



NAB Submission on the Draft White Paper on Audio and Audio-visual Content Services Policy Framework

GG No 43797

15 February 2021

Introduction

1. The National Association of Broadcasters (NAB) welcomes the publication of the long-awaited Draft White Paper on Audio and Audiovisual Content Services Policy Framework (the Draft White Paper) as published in the government gazette number 4379 of 9 October 2020. This process has taken a number of years to complete and we are encouraged that the Draft White Paper seeks to address policy concerns that have been consistently raised by industry stakeholders over the years.

2. The NAB is a leading industry association that represents the regulated broadcasting sector. It was formed at the dawn of South Africa's democracy to enable and promote a robust, viable and sustainable three-tier broadcasting sector. Members of the NAB are licensees of ICASA and are therefore directly impacted and affected by policy and regulatory reviews. The NAB membership includes:
 - i. the three television services and 18 radio services of the SABC;
 - ii. licensed commercial radio broadcasters (including: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, MRC Management Services (Pty) Ltd, Classic FM, Smile 90.4 FM, Kaya FM, YFM and YOU FM);

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- iii. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat);
 - iv. a number of community radio broadcasters and community television broadcaster, Faith Broadcasting Terrestrial;
 - v. both the licensed broadcast signal distributor as well as the selective and preferential broadcast signal distributors, Sentech and Orbicom; and
 - vi. Associate members including Nemisa, Media Development and Diversity Agency, Media Mark, United Stations, Telemedia, A&E Networks, Globecast and DSTV.
3. The NAB participated in the National Integrated ICT Policy review process since 2013, under the auspices of the former Department of Telecommunications and Postal Services (DTPS), to the former Department of Communications' attempts at addressing broadcasting and audio and audio-visual services specifically (when the department was split) – to this expansive Draft White Paper under the re-integrated Department of Communications and Digital Technologies (DCDT). During the intervening years, our members have been significantly impacted by changes in ICTs, in particular the proliferation of unregulated audio and audio-visual content services, as well as the World Economic Forum's global agenda on the fourth industrial revolution.
4. The NAB supports the proposed approach in the Draft White Paper as it aims to *“regulate platforms providing AAVCS similarly, regardless of platform used. This may entail relaxing or introducing more flexibility in some aspects of regulation for traditional broadcasting platforms while simultaneously bringing new audio and audiovisual content platforms into the regulatory framework in an appropriate manner”*.

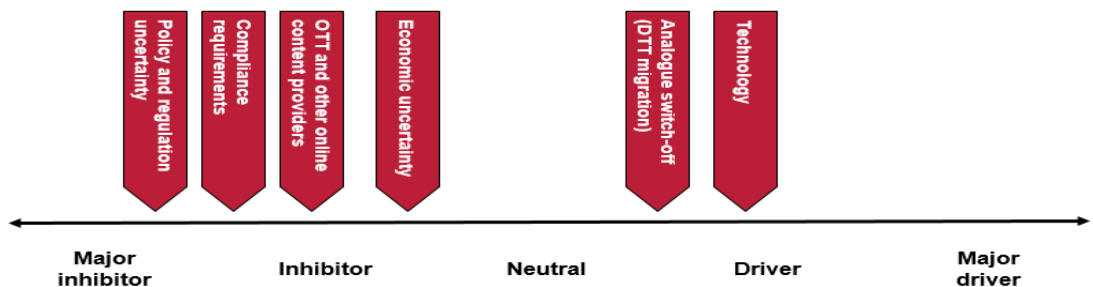
Context

5. Advancements in technology have fundamentally transformed the broadcasting industry and broader audio and audiovisual sector. Audiences have greater access

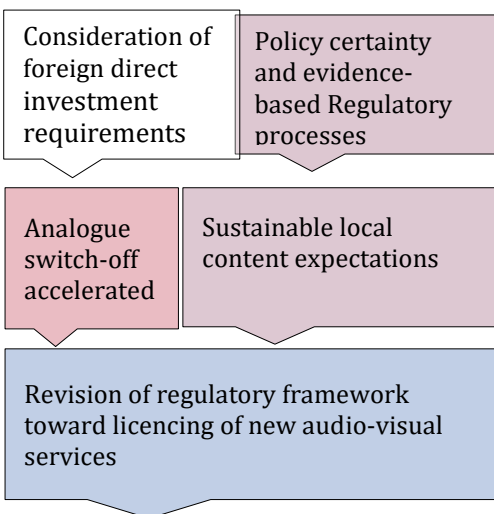


to content through traditional broadcasting services as well as online content distribution platforms. The NAB acknowledges that online distribution platforms provide audiences with more choice, thereby promoting diversity and plurality of content which is a key tenet of the regulatory framework. However, these online content distribution platforms remain unregulated notwithstanding the fact that they compete directly with licensed broadcasters for audiences and advertising revenue, which is contrary to and undermines the principle of regulatory parity. This was also cited in the NAB's 2018 State of the Broadcasting Industry report as one of the main industry growth inhibitors which if adequately addressed, may actually present new growth opportunities. A summary of the key inhibitors and desired reforms were posited by our Radio and Television members in 2018, as follows:

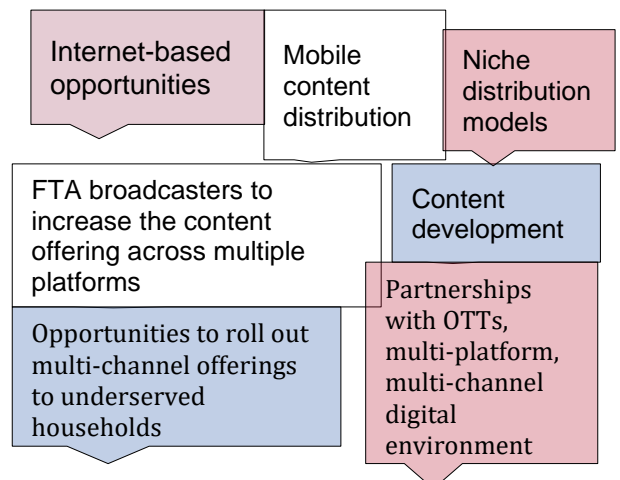
TV broadcasters view on topical issues
Industry drivers and inhibitors



Reflections on what could be changed



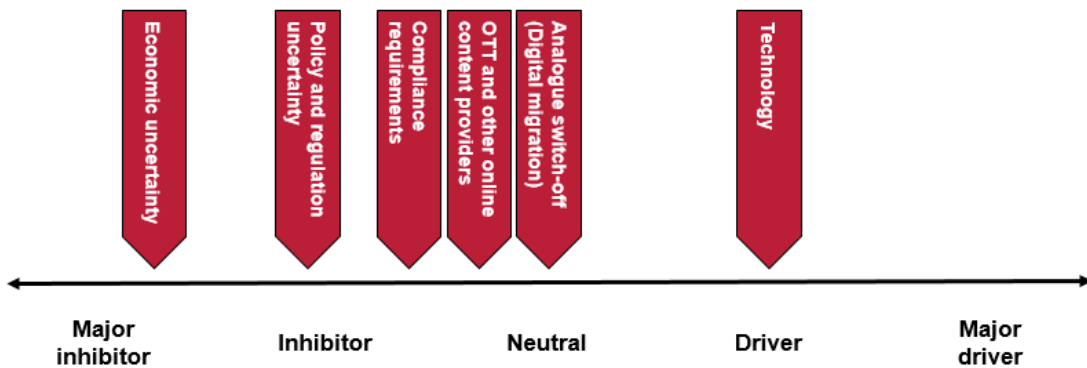
Possible growth opportunities



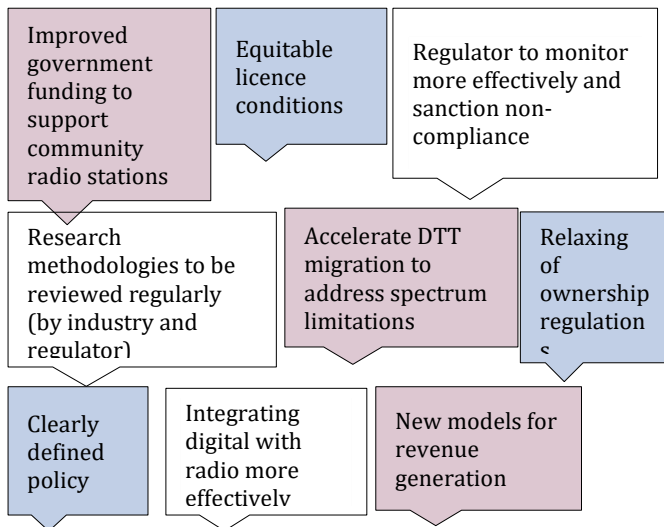
Radio broadcasters' views on topical issues

Survey respondents were asked for their views on a series of topical matters:

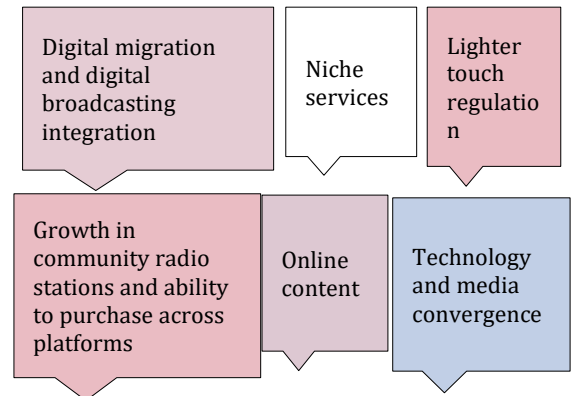
Industry drivers and inhibitors



Reflections on what could be changed



Possible growth opportunities



6. Whilst the NAB is encouraged by governments efforts to address the current regulatory *lacuna* in a holistic and comprehensive manner, we note that the Draft White Paper is a culmination of a number of previous policy review processes - that were never finalised to be taken forward to the legislature. It is therefore critical that the new licensing and regulatory framework which will emerge once the final policy



is adopted is forward looking, to ensure that it remains relevant for some years to come.

NAB Submission Focus

7. The Draft White Paper addresses a wide range of issues, however key institutional arrangements have not been adequately addressed. There is also some concern that the proposed licensing framework does not go far enough to address regulatory parity. In addition, whilst the lifting of ownership and cross media restrictions is welcomed, issues of fair competition and a level playing field remain key concerns for traditional broadcasters. The scope of the Draft White Paper is far-reaching, and this submission will focus on the primary concerns of our members. The following will be covered:

1. Key regulatory principles
2. New licensing framework
3. Thresholds
4. Capacity of the regulator
5. Institutional Arrangements
6. Ownership limitation and foreign control
7. Radio Frequency
8. The public broadcaster
9. Content Funding

Key regulatory principles

8. Broadcasting regulation is premised and guided by the principle of freedom of expression and access to information as articulated in sections 16 and 32 of the Constitution, respectively. These principles will remain relevant even in the new regulatory framework and the NAB remains committed to upholding them.

9. The proliferation of online content services has distorted competition in the audio and audiovisual market, which has undermined the principle of regulatory parity and fair competition which is vital for economic growth and viability of the sector. The NAB notes that the overarching policy response to the emergence of



unlicensed, foreign operators in a number of jurisdictions has been to reduce the regulatory load on licensed industry players which contribute to job creation, investment in local content and the national fiscus through taxation by enabling them to compete more effectively. Policy has therefore recognised that licensed, local operators make a significant contribution to the national economy. The NAB commercial TV and Radio members have contributed over R2.32 billion and R700 million respectively between 2015 and 2018, and commercial tv members invested over R7.5 billion in local content.

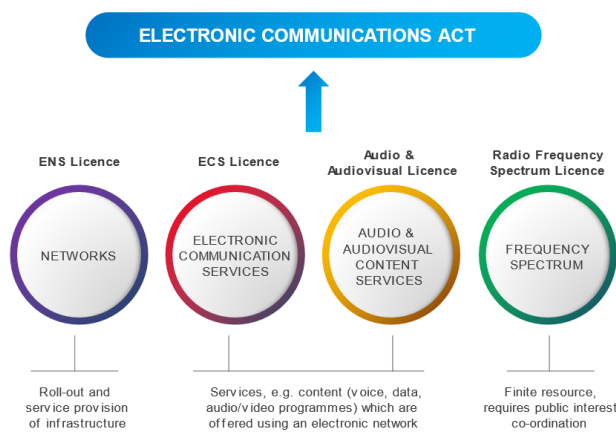
10. The NAB is therefore encouraged by governments efforts to address the current imbalances and strongly recommends a co-ordination of efforts between all relevant institutions and consistent application of competition law principles.
11. Support for local content and content diversity remains a key consideration and the NAB is encouraged to note that local content quotas in particular will remain relevant in the new regulatory framework. This will also promote the objective of content diversity and inclusivity.
12. The NAB recommends that the revised policy framework considers the last 27 years of onerous regulation which has been a considerable barrier to entry and inhibited growth and developments in the sector. In the context of new rapidly developing technologies, we strongly recommend the adoption of a light-touch, flexible approach which will enable the audio and audiovisual sector to adopt new technologies without having to be licensed based on either the platform they use or a particular service offering.
13. The delay in the publication of this Draft White Paper has illustrated the inability of policy to keep pace with advancements in technology, a challenge which is not unique to South Africa. It is therefore essential that in order to ensure legal certainty and stability, the final policy must create an enabling framework that is implementable and enforceable.
14. Given the extensive timeframes required for the implementation of the revised licensing framework and proposed Constitutional amendments, the NAB

recommends that ICASA considers interim measures which will provide immediate regulatory reprieve for incumbent broadcasters pending the finalisation and implementation of the revised licensing framework. To this end the NAB recommends that ICASA revokes or suspends the application of those regulations which are no longer practical or feasible in light of industry developments. The NAB submits that such an approach could address some of the pressing challenges facing licensed broadcasters toward regulatory parity - without having to wait for lengthy legislative amendment processes to unfold.

New Licensing framework

15. The Draft White Paper proposes that the current licence category of broadcasting service licences be substituted with a broader category of audio and audiovisual content services. The Draft White Paper further proposes that this broader category have three sub-categories namely broadcasting services, on-demand content services and video sharing platforms. The NAB supports the principle of a comprehensive framework and notes that the differentiation between broadcasting services and on-demand services is premised on the distinction between linear and non-linear content services.

Proposed New Licensing Framework: Supported by NAB



- Broadcasting becomes a subset of a broader AAVCS licence category. Content Service market expands to include VOD/Streaming and video sharing platforms
- **Level playing field - broadcasters and OTT to be subject to the same regulations. Some de-regulation to take place after reviews by ICASA.**
- On-demand Content Services which have an annual turnover of 50m or greater required to apply for a licence
- Video sharing platforms are exempt from applying for a licence, but are not exempt from regulations protecting consumers or preventing harmful content.

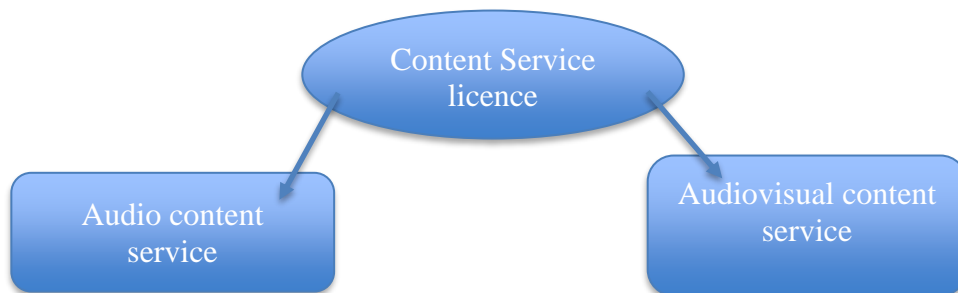


16. However, whilst these recommendations reflect some of the initial developments in the broadcasting industry when on-demand content services started entering the market, this distinction will soon become redundant as some OTT services are beginning to offer linear channels, in addition to video on demand (VOD). A prime example is Netflix Direct which provides a linear content channel akin to traditional broadcasting services.
17. Evidently new technologies have allowed new relationships to develop between content providers and the audiences/users that they serve. There is greater interaction between the content provider and user, with the user being able to determine what to consume and when to consume. The NAB therefore submits that this rigid categorisation may not serve any real purpose in the foreseeable future in light of some of these recent developments.
18. The NAB further submits that the categorisation proposed in the Draft White Paper may ultimately inhibit the ability of content service providers to provide content across different platforms as there would effectively be a licence required for linear and non-linear services respectively subject to the licensing thresholds. It has become more pressing now than ever before, for policy and regulation to adapt and evolve to stimulate innovation and allow operators greater flexibility to meet consumer demands without having to go through burdensome licensing processes.

Technology Neutral Licencing Framework

19. The NAB notes that the licensing framework proposed in the Draft White Paper is inadvertently contrary to the technological neutral approach which is articulated in section 2(b) of the Electronic Communications Act, 2005 (ECA) which provides for the adoption of a technologically neutral framework. In order to carry this principle and approach forward, the NAB respectfully recommends that the distinction between broadcasting and on-demand content services as currently proposed be set aside and that the licensing framework should rather differentiate between an audio content service and an audiovisual content service *irrespective of whether*

they use radio frequency spectrum. This essentially means there will be two license categories without any differentiation on the content distribution platforms, as illustrated below. This will enable content service providers to provide content across multiple platforms without having to apply for different licenses, which would in turn have significant financial implications.



20. The principles of pervasiveness and public interest will remain relevant in guiding the overall licence framework as well as the categorisation between exempt, class, and individual licenses. The NAB acknowledges that radio frequency spectrum is a finite and scarce resource, which must be used efficiently and effectively by licensees. However, the NAB submits that radio frequency spectrum must be regulated separately from content services.
21. Therefore, audio and audiovisual content services will still be regulated in a graduated manner as contemplated in the Draft White Paper. To this end, the NAB submits that the current definition on audio and audiovisual content service be amended to read as follows:

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



22. For the avoidance of doubt, the NAB submits that video sharing platforms should still be regulated separately from audiovisual content services pursuant to either their codes of conduct or the Films and Publications Act of 1996, as amended and subject to the exemptions afforded to members of the Press Council in terms of section 16 thereof.

Thresholds

23. The Draft White Paper sets thresholds based on annual turnover to determine what type of licence an AAVCS needs to apply for. The threshold will effectively act as a “trigger” event that lets the regulator and the applicant know that they most likely require an Individual or Class licence. The individual or class licence will be issued for a defined period of time irrespective of fluctuations below the annual turnover threshold during the licence period, but the licensee may apply mid-term and again at the renewal of the licence for a licence re-categorisation based on annual turnover performance during the licence period.
24. The Draft White Paper currently sets the threshold for an Individual license and Class license at R100 million and R50 million annual turnover respectively in the previous financial year. These thresholds are premised on the nature of the entertainment sector wherein the costs of acquiring or producing content are considerably high and may be reviewed by the Minister every three years to account for inflation, macro-economic shifts or any legislation affecting SMMEs.
25. The Draft White paper further recommends the application of the scarcity rationale, the public interest rationale, and the pervasiveness/influence rationale. The regulator may also prescribe other criteria of a socio-economic nature or include the measurement of audience size which can be utilised to require a licensee to apply for an Individual licence even if they are below the R100 million threshold.
26. The NAB supports the principle of supporting SMMEs in order to stimulate economic growth. However, the NAB is of the view that the proposed thresholds



system in the Draft White Paper is unduly complex and should be simplified. The NAB recommends that the criteria should rather be left to ICASA to determine.

27. Furthermore, the NAB recommends that section 6 of the ECA which already allows the regulator to exempt specific listed types of services such as electronic communication service, electronic communications network (ECN), electronic communications network service (ECNS) and radio frequency, be amended to also allow the regulator to exempt a type of audio-audiovisual content service (e.g. SMMEs, online sound broadcasting services) from applying or holding a licence. For the avoidance of doubt, this would be in addition to online streaming sound broadcasting services which the Draft White Paper has recommended ICASA exempt from licence applications, albeit not regulation. The recommended amendment would enable ICASA to exempt SMMEs subject to criteria which it may prescribe in regulations. The criteria could take the form of an annual turnover threshold as suggested in the Draft White Paper, but it also creates scope for the regulator to consider other criteria when it makes such a determination.
28. The NAB respectfully submits that the proposed threshold approach is not appropriate or required for Individual and Class Licensing going forward. Instead, the current “old school” approach/distinction of all Individual Licences requiring an Invitations to Apply (ITAs) and all Class licences requiring a simple registration needs to be reconsidered given the impact that audio-visual content services can have on socio-economic development especially as they can be offered to the public over-the-top without any investment in an ECN of national or provincial scope or radio frequencies.
29. The NAB also notes that should section 5(3)(b) of the ECA be amended to change “broadcasting” to “audio-visual content services” it would mean all the current national broadcasters remain Individual Licences, it would also mean that online services which are by their nature ‘de facto’ international in scope, would require an Individual licence. The proposal of thresholds in the draft policy should therefore address the fact that not all online audio-visual content services have global or national ambitions, some are intended to address only a small clearly defined target



market that might only be provincial or local in scope, in which case a Class licence and its accompanying regulatory requirements might be more appropriate. In such a case the NAB submits that the ECA already provides ICASA with the power in section 5(5)(c) to prescribe such services as Class licences that the regulator finds do not have significant impact on socio-economic development.

30. The NAB is encouraged to note the retention of the three-tier system. Class licences play a crucial role in promoting an inclusive audio and audiovisual sector which serves the needs of their respective communities. The NAB submits that greater support must be given to this tier which is essential to the overall regulatory framework and sustainability of the audio and audiovisual sector. The NAB supports the recommendation that provision be made for non-profit and non-governmental organisations which provide support educational or health initiatives. This will complement efforts by all licensees in ensuring that the public is informed on matters of national interest. The NAB further supports the recommendation that class license services provided by NPOs and NGOs should be fully funded by the licensed NPO, or NGO (not through advertising), as the purpose of such services is to support specific programmes, interventions, and social causes.

Capacity of the Regulator: ICASA

31. The Draft White Paper expands ICASA's current regulatory scope with the inclusion of audio and audiovisual content services. To this end, the Draft White Paper proposes a new licensing framework which *inter alia* introduces new factors in the distinction between Class and Individual licenses on the one hand, and services which will be exempt from licensing *albeit* still subject to a level of regulation. The Draft White Paper also recommends that ICASA undertake a number of enquires as part of the transition to the new regulatory framework.
32. Whilst the NAB understands that these proposals are aligned to the policy objectives, they will also significantly expand ICASA's mandate and operations. The additional factors which are recommended in the determination of whether an entity requires a license means that ICASA will have to consider a myriad of factors



and extensively monitor audio and audiovisual market as a whole. ICASA is currently under-resourced and has cited this as its main challenge in meeting its current strategy and annual performance plans. This has adversely impacted the broadcasting industry in particular, as a number of regulations have either not been reviewed at the prescribed intervals, or the review processes have not been concluded within a reasonable time. This has regrettably resulted in the continued application of regulations that are not fit for purpose and inconsistent with industry developments.

33. In order to effectively meet the objectives of the Draft White Paper, ICASA has to be capacitated to ensure that it has the necessary resources and human capital to regulate effectively in an agile and responsive manner. The NAB believes that in order to address the inefficiencies ICASA is plagued with, the entire structure and staffing should be reviewed given the additional scope of work - for example, specialised skills that will enable the regulator to effectively monitor thresholds and audience sizes. The NAB recommends that the following skills and areas of expertise be included:
 - a. data-scientists;
 - b. market analysts and economists;
 - c. content research specialists; and
 - d. audience/consumer research analysts.
34. Furthermore, ICASA ought to be guided by the principles of efficiency, transparency, clarity, predictability and adopt a performance driven culture. The NAB respectfully submits that a socio-economic impact assessment must be conducted on the Draft White Paper in order to guide and identify ICASA's operational and funding requirements.
35. The NAB also recommends that a hybrid funding model be considered which would enable ICASA to retain some of its administrative fees such as licence fees, fines, licence application fees, which will cover regulatory and administrative costs, while government continues providing part of the funding, which will cover certain



government mandate line items that do not have a matching revenue stream. This will require greater alignment between ICASA's budget and what Parliament ultimately grants.

Institutional arrangements

36. Whilst ICASA is the primary entity in respect of the regulation of broadcasting services and will continue to be so in respect of the broader audio and audiovisual sector, there are other entities that also play a significant regulatory role within this sector.

The Competition Commission

37. ICASA currently exercises concurrent jurisdiction with the Competition Commission and the two regulatory bodies have concluded a memorandum of understanding in order to *inter alia* apply a consistent interpretation and application of the principles of competition when exercising their powers and respective functions in terms of their enabling legislation. The memorandum of understanding also seeks to facilitate engagements in respect of mergers and acquisitions as well as determining whether there is effective competition in the markets regulated by ICASA.
38. The Draft White Paper reinforces the need for continued co-operation between the respective regulatory institutions in order to promote fair competition. The NAB recommends that there be greater co-ordination between ICASA and the Competition Commission through *inter alia* joint market enquiries and market research to ensure effective redress in respect of anti-competitive practices.

The FPB, BCCSA and ARB

39. The Draft White Paper recommends that content in the broader audio and audiovisual sector be regulated cumulatively by ICASA, the Film and Publication Board (FPB), the Advertising Regulatory Board (ARB) and the Broadcasting Complaints Commission of South Africa (BCCSA) or a similar co-regulatory body.



The BCCSA has over the years successfully administered two codes, one for free-to-air broadcasting service licensees and the other for subscription broadcasting licensees. During its term of existence, the BCCSA has among others received international and presidential recognition for its effectiveness in self-regulation. Furthermore, the BCCSA has hosted a number of regulatory bodies from other countries for benchmarking purposes. The NAB supports the continued inclusion of credible self and co-regulatory mechanisms as specifically legislated in the ECA, to ensure the protection of children and audiences/consumers.

40. The NAB recommends that there be close coordination between ICASA and the FPB in particular to ensure efficient use of resources and a clear demarcation of jurisdiction. To this end, the NAB further recommends the current exemption provided in section 54(3) of the ECA be extended to apply to all audiovisual content services provided by licensees who are members of the BCCSA or any other body which has proved to ICASA's satisfaction that its members subscribe a code of conduct and disciplinary mechanism which are acceptable to ICASA, thus exempting these services from the jurisdiction of the FPB.
41. The FPB, ICASA, BCCSA have worked collaboratively over the years and there is definitely need for these organisations to revisit the current framework with a view to filling any gaps in their current processes.

'Smart Regulation' – proposed amalgamation of ICASA, FPB and .ZADNA

42. The NAB notes that in December 2019 prior to the publication of the Draft White Paper the Minister of the DCDT reported that the DCDT intends to develop a model for 'smart regulation', which will include the amalgamation of ICASA, the FPB and the domain name authority .ZADNA. The Minister also indicated that the DCDT will explore new funding mechanisms for the new regulator.
43. The NAB notes that notwithstanding the above, the Draft White Paper does not make similar proposals or recommendations. The NAB therefore respectfully



recommends that the Draft White Paper outline the policy position on the institutional arrangements in respect of the aforementioned entities as part of this review process. It is important to ensure that there is legal certainty on the policy proposals as these lay the foundation of the legislative amendments which will follow. The NAB strongly recommends that the contemplated institutional arrangements be clearly outlined for public consideration and input as this is a critical aspect of the policy review process.

44. The NAB is particularly concerned with the implications of the proposed amalgamation of entities on the Constitutional protection afforded to the regulation of broadcasting industry through an independent entity.
45. The NAB is aware that there are ongoing deliberations of possible amendments to the Constitution. This is a process that will no doubt take time and it is therefore imperative that the policy maker consider interim provisions toward any amalgamation of institutions,
46. More importantly, the proposed new licensing framework is based on content services offered by traditional broadcasters as well as audio and audio-visual content services – content regulation is therefore central to the new licensing regime. It is essential that there is certainty going forward for the regulator as well as operators, key stakeholders, and government departments.

MDDA, Nemisa and the Digital Development Fund
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47. Currently, media literacy is addressed and promoted through various programmes administered by different agencies including Nemisa and the Media Development and Diversity Agency (MDDA).
48. The Draft White Paper recognises the significant role of the MDDA in encouraging the development of human resources, training, and capacity building within the media industry, especially amongst historically disadvantaged groups.



49. The NAB supports the recommendation of a unified approach to digital media literacy through coordination and optimal institutional alignment. The NAB further supports the recommendation that targeted interventions must be based on annual media literacy research funded through the Digital Development Fund. This will ensure support for policies aimed at strengthening media literacy.

Digital media literacy

50. It is envisaged that the growth of the ICT sector will produce a significant amount of job opportunities, both direct and indirectly. It is therefore critical that government and private sector should apply a concerted effort in ensuring that the right skills are available to meet the looming skills gap created by digitisation.
51. In order to accommodate the medium to long term e-skills needs, the NAB proposes that not only should digital media literacy be incorporated into the curriculum of primary schools, but it should be encouraged and extended into higher learning at technical training colleges and universities, to ensure that the demand is met in fields of *inter alia* electronics, engineering, digital media, with adequate funding.

Ownership limitations and limitations on foreign control

52. Currently ownership and control principles are based on coverage, reach, and are aimed at ensuring diversity and plurality of views. The Draft White Paper notes that this framework has been in place since 1993 and has remained unchanged notwithstanding the consultations conducted by ICASA in 2004 and 2011 on the continued relevance of the statutory restrictions. The NAB concurs that the ownership limitations have served their purpose and the sector should become more enabling to encourage local and foreign investment.
53. The Draft White Paper further notes the emerging international best practice in terms of which a number of jurisdictions have either relaxed their ownership restrictions or abolished them altogether. Against this background the Draft White Paper recommends that the current ownership limitations be set aside in their



entirety and proposes that the guiding principles and provisions of competition law, together with the content regulations and other license conditions be applied to ensure *inter alia* plurality of voices and diversity of programming whilst also assessing the impact of a transaction on the state of competition in the defined market.

54. The NAB supports this recommendation as it will ensure legal certainty on the assessment of mergers and acquisitions and promote consistent application of competition law principles. However, the NAB is concerned that whilst competition legislation provides a clear framework on the factors to be considered when assessing the impact of a merger or acquisition on competition within a defined market, the alternative regulatory tools which may be used by ICASA in promoting plurality and diversity in a multichannel environment have not been sufficiently defined.
55. With respect to foreign ownership, the Draft White Paper recommends that the current restrictions on foreign ownership be revised upwards from 20% to 49%. The Draft White Paper further provides that a foreign person from an African Union country may exercise control over a broadcasting licensee or have a financial interest beyond the 49% threshold, provided that this is done on a reciprocal basis between South Africa and the relevant African Union country.
56. The NAB understands that the objective of this recommendation is to support South Africa's commitment to the African Continental Free Trade Area Agreement. However, the NAB respectfully requests that clarity be given on whether there has been consideration of a similar approach being adopted in future in respect of the BRICS countries which collectively represent an important economic bloc which can also be a significant source of foreign direct investment. The NAB recommends that the Draft White Paper must clearly outline how this section will be implemented as engagements between South Africa and other countries is the prerogative of the executive authority. It is therefore not clear how the reciprocal access to markets will be facilitated.



57. Notably this restriction only applies to linear broadcasting services, which may be due to the fact that on-demand content services are often provided by foreign companies. However, companies providing on-demand content services have also begun providing linear content services akin to conventional broadcasting services with the only difference being the content distribution platform. The NAB therefore recommends that this restriction only apply to content services which use radio frequency spectrum as spectrum falls squarely within the jurisdiction of the South African government.
58. The NAB notes the recent amendments in section 12A of the Competition Amendment Act, 2019. In terms of this new section, mergers involving a foreign acquiring firm will be primarily assessed by a committee constituted by the President. The main objective of this committee will be to consider whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa as identified by the President. During its consideration of a merger, the committee may consult and seek the advice of the Competition Commission or any other relevant regulatory authority or public institution such as ICASA.
59. The amendments accord with developments in other jurisdictions wherein laws have been enacted to limit foreign ownership of media companies in an effort to protect national sovereignty and limit the ability of foreign companies to exert influence and compromise the national identity of a country through the ownership of media assets. In the UK, Australia and New Zealand, a media merger or foreign investment in broadcasting services are screened under the foreign investment laws on the grounds of security. The European Union (EU) has also developed a framework for the screening of foreign direct investments into the Union which is articulated in the EU Foreign Investment Regulations. In terms of these Regulations, Member states may adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order.



60. Due to the fact that the Competition Amendment Act of 2019 has been signed into law, albeit not yet in force, the NAB respectfully recommends that the DCDT take note of these provisions and align the revised White Paper accordingly.

Radio Frequency Spectrum

61. The Draft White recommends that ICASA must conduct an inquiry in order to determine the most appropriate licensing framework for digital terrestrial television (DTT) post analogue switch-off. However, it is not clear when the digital migration process will be completed which jeopardises the commercial viability of DTT as an alternative content distribution platform and broadcasters have begun exploring more cost-effective technologies. Furthermore, the NAB notes with concern that the Draft White Paper does not provide any guidance on the licensing framework post analogue switch-off.
62. Countries that have already migrated to digital broadcasting have realized benefits of the dividend. Increasingly jurisdictions are auctioning the digital dividend spectrum and using the proceeds to fund the digital migration. The NAB notes with concern that migrating broadcasters have still not been adequately compensated for the migration to digital and the release of licensed spectrum for the digital dividend – this needs to be urgently addressed. The NAB submits that consideration must be given to how processes such as the digital-to-digital migration by broadcasters or restacking will be funded.
63. The NAB also notes that the ultra-high frequency bands of 470MHz to 694MHz have been retained for broadcasting services by the International Telecommunications Union, however, this may change in future. It is further anticipated that this may further be impacted by the increasing adoption of IP-based technologies by content service providers. This further necessitates timely implementation of a revised regulatory and licensing framework. The NAB therefore submits that spectrum plans must adopt a holistic approach which accommodates the country's future spectrum needs for broadband, DTT, digital radio as well as



possible future technologies in order to ensure capacity for new audio and audiovisual content services.

64. One of the unintended consequences of the transition to DTT through the seven-mux plan is the extension of the coverage of geographic community television broadcasters as they will be placed on provincial muxes. This will adversely impact their key characteristic as geographic community broadcasters and will also significantly increase their signal distribution costs.
65. The NAB notes that the Draft White Paper provides that ICASA must investigate alternatives which will allow for community broadcasters to remain local broadcasting services as intended. The NAB recommends that ICASA consider the use of different modulations and lower power spectrum bands which will also be more cost effective for the licensees.

The Public Broadcaster

66. The public broadcaster is a key institution and at the centre of South Africa's three-tier broadcasting ecosystem and will remain relevant in a digital, multiplatform environment. It is a vital source of information, news and entertainment and plays a critical role in promoting inclusivity, plurality, languages, cultural heritage, content diversity and social cohesion. The public broadcaster also plays an important role in supporting the development of the creative industry as a whole.
67. The NAB believes that a credible and sustainable public broadcaster is critical to the success of a three-tier broadcasting system. As the largest broadcaster that serves the majority of citizens, the public broadcaster's mandate must be shaped by the needs and interests of South Africans and must be adequately funded and supported. The mandate of the public broadcaster is essential in defining its *raison d'être* and also forms the basis of its performance and financial planning and reporting.



68. The SABC has argued in previous submissions, that its mandate is too broad which results in it “unintentionally” neglecting some aspects. In order to alleviate this pressure, the SABC has proposed that its Charter be categorised into high priority and general objectives. The NAB submits that there may be value in categorising high priority areas that are reviewable every few years. These priorities could be aligned to national policy objectives, set against the principles underpinning the National Development Plan 2030, in particular nation building, deepening democracy and social cohesion, which in turn must be reflected in the content and programming provided by the public broadcaster. Primarily, the re-categorisation of the public service mandate will enable the SABC to invest more resources to high priority areas in support of national developments goals. The viability and sustainability of the public broadcaster is therefore the responsibility of both government and the regulator.
69. The Draft White Paper notes that the public broadcaster needs to be repurposed to ensure that it is fit for purpose in an ever-changing media environment and is able to serve diverse audiences. The Draft Paper further identifies key regulatory interventions which will address some of the challenges facing the public broadcaster.
70. The NAB notes that there are parallel review processes and recommends that there be coordination between ICASA’s and the DCDT’s processes. Importantly, the framework regulating the public broadcaster must enable it to adopt innovative, cost-effective means to execute its mandate.
71. The funding model of the public broadcaster has been an ongoing project for at least the last 15 years, and it is fair to say that in balancing national priorities and the national budget, it is not likely that the public broadcaster will ever be fully funded by the public purse. Industry stakeholders are also aware of various processes on ‘costing the public mandate’ by both government and the public broadcaster. Furthermore, whilst international best practice models on public broadcasting are useful and have been done several times, decisions must ultimately be based on South Africa’s needs and within a national socio-economic



framework. The public broadcaster and its viability, is central to this policy review process and a number of issues arise such as:

- 62.1.1 Will government pronounce on the funding model of the public broadcaster before this current policy review process is finalised?
 - 62.1.2 How will the proposed international/foreign broadcasting service be funded?
 - 62.1.3 With the proposed removal of “public commercial services” will the public broadcaster’s licence consequently be amended?
 - 62.1.4 What impact will the new licensing model have on the public broadcasters advertising revenue stream – given its reliance thereon?
 - 62.1.5 Will terms such as ‘public mandate programming’ be removed as the public broadcaster is essentially required to provide public mandated content? This is underscored in paragraph 5.2.6.2 of the Draft White Paper which provides that “the primary mandate for public service broadcasting programming will remain with the SABC.”
 - 62.1.6 Could the “unfunded mandate” be carried by other tiers of broadcasters?
 - 62.1.7 If the public mandate cannot be met/funded by the public broadcaster, should ICASA review the public broadcaster’s license conditions?
72. Given the centrality of the public broadcaster in South Africa’s three-tier broadcasting system, the NAB is concerned that until issues such as those highlighted above (amongst others) are addressed, the proposed new licensing framework may not be fully realised.

Content Funding Mechanisms

73. Content is the life blood of the audio and audio-visual sector and a key pillar of the creative industry. Licenced broadcasters have contributed to content production through commissioning, royalty payments and contributions to entities such as the MDDA. Furthermore, licensed broadcasters provide a critical nexus between content creators and audiences.



74. The Draft White Paper recognises that digital platforms have dramatically opened up opportunities for creators, distributors, and consumers of South African content. This requires greater investment in diverse content production which reflective of the demographics of our country. Currently content is funded across different ministries and institutions including the National Film and Video Foundation, Department of Trade, Industry and Competition, Industrial Development Cooperation, National Lotteries Distribution Trust Fund, and regional film commission.
75. The NAB concurs with the Draft White Paper that there must be institutional review and alignment in order to achieve a coordinated approach amongst strategic industry partners. This will also ensure greater capacity building particularly in areas outside of the main metropolitan areas of Gauteng, Durban, and Cape Town. The NAB notes that the DCDT has been engaging the Department of Small Business Development on its process of developing a masterplan for the creative industries and is encouraged by this co-ordinated approach.
76. The NAB is encouraged to note that the Draft White Paper proposes the establishment of a production fund to which all content providers could contribute. The NAB recommends that specific provision be made for broadcasters and digital content providers to have access to this fund for purposes of developing public interest programming.

Conclusion

77. In conclusion, the NAB thanks the DCDT for the opportunity to participate in this pivotal regulatory process. The broadcasting industry is a key contributor to the economy through *inter alia* investments in infrastructure, local content, licensee fee contributions including royalty payments. In addition, broadcasters contribute to the MDDA fund and support training through Nemisa. They also fund industry co-regulatory entities such as the BCCSA and fund national audience and currency research – which data is independently audited and relied upon by both government and ICASA. This is notwithstanding the challenges faced by the



industry as a heavily regulated sector competing directly with online connected services on an unequal footing.

78. The NAB understands that the final White Paper will be implemented through a series of legislative amendments and the anticipated timeframes are not clear at this stage. The NAB respectfully reminds the DCDT that the current regulatory framework has not been revised since its implementation over 20 years ago. The urgency with which this process must be concluded can therefore not be over-emphasised. We respectfully recommend a clear timeline for all stakeholders to provide further input and reposition themselves in anticipation of the new licensing framework.
79. It may be necessary for the DCDT to limit the scope of the Draft White Paper in its next iteration if it is to make any meaningful policy review that is informed by the evidence of affected licensees and industry stakeholders and not philosophical debates.
80. The NAB strongly recommends that interim relief measures be implemented in order to provide some much-needed relief to broadcasters who despite incurring high compliance costs whilst facing unfair competition from online providers, have continued to contribute to the economy and support the creative industry. Government has also acknowledged the critical role broadcasters play in keeping the public informed and engaged and designated the sector as an essential service during the national state of disaster. Even before the lockdown, broadcasters had already taken a proactive approach to broadcast messaging in line with the recommendations from the World Health Organisation. It is therefore critical that a concerted effort be made to safeguard the viability and sustainability of incumbent broadcasters pending the finalisation of this policy process.
81. The NAB looks forward to further engagements with the DCDT and will continue to support both the DCDT and ICASA in developing a new regulatory framework that promotes a level playing field and that enables continued growth, innovation, and sustainability.