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The Acting Director
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Dear Sirs

Response to Draft White Paper on Audio and Audiovisual Content Services Policy Framework (*Gazette* 43797 of 9 October 2020)

AME Ltd ("AME") is pleased to participate in this consultation. AME has several interests in the broadcasting and media sectors in South Africa.

The broadcasting sector in South Africa has matured considerably since the days of the Triple Inquiry Report and the 1998 White Paper on Broadcasting Policy. It is time for a new era in broadcasting and this Draft White Paper is therefore very welcome.

Policies in general are less rigid and more aspirational than legislation, but no less vital to creating a well-founded structure in regulatory terms. It is therefore important that form as well as substance is carefully considered and crafted. In this submission, we have noted issues with both form and substance which we have set out in detail in the hopes that this will be helpful to the draftsmen.

Several provisions follow the wording of the EU's Audiovisual Media Services Directive, 2010/13/EU as amended by Directive 2018/1808. This is a positive step in general, since it brings South Africa closer to international best practice, however the manner in which it has been integrated may need revision to suit the local circumstances and existing legislation.

1. Urgent issues

1.1 The process for passing new legislation is a lengthy one, and it is right that it should be so. However, certain issues that are canvassed in the Draft White Paper cannot wait years to be amended as they already have been long-delayed. Here we are thinking of the ownership and control issues, set out in the current ECA in sections 64, 65 and 66.

1.2 Ownership and control:

a. In the telecommunications and broadcasting sectors, several consultations have taken place about ownership and control. In 2004, new clauses were drafted to replace the clauses which dealt with foreign ownership, concentrations and cross-media ownership in the Independent Broadcast Act, 1993, but the changes were never implemented. Even when the ECA was drafted and implemented in 2006, the Minister adopted the existing provisions rather than the proposed changes.

b. Had those proposed amendments been adopted in the ECA, we would see a very different, likely more vibrant, and financially stronger sound broadcasting market. The Competition Act, 1998, had already been passed by the time the ECA was promulgated and fears of concentrations ought to have been allayed by the principles introduced at that time, of dominance and abuse of dominance.

c. In our view – and we are aware that this view is supported by several media companies – the onerous and unnecessary restrictions on ownership and control have no place in the broadcasting landscape any longer. The Draft White Paper recognizes this and devotes several sections to a discussion on this.

1.3 Foreign ownership:

a. There are some useful provisions on potential lifting of foreign ownership restrictions to encourage investment to stimulate growth in ICT. Foreign ownership of linear[1] individual audiovisual content services (i.e. tv broadcasting) can increase to a maximum of 49%. There is no explanation as to why the proposals apply to tv only – perhaps this is an error?

b. We note that persons who are from countries that are members of the African Union can possibly exceed even the 49% level of control (as a financial interest, or voting shares or paid-up capital in a commercial broadcasting licensee) provided there is a reciprocal agreement in this regard between South Africa and the country concerned.

c. The proposal to open up the broadcasting sector to foreign ownership from Africa rather than anywhere else, is difficult to understand. However, our primary concern is that before any such invitation is extended to any foreign investors, South Africans should be given an opportunity to take up additional equity stakes in South African assets in the broadcasting sector. Secondarily, we suggest that members of SADC be given priority over members of the African Union, to the extent that they are not members of the same two bodies.

1.4 Cross-media ownership and concentrations:

a. The policy notes the trend elsewhere to lift the restrictions on ownership of media because of increasing competition from non-linear (OCS) and the fact that these limitations have been in place for nearly 30 years in South Africa. It recommends the removal of all limitations on ownership and control of commercial sound and tv broadcasting licensees.[2] Cross-media ownership restrictions including the distinctions between AM and FM licensees "*are obsolete*" and must be removed.

[1] Formerly the word 'unidirectional' was used to describe one-to-many broadcasting, or traditional radio and tv broadcasting, from the broadcaster to all listeners/viewers.
[2] Paragraph 7.1.8.

b. The considerable cost to business to approach ICASA for an exemption from the limitations of these sections, which is not assured, and the restrictions on ownership mean that diversity is – ironically – penalized. By creating economies of scale and scope, media owners can invest in the broadest possible range of content, the best presenters, the most innovative ideas – and in the aftermath of the pandemic it is critical to take as many steps as possible to stimulate and support our economy. A healthier broadcaster means more jobs and more growth. We cannot put it more plainly than that.

These are the most important areas in our view to sustain the broadcasting sector. We recommend that rather than wait for the lengthy legislative process to play out across the whole broadcasting sector, Parliament pass amendment provisions in a General Laws Amendment Act, that address sections 65 and 66 of the ECA, without further delay.

2. General comments

2.1 Role of the regulator

a. Many provisions which are controversial and always have been (like the restriction on advertising revenue for pay-tv providers, must-carry, and regulation of on-demand services) are simply left to the regulator to make regulations.

b. AME does not believe that the current regulator is adequately resourced or capacitated to deal with the 'new' broadcasting landscape proposed in the Draft Policy. The Policy itself recognizes this and we support the proposals in the Draft Policy in this regard.

c. However, we do not believe that so many critical areas in this sector ought to simply be left for regulation. We trust that these areas will be dealt with by way of legislative amendment or an entirely new law.

d. In this context, it is important that the requirements of the Constitution – namely that an independent broadcasting authority be appointed – be upheld regardless of new policy or law. There are several instances in which the Draft Policy anticipates that the Minister would have additional powers e.g. in relation to defining whether certain sports events may or should be broadcast free-to-air or on other terms, and determining the threshold at which the distinction between individual and class licences might be made. This does not lend itself to certainty and the fact that the Minister might in this way determine obligations or rights for commercial entities (by categorizing them as individual or class licensees as these terms are defined in the policy) is not appropriate and could be seen to be trampling on the independence of the regulator and unconstitutional.

2.2 Content regulation

a. The Draft Policy states that ICASA should remain the content regulator, but it has never been a content regulator because the ECA specifically excludes content from ICASA's mandate. This may be an error.

b. Regulation of hate speech by ICASA is now proposed, along with protection of minors and 'related matters' and "VSPS" will need their own code of conduct or be subject to a statutory code. This suggests the role of the Film and Publications Board ("FPB") will be diminished or it will cease to operate, but in other sections of the policy, compliance with the FPB regulations is specifically required by OCS licensees (on-demand content service providers) whose content must be registered and classified by FPB. It is also unclear what the role of the Broadcasting Complaints Commission of South Africa would be in this new arrangement. They have played a pivotal role in the sector for many years.

c. In this regard, we see no reason why existing provisions contained in the Electronic Communications and Transactions Act, 2002, regarding 'take-down' of prohibited content by internet service providers, should continue to apply.

d. The policy requires the two entities, FPB and ICASA, to work more closely together to eliminate duplication and forum-shopping. This is highly unlikely given the historical and current relationship between the two. We recommend a more practical separation of their respective roles, or alternatively, a merger of the two entities.

2.3 Local content obligations

a. The Minister will be aware that many smaller entities, particularly community and commercial radio stations that have smaller footprint areas, struggle to achieve the local content thresholds. The listenership of certain areas is, dependent on the age and area, interested in other genres – which is one of the reasons why ICASA currently licenses applicants on the basis of their formats.

b. Requiring yet higher local content quotas, particularly in the digital landscape when local content can also be accessed on so many more platforms at the listener's own time and choosing, does not seem to be sensible. We support the proposal that licensees which can't meet the requirements can pay a specified sum of money or minimum percentage of gross revenue into a fund to support the creation of audio and audiovisual South African content, subject to discussion on the amount.

c. The Draft Policy observes that the EU's requirement for European (equivalent to 'local') content is limited to 30%. This should be borne in mind when setting the thresholds for the future. In

addition, and by contrast, we note that current legislation obliges commercial sound broadcasters to include at least 35% of total content as local content which is extremely difficult to calculate as currently phrased.

2.4 Sentech and SABC

a. In the current market and with the obvious failure of so many state-owned companies ("SOCs"), it is not clear why the Draft Policy would continue to focus on and appear to strengthen and entrench the roles of these entities.

b. Sentech's role is recognized and supported, it will continue to be the 'common carrier' for signal distribution for terrestrial and satellite platforms and the only provider of network services (transmission) for SABC on the mux and satellite platforms[3], which is at odds with the position that SOCs be rationalized (see below) and also at odds with the goal of promoting competition. This is concerning, particularly if it has this right exclusively, however that would require more changes to the ECA to remove the self-provision sections. This may be an error or perhaps simply require re-writing.

c. There are several provisions relating to the need to rebuild SABC, some of which refer to case law on the construction of the board, and future funding.

d. However, the Draft Policy recognizes that SOCs and "*entities with outdated mandates*" will need to "*be done away with*" and those with overlapping mandates merged into other entities or have their mandates clarified. There is therefore a conflict between the Minister's intentions in relation to SOCs.

e. To the extent that it is sensible and financially prudent to rebuild the SABC (which we are not confident is the case), we note and support the change in the name of the Broadcasting Act, 1999, to the Public Broadcasting Act as this Act currently deals almost exclusively with the SABC in any event.

2.5 Competition

a. The Draft Policy states that plurality of voices and diversity of programming in the public interest must be ensured by guiding principles of competition law, content regulation, and licence conditions. The Commission must exercise concurrent jurisdiction with ICASA in addressing market concentration and media plurality, according to the Policy.

b. However, the Commission already has this power; in addition, content regulation is unlikely to affect competition – it is the acquisition of content that affects competition; as the plurality of voices

[3] Paragraph 3.5.8.

and diversity of programming isn't first and foremost a competition issue. It is only a competition issue if there is a dominant operator – and then it is the position of dominance that is the competition issue. We are unclear on the intention here.

c. The Draft Policy also seems to suggest that the growth of internet services means the "*barrier to entry*" to broadcasting markets has been lowered, costs are lower, and there is less need for spectrum. Unfortunately, the Draft Policy does not acknowledge that this is obviously not the case where radio is concerned (particularly for those that do not have digital receivers or access to the internet).

2.6 Definitions

As a general remark, definitions are intended to clarify, create certainty, simplify and be used in the same way throughout a document. Terms should be narrowly defined so that they are as precise as possible. Unfortunately, several of the definitions in this policy contain terms within themselves that are not explained, or are circular so that they do not have a meaning, or create new concepts that are described in the sort of detail one would expect in the main body of the document. This is likely to complicate the interpretation of the document. More specifically:

a. **audio and audiovisual content service**:

i. This definition describes not only the service, but its content, purpose and method of distribution. It mostly follows the wording of the EU's Audiovisual Media Services Directive, 2010/13/EU as amended by Directive 2018/1808. The problem with following the EU description is that current legislation and practice in South Africa is not aligned with the EU position at all. Since about 2 decades have passed since the legal and policy landscape for broadcasting was last revised, it could prove difficult to ignore the existing arrangements in an attempt to fast-forward to international best practice. We deal with this difficulty again in later definitions.

ii. From a purely drafting perspective, the definition is incorrectly constructed. It suggests that an electronic communications network will be under the editorial responsibility of "a recognized natural or juristic person" whereas what is meant is that the programming will be under the editorial responsibility of a recognized natural or juristic person. The phrase "under the editorial responsibility of a recognized natural or juristic person" should follow after "inform, entertain and educate the public".

iii. We do not understand what the point is of the word "recognized" in relation to a natural or juristic person. We do not typically use this phrase. Perhaps what is meant is "licensed"?

iv. The phrase is somewhat clumsy. We suggest the term "content service" or "AAVCS" might be used instead of "audio and audiovisual content service". The term "AAVCS" is used in paragraph 3 of the Executive Summary.

b. **audio broadcasting**: The word "simultaneous" is not relevant in this context. The sentence could read "…provided by a licensee so that the public may listen to programmes based on a programme schedule".

c. A policy cannot amend a law. The definition of "**broadcasting**" must follow the definition contained in the ECA unless the Department is intending to amend the ECA, in which case the definition should be omitted from this section and referred to as a policy goal in the main document. The same comment applies to the definition of "**broadcasting service**".

d. **editorial responsibility**:

i. The definition uses the term "effective control". Although "control" could be said to have a definition under the South African Companies or Competition Act, the use of the word "effective" changes the concept. This is not defined – what is "effective" control?

ii. The (very important) job of an editor, that is "editorial responsibility", is to make changes to text – to the substance or content of a document[4]. This definition describes editing as everything *except* making changes to content. Editorial responsibility must include ensuring that the content is suitable e.g. for children, is not going to incite violence, does not include hate speech (or if it does, carries the necessary warnings), and so on. This is *not* about selecting and organizing programmes – anyone in an administrative position can do that. The definition must be revised and the context in which it is used must be amended accordingly.

e. **events of national interest**:

i. The principle that this definition is trying to establish is a good one, namely that the general public and not merely subscribers to a pay tv station should have access to events that are of interest to the South African public. However, the definition is too detailed – the detail concerning the decision about which events will be free to air should be the subject of consultation, or more precise. In the past, national teams participating in sporting events would have been included in this definition and this makes sense. Either the definition must contain all the events, or the decision about which events to include must be consulted on. The definition of "**sports of national interest**" could just as well be included in this category. This would obviate the need for intervention by the Minister and lengthy and potentially difficult discussions with other Ministers, before a decision can be taken. Defining which sports fall into the named category for the purpose of imposing conditions on commercial broadcasters could also be considered to be an intrusion on the business of commercial broadcasters.

[4] See definition of "editor" in EDITOR | meaning in the Cambridge English Dictionary. This states, "*a person who corrects or changes pieces of text or films before they are printed or shown, or a person who is in charge of a newspaper or magazine*".

ii. The definition imposes an obligation on the regulator to "ensure" that these events are broadcast free-to-air. This obligation has no place in a definition.

iii. Finally, if a broadcaster has acquired the rights to broadcast the defined event, the obligation to make coverage of that event available free-to-air is tantamount to requiring the broadcaster to lose money. Acquisition costs are significant and the acquiring entity should be able to charge for other broadcasts. This is a matter for the substance and not the definitions in this document. We suggest the definition be revised entirely.

f. **on-demand content service**; **on-demand audiovisual content service**; and **on-demand audio content service**:

i. These are all very lengthy phrases which should be shortened by using smart and simple definitions.

ii. The definitions need not refer to how the content is carried. The method of carriage of content and communications is not relevant in a technology-neutral environment.

iii. The term "content service provider" is used in each of these definitions but this is not defined anywhere. Who is this party?

iv. "musical works" is not defined, but several of the revenue-collecting agents such as SAMPRA refer to musical works as comprising music only, and music included in movies or other visual programmes. What is meant here?

g. "**video-sharing platform service**" is defined loosely based on the definition contained in the EU Directive, however the bullet points do not do that definition justice. For example, the second bullet refers to "provider of the service" which does not make it clear if the definition is referring to the "user" (who created the video) or the platform service provider. The final bullet is not required since the type of platform is not being dealt with in this policy nor are networks dealt with in the EU Directive. Either we must follow the lead of the Directive in all respects, or not at all since to only use some of that text is likely to cause problems when transposing it to the South African context and trying to overlap the regulation of electronic communications on top of the regulation of content services and broadcasting. This is in any event dealt with elsewhere.

h. "**television broadcasting"** and **"television broadcast**": please see our comments on audio broadcasting in paragraph 2.6(a).

i. The word "programme" is not defined anywhere, but it is used frequently in the definitions. A definition is required (see the EU Directives for examples).

ii. Likewise, the term “video-sharing platform” is used in the definition of “video-sharing platform service” but it is not defined. What is meant by this?

iii. The word “user” is used in several definitions but not defined. The term could signify a user of platforms, or a user of content, or a user of platforms to host content, so the term needs to be defined and any differences in types of users made clear.

We hope that these comments have been helpful and look forward to engaging further with the Minister. Please do not hesitate to contact us if you have any queries.

Yours faithfully