

November 23, 2020

To: The Acting-Director-General, Department of Communications and Digital Technologies

Subject: Draft White Paper on Audio and Audiovisual content services policy framework: A new vision for South Africa 2020

We commend the South African Department of Communications and Digital Technologies for seeking to protect children from marketing practices that harm their healthy development. We wish to lend our support and submit comments to the Draft White Paper on Audio and Audiovisual content services policy (AAVCS) framework: A new vision for South Africa 2020. UNICEF-WHO-LANCET Commission on A Future for the World's Children includes an authoritative call to protect children from harmful and exploitative business practices as a key recommendation (Clark et al., 2020). We also reiterate that the AAVCS policy framework will serve to protect children from the consumption of harmful products. Based on a recent human rights analysis by Bertscher et al. (2020), we therefore wish to share following supporting points:

1. The AAVCS policy framework upholds relevant international human rights obligations to promote and protect the children's rights and the right to health
2. The South African Constitution provides provision for the justified limitations on certain rights, such as the right to expression (including the right to impart information) if it is reasonable and justifiable, such as in this case with the aim of protecting children's rights and the right to health.

1. International human rights obligations to protect children

Children's rights

South Africa has commitments under international human right law, specifically the United Nations Convention on the Rights of the Child (UNCRC) (United Nations, 1989), which South Africa ratified in 1995. We highlight the following UNCRC Articles relevant to the AAVCS policy framework:

- All rights protected under the UNCRC need to be interpreted using its four guiding principles:
 - non-discrimination (Article 2);
 - best interest of the child (Article 3);
 - the right to life, survival and development (Article 6); and
 - child participation (Article 12).
- Article 17 of the UNCRC applies to information and which, in Article 17(e) encourages governments to develop "guidelines for the protection of the child from information and material injurious to his or her well-being". Even if advertising of alcohol and harmful foods were to be considered information, which many legal scholars consider a highly contested issue (Shiner, 2003, Cabrera and Gostin, 2011), such advertising would be information that is harmful for children's well-being, and the State's obligations to comply with its international human rights commitments would oblige it to regulate and limit such harmful information.
- South Africa's Constitution obliges the State to treat the child's best interests as of paramount importance in every matter concerning the child (Section 29.2). Accordingly, the limitation on harmful advertising through regulation of audiovisual content should be recognised as consistent with the state's obligation to protect children's rights.
- Article 24 of the UNCRC states that protecting children from exposure to unhealthy food and alcoholic beverages is important to protect their right to survival and development and their right to the highest attainable standard of health. This is because advertising of unhealthy

foods and alcoholic beverages encourages consumption of unhealthy foods and alcoholic beverages which has negative effects on children's health and development.

- UNCRC General Comment No. 15 (United Nations Committee on the Rights of the Child, 2013a), which interprets UNCRC Article 24 (right to health), suggests that the right to health as applied to children also creates responsibilities for the private sector, stating that businesses should "refrain from the advertisement, marketing and sale to children of tobacco, alcohol and other toxic substances". UNCRC Article 24 thus includes protection from marketing of unhealthy foods and alcoholic beverages.
- UNCRC General Comment No. 16 (United Nations Committee on the Rights of the Child, 2013c) addresses state obligations to protect children from harmful business practices. It highlights the risks associated with marketing of harmful products to children and proposes preventive measures such as regulation to create an enabling environment conducive to realising children's rights (Chapman, 2016).
- UNCRC General Comment No. 16 stipulates that where transnational corporations headquartered in a foreign country operate within a country's borders, states are obliged to regulate these entities' operations so that they do not negatively impact the rights of children, or violate rights in foreign jurisdictions (Chapman, 2016, United Nations Committee on the Rights of the Child, 2013b).

Right to Health

- Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the right to the highest attainable standard of physical and mental health. The full realisation of the right includes provision for the healthy development of the child. As governments have the obligation to respect, protect, and fulfil the rights protected in international treaties, governments are obligated to protect rights from violations by third parties, such as non-state actors (Inter-Parliamentary Union and United Nations Office of the High Commissioner for Human Rights, 2016).
- UN Committee on Economic, Social and Cultural Rights General Comment 14 stipulates that the failure to regulate the activities of corporations to prevent them from violating individuals' health may amount to a violation of the right to health. For instance, "the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances" (United Nations Committee on Economic Social and Cultural Rights, 2000, Section 51), which for children would include unhealthy foods amounts to a violation of the right to health.
- Therefore, the AAVCS policy framework upholds relevant international human rights obligations to promote and protect the children's rights and the right to health

2. Justifiable limitations on rights in the South African Constitution

The South African Constitution permits rights limitations under limited circumstances. We, therefore, highlight the following points relevant to the South African law and the AAVCS policy framework:

- Under section 36 of the South African Constitution, rights may be limited only in terms of law and only "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".
- As Article 17(e) of the UNCRC encourages governments to develop "guidelines for the protection of the child from information and material injurious to his or her well-being". Advertising that encourages children to consume alcoholic beverages and harmful foods that are high in salt, sugars, fat, saturated fats or trans-fatty acids would be information that is

harmful for children's well-being, and the State's obligations to comply with its international human rights commitments would oblige it to regulate and limit such harmful information. The limitation on harmful advertising through regulation of audiovisual content should be recognised as consistent with the state's obligation to protect children's rights.

- The South African Supreme Court of Appeal has held that restrictions on the marketing of tobacco products constitute justifiable restriction under the Constitution's limitation clause (*BATSA v Minister of Health* (463/2011) [2012] ZASCA 107, 2012, para 13) even though it limits the tobacco corporation's right to freedom of expression (including the freedom to impart information).
- Therefore, the limitation of the right to information as outlined in the AAVCS policy framework is justified given the public health risks and the state's obligation to protect and uphold children's rights.

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