

Acting Director-General
Department of Communications and Digital Technologies
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15 February 2021

Dear Acting-DG

PRIMEDIA: FORMAL RESPONSES TO THE DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES

1. INTRODUCTION

1.1. Primedia (Pty) Ltd (Primedia) holds four individual commercial sound broadcasting service licences and also operates EWN, a news outlet that services the four stations but is also a press operation in its own right via its website and App. Primedia makes the following submission in response to the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 (the Draft White Paper) contained in Notice 1081 published in Government Gazette No. 43797 dated 9 October 2020, the submission date for which was extended by Notice 1267 published in Government Gazette No. 43938 dated 26 November 2020, to 15 February 2021.

1.2. Primedia thanks the Department of Communications and Digital Technologies (DCDT) for the opportunity of providing it with these written submissions.

1.3. In this submission, Primedia wishes to confine its substantive submissions to two critical issues that directly affect its businesses, namely:

1.3.1. the proposals regarding ownership and control of broadcasting services; and



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PRIMEDIA PROPRIETARY LIMITED (Reg. No. 2005/044403/07) **EXECUTIVE DIRECTORS:** CJ Patricios
NON-EXECUTIVE DIRECTORS: P Langeni (Chair), M Bomela, N Khaole **ALTERNATE DIRECTORS:** CN Pongweni (Zimbabwean)
DIVISIONAL EXECUTIVE: Tazne Saunders (CFO)

1.3.2. the position of online news media that provides on-demand audio and audio-visual content services with regard to the proposed licensing requirements.

However, Primedia also has certain procedural concerns with regards to the policy-making process and it sets these out too.

2. PROCEDURAL CONCERNS

2.1. The Draft White Paper makes formal policy proposals in a number of key areas, for example, the proposed licensing regime for broadcasters, on demand audio and audio-visual content services and for video-sharing platform services.

2.2. However, the actual implementation of these is not clear. To cite one important instance for example, clause 3.3.12 the Draft White Paper provides that:

An interdepartmental task team will be set up to report to the Minister on mechanisms to ensure compliance by international (foreign-based) AAVCS who meet the licensing criteria but do not have physical business presence in South Africa and potentially refuse to apply for a licence. Potential compliance measures include international remedies, blacklisting, blocking the AAVCS at the level of ISPs, or requiring banks and/or credit card merchants to halt transfers of payments by South African subscribers and advertisers to the accounts of non-compliant AAVCS.

2.3. Primedia is of the respectful view that this issue – which is critical to the eventual success of the proposed policy initiatives regarding licensing - is clearly set aside for an eventual determination at some future date and by an as-yet unspecified grouping of different government departments. Consequently, it cannot be said that there is any real policy on this vital issue at this stage, including in respect of whether or not such licensees will in fact be required to be subject to the Broad-based Black Economic Empowerment Act, 2003.

2.4. What this requires, from the point of view of meeting the public notice and comment provisions of the Promotion of Administrative Justice Act, and more directly, the provisions of section 5(5)(b)(ii) of the Electronic Communications Act, 2005 (the ECA) is that the public is entitled to comment on these issues as and when the actual draft policy thereon has been developed and before the final White Paper is published as settled government policy. To do otherwise would deprive the public of its rights to engage on draft policy that has significant implications for the entire sector.

3. OWNERSHIP AND CONTROL PROPOSALS

3.1. As Primedia, we welcome the draft policy proposals contained in clause 7 of the Draft White Paper.

3.2. Ad clause 7.1.8.1

3.2.1. Primedia welcomes the proposals contained in this clause as these restrictions (which ICASA has recommended amending for the past seventeen years) have served to hamper the growth of significant media companies in the South African market and, without the necessary scale in South Africa, have prevented, or at least hindered, such companies from being able to grow internationally too.

3.2.2. However, Primedia queries why these proposals cannot be enacted now via certain wording changes to the provisions of the ECA? In this regard, the only amendment that would need to be made would be the deletion of section 65 of the ECA in its entirety.

3.3. Ad clause 7.1.8.2

3.3.1. Primedia welcomes the proposals contained in this clause as these cross-media control restrictions provided for in section 66 of the ECA:

3.3.1.1. have been effective only in preventing a newspaper-owning entity from controlling a newspaper and a tv licence AND a radio licence - section 66(2); and

3.3.1.2. have suffered from drafting problems from their inception as section 66(3) compares (and confuses) ABC circulation with newspaper readership rendering the restriction unworkable and ineffective in practice as there is not a single qualifying newspaper in the country.

3.3.2. However, Primedia queries why these proposals cannot be enacted now via certain wording changes to the provisions of the ECA? In this regard, the only amendment that would need to be made would be the deletion of section 66 of the ECA in its entirety.

3.4. Ad clauses 7.2 and 7.3:

3.4.1. Primedia welcomes the proposals contained in this clause as the existing foreign ownership restrictions have been hampering direct foreign investment in the South African broadcasting sector for decades now and ICASA has been recommending the amendment of section 64 of the ECA for the past seventeen years.

3.4.2. However, Primedia queries why these proposals cannot be enacted now via certain wording changes to the provisions of the ECA Electronic Communications Act, 2005 (ECA)? In this regard, the only amendments that would need to be made to the ECA would be as follows:

3.4.2.1. the repeal of section 2(w) of the ECA;

3.4.2.2. the amendment of section 64 of the ECA to read as follows:

Limitations on Foreign control of commercial broadcasting services:

64 (1) [A foreigner] One or more foreigners who is not a qualifying AU-member foreigner may not, whether directly or indirectly-

(a) exercise control over a commercial broadcasting licensee; or

(b) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding **[twenty (20)]** forty-nine (49) percent

(2) Not more than **[twenty (20)]** forty-nine (49) percent of the directors of a commercial broadcasting licensee may be foreigners who are not a qualifying AU member foreigners.

(3) Subject to the Broad-based Black Economic Empowerment Act, 2003, and any regulations prescribed thereunder, there are no limitations on the ownership and/or control, including Board representation, of a commercial broadcasting licensee by qualifying AU-member foreigners.; and

3.4.2.3. the insertion of two new definitions in section 1 of the ECA, namely:

3.4.2.3.1. **AU** means the African Union established in terms of the Constitutive Act of the African Union; and

3.4.2.3.2. **qualifying AU-member foreigners** means a person who is not a citizen of the Republic but who is a citizen of an AU country which has entered the Republic

into a reciprocal trade agreement with the Republic in terms of which a citizen of the Republic is entitled to participate in the ownership and control of commercial broadcasting licensees in that AU country to the same extent that a qualifying AU-member foreigner is entitled to so participate in the Republic in terms of section 64;

3.5. Primedia is of the respectful view that the provisions of the Draft White Paper cover an enormous scope and include cutting edge issues (the rise of on demand audio and audio-visual content services targeting South African audiences in terms of advertising and/or subscription) but also issues that have been on the DCDT's agenda for at least seventeen years given ICASA's various Position Papers published since 2004 and as alluded to by the DCTD itself in clause 7.1.7.1 of the Draft White Paper.

3.6. As many of the ownership proposals contained in the Draft White Paper have already been (at least in general terms) subject to exhaustive public notice and comment procedures over the past seventeen years, and given that any ECA Amendment Bill would also be subject to a public notice and comment procedure as set out in the Constitution of the Republic of South Africa, 1996 (the Constitution), we are of the view that it can only be in the public interest and in the interests of the South African broadcasting sector (and the related local content-production sector) to have these amendments be introduced as soon as possible and in any event well before the finalization of the various policy and legislative processes envisioned in the Draft White Paper.

4. THE POSITION OF EWN

4.1. EWN is not, currently, a licensed service. It is a content provider to four of the licensed broadcasting services within the Primedia stable.

4.2. However, it operates its own website and App and is widely recognised as a significant member of the press in its own right. EWN and its journalists have won numerous awards and the group editor in chief of EWN, Ms. Mahlatse Mahlase, is a former chairperson of the South African National Editors Forum and remains on its Management Committee.

4.3. Primedia is very concerned that the Draft White Paper does not distinguish between entertainment on-demand audio-visual content providers and on-demand audio-visual content providers that fall squarely within the definition of the "press" (that is news media and news agencies) as EWN does.

4.4. Primedia understands that the Press Council and SANEF have made detailed submissions on the need to ensure that the on demand audiovisual content services that fall within the definition of the “press” and that are members of the Press Council, governed by its self-regulatory Code of Ethics and Conduct, are not subject to the licensing requirements suggested in the Draft White Paper (particularly) in respect of individual licensing requirements given international freedom of expression and human rights standards which hold that onerous licensing requirements that constitute a barrier to entry and operation of the press are not in accordance with principles of freedom of expression.

4.5. As a member of the Press Council, Primedia submits that EWN should not be subject to any licensing requirement at all given its pivotal role as a member of the press corps in South Africa and the critical role it plays in contributing to an informed citizenry. Consequently, the existing provisions of the Draft White Paper are not in accordance with international best practice and must be amended in the next draft.

4.6. Primedia trusts that the next version of the Draft White Paper will make it clear that no licensing requirement is made for any on-demand audio-visual content service that is properly characterised as being part of the press.

5. Primedia thanks the DCDT for the opportunity of making these submissions. Please do not hesitate to contact the writer should you have any queries.

Yours Sincerely

Tebogo Mokoena
Head of Legal