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RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE

DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

ON THE

WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES POLICY FRAMEWORK

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Contents

Executive summary

There are four issues the Free Market Foundation finds concerning in the draft white paper. The first is that the white paper perpetuates the centralised control of the communications industry, which entrenches incumbent players and restricts competition. The second is that the white paper in many respects unjustifiably infringes on the constitutional rights of South Africans constitutions. The third is that while the white paper proposes to bring about regulatory parity, it in fact makes it more difficult for new players in the market to operate. Fourthly, the Department of Communications and Digital Technologies has resigned itself to the fact that the SABC will never be profitable and thus has included provisions that exempt the SABC from being required to be profitable.

To cure the first defect, the Free Market Foundation recommends that the aim of centralising and regulating spectrum, as well as the expression of individuals and the proliferation of artistic content is an intrusion on the liberties of South Africans that should be abandoned. The need for regulation in spectrum use and acquisition is premised on the scarcity of spectrum, a scarcity caused by interference between two broadcasters who may use the band of another thus interfering with their transmission. This is the logic for exclusive licenses for certain frequency bands granted to corporations at the behest of the state. In the modern day, however, there are companies like Netflix and other content providers who do not utilise any 'public utility' in the form of spectrum for the provision of their services. The decision, therefore, to also have them regulated under one overarching policy that was mainly motivated by the need to regulate a public utility, is flawed and will stifle innovation in commerce. The additional costs these regulations impose on businesses will simply be passed on to the consumer, thereby leading to more expensive entertainment and undermine the end goal of ensuring wider access to varied entertainment. A deregulatory approach should be adopted.

Furthermore, regulating content providers on platforms like YouTube is highly discouraged. Those who upload content on services like YouTube should be exempt from the regulations on any level, even within the varied analysis of scarcity and size or influence being used, which unfairly penalises growth and success.

To cure the second defect, the Free Market Foundation recommends that the freedom to express oneself, to choose what form and types of expressions one consumes as a dignified human being, be respected. The quota policy that has been in place since 2016 for 'traditional' broadcasters, and which will now be applied to content providers that are included in the expanded definition, ought to be abandoned. Any form of quota, instructing companies what content to produce and in what quantities, is reminiscent of the tyranny of communist states, and even in some respects the Apartheid state, whereby the rights mentioned were not recognised and a 'national identity' was cultivated using state force through centralised control of artistic content.

South Africans can make their own decisions about which content to watch, and if they want to consume American, European, or Asian content only, that it is within their rights. Rather than having new entrants in the market comply with the content quotas, it is recommended that the quotas be

done away with altogether. If South Africans demand local content, then there will be producers of it who seek to satisfy that demand, all without any form a government directive.

To cure the third defect, the Free Market Foundation recommends that the objective of regulatory parity sought by the policy be achieved by deregulation. Where one company or sub-sector is subject to a regulation and another is not, repeal that the regulation, rather than passing another one for the unregulated company or sub-sector.

To cure the fourth defect, the Free Market Foundation recommends that government require the SABC to be profitable and self-sustaining, or that government privatise the enterprise. The South African taxpayer cannot continue to foot the bill for an organ of entertainment, especially not in these dire economic times.

In general, the Free Market Foundation encourages government to adopt a single policy paradigm for all participants in the broadcasting industry and not drawing arbitrary distinctions that infringe on equality at law. Such a policy must respect the right of ordinary South Africans and broadcasters to decide for themselves what content they create, curate, and/or consume, without any involvement by the state, as the Constitution requires. The vision of the policy to create a so-called 'national identity' by way of regulations must be scrapped entirely from the policy. The centralisation of the industry, which leads to the creation of barriers to entry and oligopolies, should be scrapped. A presumption of 'freedom to broadcast' should be adopted and thus guide whatever regulatory path the department seeks to adopt.

Large parts of the white paper are recommended to be done away with or reconsidered. The industry covered by the policy is integral to realising the constitutional rights of South Africans, and for the economic prosperity of our society. It is crucial that government not further harm this important sector of the economy.

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Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project[2] is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

1. Introduction

The singular regulatory framework proposed by the draft White Paper on Audio and Audio-Visual Content Services Policy Framework (hereafter the "white paper") will make coordination of the policy position of the government easier. Instead of putting more strenuous regulations on companies, big or small, however, deregulation should be the aim. The goal of this deregulation must be to have as few barriers to entry in the expanding market for companies of whatever size, and as a result to put the success and prosperity of these companies in the hands of consumers, rather than in the hands of a state body or directive.

The arts are characterised by self-expression, protected under section 16 of the Constitution. It is thus that the white paper's goal to bring about a "national identity" appears ominous. The government should not be concerned with what citizens watch or do not watch, whether it is American, African, or European content. Such a concern, even if it were common practice internationally, is not reflective of a state founded on the Rule of Law, which has as a presupposition the freedom of legal subjects. The consumption of entertainment is an inherently harmless activity, in the sense that it violates no rights of another. Therefore the state seeking to direct what sort of content, through mandated quotas, its citizens consume, is paternalising the citizens by 'doing what's best for them' as if they don't have the ability to determine that themselves.

The singular regulatory environment ease of administration is frustrated by what seems to be inherently arbitrary delimitations between individual and class licences, that are contingent on things such as scarcity and 'influence'. These criteria are impossible to measure objectively, thus making whatever decision taken based thereupon arbitrary and therefore contrary to spirit and substance of

[1] www.freemarketfoundation.com.
[2] www.ruleoflaw.org.za.

section 1(c) of the Constitution, which states that South Africa is founded on the supremacy of the Rule of Law.

Below are the specific sections that represent unjustifiable infringements on the freedom to express oneself and consume the expressions of one's choosing and matters related thereto:

2. Clause-by-clause analysis of proposed AA/VCS policy

Clause 2.3.13: This section is probably the first instance wherein the confusing rationale of the regulator is laid bare. Clause 2.3 is concerned mainly with mapping the regulatory journey of South African broadcasting. It lists the various activities that were undertaken by the state to enable the development of broadcasting, from breaking up a monopoly which it created, to the centralised system of granting licenses to community radio stations that seems to be an infringement on freedom of expression that is neither rational nor contingent on any harm being done by the persons in question. The section correctly claims that infrastructure expansion and the reduction in data prices has led to growth in the audio and audio/visual space. The reduction in data prices not being attributed to the state's actions is important. The government seems to have implicitly acknowledged that data prices have been decreasing, albeit gradually, without any legislative directive mandating their decrease. Thus, it seems to be recognised that market conditions, particularly signals like prices, ought not necessarily be mandated by law. All the state did and ought to do is open up the telecommunications space, which was bogged down by regulation, to new entrants.

Clause 2.3.18: The mention of the growth of the OTT sector in other parts of the world, as being tied to an environment of less regulations whilst simultaneously imposing regulations on these existing operators and potential new entrants domestically seems to be at odds with what the white paper seeks to achieve. Namely, the development of the South African entertainment space. It has been stated in the section that the OTT space developed largely due to an absence of regulations that has bogged down traditional broadcasting in the United States through entities like the Federal Communications Commission. Yet the government, knowing this, is still proposing new legislation, which will act as the deterrent to new entrants that all regulations inherently are. Thus, the government may inadvertently or otherwise protect international OTT companies or well-established ones whilst making it nearly impossible for new entrants to enter, given the regulatory burden imposed.

Clause 3.1.10: The creation of the uniform category of AAVCS is welcomed as a way to organise broadcasting under a singular banner, thus making the regulatory and compliance requirements on business operators less strenuous. However, it must be acknowledged that rather than a uniform regulatory regime imposing even more regulations on the businesses that would fall under the AAVCS category, it should rather be used to deregulate the industry, remove barriers to entry that are still lingering from the old centralised apartheid days, and realise the freedom of expression protected by the Constitution. The government seeks to create a 'level playing field' in the telecommunications broadcasting sector, yet it proposes doing this by imposing new and uneven regulations for the varying players (individual and class broadcasters) in the broadcasting industry. This section would

be more suitable if it sought to create this level playing field through the removal of regulations that certain companies are subject to whilst others are not.

Clause 3.1.11: The definition offered for an AAVCS is too broad in scope in that it seeks to regulate the expression and dissemination of any information deemed educational or entertaining, thus creating obligations on ordinary citizens without them having violated any law. The definition as it stands will see the criminalisation of the dissemination of content for instance through the substandard of "video sharing platform service", whereby a YouTuber could be found to be foul of the law just because they expressed themselves and disseminated said expression without the approval of the state. The definition of AAVCS, which appears purposefully broad, is too all-encompassing. The general regulation of telecommunications should be frowned upon, irrespective of the trends that may be taking shape internationally. In South Africa, the right to free expression is enshrined in the Constitution and the general value of freedom is the foundation upon which the Republic rests. Thus, a blanket regulation of art and expression as proposed by the definition of AAVCS appears unconstitutional.

Clause 3.1.13: The legal obligation for certain internet content providers to be subject to more regulation than others will be contingent on the entirely subjective and arbitrary notion of "more influence". Given the nature of the market, any market, gauging the 'influence' of any particular service or good would never be objective, but at best would be intersubjectively ascertainable since ends in the market are known by the actors alone and no one else. The standard of "more influence" is representative of a breakaway from equality under the law and the blindfold that is afforded Lady Justice. It seems that this clause seeks to promote the idea of arbitrary regulation that is not contingent on general application. It is not generally applied because, using this rationale, a company might find itself in breach of a certain provision that its competitors are not obligated to adhere to, and as such this may have an effect on their growth and success. Also, the regulation seems to suggest that the more influential, and thus successful an online content provider becomes, the more onerous the regulatory burden. This serves as a clear deterrence for growth for any small player in the market or potential new entrant since their success will be punished with more regulation.

Most importantly however, is the seemingly arbitrary delineation between "more influence" and "less influence", which would be contingent on turnover. An analysis of the market influence of a particular company being based on its turnover is subject to many pitfalls, and it has no bearing on the success or failure of that company in that particular market. The standard will be inherently arbitrary in praxis, as it is in theory, since it offers differing standards for companies that are essentially the same in them being AAVCS providers.

Clause 3.2.1: The distinction between E-commerce and AAVCS is illustrative of the inherently arbitrary nature upon which the executive has constructed this policy and broader, the approach to regulation and legislation prevalent among the South African government. E-commerce, in ordinary language, would encapsulate, for instance, on-demand content services as well as video sharing online platforms. Given that some of these services are wholly on the internet, the categorisation of E-commerce (hopefully attracting fewer regulatory demands) should have been used, since the

distinction between the two categories in relation to online "linear" and "non-linear" broadcasting is one without a difference.

Clause 3.2.2: The distinction between individual and class licenses should be done away with, as it represents an unequal application of the law and its obligations on entities that are committing the same acts, thus making such a distinction arbitrary or at the least unreasonable. The demand for higher regulatory burdens on individual licences, for instance, rather than community ones, will firstly dissuade any new entrants from obtaining any new individual licences. It also creates a scenario wherein competitors in the same space are subject to different regulatory regimes, yet the actions they are being regulated for are virtually the same. This is a common theme in the entire draft white paper, and it stands in opposition with the Rule of Law principle of equality before the law.

Clause 3.2.3: The distinction between the broadcasting tiers of "commercial broadcasting" and "public broadcasting" is the inclusion of 'for profit' in the commercial broadcasting definition as well as its exclusion in the definition of public broadcasting. This is telling of the attitude the state has towards the activities of the South African Broadcasting Corporation (SABC) as well as its ability to generate a profit like every other business in the market does. Instead, by removing the 'for profit' aspect of the public broadcaster, it is implicitly acknowledged that profits are not part of the SABC's directive. But profit is what motivates the efficient use of resources in society, with more profit being a signal to produce whatever more and less profit being a signal to produce less. If the public broadcaster is not subject to these very same requirements that its commercial competitors are subject to, then the financial position it finds itself in today should be no surprise. The policy seeks to make permanent and continuous the taxpayer bailout of the SABC.

Clause 3.2.7: This clause illustrates the confusion the state must advance in order to justify the independence of the SABC whilst simultaneously proclaiming it as a public institution. This opens the door for it to receive even more taxpayer funds, including funds from their competitors since corporate tax is paid in South Africa. The distinction between "state" and "public" is a distinction without a difference. If an entity is funded by the state then that entity is a state entity or rather a public entity. This phenomenon is seen in the schooling industry, wherein public schools are *de facto* state ones whereas private ones, financed by the individual students' fees, are not. In creating this distinction in the broadcasting arena, the intelligibility of law is undermined since the regulation would be asking its reader to break with any ordinary understanding of the synonymous nature between "public" and "state", and rather impose a confusing categorisation of what a state entity is and what a public one is. It is suggested that this distinction be done away with. The SABC is a public broadcaster and thus a state broadcaster. This is the 'as is' nature of events, and no amount of simply proclaiming "independence" will make it so. If an entity receives funding from the state either in part or wholly, then it ought to be a state entity, or if it was founded by the state, and has a market position that is guaranteed by the state or its funds and regulations, then it is a state entity. The distinction introduced in this clause is unnecessarily confusing.

The non-profit nature of 'public broadcasting' and having the SABC fall under this definition is a sleight of hand meant to justify the perpetual monetary losses that the SABC runs year in and year

out. By having a definition of broadcasting that is not-for-profit, the financial mismanagement of the SABC as well the bailouts that are continuously extended to it, using taxpayer funds, are thereby ostensibly justified. The question therefore should be, if there are to be public broadcasters, that are run not-for-profit, whose funds, whose hard earned money will continually go towards funding such an entity? The overextended and dwindling South African taxpayer, naturally.

The government should move away from the notion of being a broadcaster or funding broadcasters. There is nothing special about broadcasting as a service, like many others that aren't offered by the state. It will not cease to exist without the state continually throwing liquidity at an institution like the SABC.

Clause 3.2.7.3: This subclause indicates the intentional creation of a monopoly by the state. There can only be one public broadcaster, and mention of government finances and the SABC's finances are cited as reasons for a blanket *prima facie* barring of any potential new public broadcasters. The implication of state finances being cited, of course, is that this broadcaster will be funded by tax money by and large whilst others have to survive in the market, and live and die by satisfying the entertainment preferences of South Africans. The notion that somehow public broadcasting exists independently of the state is undermined by the fact that refusal to grant other public broadcasters the right to exist is contingent on what the clause lists, namely, state finances and state considerations. The paper could argue that editorially, the SABC is independent, but as far as its structure and means of existence are concerned, it is a creature of the state, thus making the distinction between state broadcaster and public broadcaster a purely academic one. The distinction between public and state broadcaster should be abandoned. The SABC is a state broadcaster.

Clause 3.2.10: The tiered regulatory system, wherein certain actors have one set of rules whilst others have another set of rules, even though the action in question is the same, that is, OTT or on demand services, is a perversion of the equality before the law principle that is a subset of the Rule of Law as a constitutional value. It is premised on a blanket acceptance of what others have done. In other words, it is a false appeal to authority when it is mentioned that such graded regulations are a result of this European regulation or that Australian one. This shows a lack of originality in developing regulatory regimes specific for the South African context. Since this approach to regulation signifies a break with regulation over the past two decades, rather than having such a convoluted regulatory regime and one that skirts on violating equality before the law; a uniformly less strenuous regulatory regime should be considered. Uniform for all actors, and as a means to encourage potential new entrants, less strenuous. Such an approach to regulation would necessitate a different approach to how spectrum allocation is understood by the state. The technological units of spectrum, mhz or ghz, must be treated as property units, wherein duties to not take nor trespass are attached to it in the same way as is the case with any technological unit signifying property, i.e., hectares for land or area either in square metres or kilometres for houses.[3] Having private property rights which are entrenched in section 25 of the Constitution in spectrum or the ether was developing before the

[3] Marcus BK. "The Spectrum Should be Private Property: The Economics, History and Future of Wireless Technology". https://mises.org/library/spectrum-should-be-private-property-economics-history-and-future-wireless-technology.

government became involved in spectrum allocation. In the United States case of *Tribune Co. v Oak Leaves Broadcasting Station, Inc* the problem of 'interference' – something governments tend to cite as the reason for monopolising spectrum – was dealt with wholly within common law property rules relating to exclusive use rights over the what was the 'commons'.[4]

Therefore, rather than a tiered system, a uniform regulatory system is proposed. One that would show a respect for the equality before the law principle of the Rule of Law constitutional value. This value would be severely undermined by having one set of rules for A and another for B, even though both are engaged in the same act.

Clause 3.2.11: The idea of creating a level playing field by passing regulations is misguided in the sense that incumbent broadcasting or OTT suppliers, video sharing platforms or on-demand service providers will have an existing advantage over new entrants or potential ones. They can simply shift the burden imposed upon them by these regulations onto the customer. In the case of those firms with no customers, the regulations become part of start-up capital, thus dissuading new entrants. And in instances wherein licencing is exempt, for instance, those who are subject to the regulations are unfairly and unjustly discriminated against by being subject to rules that their competitors aren't. There is no levelling of any playing field using these regulations. Regulations serve to centralise an industry, and entrench the rights of incumbents whilst acting as a barrier to entry to other potential innovators. The playing field would be level if every AAVCS is subject to the same regulation – or, ideally, having none of them subject to any regulation – rather than having certain licensees subject to different sets of regulations than others. Thus, rather than the regulatory field levelling, a deregulatory field levelling is proposed.

Clause 3.2.12: Turnover is the basis of which licence a firm is to apply for, "individual" or "class". This is an arbitrary standard in the sense that the government has made it policy because it is 'international best practice' to punish successful businesses in the AAVCS space with more regulations. Yet turnover cannot be an accurate representation of the strength of a business, or more importantly, its influence in a particular market and therefore the amount of regulation it should attract. The state seems to be in favour of regulation for its own sake, not for any conflict-resolving mechanism, which is what the law should be reserved for, but rather for socially-engineering matters like 'national identity' and other authoritarian imperatives that the government has given itself. This comes at the expense of freedom of expression, freedom of trade, and dignity, as well as the foundational value of the Rule of Law.

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[4] *Tribune Co v Oak Leaves Broadcasting Station, Inc* 68 Cong. Rec. 215, 69th Cong. (2d. Sess. 1926). https://www.casebriefs.com/blog/law/property/property-keyed-to-merrill/values-subject-to-ownership/tribune-co-v-oak-leaves-broadcasting-station-inc/?utm_source=casebriefs.
An article by Thomas Hazlett detailing the aforementioned case and the impact it had on radio frequency spectrum regulation, or rather the lack thereof, is also a useful source:
Hazlett, TW. "Oak Leaves and the Origins of the 1927 Radio Act: Comment." (1998). 95(3/4): *Public Choice*. 277-85. Accessed February 1, 2021. http://www.jstor.org/stable/30025107.

The main thrust of this provision seems to be the blanket criminalisation of successful AAVCS companies or operators, in that, the more they grow, the higher the amount of regulation they attract.

Clause 3.3.8: In this section, the move for deregulation is mentioned fleetingly without any specific reference as to what shape this deregulation will take. Seeing as this a draft white paper for a new set of regulations, the aim of deregulation seems to be undermined by mere operation of fact. The FMF proposes a substantive commitment to deregulating the broadcasting space, chief among them being the removal of the ICASA regulations on local content generation for purposes of 'national identity' as the inhibition on expression and trade that they are. A property rights-based approach to spectrum ought to be adopted, whereby the state will no longer have a monopoly on a scarce resource and use said scarcity as reason to monopolise rather than subject to market forces by property rights recognition.[5]

Clause 3.3.9: This clause seeks to use the size of the company to determine the type of regulation that will be applicable to it, and it motivates motivated this by an appeal to creating regulatory parity. The unequal application of regulations contingent on constantly changing dynamics like size and/or turnover is the opposite of creating regulatory parity. The need to regulate just for its own sake, even without any conflict present, is a theme that is reflected throughout the entire white paper. The recommendation of an equal application of regulations, irrespective of size and/or turnover would motivate the state to put as few barriers to entry as possible, so as to stimulate SMMEs operating in the space. The efficiency at which these SMMEs operate would be increased knowing that they are operating within a position of regulatory certainty, with the only forces that could ruin or help them, being contingent on their provision of goods and services to consumers. Regulatory costs are always passed down to the consumer. Thus, the government is imposing an extra cost that would otherwise not exist on South Africa citizens.

Clauses 3.3.10 to 3.3.12: This is the most egregious aspect of the white paper, as it ostensibly seeks to uniformly favour one business in the marketplace over another. Clause 3.3.10 makes mention of how SMMEs would be supported by not having regulations with the standard for whether a business is an SMME or not being turnover that is arbitrarily determined as being double of what the mining sector turnover determination is. This is clearly an instance of inequality before the law. The fallacious economic reasoning that seems to motivate it can never justify the violation of a central aspect of

[5] ICASA Regulations On Local Television Content Gazette 39844 No 345. https://www.icasa.org.za/legislation-and-regulations/icasa-regulations-on-local-television-content-2016. Specifically, section 2, the 'Purpose' of the regulations: They seem to be directing private enterprises to the end of national identity by mandating that certain programmes be aired irrespective of their demand or the preference of the broadcasters. This is an unjustified infringement on the freedom to express oneself, trade as well as the freedom to choose implied in the right to dignity. Individuals are capable of choosing which programmes and subsequently broadcasters to consume so as to foster their identity. They do not need government policy preempting a function that should stem from the individual first and foremost.
These regulations that were released in 2016 are the ones the Draft White Paper wants to apply to enterprises that will fall under the AAVCS category. Rather than making more companies comply with the governmental central vision of 'building identity', the entirety of the regulations should be abandoned. This will enable small competitors to enter the broadcasting market and be able to stay commercially viable by airing content to the quantity and quality of their audience's preferences rather than to the preferences of the state.

the Rule of Law. The government, by relaxing regulations on SMMEs, implicitly acknowledges that regulations have a cost on business performance and success in the market, yet they fail to use this rationale the moment a business reaches a turnover of more than x amount? This unequal treatment is arbitrary and unmotivated.

Clause 3.3.12: makes mention of imposing and issuing of licences on an automatic basis premised on the turnover threshold, and further, going to the extent of barring South African citizens from contracting with any of these companies that may rightly refuse to comply with the diktats of the South African state. The section is a clear violation of the implicit freedom of choice that is inherent in the right to dignity, the right to trade,[6] as well as the foundational value of the Rule of Law that is opposed to the prohibition of actions that do not inhibit or aggress on another. The preventing of access of this service by a South African citizen, it must be emphasised, by blocking its accessibility in the ways listed in the section, would amount to a tyranny that would make the former state censors of Orwellian fictional narratives green with envy.

The white paper provides for rationales or tests that would be used to gauge whether a company is subject to a class licence or an individual licence. Firstly, this division between licencing is problematic. Government uses the scarcity of spectrum as a justification for why it should be the sole distributor and owner thereof, yet this scarcity is precisely why radio frequencies should be subject to the very same property rules as any article of a scarce service or good. The marketplace is defined by the scarcity of goods. Economics, the very concept of economising, is defined by scarcity. Thus, if the use of a band of spectrum inhibits another from using it, said band of spectrum's technological unit, be it mhz or ghz, ought to be subject to property rules, whose violation, like trespassing for instance evidenced by interference, would be punishable under normal operation of the law.

The scarcity rationale employed by the regulations acts as an arbitrary rule that seeks to entrench the monopoly the government has on the allocation and use of spectrum, frustrating private innovation as well as the much-decried reduction in data prices. Beyond the theoretical problems, there are conceptual ones within the context of scarcity in spectrum allocation. This is in the fact that scarce spectrum is impossible to determine, unless said unit of property is subjected to market conditions. Yet in South Africa, like in most countries globally, telecommunications have been monopolised by government under the fallacious notion of public property, with a largesse akin to a lease granted by a lord being granted to individuals who want to use their own capital and time to deliver services to people who desire them. If, for example, a technological innovation causes a certain band within the spectrum of electromagnetic waves to transfer data faster, and this band was considered non-scarce for instance, this sudden widespread use of this band would eventually lead to the state classifying it as a scarce band when licence renewal time comes, and making it a reason to put even more onerous demands on the licensees. This would frustrate the train of innovation that was sparked by free enterprise. Rather than offering property rights, akin to use rights in land, water, and other scarce resources, the state, seeks to monopolise the resource and then use the

[6] See *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* (611/2020) [2021] ZASCA 9 at para 118.

inefficiencies caused by their monopolisation as reason and justification for their continued monopolisation.

The pervasiveness rationale seeks to gauge the influence a particular company has given its size and scope of operation as criteria to determine the type of regulation it will attract: class or individual. The issue of inequality before the law applies here also. Given that market positions continually change, the inclusion of such a category as a determinant of regulations, something that has the force of law, is arbitrary, because there is no delineable criterion that could be used to gauge, for the purposes of sanctioning the violation of rights by imposing fines or the like, the pervasiveness of a particular company or service, or on-demand content subscription.

Clauses 3.4.2.1 and 3.4.2.2: These sections represent the uniformity sought by the state in recategorising broadcasting under the AAVCS category so as to allow for greater regulation for providers that don't even utilise radio spectrum for the provision of their services. The government seems to take an approach to parity that imposes more regulations where an imbalance exists rather than deregulating to achieve that parity. Deregulation rather than more regulation is as valid an avenue to pursue in creating regulatory parity, and as per the motivations of the freedom of choice that South Africans are guaranteed by having dignity, deregulation would achieve the goals the state seeks to achieve, mainly the proliferation of alternative entertainment mediums and content, even ones reflective of the diversity of cultures found in South Africa. When individuals don't have to pass through regulatory hoops to be a broadcaster, it is only natural that those who desire local entertainment will simply provide it or patronise those who do, without any government directive to do so.

Clause 3.4: On-demand Content Services (OCS) should not attract any form of regulation. The move towards more regulation rather than deregulation, necessitated by the fact of similar entities existing beyond the limited confines of a regulated thus static space, is evident here also. OCS will be subject to licensing on criteria listed in 3.4.2.2 which has the qualifying factor of a turnover of over R50 million to give a semblance of delineation to the wide range of activities that would considered to fall under regulation. The regulation of OCS is intricately tied to the regulation of expression, be it verbal or artistic in this manner. It should not transgress the standards laid out in section 16(2) of the Constitution. What broadcasting regulation globally on average and in South Africa specifically has done is treat expression under an assumption and presumption of criminality, thus requiring state sanction prior to it being manifest in the form of broadcasting. South Africans should be free to express themselves either by selling or buying entertainment content, without having said expressions of themselves subject to governmental oversight or approval.

Given the history of broadcasting, the industry has been oligopolised globally, due to the prevalence of state-enforced monopiles on spectrum and its allocation.. This centralisation is what caused innovation in the space of the broadcasting with the introduction of video sharing platforms like YouTube and OCS like Netflix or Hulu in the United States, so that potential entrants could bypass the onerous regulations that favour incumbents that are present in broadcasting using radio spectrum. This should have been taken as a sign to revise the regulations in radio spectrum by repealing a large

number of obligations on broadcasters and to grant property status to the technological unit of a particular company's radio frequency band rather than the licenses that are currently prevalent.

Clause 3.4.3.2: The requirements of the licensing for an OCS are all contingent on the discretionary powers afforded the regulator, thus in a country like South Africa where corruption is rife, this represents a major problem. The discretion allowed the regulator by the influence threshold is not harmonisable with the Rule of Law since it amounts to arbitrariness. The policy seems to err on the side of regulation rather than deregulation, thus representing a frustration of the object of the state to grow SMMEs. For growth and investment in the long term, a stable and predictable regulatory environment is needed, not one contingent on arbitrary criterion like public interest and 'influence' to determine whether regulation will be attracted or not.

Clause 3.4.4: The video sharing service licensing will be mainly self-inflicted, guided by the provisions laid out in this clause. The only provision that should stay is the application of the subsection of section 16 of the Constitution which has limitations on expression that exclude the incitement to violence and such. Any other limitation proposed by the white paper is over-regulation that has no purpose other than bureaucracy. There is no need for any additional form of regulation for video sharing services, as these represent the most basic way citizens can access broadcasting to a global audience. Since other options like terrestrial radio frequency broadcasting and on-demand services over the internet are subject to arbitrary regulations that are contingent on the discretionary judgment of the minister or the regulator. An example of this is the minimum turnover necessary for regulation, the rationale of simply doubling the turnover of a mining company represents the inherently arbitrary premise upon which these regulations are promulgated. The punishment of success in the market as the standard for regulation is misguided and will serve to discourage growth and innovation as this will not be rewarded with economic prosperity but rather entail greater costs not associated with delivering services, but imposed by the state.

Clause 4.2.4: There is no mention of the incompetence of the SABC to maintain itself. Instead, more ringfenced taxpayer funding is requested. There is no such thing as broadcasting for the national interest. Such a premise is fallacious. Individuals have interests, not the imaginary collective entity that is the nation. The mixed funding model being touted by the paper is also fallacious as it is simply an acknowledgement that the SABC cannot generate its own revenue and subsequently maintain its own operations like every other business. Rather, it needs to be supplemented by its competitors who receive no state funding yet still pay the taxes for its 'ringfenced' funding. The critique of the public-private split in the SABC is apt – rather than a fully public one, the SABC ought to be self-sustaining, receiving no funding from taxpayers like every other business.

Clause 4.2.5: By arguing that all commercial licences held by the SABC are to be converted to public broadcasting licenses and mandating that funding for 'programmes in the public interest' be ringfenced, the policy seems to sneakily introduce a policy that will see the state be made fully responsible for the funding of the SABC's activities. The financial mismanagement of the broadcaster is ignored and not addressed, instead, more money flowing into their coffers is the central theme.

Clause 4.3.5: The international best practice funding model is vague. International trends from where? From the UK, where the BBC is facing privatisation? The funding model that will ensure the sustainability of the SABC will be for it to be privatised. Yet this is somehow never mentioned, and seems to be pre-emptively dismissed by mention of national interests and other imaginary categorisations that seem to exempt the SABC from normal market forces. Rather, taxpayers who will most likely have to pay for private broadcasting still have to fund the public broadcaster with the taxes. The policy should include barring the SABC from bailouts from the public purse. Instead, the broadcaster must be self-sustainable. Failure to achieve that would mean that South Africans aren't interested in what the SABC has to offer. Audience numbers cannot be used to show the SABC's success because the fact that it is the most-watched platform in the country yet still in financial distress is a huge indictment on the management and model of the SABC.

Clause 5.1.7: Freedom of choice makes the other rights possible. If individuals are free to choose, then they can promote their cultures and ensure a diversity of views. A true diversity, not enforced by state quotas, but by organic and consensual market transactions.

Clause 5.2.1: Terms like 'the preservation of national identity' are authoritarian. What if a citizen from the country does not define their identity in terms of the prescribed 'national identity' that must be protected as government mandate? The government should instead promote an environment, premised on freedom of choice and trade, wherein a national identity can emerge from the voluntary transactions of individuals in the AAVCS market.

Clause 5.2.5: The cultural policy toolkit is an authoritarian sledgehammer meant to ensure compliance with the vaguely-defined 'cultural objectives of the nation' which in reality always translates to state intervention in the economy as is proven by the list. This is the forced mandating of carrying specific content, amounting to a limitation on the right to free expression protected in South Africa.

Clause 5.2.6.4: The regulation precludes NGOs from having the same funding model as community stations should they be allowed to broadcast to communities. This is gatekeeping and seeking to protect community broadcasters from competition, which will eventually result in economic inefficiency since unsustainable businesses will be maintained even though consumers for instance may be opting for NGO stations. Rather than business-specific regulations, sector-specific regulations are the answer, with regulations used as loosely as is possible. The default position must be one of non-intervention so as to eliminate state-induced regulatory barriers to entry.

Clause 5.2.7.6: The must-carry approach wherein public broadcast programmes are mandated to be varied by subscription services at no cost to the subscription service is subject to debate because some sides feel like the other is unduly benefitting. Typical of a situation where the state interfered where it wasn't needed. Instead, a no-hands approach or the permissionless innovation approach wherein companies can operate in a field without any government oversight or regulation, should be preferred.

Clause 5.2.8.4: The standard of high revenue and audience numbers as support for the quotas is misleading, as it suggests that the quotas are beneficial because the programmes mandated by them were commercially viable and watched by many when in actual fact, the commercial viability of the local entertainment industry as a whole, as well as its viewership numbers in South Africa has increased, quotas or none. Therefore, drawing a causal line between the two is a stretch. Beyond this, the mandating of the carrying of certain 'South African content' is a violation of the consumer right to choice and the freedom necessary to trade and enterprise for businesses, since the provision of a type of good or service will not be contingent on genuine consumer demand but rather contingent on the stimulated demand of the government, enforced through its quotas. The point about the creation of this national identity comes into play. For example, what if a South African's identity is tied to America, its mannerisms and the likes? It is not the government's job nor place to mandate that one consume South African content or that the companies one patronises carry it. If one wanted South African content, they will patronise the companies that offer it and where there's none, there is an opportunity for a new entrant. Freedom of choice and its implications should be the solution for local content rather than this mandated enforcement of content that is made to build an illusory national identity.

Clauses 5.2.8.7 and 5.2.8.8 essentially argue for the remainder of the content quotas for South African-produced content on all AAVCS, including video sharing services. Where a company fails to meet these requirements, payment of a fine into a fund is due. These regulations are meant to control the environment under which consumers make choices so as to promote the government's vision. The vision of ordinary South Africans is not considered. Instead of content quotas, the policy could afford tax breaks and regulatory exemptions for South Africa content creators and distributors or South African AAVCS. This is a negative intervention which will not see the forcing of businesses and by extension consumers to choose a particular practice, but would rather see the development of local content and its success contingent on its genuine demand locally rather than the artificial stimulated demand caused by state regulations.

Clause 5.2.8.9 is a Netflix regulation, as it applies to OCS who are also subject to the 30% local content quota our government took from the European Union.

Clause 5.2.9.20: This is an example of self-regulation not dependent on the state. It could be applied to the broader state paradigm concerning the broadcast of sports and its exclusive licencing.

Clause 5.4.4.5: This regulation which seeks to protect the traditional TV advertising market share shows the extent to which overregulation has gone. The trends in advertising need no 'investigation' from ICASA so as to protect whomever. If advertisers are moving from certain broadcasters to others, then the government should do nothing. The broadcasters must try to find a way to retain them; failure to do so will mean that their model is no longer efficient and needs to change. Market signals are there to tell businesses what to do. The government seeks to use them to interfere in the economy and stop the normal operation of the market, which includes the death of businesses or models for businesses that are no longer efficient.

Clause 6.1.6.1: This provision is the one that should be the basis for stimulating local content creation: Grant exemptions to companies that derive their incomes from the AAVCS sector so as to attract capital to that sector, seeing as it will have larger returns. This is a less invasive form of securing funding for local content creation as compared to grants and subsidies to the passion projects of artists, that are funded by the taxpayer.

Clauses 7.1.8.1 and **7.1.8.2** are good. They argue for deregulation of archaic ownership legislation and they mention the negative effect this has had on investment in the AAVCS sector. Thus, the prohibition on owning multiple media entities is removed. This looks set to clash with the Competition Commission's provisions on abuse of dominance.

Clause 7.2.3: The increase of foreign ownership in local media firms, specifically AAVCS with an individual licence from the limit of 20% ownership to 49% foreign ownership, is a good development. Of course, the ideal scenario would be having no limit on the stake of foreign ownership, so as to maximize the attraction of foreign capital which our economy is in deep need of.

3. Recommendations

The white paper represents the same regulatory regime, albeit with minor tweaks, that has up to now been prevalent in the broadcasting space. Rather than seeing the emergence of enterprises that have the same end but are beyond the scope and ambit of the current regulations as an opportunity to move away from a state-controlled entertainment industry, the government seeks to bring even more entities and enterprises under its jurisdiction. The problems of centralisation and the limited number of players in the broadcast market are caused by the state monopolising spectrum and the licencing of broadcasters who aim to use their own capital to use it. This will persist in an industry that has the potential of achieving the ends of fostering a national identity that the state has in mind. This end can only be achieved if South Africans have the freedom to express themselves however they deem fit and broadcast said expressions, not according to the standards of ICASA or the Department of Communications, but according to their own terms.

The distinction between class and individual licensing should be abandoned and rather a uniform, low-requirement licencing model should be adopted. Preferably, the granting of exclusive use rights to existing telecommunications companies would be the preferable solution. These must then be freely tradable.

No video sharing platform should not be subject to any regulations no matter the context. The idea that a South African citizen broadcasting on YouTube would need to obtain or be subject to broadcasting regulations is an unjustified and grave inhibition on the freedom to express oneself. The State may only conceivably interfere with this freedom if the expression incites racial, sexual, religious, or ethnic violence or hate.

The tiered regulatory regime should be abandoned. Rather, there should be uniform rules for the same actors. This helps create policy certainty for businesses that will make attracting investment easier and thus contribute to the growth of the entertainment industry. Also, different rules of

conduct for the same actions in law are a violation of sections 1(c) and 9(1) of the Constitution, as they violate the principle of equality before the law.

The ICASA regulations for local content should not be applied to OCS, OTT or VSPS and they should be removed from broadcasters who obtained licences in the past. Such regulations are a deliberate attempt by the state to force South Africans and their companies or those they wish to patronise to consume what the state wants. Entertainment, which is art, is highly subjective, thus having quotas that mandate the quantity of the type of content to be shown to individuals who can make a choice about what type of content to consume is an affront on the dignity of those individuals. Government does not deem them worthy enough to choose the local content they desire to consume. The ICASA local content regulations and obligations should be abandoned as part of South African broadcasting regulations. Broadcasting should be dictated by the preferences of consumers, and not the wishes of state 'visionaries'. The retort of a lack of willingness to showcase local content is moot. The regulatory environment must make it easy for the average Sibusiso to enter the broadcasting space and fill a mass or niche market should they feel like it.

Radio frequency spectrum should be approached from a wholly different paradigm. Rather than having the government use scarcity as a reason to not have property rights in spectrum, the scarcity, represented by 'interference', should be the reason for having property rights. Having property norms for spectrum would incentivise enterprises of whatever size and scope to be innovative and invest in their own infrastructure and other components of the business, thus improving the overall provision of services like broadcasting and internet services for consumers.