcasts it would be a simple registration for a class licence and in the case of online audio streaming only there would be no requirement for a licence. An amendment of the ECA would need to take place so that community broadcasting falls under both Individual and Class categories of licence.
- 3.3.6 This would represent a change in policy as community broadcasting services that currently use terrestrial radio frequency spectrum apply for Class licensees. This means community broadcasting services that use scarce terrestrial radio frequency will in future apply for Individual licences, but the processes they have to follow to acquire such licenses should be faster and less onerous than those applied to public and commercial broadcasting services. Whilst at the same time determining viability and sustainability and avoiding over-concentration in certain areas. This is a necessary step to address the current policy anomaly where community broadcasting is a class licensee and yet still goes through a very intensive competitive licensing process for terrestrial radio frequency spectrum rather than a class registration process.
- 3.3.7 The **pervasiveness/influence rationale** is in current legislation under the rather nebulous concept of “significant socio-economic impact”. However, in the context of AAVCS (of which broadcasting is a subset) the regulator needs clear policy and legislative guidance so they can determine which services require an Individual licence. In the new audio and audiovisual content environment criteria such as “national scope” and use of frequency

spectrum are rapidly becoming irrelevant. It should be clear that the concepts of significant socio-economic impact and pervasiveness/ influence would include AAVCS based either on global size (Multinational Corporation), socio-economic impact, audience size or reaching a specified threshold based on annual turnover.

- 3.3.8 The draft white paper proposes that all current national broadcasters should continue to be Individual licensees. However, as contemplated in other chapters in this draft white paper there will be a level of de-regulation taking place in some areas to promote fair competition between broadcasters and broadcasting-like services on the Internet and to acknowledge the growth and development that has occurred in the sector over the past two decades.
- 3.3.9 To ensure regulatory parity with online audiovisual content service providers, a key element, in addition to the use of broadcasting radio frequency bands, to determine the broadcasting services and on-demand content services (OCS) which will require an Individual or Class licence in the new licensing framework will be global size of the business creating the ability to have an economic effect beyond its audience numbers in South Africa or a specified threshold based on annual turnover.
- 3.3.10 Government has, in policy, in recent years prioritised entrepreneurship and the advancement of SMMEs as the catalyst to achieving economic growth and development in SA. Leading up to 2030 and in support of the 4IR goals there needs to be stimulus to encourage entrepreneurship and the development of South African start-up businesses and SMMEs in the audio and audiovisual content market. Small, medium and microenterprises and businesses will therefore not have the same level of regulatory constraints imposed on them while they are nascent and facing competition with big business in the mainstream economy. The key element to identify these nascent SMMEs from big business and apply less regulation will be the introduction of a large threshold based on annual turnover.

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- 3.3.11 The highest threshold set thus far in South Africa to exclude small and medium enterprises from the ambit of regulation intended for big business is in the mining sector where it was set at R50 million. The nature of the entertainment sector where the costs of acquiring or producing content are very high would justify having a threshold that is at least double that of the mining sector. Therefore, the initial threshold proposed for an Individual licence for broadcasting services and on-demand content services will be set at R100 million annual turnover in the previous financial year in legislation. This draft white paper proposes that the Minister should have the power in legislation to consider amending this initial threshold every three years to account for inflation, macro-economic shifts in the economy, or any legislation affecting SMMEs. As is the case now the regulator may prescribe other criteria of a socio-economic nature or include the measurement of audience size which can be utilised to require a licensee to apply for an Individual licence even if they are below the R100 million threshold.
- 3.3.12 This threshold, in the interest of fair competition, will also apply to international (foreign-based) AAVCS who are actively targeting South African audiences and extracting revenue in terms of advertising, subscription fees or other sources from South Africa. In such a case, if the global size of the international (foreign based) business is capable of affecting economic activity the regulator may issue a licence irrespective of the size of its South African annual turnover. An interdepartmental task team will be set up to report to the Minister on mechanisms to ensure compliance by international (foreign based) AAVCS who meet the licensing criteria but do not have a physical business premises in South Africa and potentially refuse to apply for a licence. Potential compliance measures include international remedies, blacklisting, blocking the AAVCS at the level of ISPs, or requiring banks and/or credit card merchant to halt transfers of

payments by South African subscribers and advertisers to the accounts of non-compliant AAVCS.

### *Class Licence*

- 3.3.13 Currently, broadcasting services that require a Class licence are community broadcasting or low power services whether provided free-to-air or by subscription. As with Individual licences, it useful in determining the AAVCS which require a Class Licence to apply the scarcity rationale, the public interest rationale and the pervasiveness/influence rationale to update the current criteria which apply to broadcasting services in legislation.
- 3.3.14 The **scarcity rationale** would suggest that if the radio frequency spectrum being used by a service is not scarce terrestrial radio frequency spectrum in the broadcasting frequency bands or the radio frequency spectrum is not licensed through a competitive licensing process or the radio frequency used is exempt from requiring a licence, then the licence should be a Class licence. Similarly, if the service does not require the use of radio frequency spectrum at all then the licence applied for, depending on annual turnover or other socio-economic criteria, should be a Class licence. The application of the **public interest rationale** coupled with the scarcity rationale would suggest that a lower level of public interest obligations or none at all should apply to licensees as they are not using a scarce public resource. However, this view must also consider the application of the **pervasiveness/influence rationale** where the threshold limit and audience market share or size may also impact on the decision of whether the licence that must be applied for is a Class Licence. In the case of OCS the entry threshold requirement to hold a Class licence should be set at an annual turnover of R50 million rand in the previous financial year and that OCS below entry level threshold should be considered to be SMMEs exempted from the requirement of applying for a licence.

3.3.15 Some examples to assist on how this could work in practice are as follows:

- if the AAVCS is on a satellite platform, it does not use scarce terrestrial radio frequency spectrum in the broadcasting services band; and if it has low audience numbers, low influence and an annual turnover in the preceding financial year lower than R100 million and higher than R50 million it would require a Class Licence. However, if the very same service were to grow over time to have either large audience numbers or an annual turnover of R100 million or greater it would have to apply for an Individual licence and attract higher levels of regulation and public interest obligations;
- If the AAVCS is on a managed network in a gated estate (e.g. IPTV), it would not use radio frequency spectrum at all and if the annual turnover in the preceding year were less than R50 million it would be exempt from the requirement to apply for a licensee. However, if the service grew to be offered locally and the annual turnover in the preceding year were R50 million or more it would require a Class licence and if the service grew even further to be offered nationally in several gated estates to the extent that either significant audience numbers were attained or annual turnover in the preceding year was R100 million or greater it would have to apply for an Individual licence and attract higher levels of regulation and public interest obligations; or
- If an AAVCS is an on-demand content service on the Internet, it would not use radio frequency spectrum at all, and if the annual turnover in the preceding year were less than R100 million and more than R50 million it would be a class licensee. However, if the service grew in popularity in South Africa and attracted significant audience numbers or annual turnover in the preceding year was R100 million or greater it would have to apply for an Individual licence and attract

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higher levels of regulation and public interest obligations (see Figure 10 for an illustrative example of the Proposed Licensing Framework).

### *Exempt*

3.3.16 The current list of services set out in legislation which the regulator may choose to exempt from applying for a licence needs to include certain types of AAVCS. The inclusion of AAVCS in the list of services will not exclude such services from the ambit of regulation as the regulator may, as it currently does, make regulations applicable to such services.

3.3.17 After government amends legislation to include certain types of AAVCS on the list of exempted services, the draft white paper recommends that the regulator consider exempting audio broadcasting services and on-demand audio content services available on the Internet from the requirement to hold a licence at this point. This decision should be subject to review every four years based on socio-economic factors, influence and audience size.

## **3.4 TYPES OF AUDIO AND AUDIOVISUAL CONTENT SERVICES REQUIRING LICENSING**

3.4.1 Government's new policy on AAVCS caters for three broad types of AAVCS using electronic communications networks for the purposes of licensing and exemption:

- broadcasting services;
- on-demand content services; and
- video sharing platform services.

### **3.4.2 Broadcasting Services**

3.4.2.1 There are two types of Broadcasting Services. Firstly, traditional broadcasting services that use radio frequency spectrum in the

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broadcasting services frequency bands (terrestrial) or satellite downlinks and secondly broadcasting services that are on electronic communication networks that either do not use radio frequency spectrum in the broadcasting bands or do not require radio frequency spectrum at all (IPTV, Internet). The second type of broadcasting service would include simultaneous or deferred retransmissions of over-the-air television and radio channels on the Internet or broadcasting-like online linear streaming channels on the Internet.

3.4.2.2 The second type of broadcasting service described above targets households that have fixed and/or wireless broadband connections or consumers with access to fixed, mobile and/or wireless broadband and in terms of their offering compete for audience and advertising with traditional broadcasting services. In the interest of fair competition and regulatory parity these services should hold a licence unless the service is either below specified thresholds or exempted by the regulator. As they do not use radio frequency spectrum the public interest obligations may be slightly less than those imposed on broadcasting service licensees using the broadcasting radio frequency bands, but other regulatory requirements should be broadly the same, for example the requirement to adhere to a code of conduct, measures put in place to protect consumers and children, access to content for persons with disabilities and South African content obligations.

3.4.2.3 Both types of broadcasting services described above may offer in addition to linear audio and audiovisual channels additional catch-up on-demand services to subscribers or viewers. Whilst it may operate similar to a video catalogue or on demand service, this is a defined intellectual property right that broadcasters may obtain

when they acquire the licensed broadcast right for a channel or programme on any platform. Generally speaking, if a broadcasting service has a right to broadcast content, there is an associated right to offer the programme on broadcasters' catch-up service. The draft white paper proposes adopting the view that this is an associated service which is part of the linear broadcasting service licence and does not require a separate licence. Furthermore, the content contained on the catch-up service should fall under the jurisdiction of the code of conduct for linear broadcasting service licensees. If, the second type of broadcasting services are exempt from the requirement to hold a licence by the regulator by virtue of being online or for a socio-economic reason, they will still fall under the jurisdiction of the Films and Publication Board for registration and the classification of content to protect children.

### 3.4.3 On-Demand Content Services (OCS)

- 3.4.3.1 There are a wide variety of AAVCS available as non-linear VOD services on the Internet making it difficult to determine whether or not an OCS would require a licence or not. International benchmarking suggests that OFCOM in the UK represents the best practice on how to deal with this assessment. In line with the best practice approach, legislation should provide specific criteria to guide OCS and the regulator. A simple approach is that if the OCS offering provided to South African citizens is likely to compete with broadcasting services, and the nature of material and the means of access would lead consumers to expect a degree of regulatory protection and if it meets the threshold requirement set out in the licensing framework it is likely that it requires a licence. To simplify matters even further this category of licence should only apply to on-demand audiovisual content

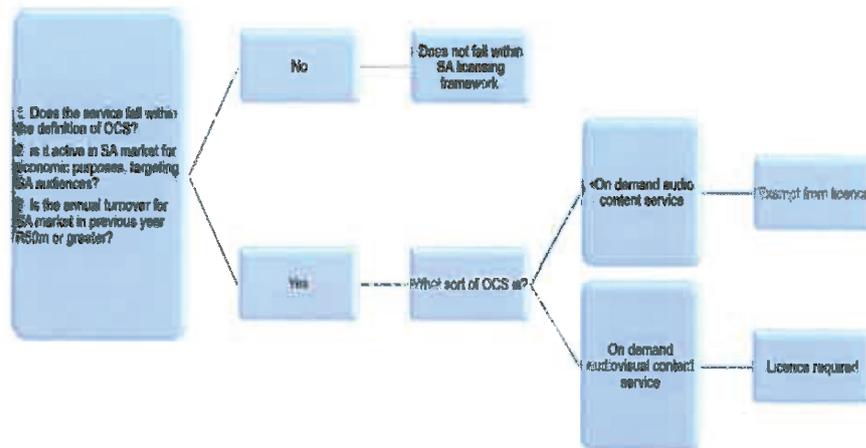
services initially and the regulator should consider exempting on-demand audio content services available on the Internet from the requirement to hold a licence.

3.4.3.2 The cumulative criteria (see Figure 7) below provide guidance on whether an AAVCS in the OCS category requires a licence in South Africa:

- the main purpose is the provision of broadcasting-like programmes which in appearance and content are similar to the appearance and content of programmes normally included in a television broadcasting service;
- access is on-demand and allows the consumer to select individual programmes, to receive the programmes using an electronic communications network and view the programmes when the user chooses to do so;
- the programmes available on the audiovisual content service fall under a person's editorial responsibility; and
- it is available for use by members of the South African public for economic purposes and the annual turnover for the South African market in the preceding financial year was R50 million or greater, or if the regulator deems the global size of the international (foreign-based) business is capable of affecting economic activity in South Africa.

**Figure 7: Example of decision-making process for OCS licence**

### Determining whether an OCS licence is required



#### 3.4.3.3 A non-exhaustive list of OCSs which would require a licence if they meet the cumulative criteria are:

- A TV archive service containing less recent TV programmes (which fall outside the catch-up service IP rights);
- An on-demand movie and TV series service provided online via a website or using other delivery technology by a provider exercising editorial responsibility over the content;
- A niche audiovisual service comprising programmes comparable to equivalent broadcast genres (religion, politics, sport, adult). See Figure 8 for an illustrative example of Proposed Licensing Framework.

### 3.4.4 Video Sharing Platform Services (VSPS)

3.4.4.1 The third type of AAVCS are video-sharing platform services (VSPS) which are exempt from licensing. However, these services will not be exempt from regulation concerning hate speech, the protection of minors and related matters and will need to set up a self-regulated code of conduct or be subject to a statutory code.

3.4.4.2 Government is of the view that VSPS must take measures to:<sup>9</sup>

- protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development;
- protect the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
- protect the general public from programmes, user-generated videos and audiovisual commercial communications containing the public provocation to commit a terrorist offence;
- encourage VSPS to develop co-regulatory codes of conduct with government.

3.4.4.3 Appropriate measures taken by the VSPS should consider the nature of the content in question, the harm it may cause, the characteristics of the category of persons needing protection, as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having

created and/or uploaded the content as well as the public interest. The measures should be practicable and proportionate, considering the size of the VSPS and the nature of the service.

3.4.4.4 Such measures shall include, as appropriate:

- including and applying, in the terms and conditions of the VSPS, the requirements not to incite to violence or hatred and not to publicly provoke the commission of terrorist offences as well as the concept of content which may impair the physical, mental or moral development of minors;
- establishing and operating mechanisms for users of video-sharing platforms to report or flag to the VSPS provider concerned the content referred to above stored on its platform;
- establishing and operating age verification systems for users of VSPS concerning content which may impair the physical, mental or moral development of minors;
- establishing and operating systems allowing users of VSPS to rate the content;
- providing for parental control systems concerning content which may impair the physical, mental or moral development of minors;
- establishing and operating systems through which providers of VSPS explain to users of video-sharing

platforms the actions taken in response to reporting and flagging;

- providing for effective media literacy measures and tools and raising users' awareness of these measures and tools.

**Figure 8: Illustrative example of SA Proposed Licensing Framework**

Types of Audio and Audio-visual content services	Individual Licence	Class Licence	Exempt from requirement to hold a Licence
Broadcasting Services	<ul style="list-style-type: none"> <li>• Public FTA, Commercial FTA, Subscription, and Community broadcasters using terrestrial frequency spectrum licensed through a competitive ITA process <u>or</u></li> <li>• Broadcasting services which have an annual turnover in the previous financial year of R100m or greater.</li> </ul>	<ul style="list-style-type: none"> <li>• Broadcasting Services which are on electronic communication networks that either do not use radio frequency spectrum (e.g. IPTV, cable, Internet) or do not use radio frequency spectrum licensed through a competitive ITA process (e.g. satellite)</li> <li>• This license category includes Linear streaming TV channels and retransmissions of over-the-air-TV channels by third parties on the Internet.</li> </ul>	Audio Broadcasting Services available on the Internet
On-demand Content Services (OCS)	<ul style="list-style-type: none"> <li>• On-demand Audio-visual Content Services which have an annual turnover in the previous financial year of R100m or greater</li> </ul>	<ul style="list-style-type: none"> <li>• On-demand Audio-visual Content Services which have an annual turnover in the previous financial year of between R50m to R99m</li> </ul>	<ul style="list-style-type: none"> <li>• On-demand Audio Content Services available on the Internet</li> <li>• On-demand Audio-visual Content Services which have an annual turnover in the previous financial year less than R50m</li> </ul>
Video Sharing Platform Services			<ul style="list-style-type: none"> <li>• Video Sharing Platform Services for sharing user generated content</li> </ul>

### 3.5 RADIO FREQUENCY SPECTRUM LICENCE AND SPECTRUM ISSUES

3.5.1 There are essentially two types of radio frequency spectrum licence in the existing framework, an administrative one where you can apply directly to the regulator for a radio frequency spectrum licence and the second where there is insufficient spectrum to meet the demand requiring an Invitation to Apply (ITA) for a Radio Frequency Spectrum licence. The licensing method for the second type can be auction rules, beauty competition or any other licensing mechanism deemed appropriate by the regulator. The radio frequency spectrum licence runs parallel to a service licence and does not

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exceed the duration of the service licence. The duration of a radio frequency spectrum licence which is not directly linked to the provision of a service licence is 1 year.

- 3.5.2 Currently, in South Africa there is a layered approach to licensing, where there is separation between the licensing of the network which requires an ECNS licence and the licensing of the content distributed by the network which requires either an ECS or Broadcasting Service licence (In future this will be an AAVCS licence). Where the provision of the service, whether it is an ECNS, ECS or Broadcasting Service, requires the use of radio frequency spectrum one must also apply for a radio frequency spectrum licence.
- 3.5.3 This requirement in law has also led to the current situation in Digital Terrestrial Television (DTT) where the same radio frequency spectrum licence is issued to not only the ECNS, but also the broadcasting service or broadcasting services where there is more than one broadcasting service on the same DTT multiplex. In the context of broadcasting this is a legacy situation that arises from a time when the broadcasting licence and the radio frequency spectrum licence were one and the same. The draft white paper proposes that legacy analogue broadcasters must be migrated on no less favourable terms and should obtain radio frequency spectrum licences for DTT multiplexes. However, the licensing of new DTT multiplexes going forward should require the issue of the radio frequency spectrum licence to only the ECNS. The ECNS would then be legally obliged to carry AAVCS licensed by the regulator and assigned capacity on the DTT multiplex.
- 3.5.4 The current DTT environment and radio frequency spectrum licensing approach is an interim one. The Broadcasting Digital Migration Policy, 2008, focused on the migration of existing terrestrial broadcasting services from analogue transmissions to digital transmissions on terrestrial radio frequency spectrum networks in the broadcasting frequency spectrum

bands. It did not address digital broadcasting post ASO, that is the purpose of this draft white paper.

3.5.5 At the International Telecommunication Union (ITU) in 2006, a regional agreement for digital broadcasting services was put in place for the frequency bands 174 - 230 MHz and 470 - 862 MHz. To enjoy the full benefits of digital broadcasting the agreement required the switch-off of analogue transmissions at an agreed upon date, thereafter protection for analogue transmissions from interference by neighbouring countries would cease. The date selected in the Agreement for analogue switch-off (ASO) was 17 June 2015, which applied to South Africa, there was a waiver in the Agreement for 34 other countries who would do an ASO in the VHF band by 17 June 2020.<sup>10</sup> For several reasons the migration in South Africa was not completed by 17 June 2015. Government remains committed to a switch-off of all analogue transmissions in South Africa and a complete migration of existing analogue TV households to digital broadcasting platforms.

3.5.6 The 2006 ITU Agreement and the Broadcasting Digital Migration Policy, 2008, contemplated an interim phase of dual illumination where all existing analogue broadcasting services would be available in both analogue and digital transmissions. The objective of this interim phase was to minimize disruption to the provision of these services to television audiences, while at the same encouraging the switch to digital reception. During this interim phase where there are both analogue and digital transmissions it was only possible to cater for two National DTT frequency networks (intended to carry the existing terrestrial television broadcasting services digital transmissions) and two metropolitan mobile DTT frequency networks (intended to carry new Mobile TV services using the DVB-H standard). The frequency plan also made provision for 2 x 1.5MHz allocations for a national Digital Radio network (T-DAB standard) in the 214-230MHz band with these only becoming available after the ASO.

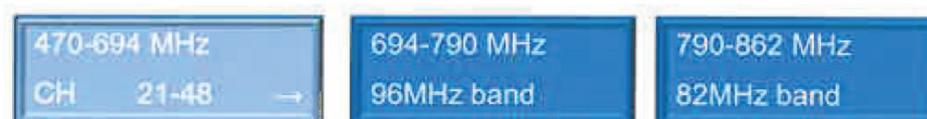
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- 3.5.7 The Regulator licensed two broadcasting services to operate mobile television services on the MDTT1 network and later in 2014 issued regulations to convert the 2<sup>nd</sup> mobile television network (MDDT2) into a third DTT network to potentially accommodate new commercial free-to-air and subscription broadcasting entrants. ICASA announced in March 2019 that it has decided to award Kwesé Free TV an individual Commercial Free-to-air Television Broadcasting and radio frequency spectrum licence for 55% of DTT Mux3 frequencies. To date the license has not been issued nor has there been a roll-out of infrastructure for the third metropolitan DTT radio frequency network.<sup>11</sup>
- 3.5.8 Government made Sentech, a state-owned entity who is an ECNS licensee in the common carrier category, responsible for the roll-out and operation of the infrastructure required for the two National DTT frequency networks that currently carries the digital transmissions of the existing free-to-air terrestrial broadcasting services and the terrestrial subscription broadcasting service. The Broadcasting Digital Migration Policy, 2008, also made provision for areas that are difficult or uneconomic to cover by terrestrial means to receive services from direct to home (DTH) satellite. Sentech is also responsible for a DTT gap filler using direct to home (DTH) satellite that as far as possible emulates the look and feel of the free-to-air DTT system. In the post-ASO environment Sentech will be the only provider of ECNS for the public broadcaster on the DTT and satellite platforms. Community broadcasters not receiving funding from government and commercial broadcasters may elect to self-provide if they do not wish to use the ECNS provided by Sentech for broadcasting services.
- 3.5.9 The radio frequency spectrum efficiencies resulting from using digital transmission and digital compression techniques will result in the existing terrestrial broadcasting services using far less radio frequency spectrum than they did in the analogue era, allowing new services to use the freed-

up spectrum. This radio frequency spectrum that the technological migration from analogue to digital transmissions releases is known as the Digital Dividend.

- 3.5.10 There are two Digital Dividends, the first Digital Dividend (790-862MHz) was identified for the implementation of International Mobile Telephony (IMT) services at ITU World Radio Conference 2007 (WRC-07) and the second Digital Dividend (694-790MHz) was identified for implementation of IMT services at the World Radio Conference 2012 (WRC-12).<sup>12</sup> The re-allocation of the 700MHz and 800MHz bands from broadcasting use to IMT required a change to the national terrestrial frequency plan for digital broadcasting post ASO. This led to the regulator developing a 7 DTT Multiplex (radio frequency network) implementation plan in the 470MHz to 694MHz frequency range. Estimates are that this would allow either 140 standard definition (SD) channels or 42 high definition (HD) channels or a combination of SD and HD TV channels.<sup>13</sup>
- 3.5.11 The additional 5 national DTT multiplexes and the two Digital Dividends for IMT services will only become available after the ASO. After the ASO there will need to be a retuning of transmitters as part of a digital to digital migration of broadcasters to vacate the 790-862 MHz and the 694-790MHz bands and completing the process of broadcasting digital migration. Sentech will be responsible for the management of the retuning of transmitters to clear the 700MHz and 800 MHz bands. The cost recovery of this digital to digital migration will be from the IMT beneficiaries of the two Digital Dividends (see Figure 9).

**Figure 9: DTT Broadcasting and Mobile wireless broadband Bands**



- 3.5.12 In 2012, ICASA published regulations that set out how it will allocate capacity on the two national DTT multiplexes during the interim phase of dual illumination to the existing analogue terrestrial television broadcasters. ICASA allocated 85% of DTT Mux 1 capacity to the public broadcaster with the balance of 15% set aside for use by community broadcasters. ICASA allocated 55% of DTT Mux 2 capacity to the commercial free-to-air broadcaster and the remaining 45% to the subscription broadcaster. The sharing of multiplexes was an interim solution at the time due to the scarcity of radio frequency spectrum caused by the use of both analogue and digital transmissions. In submissions before the regulations were made the existing national broadcasters strongly argued that they each should be allocated a minimum of a single mux to provide either HD channels or a combination of HD and SD channels, this was justified based on the licensed radio frequency spectrum that they would be releasing after the ASO and the capacity required to offer HD channels. Additional capacity for existing terrestrial can only be dealt with after ASO.
- 3.5.13 Accordingly, the regulator must conduct an inquiry to put in place a licensing framework for DTT post ASO and to determine the capacity required by the existing broadcasting service licensees after the ASO and the implementation of the seven multiplex plan. The inquiry must take into consideration that the advent of DVB-T2 and new compression technologies has further reduced the amount of spectrum need by AAVCS to provide more channels. It should also consider the availability of public, community and commercial audio broadcasting services on audio bouquets carried on the DTT platform.
- 3.5.14 There is a policy concern that the allocation of 15% capacity to community TV broadcasters on DTT Mux 1 in the regulations dealing with the dual illumination period has had an unintended consequence of elevating Community TV broadcasters from being local broadcasters to provincial/regional broadcasters because of how national Single Frequency

Networks (SFNs) have been dealt with in radio frequency planning. A key characteristic of Community Television is that it is local and services a specific geographic community or community of interest. Therefore, the regulator will need to investigate alternatives that will allow for community TV to remain local, such as the potential to create local television DTT muxes using radio frequency spectrum currently used by analogue Television broadcasting services in 174-223MHz and 238-267 MHz when those services are migrated to DTT in the 470-694MHz band.

- 3.5.15 Whilst, community broadcasters should remain accessible at local level only, the DTT licensing framework post-ASO may consider the introduction of provincial/regional public, commercial or non-profit NGO free-to-air audiovisual content services.
- 3.5.16 A significant number of TV households in South Africa now receive free-to-view and subscription television by means DTH satellite. This includes TV households serviced by the DTT gap filler using direct to home (DTH) satellite operated by Sentech. Currently, the frequency band used for satellite services is shared with mobile operators, internet service providers and other telecommunication services resulting in interference and impact on TV households. This interference is likely to increase if the regulator continues to licence the use of fixed service links within the band. Accordingly, the regulator must investigate and introduce mitigating actions to reduce the impact of interference.
- 3.5.17 In South Africa radio will remain a distinct and vibrant sector and the draft white paper wants to create a digital future for radio. In addition to regulation, government has a developmental role by supporting common technical standards for digital radio, encouraging South African car manufacturers to install digital radio alongside FM and to promote South African music and content on digital radio networks. Government will not switch off AM and/or FM signals, but it will facilitate the introduction of digital

audio broadcasting in South Africa and the directions have already been made to regulator to put in place the necessary frameworks for the licensing of digital audio broadcasting services taking into consideration the three tiers of broadcasting – public, commercial and community.

- 3.5.18 Radio Frequency spectrum remains a critical resource for terrestrial broadcasting services and sufficient spectrum needs to be available to cater for current and future needs leading up to 2030 and beyond.

### 3.6 TRANSITIONAL PROVISIONS

- 3.6.1 Government will put in place in legislation provisions for a transitional framework for conversion of existing licences to the new AAVCS licensing framework where required. These transitional provisions will also cover any cases where a person before the change in the licensing framework lawfully provided a service without requiring a licence, they will now have permission to continue to do so until the regulator has granted or refused a licence application.
- 3.6.2 The draft white paper proposes that the regulator complete the transitional period between the existing licensing framework and the new licensing framework within 24 months.
- 3.6.3 The 2002 amendment to the Broadcasting Act ensured that any person who provided a broadcasting service without a broadcasting licence had permission to continue to provide such a service if they applied for a licence after the commencement of the Broadcasting Amendment Act. This deeming provision to continue providing a service without a licence remained in place until ICASA had either refused the licence or in event of the decision to grant the application had issued the licence. This provision did not fall away with the repeal of the Broadcasting Act, as section 92(5) of the Transitional Provisions of the ECA still provides this protection for

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service providers who fell under this provision in the Broadcasting Act, as amended. To the extent that there are still broadcasting services in South Africa operating under this deeming provision since 2002, their application for a licence must be prioritised by ICASA and they must either be issued an Individual licence or Class licence or ICASA must clarify if they are exempt from applying for a licence.

#### **SUMMARY OF KEY DRAFT POLICY PROPOSALS**

##### *Context for licensing framework*

- The narrowness of the current statutory definition of broadcasting services and the overly platform-specific approach to its application by the regulator is failing to capture the range of new AAVCS. The updating of the licensing framework in South Africa will require distinguishing between linear and non-linear AAVCS while at the same time creating a level playing field between competing services. To achieve this government will amend legislation to replace the current licence category of broadcasting services, with the broader category of AAVCS. Within this broader category of AAVCS there will be three sub-categories: broadcasting services (including online streaming), OCS and VSPS.

##### *Proposed new licence framework*

- The regulatory distinction between Individual and Class licences remains a critical element as it allows the regulator to make distinction between these two types of licences to impose a higher level of regulation and public interest obligations on Individual Licensees versus a lower level of regulation and obligations on Class licensees. Similarly, the regulatory distinction between the three tiers of broadcasting namely public broadcasting, commercial broadcasting (free-to-air and subscription) and community broadcasting

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continues to remain relevant as a tool for the regulator to determine the level of public interest obligations that apply to the AAVCS licensee.

- Changes to the definitions of commercial broadcasting and public broadcasting are necessary to make them more distinct from one another. The current definition of public broadcasting is flawed as it suggests that any service funded by the State or a State-Owned entity, even if it was a commercial service, would constitute a public broadcasting service. The proposal is that public broadcasting services should be redefined as “any broadcasting services provided by the SABC”.
- In addition to the usual criteria applied to determine if a licensee requires an Individual or a Class licence, thresholds based on annual turnover will also determine what type of licence an AAVCS must apply for. To assist the regulator to properly monitor thresholds and audience size all AAVCS operating in South Africa must provide the regulator with annual audited financial records and user/subscriber/audience numbers.

#### *Individual Licence*

- Scarce terrestrial radio frequency spectrum licensed through a competitive licensing process or where carriage on an electronic communication network operated by an SOE or funded by government is determined through a competitive process would be one key indicator that an AAVCS requires an Individual licence. (Note the current policy anomaly where community broadcasting is a class licensee and yet still goes through a very intensive competitive licensing process for terrestrial radio frequency spectrum, rather than a class registration process will require listing community broadcasting under both Individual and Class categories of licence in the ECA).
- Legislation already provides for the regulator to take pervasiveness and influence into consideration under the concept of significant socio-economic

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impact. However, the regulator has not to any large extent made use of this concept in licensing. Thus, in the context of AAVCS (of which broadcasting is a subset) clear policy and legislative guidance will assist the regulator in determining which services require an Individual licence. In addition to the criteria of use of the broadcasting service radio frequency bands, the draft white paper proposes that the regulator should also consider the global size of the business which can have an economic impact in South Africa not just the audience size or a specified threshold based on annual turnover.

- A large threshold based on annual turnover will allow ICASA to distinguish between SMMEs and big business to give them time to develop. The initial threshold for an Individual licence for broadcasting services and OCS will be set at R100 million annual turnover in the previous financial year. Furthermore, legislation will give the Minister the power to amend this initial threshold every three years to account for inflation, macro-economic shifts in the economy, or any legislation affecting SMMEs.
- In the interest of fair competition, this threshold will also apply to international (foreign-based) AAVCS who are actively targeting South African audiences and extracting revenue in terms of advertising, subscription fees or other sources from South Africa. In such a case, if the global size of the international (foreign-based) business is capable of affecting local economic activity the regulator may issue a license irrespective of the size of its South African annual turnover.
- An interdepartmental task team will be set up to report to the Minister on mechanisms to ensure compliance by international (foreign based) AAVCS who meet the licensing criteria but do not have a physical business premises in South Africa and potentially refuse to apply for a licence.

#### *Class Licence*

- Where the AAVCS does not use radio frequency spectrum or the radio frequency spectrum is not in the broadcasting frequency bands (nor is it licensed through a competitive licensing process) or the radio frequency is exempt from requiring a licence then the licence applied for should be a Class licence, subject to annual turnover or other socio-economic criteria which may influence the decision by the regulator.

- In the case of OCS, the entry level threshold requirement to hold a class licence should be set at R50 million in the previous financial year and that OCS below this entry level threshold are SMMEs exempt from applying for a licence.

#### *Exempt*

- Implementation of the new licensing framework, means that the current list of services set out in legislation which the regulator may choose to exempt from applying for a licence needs to be updated to include certain types of AAVCS.
- The regulator needs to consider exempting audio broadcasting services and on-demand audio content services available on the Internet from the requirement to hold a licence at this point in time and this decision should be subject to review every four years based on socio-economic factors, influence and audience size.

#### *Types of AAVCS requiring licensing*

- There are three broad types of AAVCS using electronic communication networks and which will fall within the new proposed regulatory framework. These are linear broadcasting services, non-linear on-demand content services and video sharing platform services (VSPS). The first two types require licensing, and the third type VSPS is exempt from licensing, but not from regulation.

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Generally speaking, if a broadcasting service has a right to broadcast content there is an associated right to offer the programme on the broadcasters' catch-up service. Therefore, a catch-up service even though it is on-demand is an associated service which is part of the linear broadcasting service licence. Furthermore, the content on the catch-up service will fall under the jurisdiction of the code of conduct that applies to linear broadcasting service licensees.

#### *Radio frequency spectrum licence and spectrum issues*

- The current DTT environment and radio frequency spectrum licensing approach is an interim one. The Broadcasting Digital Migration Policy, 2008, did not address digital broadcasting post ASO. Legacy analogue broadcasters should be migrated on no less favourable terms and received radio frequency spectrum licences for DTT multiplexes. In respect to new DTT multiplexes only the ECNS should be issued with a radio frequency spectrum licence. The ECNS would then be legally obliged to carry AAVCS licensed by the regulator and assigned capacity on the DTT multiplex.
- The additional 5 national DTT multiplexes and the two Digital Dividends for IMT services will only become available after the ASO. After the ASO there will need to be a retuning of transmitters as part of a digital to digital migration of broadcasters to vacate the 790-862 MHz and the 694-790MHz bands. Sentech will be responsible for the management of the retuning of transmitters to clear the 700MHz and 800 MHz bands. The cost recovery of this digital to digital migration will be from the IMT beneficiaries of the two Digital Dividends.
- The regulator must conduct an inquiry to put in place the licensing framework for DTT post ASO and to determine the capacity required on DTT Multiplexes by the existing broadcasting service licensees after the ASO and the implementation of the seven multiplex plan. It should also consider the availability of public, community and commercial audio broadcasting services on audio bouquets carried on the DTT platform.

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- A key characteristic of Community Television is that it is local and services a specific geographic community or community of interest. Therefore, the regulator must investigate alternatives to carriage on national/provincial DTT multiplexes that will allow for community TV to remain local, such as the potential to create local television DTT muxes using radio frequency spectrum currently used by analogue Television broadcasting services in 174-223MHz and 238-267 MHz when those services are migrated to DTT in the 470-694MHz band.
- A significant number of TV households in South Africa now receive free-to-view and subscription television by means DTH satellite. This includes TV households serviced by the DTT gap filler using direct to home (DTH) satellite operated by Sentech. Currently, mobile operators, internet service providers and other telecommunication services share the frequency band for satellite services resulting in interference and impact on TV households. Accordingly, the regulator must investigate and introduce mitigating actions to reduce the impact of interference on DTH broadcasting services.
- In South Africa radio will remain a distinct and vibrant sector and government will facilitate the creation of a digital future for radio. In addition to regulation, government will play a developmental role by supporting common technical standards for digital radio, encouraging South African car manufacturers to install digital radios and promoting South African music and content on digital radio networks.

#### *Transitional Provisions*

- Government will establish a transitional framework for conversion of existing licences to the new AAVCS licensing framework and where any person before the change in the licensing framework lawfully provided a service without requiring a licence they will have permission to continue to do so until the

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regulator has granted or refused a licence application. The regulator will need to complete the transitional period within 24 months.

- Where there are still broadcasting services in South Africa operating under the Broadcasting Act (and later s95(2) of the ECA) deeming provision since 2002, their application for a licence must be prioritised by ICASA and they must either be issued an Individual licence or Class licence or ICASA must clarify that they are exempt from applying for a licence

## 4. PUBLIC BROADCASTING IN THE NEW POLICY FRAMEWORK

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*'Public broadcasting is not about technology. It is about an idea, which happens to employ a technology, of how one creates and feeds society and its culture.'*

Michael Tracey, 1998<sup>14</sup>

### 4.1 KEY POLICY PRINCIPLES

- 4.1.1 In parallel with this policy process, the public and key stakeholders made comments concerning the future sustainability of Public Broadcasting in a multichannel, multiplatform environment. On 5-6 September 2018, the Department of Communications hosted a colloquium on the Review of Public Broadcasting Policy. This colloquium discussed and confirmed several key policy principles that must continue to guide the SABC.
- 4.1.2 It is nearly 20 years since enactment of the Broadcasting Act and it is time to bringing the SABC's governing legislation up to date. Whilst, many provisions of the Broadcasting Act are important to retain, the Act must change to reflect the changing audio and audiovisual content environment and the SABC's continued leading role as the public broadcaster.
- 4.1.3 A founding statute must continue to govern the SABC. However, the title of the Broadcasting Act must change to "the South African Broadcasting Corporation Act" and should only deal with SABC-related matters. The current title of the Act and some of its provisions still reflect a time when the Act dealt with broader 'broadcasting' issues. However, these 'broader' policy framework issues are now found in the ICASA Act and the ECA.
- 4.1.4 The main key guiding policy principles coming out of the Colloquium were as follows:

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- a strong, sustainable and independently-governed SABC continues to be critical in building and shaping South Africa as a democratic nation.
- the SABC must be 'repurposed' to be able to fulfil its mandate, especially in terms of SABC being able to provide universal access across analogue and digital broadcasting platforms, as well as over the internet and mobile platforms;
- SABC must work to rebuild and maintain public trust in the SABC across the wide spectrum of audience and including and especially its employees;
- SABC is fundamentally a creative organisation and a content business. The Corporation must facilitate innovation and invest in South African audio and audiovisual content for a multiplatform media environment.
- SABC should continue on a mixed funding model including revenue from commercial sources (advertising, sponsorship, carriage fees and commercial partnerships); licence fees and government grants.
- the problem of the "unfunded public mandate", subject to the SABC's editorial independence, requires creation of a framework for government departments to fund information and content programming that is necessary in public interest; and
- while change at the public broadcaster is necessary, government will implement this responsibly and in line with the principles of the Broadcasting Act.<sup>15</sup>

## 4.2 LEGISLATIVE AMENDMENTS

4.2.1 The title of the current Broadcasting Act will change to “The South African Broadcasting Corporation Act” and government will amend it to reflect the public broadcasting service role to be played by the SABC in the growing audiovisual content services market in South Africa. To reflect recent changes to the Memorandum of Incorporation (MOI), government will amend legislation to provide and delineate the powers of the Minister as a shareholder representative of the Corporation, the powers of the Board of the Corporation and the powers of the Executive Committee. The amendments to the legislation in this regard must align to the judgment by Justice Matojane in *SOS and others vs the SABC and others*<sup>16</sup> which held, inter alia, that non-executive directors of the SABC Board solely appoint the SABC executive directors.

4.2.2 The amended legislation should retain the following provisions on:

4.2.2.1 the Charter of the Corporation and the Objectives of the Corporation respectively are still highly relevant. To achieve the goal of the SABC becoming a multiplatform, multichannel public content service provider, the provisions need to include the SABC’s obligations to distribute its audio and audiovisual content on both a linear and nonlinear basis.

4.2.2.2 the Governance of the Corporation including existing provisions:

- the composition of the board;
- Members of Board;
- Executive Committee;
- Removal from office and resignation of a Member;
- Resolution for removal of member, dissolution of Board and appointment of interim Board;

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- Disqualification;
- Disclosure of conflicting interests.

4.2.2.3 Provisions on the Financial Matters and the Staffing of the Corporations are necessary, although they require review and consequential amendments, including amendments to the TV Licence Fee section to broaden the definition and the collection system for television licences and to strengthen enforcement mechanisms and penalties for non-payment.

4.2.3 The White Paper on Broadcasting Policy of 1998 proposed the division of the SABC into a public and commercial broadcasting services based on the assumption that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels, and therefore that this division would protect and enhance public content. Legislation implemented this proposal.

4.2.4 However, this assumption has proven to be incorrect and it has been certain public services which have been more commercially successful. So, the idea of a commercial division cross subsidising the public division has been a policy failure since inception. Although it is possible to separate the stations/channels into public and public commercial divisions, it does not necessarily follow that it still makes sense to do so. It has become both impractical and expensive for the SABC to have separate books for the two divisions as it requires duplication of services to implement this legislative obligation. The draft white paper points out that the key policy question rather is to define the SABC's unfunded mandate and to ensure that funding is available for specific national development or national interest programming, and to ring-fence government funding at the level of the specific programming.

4.2.5 This will ensure that government funding does not go to stations or programming that is commercial per se but rather to 'unfunded mandate' or 'public mandate' programming. Accordingly, the draft white paper submits that the legislative provisions dealing with the split of the Corporation's services into public and public commercial services should be removed and all the current broadcasting service licences held by the SABC should be converted into public broadcasting service licences.

### 4.3 SUSTAINABLE AND ACTIVE SABC

4.3.1 The draft white paper recognises the importance of the public broadcaster to the entire audio and audiovisual content ecosystem. Apart from the dependency of millions of South Africans on the SABC, the sustainability of the public broadcaster has an impact on its employees, sports rights associations, Sentech, independent television producers, commercial partners and creative artists like musicians, actors, writers, directors. A strong and financially fit SABC is vital for South Africa and Government will take the necessary legislative and financial steps to ensure this.

4.3.2 The draft white paper points out that a strong SABC not only requires Government, the Board and Parliament to play their respective roles; but the regulator should also ensure that all regulations are in line with the requirement to protect the integrity and viability of the public broadcaster.

4.3.3 The draft white paper proposes that in the interests of ensuring an informed public who are aware of the policy and legislative debates in South Africa, one of the digital channels on the capacity allocated to the SABC on DTT Multiplex 1 should be a dedicated Parliamentary channel to ensure access for all South Africans on a free to air basis.

4.3.4 The public broadcaster should also have a mandate in legislation to operate international satellite television, radio and Internet services, under the name

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SABC international broadcast services or SABC Foreign broadcasting service. The Channel Africa radio services and Ubuntu Radio, DIRCO's 24-hour internet-based radio station, will form part of this unitary service to provide both domestic and international news, information, as well as a wide variety of programming, 24 hours a day, to the world accurately and promptly from various African perspectives, making the best use of public broadcaster and its international partners networks.

- 4.3.5 The draft white paper proposes that there will be a comprehensive overhaul of the SABC's funding model based on international best practices to ensure that the public broadcaster has adequate funds to meet its public mandate.

#### SUMMARY OF KEY DRAFT POLICY PROPOSALS

##### *Legislative Amendments*

- The title of the Broadcasting Act will change to "The South African Broadcasting Corporation Act" and should only deal with SABC-related matters. The 'broader' broadcasting policy framework issues were taken out the Broadcasting Act some time ago and are now found in the ICASA Act and the ECA.
- Government will amend the Act to reflect the public broadcasting service role to be played by the SABC in the growing AAVCS market, to reflect recent changes to the Memorandum of Incorporation (MOI), to provide and delineate the powers of the Minister as a shareholder representative of the Corporation, the powers of the Board of the Corporation and the powers of the Executive Committee.
- The division of the SABC in the Act into public and commercial broadcasting services based on the assumption that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels, has been a policy failure since inception. This division will fall away and the focus will be

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on defining the SABC's public mandate and ensuring that government funding for specific national development or national interest programming is ring-fenced at the level of the specific programming. This will ensure that government funding does not go to stations or programming that are commercial per se but rather to 'public mandate' programming.

#### *Sustainable and active SABC*

- In the interests of ensuring an informed public who are aware of policy and legislative debates one of the free-to-air digital channels on the capacity allocated on DTT Multiplex 1 to the SABC will be a Parliamentary channel.
- The SABC will have a legislative mandate to operate international satellite television, radio and internet services, under the name of SABC international broadcast services or SABC Foreign broadcasting service.
- There will be a comprehensive overhaul of the SABC's funding model based on international best practices to ensure that the public broadcaster has adequate funds.

## 5. CONTENT REGULATION OF AUDIO AND AUDIOVISUAL CONTENT SERVICES

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### 5.1 PROTECTION OF CONSTITUTIONAL PRINCIPLES

5.1.1 The foundational right for AAVCS is the right to freedom of expression as provided by section 16 of the Constitution of the Republic of South Africa Act, 1996 (the Constitution). Section 16 guarantees that freedom of expression but also qualifies the right as follows:

5.1.1.1 Everyone has the right to freedom of expression, which includes

- freedom of the press and other media;
- freedom to receive or impart information or ideas;
- freedom of artistic creativity; and
- academic freedom and freedom of scientific research.

5.1.1.2 This right does not however extend to

- propaganda for war;
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

5.1.2 Given the importance of broadcasting, for democracy and free and fair elections, since 1996 there has been a specific constitutional provision protecting the independent regulation of broadcasting, namely section 192 of the Constitution which provides that:

*“National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”*

- 5.1.3 In compliance with section 192, ICASA has always been the “independent authority” which “regulates broadcasting in the public interest” and importantly must “ensure fairness and a diversity of views broadly representing South African society”. The ICASA Act, 2002, founded ICASA.
- 5.1.4 In July 2007 the *Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions in its report to the National Assembly* confirmed ICASA’s status as that constitutional independent authority.<sup>17</sup> This report is also known as the ‘Asmal Report’, referring to the Chairperson of the Ad Hoc Committee, the late Professor Kader Asmal.
- 5.1.5 As explained in the Asmal Report:
- “Given South Africa’s political history, the provision for the existence of an independent regulator for broadcasting is intended to give meaning to certain rights such as freedom of expression, the right of access to information, and language rights. If implemented effectively, such regulation can therefore contribute to the quality of democracy”.<sup>18</sup>*
- 5.1.6 The Report noted further:
- “The Committee is convinced of the necessity for the existence of an independent regulator for both the protection of free speech and the economic development of the sector. In particular, the Committee highlights the importance of an independent regulator for broadcasting as a key construct of democracy”<sup>19</sup>*
- 5.1.7 ICASA will remain the ‘content regulator’ for South Africa, in particular for newly-defined AAVCS, including broadcasting services. Furthermore, the regulator must continue to guarantee the fundamental rights in the Constitution in its approach to regulation, namely:

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- Freedom of expression for all South Africans;
- The right to equality;
- The equality of all languages;
- The multi-cultural nature of SA and the right of all South Africans to the promotion of their cultures; and
- Choice and diversity.

5.1.8 With the new policy defining 'broadcasting' as a subset of AAVCS, the constitutional protection afforded to the independent regulation of broadcasting should also extend to AAVCS. Parliament should amend section 192 of the Constitution to replace the word "broadcasting" with the words "audio and audiovisual content services". This constitutional change does not preclude government from commencing to amend other legislation to align the legislative framework with the policy changes outlined in the White Paper.

## 5.2 CULTURAL AND NATIONAL INTEREST

5.2.1 Closely related to constitutional and democratic principles are the cultural objectives around the creation and preservation of national identity, culture, diversity and indigenous languages. The 1998 White Paper stated in this regard: that

*"The South African broadcasting system should reflect the identity and the multi-cultural nature of South Africa by promoting the entire spectrum of cultural backgrounds in South Africa."*

5.2.2 Even though in the past decade digital platforms have dramatically opened up opportunities for creators, distributors and consumers of South African content, it is still critical that this reflection of the identity and multi-cultural nature of South Africa should remain at the core of broadcasting and the broader audio and audiovisual content environment. This approach is not

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unique to South Africa - governments all over the world are concerned about the impacts of globalisation on national identity and culture.

5.2.3 These countries have a range policy and regulatory tools to ensure cultural objectives, such as the promotion of local content, local languages and media diversity.

5.2.4 South Africans now spend as much time viewing content on Internet platforms and services, over-the-top video streaming services and websites as they watch television or listen to radio. Traditional broadcasters are evolving to deal with the challenges and competition that new online content and media services presents. A central policy question then is how should the existing policy tools and support measures used to promote South African Content and the national interest be adapted to this new online audio and audiovisual content environment to ensure that South African content and culture continues to develop and prosper?

5.2.5 The cultural policy toolkit used in the past has included public service programming, promotion of South African television content, South African music and languages, ensuring diversity of content, must carry of public service programming and facilitating access to sports of national interest on free-to-air broadcasting services for all citizens.

#### 5.2.6 **Public service programming**

5.2.6.1 Public service programming is programming that is of a cultural and linguistic nature, has social consideration for historically disadvantaged groups and other special needs and interests, particularly education including programmes for schools and provisions for persons with disabilities. It can also cater for regional interests and communities of interests.<sup>20</sup> In South Africa, although the public mandate for public service broadcasting

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resides primarily with the public broadcasting service licensee, legislation does view it as a collective responsibility. Thus, measurement considers all broadcasting services to ensure that they collectively:

- cater for all language and cultural groups and provide entertainment and information;
- provide for regular news, actuality programs on matter of public interest, programmes on political issues of public interest; and programmes on matters of national, regional and local significance; and
- provide a broad range of services and specifically cater for the programming needs of children, women, the youth and the disabled.<sup>21</sup>

5.2.6.2 The primary mandate for public service broadcasting programming will remain with the SABC and that public service broadcasting programming of local significance and communities of interest will be the responsibility of community broadcasting service licensees.

5.2.6.3 There are three core issues concerning the community broadcasting sector:

- how to ensure the sector is distinct from others and that target audiences are involved in the services;
- how to ensure community-based content and programming is available across a wide range of platforms and devices and that communities have the means to distribute their content across these; and
- how to ensure non-profit entities are sustainable and viable.

- 5.2.6.4 The traditional third tier of broadcasting, being community broadcasting, due to an overly narrow regulatory approach currently excludes opportunities for non-governmental organisations (non-profit) that may want to provide public service programming channels that focus specifically on education or health matters. In updating, the regulatory licensing framework, the draft white paper proposes there must be provision for non-profit non-governmental organisations (NGOs) to provide AAVCS programming at national, regional and local level in the public interest. To ensure that these NGOs do not undermine the sustainability of traditional public and community broadcasters their funding model mix should only comprise sponsorships, donations, membership fees or subscriptions and not include advertising revenue.
- 5.2.6.5 Government should develop a framework to assist community and non-profit services with transmission costs and engaging directly with the regulator on how to strengthen the Community Broadcasting sector. Government should also explore the possibility of granting section 18(a) tax status to community/non-profit media projects, as this could assist such services to raise funds from a wider base.
- 5.2.6.6 Due to the cost of running a community TV stations there have been proposals in public processes that government should consider creating scope for an open access TV model. After ASO, when there will be capacity on local DTT multiplexes that could accommodate such a broadcasting model the regulator can explore opportunities for trialling open access TV models.

## 5.2.7 Must Carry and Findability

- 5.2.7.1 Must Carry has historically been a policy tool that is closely related to public interest programming. Governments have a vested interest in ensuring that public interest programming is universally available to all citizens to create national identity, social cohesion and to support democracy. In the era of terrestrial broadcasting it was easy to achieve this objective by simply ensuring that there was a public broadcaster and imposing some public service obligations on commercial free-to-air broadcasters in return for access to terrestrial radio frequency spectrum.
- 5.2.7.2 The evolution over time of new broadcasting distribution platforms globally, such as cable (which was never rolled out in South Africa) and satellite, led to a concern that without legislative intervention these new broadcasting distribution platforms could either refuse to carry the terrestrial public interest programming channels on their platforms or enter into exclusivity contracts with terrestrial public interest programming channels thereby preventing universal access to these channels on the new platforms.
- 5.2.7.3 The net effect of either scenario would be to deprive citizens, who switched from the terrestrial platform to the new broadcasting distribution platforms, of universal access to public interest programming and undermine governments cultural objectives. The solution selected by governments globally was to impose “must carry” requirements on cable and satellite platforms. There are two distinct approaches to must carry as a policy tool – the European Union approach and the United States of America approach.

5.2.7.4 The European Union approach is in Article 31 of the Universal Service Directive. In terms of this provision member states can grant a must-carry status to specific channels based on the view that the content they carry benefits public interest objectives, such as pluralism, cultural diversity, national language and so forth. Public broadcasters in Europe tend to be the beneficiaries of this rule and it achieves the objective of universal access to public interest programming. As the obligation is an imposed one, European public broadcasters carried under the Must Carry status cannot request financial compensation.<sup>22</sup>

5.2.7.5 In contrast, the United States of America confers must carry status upon all local television broadcasters irrespective of what type of content they broadcast. The aim is not one of universal access, but instead to ensure the economic viability of “free” broadcast television and that subscribers continue to have access to election political debate on terrestrial local television stations. Must Carry requirements ensure that cable television subscribers still have the option of viewing local terrestrial broadcast channels when they shift away from the terrestrial platform. It also ensures that the terrestrial local broadcast television channels can continue to generate advertising revenue from their audience when they have shifted away from the terrestrial platform to cable or satellite platforms. Where cable and satellite operators comply with must-carry obligations the individual broadcasters cannot request financial compensation. Broadcasters who opt out of the must carry system can seek compensation for their consent to re-transmission by cable and satellite operators. The period for opt in or opt out of must carry is three years.<sup>23</sup>

5.2.7.6 In terms of the 2005 ECA South Africa adopted the European Union approach of imposing a “Must Carry” status on the

programmes carried by the public service broadcaster and requiring carriage by subscription broadcasters. The 2008 ICASA Must Carry regulations require that programming be carried at “no cost” to the subscription broadcasters in line with the European Union approach. There has been considerable debate in recent years about whether the must carry regulations distort competition. This is based on view that although one side of this debate may argue that the public broadcaster has benefited from universal access to audience and access to advertising revenues from the subscription broadcasting platforms they have been carried on, the other side of the debate points out that must carry rules have also provided an economic benefit to subscription broadcasters by giving them the compulsory retransmission of the copyrighted broadcast video content of the public broadcaster and other rights-holders on the public broadcasting channels at no cost.

- 5.2.7.7 Persons who oppose must carry without financial compensation to the SABC argue that Must Carry rules are especially no longer necessary in the digital broadcasting environment where these public broadcasting channels would be available anyway given their popularity with subscribers and the need for local news and content in languages other than English on these subscription broadcasting platforms.
- 5.2.7.8 Strengthening this de-regulation argument is that in the new AAVCS environment there is a plethora of thematic channels (history, documentary, news and educational) and options to access public interest programming so carriage of the public broadcaster on subscription broadcasting platforms is no longer needed to achieve the objective of access to public interest programming.

- 5.2.7.9 The situation has also changed significantly since 2008 as currently there are new platforms and services that may potentially remunerate the public broadcaster for its programming.
- 5.2.7.10 Another reason to review Must Carry rules in South Africa is that the shift from analogue to digital terrestrial television (DTT) broadcasting is going to increase the regulatory burden of “must carry” obligations on subscription broadcasters as it will require more bandwidth if terrestrial broadcasters use high definition television or expand the number of broadcast channels they provide.
- 5.2.7.11 The public broadcaster’s channels will soon be increasingly available to all South Africans on free DTT, DTH and internet platforms. If commercial negotiations were to fail in the worst-case scenario losing access to SABC’s programming on a subscription TV platform would not necessarily mean South Africans will lose access to this programming as it will remain freely available on multiple platforms.
- 5.2.7.12 Must carry rules have achieved their intended objective but going forward they may distort competition in the audiovisual content service market and prevent the public broadcaster from commercially negotiating retransmission consent agreements for its channels and programmes.
- 5.2.7.13 The Broadcasting Act contains sufficient public interest protection on the universal access requirement. One of the primary statutory objectives of the SABC is to “make its services available throughout the Republic”.<sup>24</sup> Further, the Broadcasting Act

requires the SABC to develop and comply with a universal service and access policy.<sup>25</sup> Thus, the law itself already requires the SABC to make its programming universally available, whether must carry laws exist or not, subject to commercial terms being negotiated.

5.2.7.14 Accordingly, for all these reasons, the draft white paper proposes that the must carry regulation provision is no longer necessary in law and that the legislation governing the public broadcaster should allow the SABC to negotiate retransmission consent agreements on commercial terms with other AAVCS in South Africa and internationally. With the proviso, that in South Africa the retransmission consent agreements for audiovisual content broadcast free-to-air terrestrially by the public broadcaster may not be exclusive to a single subscription audiovisual content service.

5.2.7.15 Rules ensuring the findability or 'discoverability' of public interest content are seen as the logical next step beyond must carry rules to ensure that programmes and services which are seen as being of particular value for society, for democratic, cultural or social reasons, can be found easily and accessed on relevant platforms, whether they are linear or on-demand.

5.2.7.16 The draft white paper proposes that the regulator must conduct a public inquiry to determine a regulatory framework for rules ensuring the findability or 'discoverability' of public interest content on all audio and audiovisual content service platforms. In particular, the inquiry by the regulator should determine if legislation should make it mandatory that the manufacturers of

smart television sets and other connected receiving devices must provide access to the SABC's app(s) on their screens.

## 5.2.8 Promotion of South African Content and languages

5.2.8.1 The 1998 White Paper highlights that *"broadcasting plays an integral role in developing and reflecting a South African identity, its character and cultural diversity within the framework of national unity"*<sup>26</sup>. In line with this, it stipulated that all broadcasters should commit resources and airtime to South African content and:

- Television broadcasters must provide a mix of their productions and programmes produced by independent South African producers.
- Programming on all broadcasting services should be "predominantly South African".

5.2.8.2 The current legislative approach is for the regulator to prescribe regulations applicable to the broadcasting service licensees regarding the commissioning of independently produced South African programming to stimulate demand and support the independent production sector.

5.2.8.3 The regulator may also prescribe regulations that impose and specify in a broadcasting service licence conditions regarding South African content that require the licensee to expend an annual sum of money or percentage of gross revenue or minimum percentage of total broadcasting time to programming with South African content (SA content quotas). The regulator has put in place a regulatory framework for South African content and independent production.

- 5.2.8.4 The high audience and revenue performance of South African drama and music content is evidence that the South Africa content quotas have been successful in stimulating demand for South African content.
- 5.2.8.5 The European Union's AVMSD governs the coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. The review of AVMSD resulted in the European Parliament, on 2 October 2018, adopting a report on the provision of audiovisual media services which will result in the AVMSD additionally promoting European works by guaranteeing a 30% share of European works in on-demand catalogues.<sup>27</sup> The technology-neutral approach of the AVMSD means that the same services are regulated in the same manner irrespective of the device or platform on which they are consumed.
- 5.2.8.6 In South Africa, the AAVCS market has grown rapidly due to convergence and the growth in access to the Internet. As a result, the viewing habits of South Africans, especially the youth, have evolved and while the traditional television set remains the main device upon which people view content other new types of content provided by OCS and VSPS viewed on mobile devices have gained in importance. As connected Smart TVs increase in market share these OCS and VSPS are also now becoming part of content that is available on the television set for consumption as well. In the context of development of South African content and ensuring the regulation of the same services in the same fashion to ensure fair competition, the South African Content regulatory framework will need to include all AAVCS and not just broadcasting services.

- 5.2.8.7 The draft white paper proposes that South African content quotas should remain in place for broadcasting services (including those offered online), with an emphasis on the need to continue to reinforce South African content and music in all genres and formats. However, the current approach of specifying a minimum percentage of total broadcasting time per TV channel for the public broadcaster by the sector regulator reflects an analogue mind-set that is not appropriate in a digital broadcasting multichannel environment where a broadcasting service licensee will have multiple channels. The current approach can continue to apply to analogue channels, but after the ASO, the practice of issuing separate public broadcasting licences for SABC 1, 2 and 3 needs to be normalised by the regulator into a single technology-neutral public broadcasting service licence.
- 5.2.8.8 The draft white paper proposes that South African quotas be measured across the total bouquet of channels offered by a broadcasting service licensee and where it is not possible to meet the South African content quota due to the nature of the service the licensee be offered the opportunity to pay a specified sum of money or minimum percentage of gross revenue into a fund which supports the creation of audio and audiovisual South African content. This multichannel measurement would apply equally to the public broadcaster's bouquets. The sector regulator should review the current South African content regulations to address digital broadcasting and the consequential changes to be inclusive of new broadcasting services offered on the public Internet.
- 5.2.8.9 In respect of OCS targeting South African audiences, they should also have South African content obligations. These South African content obligations can apply in a graduated manner

distinguishing between individual and class licensees and whether the service is public, commercial or community/non-profit in nature and should not exceed 30% of the video catalogue.

5.2.8.10 The broadcasting system needs to accommodate that South Africa has eleven official languages and sign language is a twelfth language to ensure access for persons with disabilities. After two decades the regulator needs to conduct a review to ensure that the broadcasting system has given effect to the right of all South Africans to the promotion of their cultures and languages.

#### 5.2.9 **Competition and Access to events and sports of national interest on free-to-air platforms**

5.2.9.1 Sport has a long history of playing a very critical role in national identity, social integration and the development of culture in a country. However, Sport has also become a very big business in terms of the economic growth in sports-related activities resulting in sports bodies becoming companies and operating like business organisations. This is partly due to the rise in the value of TV sports broadcasting rights which has had a very positive impact on the development of major and minority sports.

5.2.9.2 People who wish to follow a sport are not always able to do so physically and therefore rely on radio and television to allow them to participate in the live experience differently. This can be through information about the event in news broadcasts or through live broadcasts. To provide this service broadcasters need to acquire the retransmission rights from sports bodies and since they pay for this right, they usually acquire it exclusively so they can recoup costs from advertising revenues and/or fees from their subscribers.

- 5.2.9.3 These television broadcast rights have become key to attract audiences and in the context of subscription television, one of the motivations for people to pay directly for television services (subscription television). This is likely to extend in future to the consumer subscribing to new internet streaming services on broadband networks to access exclusive sporting events. As a result, TV sports broadcasting rights have become the object of highly competitive bidding wars between television broadcasters globally and nationally causing huge price increases to the benefit of sports federations, clubs and organising bodies.
- 5.2.9.4 This can lead to anti-competitive effects impeding access to the sports broadcasting rights and causing negative impacts on the structure of TV markets. Globally and nationally anti-competitive issues fall under competition law of general application. Competition law deals with joint selling and purchasing of television sports broadcasting rights and the periods of exclusivity granted in respect of those rights. In South Africa, the appropriate body to deal with these anti-competitive issues and evaluate the effect on competition in an economic context is the Competition Commission. To avoid “forum shopping” by the industry when there is duplication of effort between the Competition Commission and the regulator for AAVCS, they must conclude a memorandum of understanding.
- 5.2.9.5 However, competition law cannot deal with another policy issue namely that the events of major national or cultural importance for society if acquired exclusively may not be seen by significant portions of the population of the country. Exclusive rightsholders are not always subscription television broadcasters or online subscription audiovisual content services, free-to-air

broadcasters can also acquire these rights exclusively. But when they are the exclusively obtained by subscription broadcasting services or other AAVCS, access to the sporting event is limited solely to the subscribers of that service. This creates a conflict between the rights of citizens to access and receive information and the economic rights of sports bodies to property and freedom to enter into contract on an exclusive basis.

5.2.9.6 In Europe and elsewhere this conflict has resulted in a limitation on the sale and acquisition of exclusive broadcasting rights for events of “major importance to society”. The subscription broadcaster may acquire exclusive rights for events of major importance to society, but they may not exercise such rights unless they offer to resell them to free-to-air broadcasters. The key element being that there is a restriction of contractual freedom to ensure the public’s right to be informed about events of relevance to society.

5.2.9.7 In line with this policy principle Article 14(1) of the AVMSD establishes that:

*“Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television.*

*If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society.*

*It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.”*

5.2.9.8 The options of live/deferred and whole/partial coverage raised in the AVMSD are to address the principle of proportionality so as not to excessively restrict the exclusive rights of the legitimate rightsholders.

5.2.9.9 Guidance on criteria to apply to this provision are in a Working Document of the Contact Committee established by the AVMSD, which offer four indicators to assess whether an event can be considered to be of major importance for society, at least two of which should be fulfilled for an event to be considered to be of major importance for society, these are:

- the event and its outcome have a special general resonance and not simply have a significance to those who ordinarily follow the sport or activity concerned;
- the event has a generally recognised, distinct cultural importance for the population, in particular as a catalyst of its cultural identity;
- the event involves a national team in the sport concerned in a major international tournament; and
- it has traditionally been broadcast on free television and has commanded large television audiences.<sup>28</sup>

5.2.9.10 In the United Kingdom (UK), an event must contain *“an element which serves to unite the nation, a shared point on the national calendar, not solely of interest to those who follow the sport in*

*question" in order to be on the list. In the UK, decisions on which events to include in a list should be based on the following criteria: "An event must have a special national resonance and not simply a significance to those who ordinarily follow the sport concerned. Such an event is likely to fall into one or both of the following categories:*

- *It is a pre-eminent national or international event in sport;*
- *It involves the national team or national representatives in the sport concerned.*
- *It should also be likely to command a large television audience."<sup>29</sup>*

5.2.9.11 In South Africa, the 1998 White Paper and related legislation put in place similar mechanisms to ensure that national sporting events which are identified as being in the public interest are aired free-to-air and not only over subscription services. These mechanisms did not extend to other events of cultural importance for society. The list of national sporting events that these provisions apply to are defined by the regulator after consultation with the Minister of Communications and Digital Technologies and the Minister of Sport and Recreation and the law states that subscription broadcasters may not acquire exclusive rights that prevent the free-to-air broadcasting of such national events.

5.2.9.12 The draft white paper proposes that the legislation include criteria to guide the regulator in determining regulations. The draft white paper proposes that to identify a national sporting event whose free to air broadcasting a subscription broadcaster should not prevent, the event should meet all of the following criteria:

- 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.

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- 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.
- The event must be of major importance to South African society, and not just to those who ordinarily follow the sport.
- The event is appropriate to list, given its structure and duration.
- The event takes place in South Africa. The only events which take place outside South Africa 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.

5.2.9.13 In cases where a subscription broadcaster holds the rights and must sub-licence to a free-to-air broadcaster to comply with the law, legislation has provided that if there is a deadlock in commercial negotiations either party may notify the regulator and the regulator must resolve the dispute on an expedited basis.<sup>30</sup>

5.2.9.14 The draft white paper proposes that it should remain the policy intention to continue to ensure that key national sport events are aired free-to-air, whilst acknowledging that certain exclusive sports events are critical to the viability of the subscription model.

5.2.9.15 The draft white paper proposes that the listing of national sporting events which are in the public interest apply in legislation not just to broadcasting, but also to the broader AAVCS market to ensure the public continues to enjoy free-to-air and free-to-view access to listed events.

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5.2.9.16 The draft white paper proposes that to ensure fair competition sports broadcasting rights of listed events must be granted:

- after an open, transparent and non-discriminatory bidding process; and
- for a period not longer than five years to allow broadcasters a reasonable time to recoup their investment (e.g. broadcasting infrastructure installed at stadiums).

5.2.9.17 In Europe, Article 15 of the AVMSD also provides a right to short news reporting – so audiovisual media providers may inform the public during general news programmes about events of high interest and it is applicable without the submission of a list of pre-agreed events. Assessing who can broadcast short extracts from events of high interest is carried out on a case-by-case basis and the short extracts must be limited in scope. Once access has been granted, the broadcaster wishing to transmit short extracts must nonetheless respect the following conditions:

- (a) the broadcaster must identify the source of the extracts;
- (b) the extracts can solely be used in general news programmes;
- (c) the use of the extracts in on-demand catalogues is allowable only in the case of deferred transmission of the same programme originally available on free-to-air services.

5.2.9.18 In terms of South African law, the use of short excerpts for news purposes is in the Copyright Act in section 19(1) and (2) which deals with general exceptions to protection of programme-carrying signals as follows:

*“19(1) The copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried-*

- (a) that consist of reports of current events; or*
- (b) as are compatible with fair practice, and to the extent justified by the informatory purpose of such excerpts.*

*(2) The provisions of this section shall not apply with reference to a programme carried by programme-carrying signals representing a sporting event.”*

5.2.9.19 However, unlike the AVMSD in Europe, there is no exception in the Copyright Act for the protection in programme signals representing a sporting event and this is to protect the intellectual property of the Sports Federations as they usually do deal with highlights packages as a separate bundle of rights that they can sell to broadcasters. The current Copyright Amendment Bill waiting assent by the president does not amend section 19. (1) or (2).

5.2.9.20 Despite this omission in the Copyright Act, in practice there is an unwritten agreement among South African broadcasters that allows use of short excerpts of less than 3 minutes in news programmes.

5.2.9.21 The draft white paper proposes that consultation with the Minister responsible for administration of the Copyright Act to amend section 19(2) of the Copyright Act to formalise the unwritten agreement between broadcasters to allow use of short excerpts of programme carried by programme-carrying signals representing a sporting event for news reports. This amendment to Copyright Act should also be subject to the identification of the source of the extract, that the extract is used solely in a news

programme and the use of the extract in an on-demand catalogue is only allowed to extent it is contained in the same news programme originally available on the free-to-air broadcasting service; and that the duration of the extract will not exceed 3 minutes.

5.2.9.22 Similar, to the approach followed in the European AVMSD, the draft white paper proposes that the listing of events in legislation will also expand to include events of major public importance or cultural significance e.g. presidential inaugurations or state funerals.

### 5.3 PROTECTION OF CHILDREN AND CONSUMERS

5.3.1 The protection of children and consumers is a key guiding principle in the regulation of media content services. The right of freedom of expression which includes freedom of the media is not absolute and therefore needs to be carefully balanced against other rights enshrined in the Constitution.

5.3.2 The current instruments used to promote the protection of children and consumers in respect of broadcasting services are the code of conduct administered by ICASA and the code of conduct administered by the Broadcasting Complaints Commission of South Africa (BCCSA) which is exclusively applicable to the members of the National Association of Broadcasters (NAB).<sup>31</sup> On-demand content services are currently regulated in only a very narrow sense by the Film and Publication Board (FPB) through the content classification framework provided in the Films and Publications Act, 1996<sup>32</sup> read together with the FPB classification guidelines, to determine and assign appropriate age ratings and consumer advisories.

5.3.3 The convergence of technologies and emergence of multiple content distribution platforms has brought about new challenges to the content

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regulatory approach. This challenge has brought a new focus on the need to ensure adequate measures to protect children from harmful content and also ensure that consumers can make informed viewing and listening choices.

5.3.4 The concerns regarding the protection of children and consumers have been canvassed in previous policy process, including the Draft Audiovisual Policy Green Paper, ICT Policy Review, the Draft White Paper on the Audiovisual and Digital Content for South Africa, as well as the review of the broadcasting regulatory framework which ICASA conducted. This matter has also come to the fore of policy considerations in other jurisdictions. The European Union's recently adopted Audiovisual Media Services Directive provides that appropriate measures for the protection of minors applicable to television broadcasting services should also apply to on-demand audiovisual media services. It follows from the Directive that individual countries will begin the process of implementing the Directive through their national legislation. It must be noted that countries such as the United Kingdom had already begun the process of revising their regulatory framework. To this end, in 2010 Ofcom introduced regulations for catch-up services which also extend to on-demand services.

5.3.5 The draft white paper proposes to amend legislation to provide for a code of conduct for OCS, in addition to the existing Code of Conduct for broadcasting services. The current codes applicable to broadcasting services as currently defined in the ECA need to include broadcasting services offered on the Internet and the catch-up services offered by broadcasting services. These services will be subject to the code of conduct administered by ICASA, unless the provider thereof is a member of a body which has proved to the satisfaction of ICASA that it subscribes and adheres to a code of conduct enforced by that body using its own disciplinary mechanisms, provided that such code and disciplinary mechanisms are acceptable to ICASA.

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- 5.3.6 The draft white paper proposes that OCS should continue to be subject to the jurisdiction of the FPB in respect of registration and classification and should therefore adhere to the provisions of the FPB classification guidelines.
- 5.3.7 Whilst this draft white paper does not seek to introduce extensive regulation of VSPS, the protection of children and consumers remains equally relevant. Prohibited content which VSPS distributes must be taken down following the process outlined in the Electronic Communications and Transactions Act or any other relevant legislation that may be enacted in the future<sup>33</sup>.
- 5.3.8 The draft white paper proposes that in light of the various institutions which play a role in promoting the protection of children and consumers, consumer education and awareness initiatives are essential for consumers to benefit from these measures. The effectiveness of these proposed provisions is also dependent on increased co-ordination between the afore-mentioned entities.

#### **5.4 COMMERCIAL COMMUNICATIONS (ADVERTISING)**

- 5.4.1 Television advertising and online video advertising compete for the same budgets and the same advertisers in the same way, even if the services do not play the exact same function for advertisers. There are differences in the rules around advertising which creates a regulatory imbalance as advertisers may be able to do things online which the rules would not permit on television. There is a need to harmonise rules for all audiovisual content services on misleading and comparative advertising and a need to address disclosure and disinformation for political advertising online. The draft white paper recommends self-regulation and co-regulation, that is the

combination of industry self-regulation with the active support of the national regulator/legislator.

#### 5.4.2 Advertising Standards

5.4.2.1 Currently, a self-regulatory body regulates the content of television advertisements, namely the Advertising Regulatory Board (ARB) which replaced the Advertising Standards Authority (ASA). Legislation provides that broadcasting licensees must abide with the Code of Advertising Practice administered by the ASA or an entity that replaces it but has the same function and with any advertising regulations in respect of scheduling of adverts, infomercials and programme sponsorships. These co-regulatory provisions in legislation should extend to include all AAVCS licensees.

5.4.2.2 The legislative framework is effective and co-regulation is working. However, the framework applied by the regulator does need to expand to include all AAVCS. The regulator in respect of limitations on the amount of advertising on AAVCS can relax limitations and allow services to be flexible. The draft white paper proposes that to protect children, the regulator must in respect of the scheduling of adverts make regulations for all AAVCS licensees on the advertising of alcoholic beverages and harmful foods that are high in salt, sugars, fat, saturated fats or trans-fatty acids or that otherwise do not fit national or international nutritional guidelines.

### 5.4.3 Political broadcasts and Advertising

5.4.3.1 The current legislative approach to political election broadcasts and political advertising on traditional broadcasting platforms has been effective and does not require further review. It is, however, very specific to traditional broadcasters with no regard to online media and their role in spreading “false information” or “fake news” during elections.

5.4.3.2 The draft white paper proposes a review of legislation to include provisions on online political advertising to ensure that it is done in a fair and non-discriminatory manner with the proper disclosures.

### 5.4.4 Restriction of advertising on subscription broadcasting services

5.4.4.1 There are two types of commercial broadcasters operating in South African at present the commercial free-to-air broadcasters (television and radio) and subscription broadcasters. The commercial free-to-air broadcasters have only one source of revenue – advertising revenues that derive from delivering audiences to advertisers. These broadcasters must compete with each other, with the public broadcaster, with community broadcasters, with subscription broadcasters and other online AAVCS. The 1998 White Paper recognised that commercial free-to-air broadcasters can meet imposed public service obligations in a way that the subscription sector cannot in terms of audience reach, thus it proposed that they receive priority in terrestrial broadcasting frequency assignment over encrypted services and that subscription broadcasters’ revenue should come primarily from subscription fees and not advertising.

- 5.4.4.2 Legislation permits subscription broadcasters to draw revenue from subscriptions, advertising and sponsorships, however advertising and sponsorships may not be the largest source of annual revenue. The intention of the legislature in 2005 was clearly to limit the subscription broadcasters share of advertising revenue which is the main source of revenue for free to air broadcasters. However, since the promulgation of the ECA in 2005 the number of subscribers to subscription broadcasting services and thus total subscription revenue has increased and now significantly exceeds the total TV ad revenue, rendering the current provision in law redundant as it no longer poses a limit on advertising market share.
- 5.4.4.3 Television advertising is important in the South African television sector with 23.2% of total revenue attributable to advertising in 2017. This reliance on advertising makes the sector vulnerable to macroeconomic problems and political turmoil which can undermine business confidence. This was the case in 2016 and 2017 which led to growth in TV advertising slowing in nominal terms to 1.1%. Despite this lack of growth South Africa is still the largest TV advertising market in Southern Africa with a revenue of R7.5 billion and based on projections this will continue to be the case with revenue reaching R9.0 billion in 2022. While pay-tv is eroding the terrestrial free-to-air broadcasters' dominance of TV advertising budgets, there are differing revenue share figures that need a proper inquiry to resolve.
- 5.4.4.4 Online TV advertising is still growing and while it is not at the levels in Europe and the United States yet, it has the potential to significantly erode TV advertising market share soon. Mobile viewing is likely to have more of an impact than fixed broadband initially with 47.1% of people having a smartphone by end-2017,

although data costs are a limiting factor that government will have to address to unlock the potential for further growth in AAVCS. Leading up to 2030 there will be tremendous potential for online TV advertising in South Africa.<sup>34</sup>

5.4.4.5 The draft white paper recommends that section 60(4) of the ECA which focuses on traditional television be replaced with a requirement that the ICASA hold an inquiry into whether the current share of advertising revenue by subscription services is appropriate and what the impact of online advertising will be on the TV advertising market in the short and long term. If it is detrimental to the survival and viability of free-to-air services, the regulator must make regulations to protect the sustainability and viability of free-to-air services in South Africa taking into consideration the expansion of the regulatory licensing framework to include all AAVCS.

## **5.5 THE PROVISION OF GREATER ACCESSIBILITY TO AUDIOVISUAL MEDIA SERVICES FOR PERSONS WITH DISABILITIES**

5.5.1 There remains a strong policy commitment to addressing the need to make AAVCS accessible for persons with disabilities, and continuously examining measures to make access systems for persons with disabilities more widely available across all audiovisual media services.

5.5.2 The provision of greater accessibility to AAVCS key products and services (content and companies' equipment/set top boxes) for persons with disabilities is of especially high relevance to help people with disabilities (persons who are visually or aurally impaired) to participate fully in society. This will require legal provisions on accessibility obligations for public service broadcasters, commercial broadcasters and on-demand audiovisual media services.

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- 5.5.3 The draft white paper proposes that the regulator must provide annual reports and studies/research on the specific obligations of AAVCS to generate better results and annual improvements in the field of accessibility; monitoring and enforcing compliance with broadcasters/audiovisual media services' obligations; awareness campaigns and facilitating periodic consultation between service providers and representatives of disabled end-users.
- 5.5.4 The draft white paper proposes that the Digital Development Fund must grant funding for accessibility services or bear all the required costs, after considering the financial situation of an AAVCS. Accessibility obligations apply according to the audience share and revenues of AAVCS.

## 5.6 COPYRIGHT AND INTELLECTUAL PROPERTY

- 5.6.1 The broadcasting sector is a major developer of content and South African intellectual property rights and law apply. Audio and audiovisual content generation is set to expand massively in future with the migration from analogue to digital broadcasting and with increased data storage and distribution across the Internet. Content and intellectual property related to audio and audiovisual content will be a continued source of income generation in the future for AAVCS, independent producers and performers.
- 5.6.2 Government wants to encourage this development and grow and support content generation and expansion of this creative industry. One element is to ensure that creators and independent producers have access to funds that will allow them to share the financial risk with AAVCS when they commission content and thereby also benefit from copyright and the exploitation of intellectual property rights of the content they have created. However, these investments are undermined if piracy and infringement of intellectual property rights are not kept in check.

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- 5.6.3 Pirating of broadcasting signals or audiovisual content results in revenue losses across the entire content distribution chain from the content producers to the AAVCS. Audio and audiovisual content, irrespective of whether it is on free-to-air or subscription platforms, is not free. Artists, performers, writers and producers of that content earn their living by being creative and charging service providers for the right to broadcast or stream their content
- 5.6.4 Licensed service providers in South Africa make significant investments in the acquisition or licensing of programming from third parties, which they arrange and package with their own content in creating their programme schedule. They also invest in the equipment and infrastructure and make significant investments in marketing their content to increase the consumers/audience of their content. If financial returns divert to signal and content pirates, it becomes difficult for service providers to continue to make these significant investments.
- 5.6.5 Service providers, producers and performers in developing countries are harmed the most by piracy as they don't have the economies of scale of international providers or distributors and are heavily reliant on the revenue generated by sale and the exploitation of their intellectual property rights.
- 5.6.6 South Africa, like other BRICS members, has hosted major global sporting events over the years, such as the FIFA World Cup, the Cricket World Cup and the Rugby World Cup. The FIFA World Cup alone contributed 55.7 billion rand to South Africa's economy.<sup>35</sup> The sale of broadcast and streaming rights is a substantial source of revenue to the sports rights owners who invest and distribute this revenue throughout their organisations, from grassroots to professional leagues and clubs. It is a core component of what makes them sustainable. Sports associations and bodies receive no compensation from any pirated re-transmission of their

events, whereas those providing the pirated live re-transmission profit from advertising embedded in the website or the software client.

5.6.7 In South Africa, piracy is damaging the South African creative industries and the economic contribution of sport events. Steps need to be taken to protect South African content and intellectual property rights-holders. There is a critical need for legislation that will impose requirements on ISPs to co-operate with rights-holders and government to police illegal file-sharing or streaming websites. Neither the Electronic Communications Act, nor copyright law currently cover this aspect.

5.6.8 Legislation about Intellectual Property falls under the Minister of Trade and Industry and is currently under review through the Copyright Amendment Bill and the Performers' Protection Amendment Bill respectively. However, these two Bills have not addressed signal piracy and their definition of Technology Protection measures do not extend to broadcasting technology protection measures. Similarly, the Cybercrime Bill focuses only on computer crime and does not address signal piracy. An unintended consequence of repealing the Independent Broadcasting Act (IBA Act) was that section 66A which did criminalise signal piracy fell away. However, as s.66A of the IBA Act only applied to signal piracy of subscription broadcasters it would have been unable to deal with signal piracy of free-to-air terrestrial and free-to-view satellite broadcasting services. The growing challenges posed by the Internet relating to the protection and enforcement of Intellectual Property rights and South African audio and audiovisual content requires a joint effort by the relevant government ministries through an Inter-Ministerial Committee or a similar forum.

5.6.9 The draft white paper proposes that legislative and regulatory mechanisms to strengthen protection against signal piracy must be introduced in the Electronic Communications and Transactions Act and there should be co-operation between government departments to ensure that statutory

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prohibitions against piracy and circumvention of technological protection measures are regularly reviewed to ensure they remain effective against the evolving technology solutions employed by persons engaging in the piracy of South African audio and audiovisual content.

#### **SUMMARY OF KEY DRAFT POLICY PROPOSALS**

##### *Protection of Constitutional Principles*

- The draft white paper proposes that the constitutional protection afforded to the independent regulation of broadcasting in s192 of the Constitution should expand to include AAVCS as a whole and not just the subset of broadcasting services.

##### *Cultural and National Interests*

- The identity and multi-cultural nature of South Africa remain the core of broadcasting and the wider audio and audiovisual content environment, albeit the regulatory policy toolkit used to achieve this will need an update to deal with the challenges posed by online AAVCS.

##### *Public Service Programming*

- Primary mandate for public service broadcasting will remain with the SABC, but public service broadcasting programming of local significance will be the responsibility of community broadcasting licensees.
- The draft white paper proposes amending the current regulatory licensing framework to allow non-governmental organisations (non-profit) that want to provide public service programming channels that focus specifically on education or health matters the opportunity to apply for AAVCS licences. To

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ensure that these NGOs do not undermine the sustainability of traditional public and community broadcasters their funding model mix will not include advertising revenue.

#### *Must Carry and Findability*

- Must carry rules have achieved their intended objective, but going forward they may distort competition. Accordingly, the draft white paper proposes amending legislation to remove must carry regulation and amending the legislation governing the public broadcaster to reflect that the SABC may negotiate retransmission consent agreements on commercial terms. With the proviso that in South Africa the retransmission consent agreements for audiovisual content broadcast free-to-air terrestrially by the public broadcaster may not be exclusive to a single subscription audiovisual content service.
- The draft white paper proposes that the regulator conduct a public inquiry to determine a regulatory framework for rules ensuring the findability or 'discoverability' of public interest content on all audio and audiovisual content service platforms.

#### *South African Content*

- The high audience and revenue performance of South African drama and music content is evidence that the South Africa content quotas have been successful in stimulating demand for South African content. South African content quotas should remain in place for broadcasting services, however the current approach of specifying minimum percentage of total broadcasting time does not work in an AAVCS environment. The review should consider applying rules in a graduated manner distinguishing between linear and non-linear individual and class licensees and whether the service is public, commercial or community/non-profit in nature.

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- In respect of OCS targeting South African audiences their video libraries should also have South African content requirement. The draft white paper proposes that this be set by the regulator in a graduated manner considering the nature of the service to a maximum of 30% of the video catalogue available in South Africa.

#### *Access to events and sports of national interest*

- There are legislative mechanisms in place to ensure that national sporting events which are identified as being in the public interest are aired free-to-air and not only over subscription services. Recent events suggest that the regulator struggles with determining which events should be on the list. The draft white paper proposes amending the legislation to include criteria to guide the regulator in determining regulations.
- The draft white paper proposes the listing of national sporting events which are in the public interest should apply in legislation not just to broadcasting, but also to the broader AAVCS market to ensure the public continues to enjoy free-to-air and free-to-view access to listed events.
- To ensure fair competition the draft white paper proposes that sports broadcasting rights of listed events must be granted after an open, transparent and non-discriminatory bidding process and for a period of no longer than 5 years to allow the AAVCS provider a reasonable time to recoup investment in the rights.
- In addition to sport, the draft white paper proposes that the listing of events in legislation will also include events of major public importance or cultural significance e.g. presidential inaugurations or state funerals.

#### *Protection of Children and Consumers*

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- The protection of children and consumers is a key guiding principle in the regulation of AAVCS. The draft white paper proposes that the current instruments used to promote the protection of children and consumers in respect of broadcasting services needs a review so that the Codes of Conduct are inclusive of all AAVCS.

#### *Advertising*

- There is a regulatory imbalance between the regulation of advertising on broadcasting platforms and online. The draft white paper proposes that the legislative framework for advertising standards needs to apply to all AAVCS.
- In respect of protecting children, the draft white paper proposes that the regulator must in respect of the scheduling of adverts make regulations for all AAVCS licensees on the advertising of alcoholic beverages and harmful foods that are high in salt, sugars, fat, saturated fats or trans-fatty acids or that otherwise do not fit national or international nutritional guidelines.
- The current legislative approach to political election broadcasts and political advertising on traditional broadcasting platforms has been effective, but a review of the legislation is necessary to include provisions on online political advertising to ensure that it is done in a fair and non-discriminatory manner with the proper disclosures.

#### *Restriction on advertising placed on subscription broadcasting services*

- The draft white paper proposes that section 60(4) of the ECA which focuses on traditional television should fall away as it has become incapable of achieving its purpose in the current marketplace. In its place, legislation should require the regulator to hold an inquiry into whether the current share of advertising

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revenue by subscription services is appropriate and what the impact of online advertising will be on the TV advertising market in the short and long term. If it is detrimental to the survival and viability of free-to-air services, the regulator must make regulations to protect the sustainability and viability of free-to-air services in South Africa taking into consideration the expansion of the regulatory licensing framework to include all AAVCS.

#### *Access to AAVCS by persons with disabilities*

- The existing legal provisions on accessibility obligations for public service broadcasters and commercial broadcasters need to apply to all AAVCS.
- The regulator must provide annual reports and studies/research on the specific obligations of AAVCS to address access by persons with disabilities.
- The draft white paper proposes that the Digital Development Fund must grant funding for accessibility services.

#### *Copyright and Intellectual Property*

- Piracy is damaging the South African creative industries and the economic contribution of sport events.
- The draft white paper proposes that legislation impose requirements on ISPs to co-operate with rights-holders and government to police illegal file-sharing or streaming websites.
- The draft white paper further proposes that legislative and regulatory mechanisms to strengthen protection against signal piracy must be introduced in the Electronic Communications and Transactions Act and there should be co-operation between government departments to ensure that statutory

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prohibitions against piracy and circumvention of technological protection measures are regularly reviewed to ensure they remain effective against the evolving technology solutions employed by persons engaging in the piracy of South African AAVCS.

## **6. SUPPORT OF DOMESTIC AUDIO AND AUDIOVISUAL PRODUCTION AND CREATIVE INDUSTRIES SECTOR**

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### **6.1 CONTENT FUNDING MECHANISMS AND INSTITUTIONS**

6.1.1 The funding and support for South African audiovisual content is a key success factor for the new policy framework. In the multichannel, multiplatform environment, there will be a need for increasing amounts of content, in particular television content.

6.1.2 There are numerous Ministries, Departments and national public entities that are involved in the development and funding of the audiovisual content industry. This has resulted in numerous policy documents originating from within the various Ministries all having a direct bearing on the industry.

#### **6.1.3 National Film and Video Foundation**

6.1.3.1 The NFVF is a statutory body mandated by parliament to spearhead the development of the South African film and video industry.

6.1.3.2 The NFVF helps the industry access funds, promotes the development of South African film and television audiences, develops talent and skills in the country – with a special emphasis on previously disadvantaged groups and helps filmmakers represent and market their work internationally.

6.1.3.3 The NFVF offers funding for the production of films and documentaries through repayable loans or grants. It supports South African-owned production companies, and prioritises projects or organisations

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6.1.3.4 It also funds education and training through various bursaries; awards development funding; and supports applications for marketing and distribution funds, allowing independent producers and distributors access to test screenings and film launches.

6.1.3.5 The NFVF's Sediba Skills Development Initiative also supports, nurtures and develops South African writing talent and aims to provide the industry with a script development and editors programme.

#### 6.1.4 Industrial Development Corporation

6.1.4.1 A state-owned development financing institution, the IDC seeks to create a sustainable film industry in which skills transfer to people from groups disadvantaged under apartheid and "homegrown" films are made and watched by South Africans.

6.1.4.2 The IDC's Media and Motion Pictures Strategic Business Unit funds film, broadcasting and post-production projects. Assistance is usually in the form of loan finance. Its minimum participation is R1 million and no more than 49% of a project.

#### 6.1.5 Department of Trade and Industry (DTI)

6.1.5.1 The DTI offers industry-specific incentives to encourage local content generation as well as attract international productions and post-production industry. The incentives consist of:

- The Foreign Film and Television Production and Post-Production Incentive to attract foreign-based film productions to shoot on location in South Africa and conduct post-production activities, and

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- The South African Film and Television Production and Co-Production incentive, which aims to assist local film producers in the production of local content.
- The South African Emerging Black Filmmakers incentive, a sub-programme of the South African Film and Television Production and Co-production Incentive, which aims to assist local emerging black filmmakers to nurture and grow them to take up big productions and thus contribute towards employment creation.

#### **6.1.6 South African Revenue Service Tax incentives**

6.1.6.1 The South African Revenue Service (SARS), through Section 120 of the Income Tax Act 2012, provides for incentive in the form of a tax allowance to stimulate the film production. To qualify for the tax allowance, taxpayers must meet the following criteria:

- Income must be derived from a film
- The film must be approved as a local film or co-production
- Income must be allocable to the initial investors
- Income must be derived from exploitation of rights
- Income must fall within a 10-year period

#### **6.1.7 National Lotteries Distribution Trust Fund**

6.1.7.1 The Distributing Agency for Arts, Culture, Environment and National Heritage, established in terms of the Lotteries Act (No. 57 of 1997), the National Lotteries Distribution Trust Fund (NLDTF) considers applications for funding from the proceeds of the National Lottery through targeted calls made periodically to cultural organisations across all genres.

6.1.7.2 The NLDTF encourages the development and production of new, original work with a strong South African cultural flavour, including but not limited to music, dance, literature, film, visual arts, craft, theatre, etc. Funding is available to organisations involved in the production of films and documentaries with distinctive traditional stories and practices.

#### 6.1.8 Media Development and Diversity Agency

6.1.8.1 The Media Development and Diversity Agency (MDDA) was set up by an Act of Parliament (Act 14 of 2002) to create an enabling environment for media development and diversity which reflects the needs and aspirations of all South Africans.

6.1.8.2 The MDDA's objectives are also to:

- Redress exclusion and marginalisation of disadvantaged communities and persons from access to the media and the media industry.
- Promote media development and diversity by providing support primarily to community and small commercial media projects.
- Encourage ownership and control of, and access to, media by historically disadvantaged communities as well as by historically diminished indigenous language and cultural groups.
- Encourage the development of human resources and training, and capacity building, within the media industry, especially amongst historically disadvantaged groups.
- Encourage the channelling of resources to the community media and small commercial media sectors.
- Raise public awareness concerning media development and diversity issues.

## 6.1.9 Regional film commissions

- 6.1.9.1 Several regional and local film bodies have been set up over the past decade to market their regions. The Cape Film Commission, Gauteng Film Commission, Durban Film Office and Cape Town Film Permit Office seek to create an enabling environment for filmmakers while also undertaking location marketing.

## 6.2 CONSOLIDATION AND ALIGNMENT

- 6.2.1 A national policy and institutional review needs to assess not only policy alignment but also the optimal institutional alignment of key entities involved in the industry. Greater coordination among strategic industry partners is critical. A clearly defined institutional framework for the coordination and management of the funding audiovisual content nationally as well as provincially is required.

### SUMMARY OF KEY DRAFT POLICY PROPOSALS

#### *Content funding mechanism and institutions*

- There are numerous Ministries, Departments and national public entities that are involved in the development and funding of the audiovisual content industry, resulting in a confusing mess that creatives and aspirant independent producers have to navigate through to find funding for their projects. The draft white paper proposes that there be a national policy and institutional review to ensure that an institutional framework that supports the optimum funding of audiovisual content at national, provincial and local level in South Africa is put in place to reduce this confusion and stimulate the 4IR.

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## **7. OWNERSHIP, PLURALITY, COMPETITION AND INVESTMENT**

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*“It is generally agreed that in order for our economy to grow at a rate that will lead to job creation on a meaningful scale, we need to significantly increase levels of investment.*

*We are decisively and rapidly accelerating the implementation of key economic reforms that will unlock greater investment in important growth sectors”*

President Cyril Ramaphosa, 21 September 2018

### **7.1 REFORM OF BROADCASTING OWNERSHIP LIMITATIONS IN THE ECA**

- 7.1.1 Since the enactment of the IBA Act in 1993, diversity of content, audience and ownership are key principles underpinning the policy and legislative framework of South Africa’s broadcasting industry. These principles have been translated into regulatory provisions in the ECA and are also echoed in the NDP and the National Integrated ICT White Paper.
- 7.1.2 However, the statutory limitations have not been changed for 25 years despite many recommendations from regulatory and other policy processes initiated by the Department of Communications and Digital Technologies (DCDT) and ICASA respectively.
- 7.1.3 Currently the ECA imposes limitations on the number of commercial radio and television broadcasting services that an entity can control, as well as limitations on foreign ownership and cross-media control respectively. These provisions were developed in 1993 and implemented primarily within the context of a predominantly single channel analogue broadcast environment.
- 7.1.4 As set out in detail in Chapter 3, the ongoing advancements in technology have had a significant impact on the broadcasting market with the

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introduction of new AAVCS as well as the development of new content distribution platforms.

7.1.5 While these developments have necessitated the re-evaluation of the current ownership limitations, media diversity continues to be essential for the enjoyment of the constitutional rights of access to information and freedom of expression. The need to continue protecting diversity in the changing media landscape has also been reaffirmed by the European Court of Human Rights<sup>36</sup>.

#### 7.1.6 International best practice

7.1.6.1 Against this background, numerous jurisdictions have begun reviewing their ownership limitations to assess their relevance and effectiveness in a converged audiovisual media and content environment. In assessing these laws and regulations authorities have taken note of the increasing amount of AAVCS and the diminishing impact of spectrum scarcity on the availability of these new distribution platforms. Furthermore, traditional broadcasting companies are facing increasing competition from the non-linear on-demand audiovisual content services which are often multinational companies operating on more integrated business models. In response, regulatory authorities have begun relaxing ownership restrictions and, in some cases, abolishing them altogether.<sup>37</sup>

7.1.6.2 In the United Kingdom, there has been a relaxation of cross-media restrictions on ownership of local broadcasters, and removal of restrictions on media ownership by non-EU persons. The emphasis now is on the need to clearly distinguish between competition and plurality policy, with transactions assessed on

both grounds where relevant, in a way which keeps competition and plurality apart.

7.1.6.3 In United States of America, the Federal Communications Commission (FCC) reviews its media ownership rules every 4 years to determine whether they are still in the public interest. The limitation on the number of commercial radio stations that a single entity can own together with the cross-media ownership rules has been removed. The number of local commercial television stations that a corporation can own has also increased. However, the FCC has maintained its disposition not to relax the 25% limit on foreign investment in US broadcast companies, however, this is pending further deliberation.

7.1.6.4 Australia's foreign ownership limitations in respect of the control of commercial and subscription television services were removed in 2006. The Australian Communications and Media Authority is required to establish and maintain a register of controlled media groups identifying the control and ownership of media groups.

7.1.6.5 In New Zealand the restrictions on foreign ownership have been repealed and media ownership, including cross media ownership is now governed solely through competition law.

#### 7.1.7 **Developments in South Africa**

7.1.7.1 Turning to South Africa, in 2004 and 2011 ICASA has previously conducted consultations on the continued relevance of the current statutory restrictions. Many submissions emphasized the need to amend the legislative provisions, as they are no longer appropriate for a multichannel digital audio and audiovisual content industry. Some responses have also highlighted that the

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current restrictions have had a detrimental impact on the growth of the industry which continues to have insurmountable barriers to entry, particularly for SMME's.

- 7.1.7.2 The ownership limitations were developed in 1993 to promote the diversity of the new post-apartheid broadcasting industry. New commercial television and sound broadcasting licenses were issued in the mid-90s and the ownership limitations guided ICASA in this regard. In 1994 there was only one licensed commercial radio station and one commercial television broadcaster. Noting that the strongest media companies at the time were the print media companies and that foreign entities were in a better position to acquire many of the new licenses, led to the design of ownership limitations aimed at ensuring the emergence of a diverse, black owned and controlled South African commercial broadcasting industry.
- 7.1.7.3 Today the landscape has changed given the increased number of other commercial broadcasting entities which exist. The draft white paper indicates that the 1993 limitations have served their purpose and the sector should become more enabling to encourage local and foreign investment. This will in turn grow and further develop the sector and create new opportunities in the industry.
- 7.1.7.4 The Competition Commission is well placed, from a merger control point of view, to ensure anti-competitive issues are addressed.
- 7.1.7.5 Economic transformation remains a key policy priority of South Africa. The promulgation of the Broad Based Black Economic Empowerment Act 53 of 2003, as amended, read together with

the Codes of Good Practice have introduced additional measures to promote ownership by specific categories of black people including black women, black youth and black people living with disabilities. The BBBEE Act requires all public entities to apply the relevant sector code of good practice in determining the qualification criteria for the issuing of licences, or other authorisations in respect of economic activity in terms of any law<sup>38</sup>, including the ECA.

#### **7.1.8 Proposals on ownership limitations in AAVCS market**

- 7.1.8.1 The draft white paper recommends the removal of all limitations on the ownership and control of commercial sound and television broadcasting licensees, including the obsolete distinction between AM and FM licenses and the other numerical restrictions which are currently applicable to commercial sound and television broadcasting services.
- 7.1.8.2 Given the developments of the last 25 years, where print media companies are no longer by default the largest media companies, there has been a proliferation of on-demand content services and access to online news has multiplied tenfold, the cross-media ownership limitations are also obsolete. Therefore, the draft white paper also recommends their removal.
- 7.1.8.3 The multichannel digital environment requires the adoption of different regulatory tools to address concerns regarding economic concentration and abuse of dominance. This draft white paper recommends that the guiding principles and provisions of competition law, together with the content regulation and other license conditions apply to ensure plurality of voices and diversity of programming in the public interest. This will effectively require

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the Competition Commission to continue to exercise concurrent jurisdiction with ICASA in addressing concerns of market concentration and media plurality.

- 7.1.8.4 Both regulatory authorities will have to align their efforts in recognition of the shared responsibility of approval of mergers and acquisitions concerning the impact thereof on fair competition and assessing whether they serve the public interest of media plurality. This will require increased coordination and consultation to ensure alignment between the decisions and conditions attached to approvals by ICASA and the Competition Commission.

## **7.2 LIMITATIONS ON FOREIGN CONTROL OF COMMERCIAL BROADCASTING OWNERSHIP<sup>39</sup>**

- 7.2.1 The current legislative framework prohibits a foreigner from exercising control over a commercial broadcasting licensee, by limiting financial interest, interest in voting shares or paid up capital to a maximum of 20%. Similarly, not more than 20% of the directors of a commercial broadcasting licensee may be foreigners.
- 7.2.2 The regulatory environment for foreign direct investment is one of the key factors which are likely to influence the location decisions of foreign investors.<sup>40</sup> Cross-border direct investment is beneficial when considering its impact on employment, productivity, growth, prospects for stronger integration with international regional and markets as well as the transfer of skills and technology. This draft white paper therefore seeks to create an enabling policy environment for increased foreign direct investment, as a stimulus to the growth and development of the ICT sector as a whole.

- 7.2.3 The draft white paper proposes retaining the limitations in respect of foreign ownership of linear individual audiovisual content services (broadcasting services) subject to them increasing to a maximum of 49% to stimulate investment.

### 7.3 FOREIGNERS FROM AFRICAN UNION COUNTRIES

- 7.3.1 South Africa has recently signed the African Continental Free Trade Agreement. This Agreement seeks to foster greater economic integration through the creation of a single continental market for goods and services, with free movement of business persons and investments. Furthermore, the Agreement seeks to expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation in line with the African Union Agenda 2063. This Agreement will cover a market of 1.2 billion people and a gross domestic product (GDP) of over \$2.5 trillion, across all 55 member states of the African Union.
- 7.3.2 To support South Africa's commitment and to promote investment in a reciprocal manner in the African Union, it is recommended that a foreign person or persons from an African Union member country be able to, whether directly or indirectly, exercise control over a commercial broadcasting licensee; or have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding forty-nine (49) percent: Provided this must be subject to a reciprocal agreement between South Africa and the relevant African Union country.
- 7.3.3 This will also enable greater access to the South African market.<sup>41</sup> Prospective investors seeking to benefit from these provisions will need to provide information and supporting documentation regarding the source of the investment funds to determine whether the transaction falls within the scope of the proposed policy framework.

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- 7.3.4 The effectiveness of the recommendations is dependent on rigorous enforcement through compliance monitoring by the ICASA, and review of the market definitions at least every four years. It is also imperative to develop the limitations through consultations with other government departments including the Department of Trade and Industry, the Department of International Relations and Cooperation and National Treasury to ensure that the legislative provisions support the government's commitments in terms of the international agreements and national policy on foreign direct investment.

#### SUMMARY OF KEY DRAFT POLICY PROPOSALS

##### *Ownership Limitations*

- The draft white paper proposes that due to the changing nature of the AAVCS market in South Africa since ownership limitations were put in place two decades ago that there be a complete removal of all limitations on the ownership and control of commercial sound and television broadcasting licensees, including the obsolete distinction between AM and FM licenses and the other numerical restrictions which are currently applicable to commercial sound and television broadcasting services.
- In place of the current rigid and inflexible mechanism dealing with limitations on ownership there should be a flexible approach by the competition authority and the sector regulator who have a shared responsibility for approval of mergers and acquisitions. Both regulators should take into consideration the impact of mergers and acquisition in the AAVCS market on fair competition and assessing whether they serve the public interest of media plurality.

##### *Foreign Control of Broadcasting Services*

- In the interests of promoting foreign investment and growing the sector, the draft white paper proposes the amendment of legislation to empower the

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regulator to consider allowing foreign ownership of linear individual audiovisual content services (broadcasting services) to a maximum of 49% to stimulate investment.

- In the case of foreigners from AU member countries, this maximum of 49% may be waived so long as there is a reciprocal agreement between South Africa and the relevant AU country.

## 8. DEVELOPING HUMAN CAPITAL, DIGITAL SKILLS AND DIGITAL MEDIA LITERACY

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*“The Fourth Industrial Revolution does not just disrupt employment, it creates a shortfall of newly required skills. Therefore, we are facing a global talent crisis. We need a new mindset and a true revolution to adapt our educational systems to the education needed for the future workforce.”*

Klaus Schwab, Executive Chairman, World Economic Forum

### 8.1 HUMAN CAPITAL AND DIGITAL SKILLS DEVELOPMENT

8.1.1 Human Capital is *“the knowledge and skills people possess that enable them to create value in a global economic system.”*<sup>42</sup> Failure to properly encourage and grow talent is depriving people of the opportunity to gain access to skilled work and is strengthening inequality in the marketplace. World Economic Forum identifies three interconnected elements that need to be considered:

- Firstly, globalisation and digital technological disruption are changing business models in all sectors and by 2020 predictions are as much as third of the skillsets required to perform current jobs will be totally different;
- Secondly, education and training has largely remained the same over the decades and are woefully underprepared to cater for these new job skills. Studies suggest that as much as 65% of children entering primary education today will be applying for jobs which do not currently exist and for which their education will have failed to prepare them for. Increasing the potential for skills gaps and unemployment in the future; and
- Thirdly, there are still stumbling blocks based on gender so that despite higher levels of education woman are still under-represented and underpaid in the job place.<sup>43</sup>

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- 8.1.2 A key learning from two of these elements is that labour in the AAVCS sector is going to have to continuously reskill and adapt their careers to deal with digital disruption and 4IR. Current adult education systems in the workplace do not aim to continuously reskill or upskill the entire staff complement. There is going to have to be an improved human capacity and skills development training programme in the sector to allow staff and their employers to chart a course through the unknown waters of the new Industrial revolution impacting this sector. There also needs to be training of people who are not currently in the workforce so that can take advantage of the new job opportunities offered by 4IR to ensure that there is inclusion and not a continuation of the current inequalities.<sup>44</sup>
- 8.1.3 The development and promotion of a skills system geared towards supporting the digital media economy must be prioritised. In this regard, the government will work with key skills partners across the spectrum to develop skills in the areas of television, film, animation, games, radio, advertising, app development and marketing communications. These partners will support and invest in the workforce to keep content relevant and the creative industries competitive so that they can compete globally.
- 8.1.4 Government is committed to increasing equal economic and social opportunities for all as the economy is becoming more digital. The draft white paper proposes that Government must strengthen the co-operation and collaboration amongst stakeholders from government, business, civil society organisations, researchers, universities and regulatory authorities to work together on initiatives and actions to develop human capital to meet the existing and future needs for 4IR and to help SMMEs increase productivity and reach new markets by using the audiovisual content demand and supply sides.

- 8.1.5 Women, youth, rural and poor urban communities, persons with disabilities, the illiterate and other vulnerable groups will need particular attention from an empowerment perspective. To promote job quality and address skill needs, they will need education and vocational job training.

## 8.2 DIGITAL MEDIA LITERACY

- 8.2.1 The draft white paper proposes that Government must support the establishment, definition and actions that must contribute to the development of digital media literacy in South Africa. Currently media literacy is situated at the intersection of various policy and regulatory entities and requires a collaborative and targeted approach to better meet the needs and interests of children, young people and adults. In this way the policy intentions and actions will be as close as possible in aligning and streamlining the media literacy policy.
- 8.2.2 The draft white paper proposes that the regulator must focus on media literacy, set the goals and trends in the field of media literacy, analyse and define good practices, develop concrete action plans and strategic vision, report on the levels of media literacy and promote proposals for measures in this area for a more competitive audiovisual and content industry and an inclusive 4IR.
- 8.2.3 The draft white paper acknowledges various regulatory initiatives around digital media literacy and recommends amending legislation to confer the powers and responsibility for promotion of digital media literacy on the regulator, to help inform debates about digital media literacy.
- 8.2.4 To promote a unified approach to digital media literacy, at the Policy or Governmental level, an inter-ministerial committee to be coordinated/chaired by Ministers responsible for audiovisual content, education and digital development funds must fulfil the media literacy

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through the co-ordination and publication of annual Media Literacy research reports into adults' and children/parents' media use and attitudes, to provide detailed evidence about media use, attitudes and understanding among adults and children and young people, promote the importance of media literacy skills, support policies that strengthen media literacy in the population, and encourage greater understanding of the social media works, the impacts of media use and content.

- 8.2.5 The draft white paper proposes that a digital media annual research and report must be funded from the Digital Development Fund and the findings of the research must be shared widely with media (broadcasting, digital, print, games, community media), education (formal and informal, primary, secondary, tertiary), commercial (e.g. companies and organisations who depend on digital transactions), digital Intermediaries (social networks, search engines), civil society (foundations, community groups and networks, special interest groups, unions), regulators, academia and the experts and research community.

#### **SUMMARY OF KEY DRAFT POLICY PROPOSALS**

##### *Human Capital and Skills Development*

- Government will work with key skills partners across the spectrum to develop a skills system geared towards supporting the digital media economy and to develop human capital to meet the existing and future needs for 4IR and to help SMMEs increase productivity and reach new markets.

##### *Digital Media Literacy*

- Legislation must require the regulator to promote digital media literacy.

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- To promote a unified approach to digital media literacy an inter-ministerial committee should be put in place to develop policies that strengthen digital media literacy and co-ordinate the publication of annual digital media literacy research.
- The annual digital media research to be funded from the Digital Development Fund.

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## END NOTES

<sup>1</sup> The term “audio broadcasting” replaces the current term in legislation of “sound broadcasting” to reflect the policy change to an audio and audiovisual content service sector.

<sup>2</sup> South Africa. National Development Plan 2030 – Our Future – make it work. National Planning Commission (The Presidency). p464

<sup>3</sup> South Africa. National Development Plan 2030 – Our Future – make it work. National Planning Commission (The Presidency), page 464

<sup>4</sup> South Africa. National Development Plan 2030 – Our Future – make it work. National Planning Commission (The Presidency), page190

<sup>5</sup> South Africa. 2016. National Integrated ICT Policy White Paper. Department of Telecommunications and Postal Services. p.10

<sup>6</sup> South Africa. 2016. National Integrated ICT Policy White Paper. Department of Telecommunications and Postal Services. p.2

<sup>7</sup> South Africa. 2016. National Integrated ICT Policy White Paper. Department of Telecommunications and Postal Services. p.2

<sup>8</sup> ICASA Position Paper in relation to Internet Protocol Television (IPTV) and Video on Demand (VOD) Services General Notice770 of 2010, GG33436, 3 August 2010

<sup>9</sup> This section of the White Paper is indebted to the Council of Europe’s general approach on amending AVMSD on 24 May 2017 as set out in Cabrera Blázquez F.J., Cappello M., Fontaine G., Rabie I., Valais S., *The legal framework for video-sharing platforms*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2018 pages 111-122

<sup>10</sup>[https://www.itu.int/en/ITU-D/Regional-Presence/Europe/Documents/Events/2015/05\\_Spectrum%20Management%20and%20Transition%20to%20Digital%20Terrestrial%20Television%20Broadcasting/Session%20Ilham%20GE06%20Requirements%20on%20the%20ASO.pdf](https://www.itu.int/en/ITU-D/Regional-Presence/Europe/Documents/Events/2015/05_Spectrum%20Management%20and%20Transition%20to%20Digital%20Terrestrial%20Television%20Broadcasting/Session%20Ilham%20GE06%20Requirements%20on%20the%20ASO.pdf)

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<sup>11</sup> <https://www.icasa.org.za/news/2019/kwese-free-tv-is-the-successful-applicant-to-provide-free-to-air-television-services-in-south-africa>

<sup>12</sup> Department of Communications, Second Digital Dividend: Final Report and Implementation Plan, by Deloitte, May 2013

<sup>13</sup> Department of Communications, Second Digital Dividend: Final Report and Implementation Plan, by Deloitte, May 2013

<sup>14</sup> Tracey, M. (1998) *The Decline and Fall of Public Service Broadcasting*. Oxford: Oxford University Press.

<sup>15</sup> Department of Communications. 2019. Rapporteur Report: South African Public Broadcasting Policy Review Colloquium. Held at Gallagher Estate, Midrand 6-7 September 2018.

<sup>16</sup> 17 October 2017

<sup>17</sup> Parliament of the Republic of South Africa (2007). Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa. (hereinafter "the Asmal Report")

<sup>18</sup> The Asmal Report, page 190

<sup>19</sup> Asmal Report page 194

<sup>20</sup> Banerjee, I. & Seneviratne, K. (eds.) 2005. *Public Service Broadcasting: A Best Practice Handbook*. UNESCO. p.16

<sup>21</sup> Section 2(s) of the ECA, No. 36 of 2005

<sup>22</sup> European Audiovisual Observatory, 2005. To have or not to have - Must Carry Rules. European Audiovisual Observatory, Strasbourg (France)

<sup>23</sup> European Audiovisual Observatory, 2005. To have or not to have - Must Carry Rules. European Audiovisual Observatory, Strasbourg (France)

<sup>24</sup> Section 8(a) of the Broadcasting Act, 1999

<sup>25</sup> Section 6(5)(a)(v) of the Broadcasting Act, 1999

<sup>26</sup> Department of Communications, 'White Paper on Broadcasting Policy', 4 June 1998, Section 1.3.3: Public Interest

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<sup>27</sup><https://ec.europa.eu/digital-single-market/en/policies/audiovisual-media-services>;  
<https://ec.europa.eu/digital-single-market/en/news/european-parliament-approves-revised-rules-audiovisual-media-across-europe>

<sup>28</sup> European Audiovisual Observatory. 2016. *Audiovisual sports rights – between exclusivity and right to information*. IRIS Plus 2016-2, European Audiovisual Observatory, Strasborg. p.38 and *European Commission, Working Document CC TVSF (97) 9/3*, Implementation of Article 3A of Directive 89/552/EEC, as modified by Directive 97/36/EC. Evaluation of National Measures

<sup>29</sup> *Review of free-to-air listed events*. Report of the Independent Advisory Panel, November 2009, para 124, quoted on page 9 of Briefing Paper Number 802, Listed Sporting Events, 3 October 2018, House of Commons Library, UK

<sup>30</sup> Section 60(1) and (2) of the ECA, No 36 of 2005

<sup>31</sup> Pursuant to section 54 of the ECA

<sup>32</sup> 65 of 1996

<sup>33</sup> 25 of 2002, as amended

<sup>34</sup> PWC Entertainment and Media Outlook 2018

<sup>35</sup> <http://venturesafrica.com/the-world-cup-was-great-for-our-economy-south-african-sports-minister/> , accessed on 8 August 2017

<sup>36</sup> European Audiovisual Observatory, 2016 Media ownership market realities and regulatory responses

<sup>37</sup> Ibid

<sup>38</sup> BBBEE Act, section 10

<sup>39</sup> These recommendations have drawn on the public consultations on the Green Paper, p68.

<sup>40</sup> National Treasury, 2011 A review framework for cross-border direct investment in South Africa

<sup>41</sup> ICASA. 2004. Review of Ownership and Control of broadcasting services and existing commercial sound broadcasting licenses, page 12

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<sup>42</sup> Harrington, S. "We need a revolution in education and skills if humans are to thrive in the future economy, says World Economic Forum". [Accessed 17 October 2018] <https://www.thepeoplespace.com/ideas/articles/we-need-revolution-education-and-skills-if-humans-are-thrive-future-economy-says>

<sup>43</sup> World Economic Forum. 2017. Realising Human Potential in the Fourth Industrial Revolution: An Agenda for Leader to Shape the Future of Education. Geneva: World Economic Forum. p.5

<sup>44</sup> World Economic Forum. 2017. Realising Human Potential in the Fourth Industrial Revolution: An Agenda for Leader to Shape the Future of Education. Geneva: World Economic Forum. p.9





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