

PORTFOLIO COMMITTEE ON COMMUNICATIONS

**Presentation by the Department on the objectives of the
Draft Audio and Draft White Paper on Audio and
Audiovisual Content Services Policy Framework and its
implications on the public broadcaster**

25 NOVEMBER 2020

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INTRODUCTION AND CONTEXT TO THE NEW POLICY FRAMEWORK

- ❑ The rapid and unprecedented changes occurring both in society and communications have brought a period of volatility, complexity and 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 audio-visual content.
- ❑ In the last 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 4th Industrial Revolution (4IR).
- ❑ The 4IR has already begun disrupting society, business models and traditional ways of distributing goods and services through digitization, the Internet of Things (IoT), cloud computing and storage, artificial intelligence (AI), robotics and advances in nanotech and bio-tech.

INTRODUCTION AND THE CONTEXT TO THE NEW POLICY FRAMEWORK

- ❑ These changes require policy interventions to ensure that the disruptions and changes will not reinforce current disparities in access in South African to information communication technology (ICT) and services and widen the digital divide.
- ❑ Policy and regulatory intervention since 1993
 - ❑ Independent Broadcasting Authority Act (IBA Act) 1993
 - ❑ Broadcasting Act, 1999
 - ❑ Independent Communications Authority Act of South Africa Act (ICASA Act), 2000 and;
 - ❑ the Electronic Communications Act (ECA), 2005
- ❑ These 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”

INTRODUCTION AND THE CONTEXT TO THE NEW POLICY FRAMEWORK

- ❑ It was only 2008 with the BDM that created a major turning point in the development of the entire broadcaster sector.
- ❑ However, its limitations was lacking provisions on what happens Analogue Switch-Off (ASO) and the digital Audio-Visual environment.
- ❑ The 2015 ICT Policy review brought with it the entire overhaul of the entire telecommunications industry inclusive of the broadcasting landscape which was later termed “Audio and Audio-visual Services”.
- ❑ Out of this process key recommendations were made for a new South African policy on broadcasting and new broadcasting-like services.
- ❑ Thus, views articulated in this draft white paper have been drawn on recommendations made in the ICT Policy Review Report.

RATIONALE FOR THE POLICY REVIEW

- ❑ The proposed policy changes in this draft white paper will align South Africa’s policy, legislative and regulatory framework with the 4IR.
- ❑ The 2015 ICT Policy review brought with it the entire overhaul of the entire telecommunications industry inclusive of the broadcasting landscape which was later termed “Audio and Audio-visual to promote investment in the audio and audiovisual content industries, repositioning the industry for further growth, and encourage investment, capital, infrastructure and skills development.
- ❑ to modernize the South African broadcasting landscape

RATIONALE FOR THE POLICY REVIEW

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

RATIONALE FOR THE POLICY REVIEW

- 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
 - ❖ Freedom of expression
 - ❖ Values
 - ❖ 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
 - ❖ Consumer protection

□ 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, On-demand Content Services (OCS) and Video Sharing Platform Services (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 continues to remain relevant as a tool for the regulator to determine the level of public interest obligations that apply to the AAVCS licensee.

❑ Proposed new licence framework

- In addition to the usual criteria applied to determine if a licensee requires an Individual or a Class licence thresholds based on annual turnover 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.
- Legislation already provides for the regulator to take pervasiveness and influence into consideration under the concept of significant socio-economic 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.

LICENCE FRAMEWORK AND THRESHOLDS FOR AUDIO AND AUDIOVISUAL CONTENT SERVICES

❑ *Individual licence*

- 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

LICENCE FRAMEWORK AND THRESHOLDS FOR AUDIO AND AUDIOVISUAL CONTENT SERVICES

❑ **Individual licence**

- 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.
- 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 Electronic Communications Network Service (ECNS) should be issued of the 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.

❑ *Radio frequency spectrum licence and spectrum issues*

- 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.
- A key characteristic of Community Television is that it is local and is 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 470-694Mz band.

❑ *Radio frequency spectrum licence and spectrum issues*

- 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 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.

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

□ SUMMARY OF KEY DRAFT POLICY PROPOSALS

❖ *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.

□ SUMMARY OF KEY DRAFT POLICY PROPOSALS

❖ *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.
- 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.

□ SUMMARY OF KEY DRAFT POLICY PROPOSALS

❖ *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.
- To ensure fair competition the draft white paper proposes:
 - ✓ amending the legislation to include criteria to guide the regulator in determining regulations.
 - ✓ the listing of events in legislation will also include events of major public importance or cultural significance e.g. presidential inaugurations or state funerals.
 - ✓ 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.
 - ✓ 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.

CONTENT REGULATION OF AUDIO AND AUDIOVISUAL CONTENT SERVICES

❑ SUMMARY OF KEY DRAFT POLICY PROPOSALS

❖ *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.

❖ *Protection of Children and Consumers*

- 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 d so that the Codes of Conduct are inclusive of all AAVCS.

❑ **SUMMARY OF KEY DRAFT POLICY PROPOSALS**

❖ **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.

❑ **SUMMARY OF KEY DRAFT POLICY PROPOSALS**

❖ ***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 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.

□ SUMMARY OF KEY DRAFT POLICY PROPOSALS

❖ *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 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.

SUPPORT OF DOMESTIC AUDIO AND AUDIOVISUAL PRODUCTION AND CREATIVE INDUSTRIES SECTOR

□ 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.

SUPPORT OF DOMESTIC AUDIO AND AUDIOVISUAL PRODUCTION AND CREATIVE INDUSTRIES SECTOR

□ *SUMMARY OF KEY DRAFT POLICY PROPOSALS*

❖ *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 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.

❑ ***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.
- 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.

IMPLICATIONS ON THE PUBLIC BROADCASTER

□ **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 audiovisual content services 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 inceptions.
- ❖ This division will fall away, and the focus will be 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 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.

IMPLICATIONS ON THE PUBLIC BROADCASTER

❑ *Proposed new licence framework*

- ❖ 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”.

THANK YOU