PRIMEDIA BROADCASTING

CREATING CONNECTIONS

Attention: Mr. Peter Mailula

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Dear Mr Mailula

PRIMEDIA: FORMAL RESPONSES TO THE DRAFT REGULATIONS IN RESPECT OF LIMITATIONS OF CONTROL AND EQUITY OWNERSIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE

1. INTRODUCTION

1.1. Primedia (Pty) Ltd (Primedia) holds four individual sound broadcasting service licences and makes the following submission in response to the Draft Regulations in respect of Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code (the Draft Regulations) contained in Notice 91 published in Government Gazette No. 43021 dated 14 February 2020.

1.2. Primedia thanks the Authority for the opportunity of providing it with these submissions and requests the opportunity to participate at its oral hearings in relation to the Draft Regulations in due course.

2. AD SECTION 1 DEFINITIONS

2.1. Ad Definition of “affiliate”:
Primedia notes the definition of “affiliate” and queries why a sibling is not included in paragraph (b) of the definition?

2.2. Ad Definitions of “Control” and “Control Interest”:

2.2.1. Primedia notes that are, confusingly, three different shareholding thresholds for control provided for in the Draft Regulations, namely:

2.2.1.1. 50+1% as provided for in the Competition Act, 1998 - at section 12(2)(a) - which is incorporated into the definition of “Control” contained in the Draft Regulations;

2.2.1.2. 20% which is provided for in paragraph (a) of the definition of “Control Interest”; and

2.2.1.3. 25% which is provided for in paragraph 6 of Annexure A to the Draft Regulations

Primedia submits that the Authority clearly cannot have three different thresholds for control by way of shareholding percentages of a company in the same set of Regulations as this would cause significant regulatory confusion.

2.2.2. Primedia notes that there are very real drafting constraints upon the Authority with regard to defining "control" in regulations because the provisions of the Electronic Communications Act, 2005 (the ECA) are themselves contradictory when it comes to determining thresholds for control and, in any event, the Authority cannot act *ultra vires* the provisions of the ECA. In this regard:

2.2.2.1. section 64 of the ECA, expressly allows a foreigner to own 20% of the issued share capital in a licensee[1] but also prohibits a foreigner from "exercising control over a commercial broadcasting service licensee"[2]. If owning 20% of issued share capital is expressly allowed for foreigners, such a stake cannot also constitute "a control interest" as foreigners are expressly prohibited from holding a control interest; and yet

2.2.2.2. section 66 of the ECA, which is dealing with the issue of cross-media control, provides at sub-section 66(5) that "a twenty (20%) percent shareholding in the commercial broadcasting service licences, in either the television broadcasting service or sound broadcasting service, is considered as constituting control" [sic]. As the Authority is no doubt aware, this sub-section:

2.2.2.2.1. is extremely poor drafted and is not grammatically correct; and

2.2.2.2.2. has been the subject of litigation as there have been disputes between licensees and the Authority over whether or not this is a definition of deemed control that applies in all circumstances (which would then cause a conflicts of laws problems with section 64(1)(a) of the ECA which prohibits a foreigner from exercising control) or only when considering what constitutes control of a broadcasting licensee in the context of an enquiry as to whether or not cross media control arises as a result of controlling both broadcasting licences and newspapers. Certainly up until the repeal of the Independent Broadcasting Authority Act, 1993 (the IBA Act) by the ECA, the Authority did not consider 20% to be a control interest outside of the context of a cross-media control enquiry as the IBA Act expressly provided that deemed control of a company required a 25% shareholding[3].

2.2.3. Consequently, Primedia is of the respectful view that the Authority ought, instead, to recommend to the Minister of Communications and Digital Technologies that amendments to the ECA be made expressly to:

2.2.3.1. provide for a definition of deemed control acting under the authority of section 4(3)(a) of the ICASA Act, 2000 (the ICASA Act). In this way ICASA can recommend any shareholding threshold it considers to be in the public interest as a basis for deemed control (from 20+1% to 50+1%); and

2.2.3.2. the provisions of sub-section 66(5) to clarify that they pertain only in circumstances where a broadcasting licensee also controls a newspaper.

2.3. <u>Ad definition of "HDG" and "Historically Disadvantaged Persons":</u>

2.3.1. Primedia respectfully submits that while a definition of HDG and Historically Disadvantaged Person is required to be retained because reference is made to it in section 9(2)(b) of the ECA, ICASA is not bound by any particular wording thereof as neither HDG nor Historically Disadvantaged Person is defined in any of the broadcasting-related statutes, that is, neither term is defined in the ECA, the ICASA Act or in the Broadcasting Act, 1999 (the Broadcasting Act).

2.3.2. Primedia respectfully submits that the definition of Historically Disadvantaged Persons in the Draft Regulations is extremely confused and confusing because it:

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[1] Section 64(1)(b) of the ECA provides, in its relevant part, that "a foreigner may not, whether directly or indirectly… have…an interest in…paid-up capital in a commercial broadcasting licensee, exceeding [that is, more than] 20%.".
[2] Section 64(1)(a) of the ECA.
[3] See section 3 of Schedule 2 to the now-repealed IBA Act.

2.3.2.1. refers to refers to particular categories of people at the beginning of the definition, namely, “black people, women, and persons with disabilities and youth” who were disadvantaged by, among other things, “unfair discrimination on the basis of sexual orientation or religion”. And yet the categories do not include, for example, white men who were also unfairly discriminated against on the basis of their sexual orientation and/or religion; and

2.3.2.2. refers to particular categories of people at the beginning of the definition, namely, “black people, women, and persons with disabilities and youth” who were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion “before the Constitution of the Republic of South Africa 1996 came into operation” whereas each of those grounds of discrimination had been constitutionally outlawed by the Interim Constitution of the Republic of South Africa, 1993 (the Interim Constitution) and so it could not be said that they were so discriminated against (in terms of not have a right to equality based on those grounds) in the period between 27 April 1994[4] and 4 February 1997[5].

2.3.3. Primedia is of the respectful view that a quarter of a century into our transition, it is important to recognise that the sole category of people that the Authority ought to promote in terms of requiring set asides or percentages of ownership stakes in licensees for are Black People as defined in the Draft Regulations and in the Broad-based Black Economic Empowerment Act, 2003 (the B-BBEE Act).

2.3.4. Consequently, Primedia respectfully submits that the definition of Historically Disadvantaged Persons in the Draft Regulations ought to be amended to read “Black People”. This will require consequential amendments to other regulations which define HDG or Historically Disadvantaged Persons differently.

3. AD SECTION 3 OF THE DRAFT REGULATIONS

3.1. Primedia notes that unless the changes it proposes to the definition of Historically Disadvantaged Person are made as suggested in paragraph 2.3.4 above, the provisions of section 3(3) of the Draft Regulations will make no sense and will be unworkable because accredited verification agencies verify ownership, control and procurement by Black People as defined in the B-BBEE Act only.

3.2. Primedia is of the respectful view that section 3(8) is an unnecessary duplication of section 3(3) of the Draft Regulations as all individual licensees (whether or not they are or are controlled by publicly-traded/listed companies) are also subject to the B-BBEE Act and are, in any event, required to provide the Authority with a certificate from a recognised and accredited verification agency. Consequently, Primedia respectfully suggests that section 3(8) be deleted in its entirety.

4. AD SECTION 4 OF THE DRAFT REGULATIONS

4.1. Primedia notes that almost the whole of section 4 of the Draft Regulations becomes superfluous if the changes it proposes to the definition of Historically Disadvantaged Person are made as suggested in paragraph 2.3.4 above.

4.2. The exceptions to the above statement are the provisions of the relating to B-BBEE status levels. In this regard, Primedia respectfully suggests that section 3(3) of the Draft Regulations be amended to include the words “and that it has a minimum level 4 B-BBEE status” at the end of the existing wording thereof.

4.3. Subject to the amendment to section 3(3) being made as suggested in paragraph 4.2, Primedia recommends the deletion of section 4 of the Regulations which will require consequential numbering changes to the subsequent sections.

5. AD SECTIONS 3 AND 4 READ TOGETHER

[4] The date on which the Interim Constitution came into force.
[5] The date on which the Constitution came into force.

5.1. Primedia respectfully feels the need to point out another key flaw of the Draft Regulations, as when taking into account its definitions of Historically Disadvantaged Persons, Black People, and the current wording of sections 3 and 4, namely, that if one complies with the requirements pertaining to Black People in section 4, one automatically complies with the requirements of section 3 without being under any additional obligation to provide for equity ownership for any other groups currently listed in the definition of Historically Disadvantaged Persons, namely "women, persons with disabilities and youth" who do not fall within the definition of Black People.

5.2. Primedia respectfully submits that this overlap effectively negates the usefulness of a definition of Historically Disadvantaged Persons (which incorporates white women, white persons with disabilities and white youth) as their interests are simply not protected or enforced as a result of the definitions and the operation of section 4 of the Draft Regulations.

5.3. As suggested in paragraph 2.3 above, Primedia respectfully suggests that it far more appropriate to address the definitional issues by making it clear the definition of Historically Disadvantaged Person is confined to Black People.

6. AD SECTION 5

6.1. Primedia notes the provisions of section 5 of the Draft Regulations.

6.2. Primedia is extremely concerned at the provisions of section 5 as these constitute a complete break with past practice and are not consistent with the provisions of section 13 of the ECA which requires ICASA's approval for the transfer of:

6.2.1. a licence (note not of the transfer shares in a licence); and

6.2.2. control of a licence.

6.3. In particular, shareholding changes that do not constitute a transfer of control have always been dealt with by way of a notification process as provided for in section 14A(2)(c) read with Form O of the Individual Licensing Processes and Procedures Regulations, 2010[6], as amended.

6.4. It is of course quite possible to have 100% shareholding transfers in the licensee without these constituting a change of control. For example, when such changes are effected at an intra-company level, that is between holding and subsidiary companies of the ultimate controlling shareholder of a licensee.

6.5. To require the holding company to have to go through the expense and effort of completing a form G process for a non-controlling change that would otherwise be effected by way of a Form O notification is unwarranted, unjustified and unreasonable and would, frankly, also be a waste of ICASA's time and resources.

6.6. The reference to provisions of shareholder agreements or incorporating documents of the Licensee in section 5 does not address the fundamental problem as intra-company transfers are, as you must be aware, not dealt with in the founding documentation of a company under the Companies Act, 2008.

6.7. Primedia therefore respectfully suggests that draft section 5 of the Draft Regulations be deleted. This will require consequential numbering amendments.

7. AD SECTION 8

7.1. Primedia notes the provisions of section 8(1) of the Draft Regulations, in particular that the offence of submitting false, misleading or inaccurate information is punishable by the imposition of a fine up to R5 million or a period of imprisonment of between one week and two years.

7.2. Primedia notes that the offence of submitting false, misleading or inaccurate information is already provided for in sections 17H(1)(c) and 17H(3)(a) of the ICASA Act, 2000 (the ICASA Act). And the punishment for such offence is already provided for in sections 17H(2)(a) and 17H(3)(i) as being a fine not exceeding R5 million only. There is no mention of a period of imprisonment for such an offence in terms of the ICASA Act and therefore Primedia respectfully submits that the reference to

[6] Notice 522, published in Government Gazette No. 33293 dated 14 June 2010.

a term of imprisonment as being a possible penalty for the commission of an offence in the Draft Regulations is ultra vires the ICASA Act and would be unlawful is prescribed. Consequently, Primedia respectfully submits that section 8(1) of the Draft Regulations is required to be amended by the deletion of the proposed wording "**[or imprisonment of not less than 1(one) week but not more than 24 (twenty-four) months]**" at the end of the proposed section.

7.3. Further, given its submissions with regard to the proposed deletion of section 4 of the Draft Regulations, Primedia respectfully suggests that section 8(2) of the Draft Regulations is amended by the deletion of the reference to section 4(4) therein so that it refers only to a contravention of regulation 3(5). Thus section 8(2) of the Draft Regulations would read: "A licensee that contravenes regulation**[s]** 3(5) **[and 4(4)]** is liable to a fine not exceeding the greater of 5 million Rand or 10% of the licensee's annual turnover".

8. AD SECTION 9

Primedia respectfully suggests that the wording of section 9(2) is ambiguous and suggests that it be amended to read: "Compliance by existing licensees with these Regulations is required within twenty-four (24) months of these Regulations being published with 50% compliance being required by the end of **[in]** the first year".

9. AD ANNEXURE A

9.1. Primedia respectfully reiterates its submissions contained in paragraph 2.2 above, namely that:

9.1.1. the Authority has made provision for three different (and conflicting) definitions of deemed control in the Draft Regulations; and

9.1.2. it is not appropriate for ICASA to develop a definition of deemed control in these regulations given the difficulties with the existing control-related provisions of the ECA as set out in that paragraph.

9.2. Consequently, Primedia respectfully suggests the deletion of all references to control interests in Annexure A until such time as the proposed legislative changes to provide for deemed control provisions have been enacted. This would require the deletion of the following in Annexure A, namely:

9.2.1. the words "**[Under the regulations, Company A would be deemed to hold a control interest in the Licensee.]**" from the end of the third paragraph; and

9.2.2. the whole of the last paragraph on pg.14 of the Draft Regulations.

10. NOTABLE OMISSIONS FROM THE DRAFT REGULATIONS

10.1. Primedia is of the respectful view that it is extremely disappointing that the Authority has failed to make recommendations in the Draft Regulation to the Minister under the authority of section 4(3)(a) of the ICASA Act, 2000 for amendments to, among others, section 65 of the ECA to increase the number of broadcasting licensees a single broadcaster may control. In this regard:

10.1.1. the Authority is only too aware that the provisions of section 65(3) of the ECA have effectively fallen into disuse (with the notable exception of Cape Talk) given the now-universal view as to the unsuitability of analogue MW for commercial sound broadcasting. The effect of this is that a single entity is entitled, effectively, to control just two commercial sound FM broadcasting services (unless exempted by the Authority) – a situation that has remained unchanged since the coming into force of the now-repealed IBA Act in 1993;

10.1.2. the Authority inexplicably relaxed the requirements of section 65(1)(a) for subscription television broadcasting services without any public consultation in paragraph 5.8.2 of the Reasons for Decisions on the 2007 Satellite Licensing Process[7], despite the prohibition thereof in section 65(1)(a) of the ECA but has neglected to do the same for commercial sound broadcasting services; and

[7] Available at: http://thornton.co.za/resources/Subscription_Reasons.pdf

10.1.3. the Authority has repeatedly recognised that the failure to amend the provisions of, particularly, section 65(2) is hindering the growth of the commercial sound broadcasting industry, and in particular, is hampering the ability of B-BBEE media houses from developing economic heft in that industry. It has repeatedly undertaken, as a matter of policy, to act to advise in favour of such amendments, see:

10.1.3.1. The Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licence 2004, the recommendations from which (including detailed proposed amendments existing foreign ownership, ownership and control and cross-media control provisions in the IBA Act) were made to the Minister but never tabled by her before Parliament[8];

10.1.3.2. The Findings Document on the Revie of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services contained in Notice 624, Government Gazette No. 34601 dated 15 September 2011, the findings of which included, *inter alia*, that the Authority would again make recommendations for the necessary amendments to be made to the ECA having regard to the still-relevant recommendations from the 2004 Position Paper[9]; and

10.1.3.3. The ICASA Final Report on its Review of Broadcasting Regulatory Framework Towards a Digitally Converged Environment contained in Notice 643, Government Gazette No, 36598 dated 25 June 2013 in which it reiterated that it was pursuing the 2011 recommendations[10].

10.2. Consequently, it is extremely disappointing that the Draft Regulations focuses only on ownership issues relating to the existing market structure without mentioning the on-going crisis of investment in the broadcasting sector due to the inability of empowered companies from holding additional licences – a problem that that ICASA has repeatedly identified and undertaken to advise Parliament on for sixteen years now.

10.3. As a result Primedia respectfully calls on ICASA to publicly issue a Notice, alongside any final regulations resulting from this process, with additional provisions that contain ICASA's current thinking on what amendments ought to be made to sections 64-66 of the ECA by Parliament in light of the enormous technological changes in how audiences consume audio and audio-visual content since our statutory provisions were first enacted in 1993 (some 27 years ago) so that interested parties may make detailed submissions thereon.

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

Yours Faithfully

[8] See paragraphs 5 -8 of ICASA's Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Networks Services published in Notice 624, Government Gazette No. 34601 dated 15 September 2011.
[9] At pg 56.
[10] At paragraph 3.1.11.