



Attention: The Acting-Director-General

Department of Communications and Digital Technologies
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Dear Acting Director General

Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020

1. Introduction

- 1.1 We refer to the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: *A New Vision for South Africa 2020* (the "**White Paper**"), which was published by the Department of Communications and Digital Technologies (the "**DOC**") on 9 October 2020 under Government Gazette No. 43797. In the White Paper, the DOC invited members of the public and interested persons to submit written representations on the White Paper by 30 November 2020.
- 1.2 This date was subsequently extended by the DOC to 15 February 2021. We thank the DOC for the opportunity to participate in this process and trust that this submission will be helpful.
- 1.3 We note that the White Paper seeks to (amongst other things) align South Africa's policy, legislative and regulatory framework with the changes that come with, or will come with, the fourth industrial revolution, and new trends and also seeks to promote investment in the audio and audiovisual content industries within, amongst other things, the National Development Plan 2030. In terms of the White Paper, the changes that come with these technological developments will require policy interventions to ensure that the disruptions and changes will not reinforce current disparities in access to information communication technology ("**ICT**") and services and widen the digital divide. Amongst the many proposals made in the White Paper

is the formation of new statutory definitions that will underpin the new policy framework to address a broader market of audio and audio visual content services that include traditional linear broadcasting services, online linear broadcasting services, non-linear on-demand services and video sharing platforms. The proposals made in the White Paper will therefore have far reaching consequences for the South African ICT sector.

1.4 We are encouraged by a number of the proposals made in the White Paper and the progressive steps that the DOC has initiated to develop the local ICT sector. In particular, we are encouraged by:

1.4.1 the recognition that piracy is damaging the South African creative industries and the economic contribution of sport events. Therefore, the White Paper proposes that legislation which imposes requirements on Internet service providers to co-operate with rights-holders and government to police illegal file sharing or streaming websites be introduced; and

1.4.2 the proposal that legislative and regulatory mechanisms to strengthen protection against signal piracy will be introduced in the Electronic Communications and Transactions Act and that there should be co-operation between government departments to ensure that statutory prohibitions against piracy and circumvention of technological protection measures are regularly reviewed and that they remain effective against the evolving technology solutions employed by persons engaging in South African Audio and Audio-Visual Services ("**AAVS**").

2. **Background**

2.1 The Walt Disney Company ("Our" "**We or "Disney"**"), is a diversified multinational mass media and entertainment company. Disney established itself as a leader in the global animation industry before diversifying into, amongst other things, live-action film production, television, and theme parks. Disney is known for its film studio division, The Walt Disney Studios, which includes Walt Disney Pictures, Walt Disney Animation Studios, Pixar, Marvel Studios, Lucasfilm, 20th Century Studios, Searchlight Pictures, and Blue Sky Studios. Disney's other main business units include divisions in television, broadcasting, streaming media, theme park resorts, consumer products, publishing, and international operations. Through these various segments, Disney owns and operates the ABC broadcast network; cable television networks such as Disney Channel, ESPN, Freeform, FX, and National Geographic;

publishing, merchandising, music, and theatre divisions and direct-to-consumer streaming services such as Hulu, ESPN+, and Hotstar.

2.2 Disney, in various capacities, has a presence in a number of territories worldwide, including Europe, the Middle East and Africa. On the African continent, Disney has a presence in Sub-Sahara Africa through its entertainment channels broadcast on various subscription broadcasting services and in Southern Africa, East Africa and West Africa through our theatrical distribution activities.

2.3 Disney has had a presence in South Africa for over 50 years. The Disney Africa business is headquartered in South Africa, with offices in Cape Town and Johannesburg, with 53 employees across both offices. The Disney operations in South Africa include the following:

2.3.1 7 TV channels in the form of National Geographic, National Geographic Wild, Disney Channel, Disney Junior, ESPN 1, ESPN 2 and Fox;

2.3.2 we also license content to the public broadcaster, the South Africa Broadcasting Corporation ("**SABC**") and to commercial free-to-air ("**FTA**") broadcaster, eTV.

2.4 We are committed to contributing to the health and growth of the South African media landscape and consequently, the country's broader economic well-being. Therefore, we look forward to working with the government to develop a regulatory framework that advances our shared objective of driving investment in South Africa and enriching the cultural heritage.

2.5 In view of our commitment, Disney is a material stakeholder in any policy developments (such as the White Paper) which may unfold in the South African ICT sector. Our submission should be viewed both in this context and our commitment to growing a competitive audiovisual sector.

2.6 Our submissions in response to the White Paper focus on the following points:

2.6.1 the proposed new framework;

2.6.2 the proposed regulation of content; and

2.6.3 the proposed relaxation of foreign shareholder limitations.

2.7 While our submission focuses on the aforementioned points, should we have any other concerns arising from the proposals in the White Paper, we reserve our rights

to make further representations regarding any such concerns at the appropriate forum.

2.8 This submission is structured as follows:

2.8.1 **Part A:** overarching observations regarding the need for a regulatory impact assessment;

2.8.2 **Part B:** our views regarding the proposed licensing framework;

2.8.3 **Part C:** our views regarding the proposed regulation of content;

2.8.4 **Part D:** our views regarding the proposed relaxation of foreign shareholder limitations; and

2.8.5 **Part E:** other matters.

3. **Part A: Overarching observations regarding a regulatory impact assessment ("RIA")**

3.1 Prior to turning to our substantive comments, we make some general observations regarding the importance of conducting an RIA when proposing far-reaching legislative amendments.

3.2 To our knowledge, the White Paper, which proposes significant amendments to various legislation, including the Constitution of the Republic of South Africa (the "**Constitution**") and the ECA, has not been preceded by any RIA as required by the department of planning, monitoring and evaluation.

3.3 As the DOC is likely aware, in or around February 2007, it was decided by cabinet that there was a need for a consistent assessment of the socio-economic impact of policy initiatives (such as the White Paper), legislation and regulations. This decision followed a study commissioned by the presidency and national treasury in response to concerns about the failure in some cases to understand the full costs of regulations and especially their impact on the economy. Following the aforementioned study and since 01 October 2015, any cabinet memorandum which seeks approval for draft policies, bills or regulations must include an impact assessment which has been approved by the relevant socio-economic impact assessment system ("**SEIAS**") unit.

- 3.4 To the extent that the DOC has not performed an RIA regarding the proposals set forth in the White Paper, this is an essential step in this process that is outstanding. An RIA would also facilitate meaningful engagement with stakeholders.
- 3.5 A RIA would provide an opportunity to debate the feasibility of some of the proposals set forth in the White Paper. By way of example, in the context of local content, it is not clear to us whether the DOC has considered whether the local production industry has the capacity to meet the demands which will be occasioned by local content quotas should such obligations be placed on licensees. If the local production industry does not have the requisite capacity, how would licensees meet their obligations?
- 3.6 In any event, we submit that conducting an RIA in relation to a policy initiative such as the White Paper is considered as international best practice. In this regard, we note that the Office of Communications (the communications regulator in the United Kingdom), in the context of a document entitled "*Better Policy Making: Ofcom's approach to Impact Assessment*") states as follows:

"To be effective, the process of doing an Impact Assessment should begin right at the start of a project, with the Impact Assessment being developed from then onwards. An Impact Assessment is therefore a core part of the policy-making process, not a bureaucratic add-on."

4. **Part B: The proposed licensing framework**

- 4.1 In summary, the White Paper proposes the creation of a wider audio and audiovisual content services licence category (the "**AAVCS Licence Category**"). It is proposed that the following services (subject to their fulfilling the proposed cumulative criteria) will be licensable under the AAVCS Licence Category:
- 4.1.1 linear broadcasting services;
- 4.1.2 non-linear on-demand content services ("**OCS**"); and
- 4.1.3 video sharing platform services.
- 4.2 Linear broadcasting services and OCS will require a licence, while video sharing platform services will be exempt from licensing although not from regulation.
- 4.3 We are encouraged to note that the White Paper proposes a lighter touch regulatory approach for OCS. For example:

4.3.1 At paragraph 3.2.10 of the White Paper, the following is stated:

"In approaching the licensing and regulation of AAVCS, this Draft white paper proposes taking a new approach that will differ from how the licensing and regulation of broadcasting services took place over the past two decades. This Draft white paper proposals on AAVCS follows an integrated approach that considers international benchmarking, in particular: the graduated or scaled system approved by the European Parliament in their Audio Visual Media Services Directive (AVMSD) of 2010, as amended in 2016 and 2018, provides for greater regulation on linear services using radio frequency bands in comparison to less regulation for on-demand services and self-regulation for video sharing platforms."

4.3.2 We agree that OCS should be subject to lighter-touch regulation by virtue of the following features of OCS:

4.3.2.1 OCS are often discretionary services to which a subscription is required prior to their enjoyment;

4.3.2.2 OCS are often delivered to consumers using the Internet and, in such circumstances, would not require radio frequency spectrum which is accepted as a national asset;

4.3.2.3 OCS are nascent services in South Africa and should be afforded the opportunity to develop without being overly burdened by regulation; We note that the White Paper has recognised that budding services should not be burdened with regulation in the context of audio services offered over the Internet; and

4.3.2.4 OCS are often equipped with child protection mechanisms/parental control mechanisms and the appropriate consumer advisories. This further diminishes the case for intense regulation.

4.3.3 We submit that the approach proposed in the White Paper accords with international best practice, for example:

4.3.3.1 the United States of America has not yet introduced any legislative provisions aimed specifically at OCS and they therefore remain generally unregulated, albeit with some obligations pertaining to compliance with advertising standards and closed captioning; and

- 4.3.3.2 OCS are broadly unregulated in India although they are subject to content regulation under the Information and Technology Act.
- 4.3.4 A light-touch regulatory approach to OCS would lower the regulatory barriers which would in turn lower the barriers to entry thus facilitating the entry of new players. This would be beneficial to consumers due to the plurality and diversification of services.
- 4.3.5 Furthermore, we note that self-regulation should be encouraged as South Africa has a credible self-regulation system through organisations such as the Broadcasting Complaints Commission and the Advertising Regulatory Board.
- 4.3.6 In conclusion, we submit that we are in support of a regulatory regime that reflects the characteristics of OCS which merits a light-touch regulation approach. Furthermore, we also encourage the DOC to consider (given the changing media landscape and the resulting competitive marketplace) which regulations that are currently in force are still relevant and/or required across all platforms.

5. Part C: Our views regarding the proposed regulation of content

- 5.1 We are committed to investing in South Africa and support the government's efforts to develop the local content industry. In this regard, we note that Disney has an impressive track record of investing in South Africa which has been developed over our 50-year local presence. Below, we discuss recent South African projects:
 - 5.1.1 Disney Black Beauty which was released on Disney+ in November 2020. Filming began in South Africa in October 2019 and the film was filmed predominantly in the Western Cape at the Val de Vie Winelands Estate in Paarl and Lourensford Wine Estate in Somerset West;
 - 5.1.2 Cookabout which is an original long-form content produced in South Africa and aired on SABC 2 and then on the local Disney Channel;
 - 5.1.3 Avengers Age of Ultron which was filmed in Johannesburg;
 - 5.1.4 Disney's Queen of Katwe which was filmed in Kampala and Johannesburg;
 - 5.1.5 ABC Studios' of Kings and Prophets which was filmed in the Western Cape;
 - 5.1.6 We are increasingly developing partnerships with local creators which are aimed at fostering the South African cultural and audiovisual ecosystem.

These partnerships are also aimed at providing a global platform for South African stories and talents. One such example is the Africa Story Lab. This is an innovative policy collaboration between Disney, TriggerFish Animation and the German Development Bank ("GIZ") aimed at discovering and developing the next generation of African storytellers. This collaboration led to "Kiya", a global pre-buy for Disney Junior and Disney+. We are also working with South African partners on a series of shorts that will be presented as an Africa shorts anthology on Disney+, as well as other collaborations.

5.2 As is clear from the above, we fully support, and contribute to, the development of a robust local creative industry. We therefore submit, that any regulations passed in relation to local content ought to be appropriate and proportional and take into account the different means of contribution by different actors in the value chain and the nature of each service. In this regard, we are encouraged that the White Paper recognises that any rules relating to local content will be applied in a graduated manner.

5.3 Below, we advance our reasons why we believe other initiatives (as set out below) would be more beneficial to the South African creative industry (especially in the digital era) when compared to local content quotas, which should not be applied to OCS:

5.3.1 As discussed in preceding sections of this submission, OCS are often discretionary services. While OCS have a general public interest mandate (as does all media), their contributions should reflect the nature of their service and the different consumer propositions that they offer.

5.3.2 We agree with the following statement made at paragraph 5.2.6.2 of the White Paper:

"The primary mandate for public service broadcasting programming will remain with the SABC and that public service programming, programming of local significance and communities of interest will be the responsibility of community broadcasting service licensees".

5.3.3 The sentiment that different services ought to be treated differently where local content requirements are concerned has, in the past, been accepted by the Independent Communications Authority of South Africa ("**ICASA**") in the context of a discussion document on the inquiry into subscription broadcasting on 23 April 2004. In the aforementioned document, ICASA stated as follows:

"Subscription broadcasting services should make a contribution to national development along with other broadcasting services. However, the form of this requirement needs to reflect the specific nature of their service".

5.3.4 We submit that the above statement is equally applicable to OCS given the discretionary nature of these services. OCS are generally driven by consumer preferences and a hypothetical OCS must offer content demanded by its target audience in order to remain financially viable. In the circumstances, if consumers desire more local content, OCS will heed this demand and supply it as a matter of survival.

5.3.5 We also note the following statement¹ by the National Association of Broadcasters (the "NAB"):

"Investment in local content continues to be a possible differentiating factor between broadcasters and is becoming increasingly necessary given the big local content budgets that streaming services have earmarked so as to capture an increased share of local audiences. Local content resonates with audiences and has led to significant investment, above and beyond regulatory requirements".

5.3.6 In the context of radio broadcasters, the NAB has noted that a number of radio broadcasters exceed their ICASA licence requirements.²

5.3.7 In our view, these sentiments demonstrate that local content quotas may no longer be necessary as local content has become a business imperative.

5.3.8 While local content quotas may have been appropriate in an analogue environment, this regulatory approach is not appropriate in the digital era where there are no capacity constraints on an OCS library and the consumer has much broader choices across services.

5.3.9 We also note that achieving compliance with a local content quota for thematic-based digital services is challenging. In a thematic environment, there is a focus on specific categories of content, be it movies, sport or kiddies programming. For example, it may be difficult to impose a local content quota on a OCS which focuses on sport and sport-related content.

¹ The National Association of Broadcasters, State of the Broadcasting Industry Report, 2015-2018 (Second Edition) 25 years of freedom in broadcasting at page 13.

² Supra note 1 at page 14.

- 5.3.10 Achieving compliance with a local content quota may also be challenging for a multinational organisation. While multinational OCS, to some extent, localise their offering according to the market in question, their service is largely designed for an international or cross-border audience. This is especially important to achieve efficiencies and economies of scale. In the context of a multi-national OCS, were it to be required by every government in each market of operation to carry significant amounts of local content (whether or not this was actually required by consumers), this would render any such service technically and financially unviable.
- 5.3.11 The DOC is encouraged to consider other opportunities to stimulate local content. Any such opportunities should be anchored by creating incentives to OCS and other players instead of obligations. The Foreign Film and Television Production and Post-Production Incentive (the "**Foreign Film Incentive**") is one such example of innovative measures deployed by government to develop the local creative industry.
- 5.3.12 Although the Incentive is progressive, the government may wish to consider certain revisions aimed at enhancing its ability to attract international investors. In this regard, the following aspects of the Incentive should be reconsidered:
- 5.3.12.1 the Incentive cap which is set at R50 million;
 - 5.3.12.2 the stringent broad-based black economic empowerment ("**BBB-EE**") requirements. On the BBB-EE requirements, we emphasise that we are committed to the economic transformation ideals of South Africa. However, in the relation to the Incentive, the BBB-EE requirements should be assessed on a case by case basis;
 - 5.3.12.3 the limitations placed on a services company that it can service no more than 3 active projects unless it procures with regards to qualifying South African Production Expenditure at least 30% of goods and services from entities which are 51% black-owned by South African citizens and have been operating for at least 1 year.
- 5.3.13 In view of the above, we propose that there should be greater cooperation between the DOC and the DTI in relation to the implementation of the Foreign Film Incentives.

5.3.14 It is encouraging that the DOC is prepared to be guided by international best practice. However, we caution that any practice that is considered should also have regard to the nuances of the South African landscape. We elaborate on this below:

5.3.14.1 it is noted that the White Paper refers to the European Union's ("EU") Audiovisual Media Services Directive ("**AVMSD**") which requires a 30% share of European Works on on-demand services. In our view, the wholesale adoption of this approach would be inappropriate by virtue of the following:

5.3.14.1.1 the EU has a more mature local content industry and a long-established regulatory and policy framework; whose principles are enshrined into the fundamental law of the EU and in turn the national laws of each member state;

5.3.14.1.2 the EU has 27 member states from which to source local content;

5.3.14.1.3 in addition, local content can also be sourced from the states which are signatories to the European Convention on Transfrontier Television such as Russia;

5.3.14.1.4 in comparison, South Africa is a much smaller market, with a population of approximately 60 million people.

5.4 In the event that the DOC insists on the proposed local content quota (we argue that this is not advisable), we note that the White Paper has not provided any detail regarding how this will be implemented. For example, will new entrants be afforded an opportunity to comply over a period of time?

6. **Part D: The proposed relaxation of foreign shareholder limitations**

6.1 The ECA prohibits a foreigner from exercising control over a commercial broadcasting licensee, by limiting financial interest, interest in voting shares or paid up capital to a maximum of 20%. Similarly, not more than 20% of the directors of a commercial broadcasting licensee may be foreigners ("**Foreign Shareholder Limitations**").

6.2 It is a positive development that the White Paper recognises that the regulatory environment for foreign direct investment is one of the key factors which is likely to influence the location decisions of foreign investors. Rightly, the paper also recognises that cross-border direct investment is beneficial when considering its

impact on employment, productivity, growth, prospects for stronger integration with international markets as well as the transfer of skills and technology.

6.3 In the interests of promoting foreign investment and stimulating growth in the sector, the White Paper proposes the amendment to the legislation to empower the regulator to consider allowing foreign ownership of linear individual audiovisual content services up to 49% to stimulate investment. The above sentiments expressed in the White Paper, align with general government policy regarding foreign direct investment.

6.4 We argue that Foreign Shareholder Limitations should not apply to OCS. We believe that this would be beneficial to the local creative industry and yield the following benefits:

6.4.1 an increased investment into the local sector;

6.4.2 enhanced competition as it will likely lead to new entrants into the local sector from other markets. This is likely to lead to increased product choice and innovation;

6.4.3 enhance the international competitiveness of local players;

6.4.4 result in job creation and the transfer of foreign technology and skills

6.4.5 increased choice for consumers.

6.5 Furthermore, we submit that these benefits accord with the objects of the ECA as enunciated in section 2 of that Act.

6.6 This approach also accords with international best practice as we demonstrate below:

6.6.1 in Australia, foreign ownership limitations in respect of commercial and subscription television services were done away with in 2006;

6.6.2 in New Zealand, the restrictions on foreign ownership have been repealed and media ownership is governed solely by competition law since 1991;

6.6.3 in the United Kingdom ("**UK**"), restrictions on media ownership by non-European Union persons was abolished in 2003. Transactions in the media industry are assessed based on competition law and the applicable plurality policy. Therefore, media ownership is subject only to the Enterprise Act 2002 and the 2003 Communications Act which amended it.

- 6.7 It is noted that the government is not precluded from exploring other measures designed to consider foreign direct investments into the media sector. For example:
- 6.7.1 as mentioned above, the UK abolished its foreign ownership limitations in 2003. Issues relating to media ownership are now principally regulated by the 2002 Enterprise Act and the 2003 Communications Act. The amendment aimed to liberalise and simplify ownership rules and the changes brought about by the 2003 Communications Act resulted in persons from outside of the European Economic Area being able to own media organisations such as television and radio stations. These amendments left media ownership in the UK primarily subject to two mechanisms: first, the 20/20 principle³, and secondly, discretionary intervention by the government under the 2002 Enterprise Act if the relevant Secretary of State considers a merger to raise plurality concerns.
- 6.7.2 The import of the above discussion is that in the UK, there are no hard limits of foreign ownership. Each case is assessed according to its own merits. Australia, Denmark, Germany and the Netherlands follow a similar approach.
- 6.7.3 The Australia example merits further consideration. Australia once had detailed restrictions on foreign ownership under the 1992 Broadcasting Services Act, but, as discussed above, most of these were repealed in 2006. Prior to the 2006 amendments, the following rules were applicable:
- 6.7.3.1 no foreign person was permitted to control a commercial TV license;
- 6.7.3.2 no foreign person was permitted have company interests in such a license exceeding 20 percent in aggregate;
- 6.7.3.3 no more than 20 percent of directors in each license were permitted to be foreign persons;
- 6.7.3.4 no foreign person was permitted to have company interests exceeding 20 per cent in a pay-TV license and the total company interests held by foreign persons could not exceed 35 per cent.
- 6.7.4 Since 2007, however, Australia has defined media as a “prescribed sensitive sector”, allowing the government to consider and veto acquisitions or investments **on a case by case basis**.

6.8 In conclusion, while the UK and Australian approaches are useful by way of guidance, these approaches should not be imported wholesale into the South African context. The DOC would be enjoined to consider the practices of the UK and Australia in the light of section 192 of the Constitution which, in material part, requires ICASA to **independently** regulate the broadcasting industry in the public interest. Put differently, instead of a cabinet minister evaluating the impact of foreign investment or a media merger on ideals such as freedom of the media, this should be performed by ICASA (in line with section 192 of the Constitution) following the appropriate stakeholder consultations.

7. **Part E: Other matters**

7.1 The White Paper states that government will include legislative provisions for a transitional framework and for the conversion of existing licences to the new AAVCS licensing framework where, required.

7.2 These transitional arrangements will allow a person who lawfully provided a service without requiring a licence to continue to do so until the regulator has granted or refused a licence application. Furthermore, the White Paper proposes that the regulator put in place a transitional period of 24 months between the existing licensing framework and the new licensing framework.

7.3 We support the above proposal. However, for the purposes of certainty, which is crucial for business planning, we propose that the revised licensing framework be finalised before the transitional period.

8. **Conclusion**

We look forward to contributing further to this process and record our intention to participate in any public hearing that the DOC may arrange. We are available should the DOC wish to discuss any aspect of this submission.

³ In terms of the 20/20 rule, no company holding a national ITV license can merge with a company owning 20 percent of a national newspaper market or more than 20 percent of the newspapers in a region.

Yours faithfully,

[NOT SIGNED DUE TO ELECTRONIC SUBMISSION]

Christine Service

The Walt Disney Company Africa

Country Manager