

### 8.1 Introduction

Convergence and technological changes pose particular challenges to traditional approaches to broadcasting regulation. Increased access to high speed affordable broadband will increasingly fundamentally change the way audiences access audio-visual content. People will be able to watch and listen to a range of television- and radio-like content on a variety of platforms and devices – and be able to create and distribute their own content via the internet. As new technologies develop and become more pervasive, audiences will be able to watch broadcasting-like content distributed and developed by international and South African organisations and companies on their computers, mobile phones, tablets and other connected devices. With the introduction of internet enabled televisions, set top boxes (STBs) and gaming devices, this content will also be viewable on television screens. Traditional broadcasters will face increasing competition for content, audiences, advertising and revenue from other players (including internet companies and network operators).

These technological changes pose both opportunities and threats. On the one hand it will enrich diversity and allow South Africans to access news, information and entertainment programming from a range of different sources (local and international) and enable us to tell the South African story to an international audience. On the other hand, the need to ensure all audiences access to public interest content reflecting the cultural, social and linguistic diversity of the country could be threatened as traditional broadcasters will face increasing competition. The new framework must be flexible enough to anticipate the challenges and opportunities so that the overarching public objectives set for the sector can be realised. This section of the Green Paper identifies some of the key issues facing television and radio services given technological changes. It poses questions about what policy approaches would best ensure that the critical social, cultural and political objectives determined can be achieved.

Many other countries have adapted or are reviewing their broadcasting policy frameworks in light of convergence and digitisation. Their particular public policy objectives include:

- Ensure access to diverse content for all, including locally produced public interest programming,
- Promote diversity of ownership and control of content services and limit media concentration;
- Ensure fair competition between different content services; and
- Protect audiences from illegal content; ensure community standards are agreed on and met and that children are protected from harmful content.

### 8.2 The Future

This section highlights key emerging issues to be considered in reviewing current broadcasting related policies and legislation.

#### 8.2.1 The changing environment

Convergence and digitisation will inevitably change the way audiences access news, information, entertainment, cultural and educational programming. The imminent migration to digital terrestrial television will give audiences access to many more free-to-air and subscription television channels. Increased access across the country to affordable high-speed broadband linked to growth in the range, affordability and availability of internet-enabled devices (such as smart phones, tablets, smart TVs, internet enabled set top boxes

and gaming devices) will, in addition, make it possible for South Africans to access a variety of international and South African audio-visual and audio content over the internet.

This will not only affect audiences – but will undoubtedly impact on the viability of traditional broadcasters and therefore affect their capacity to fulfil obligations placed on them to, for example, air a wide range of South African content in all languages and ensure access to services by people with disabilities (by sign-language, sub-titling and audio description for example). New content providers will also not be bound by current broadcasting codes and standards aimed at protecting audiences and children in particular, from harmful content. New services, not bound by regulations or licence conditions, will be competing with traditional broadcasters for audiences, content and revenue.

### **8.2.2 Defining “broadcasting”**

The ECA, in line with the White Paper, includes a technology neutral definition of broadcasting. The regulator noted that in the future, on demand services, including those available over the public internet, “*may be a substitute for traditional television broadcasting*” and therefore require some form of regulation but stated that this would require a legislative amendment to permit the regulation of content services (distinct from broadcasting services) under certain circumstances.

In the UK, the Communications Act defines the different services essentially by the delivery platform used. The regulator in that country (the Office of Communications – Ofcom) has, in line with this, outlined specific obligations and requirements for the different licence categories. For example, television services using the DTT platform have to have either Digital Television Programme Service or Digital Television Additional Service licences, while those that provide television programmes or electronic programme guides (EPGs) over other platforms (eg satellite, cable, the internet or mobile platforms) require Television Licensable Content Services licences (TLCS).

One of the issues that this policy review process has to consider is the approach to broadcasting-like services delivered over the internet. The migration to digital terrestrial television (DTT) will, on the one hand, give audiences access to a greater number of television and audio channels, while freeing up frequencies that will be used to increase high speed broadband access. Licensed multi-channel television broadcasters will therefore not only face increased competition for audiences, revenue and content from new services on DTT platforms, but also increasingly compete with internet based audio-visual content providers. While some of these new services might be South African based and focused, others will originate from other countries and be targeting a global rather than South African specific audience.

In terms of current legislation in South Africa, content services such as Video-On-Demand will not require a broadcasting licence or therefore be bound by the particular obligations for broadcasters.

### **8.3 Regulatory Parity**

A number of submissions to the Framing Paper proposed that the principle of regulatory parity should inform a new approach to policies for broadcasting and audio and audio-visual content. Regulatory parity is based on principles of fair competition and technological neutrality and aims to ensure that like services are treated in a similar manner, regardless of how they are delivered (whether, for example, via satellite, transmitters, over the internet) or what device is used to access them (for example, a radio set, the internet, a mobile phone, a television, a computer).

While the principle of similar regulatory treatment for similar services might seem obvious, ensuring parity is not necessarily easy in practice. Traditional linear broadcasting, for example, has a range of requirements relating to prime-time (such as what types of public interest programming should be aired at times when audiences are most likely to be watching) and ICASA has set watershed periods for different broadcasters to protect children from unsuitable content. Such requirements, however, are not necessarily relevant to on-demand content providers and audiences can schedule their own prime time viewing with new technologies such as interactive television recording devices such as personal video recorders (PVR).

There are also a range of different approaches which could be adopted to achieve such parity. Linked to this, is the need to consider whether or not the current approach of regulation by business model is still appropriate. Services have varying regulatory obligations based on their business model – with lighter touch regulation for subscription services. An issue for the review is whether or not such regulation by business model will in the new environment be in line with principles of fair competition and regulatory parity, noting that these services are increasingly competing with FTA broadcasters for advertising revenue (see Chapter 3).

When considering these issues and their implications on the policy framework, it is also important to recognise that audiences may have different expectations of different mediums. In submissions on the Framing Paper, several stakeholders also raised the issue of net neutrality as critical in the changing environment to ensuring regulatory parity and fair competition between different content providers. They argued that the new policy framework must ensure net neutrality so that all data available on the internet is treated equally by network providers. These stakeholders raised concerns that if the policy framework did not enforce net neutrality, broadband providers might use their last mile infrastructure to block internet applications, content (websites, services, protocols) and competitors by, for example, using deep packet inspection to discriminate between over the top broadcasting services or applications.

Arguments against net neutrality, internationally, generally centre around the impact this will have on the availability of bandwidth given the amount of content that will be made available. Consideration of all these issues has to be guided by the overall objectives set for the policy framework and therefore be based on how best to ensure the identified public interest goals for the sector are met.

#### **8.4 Regulatory Parity and Internet Content**

An extension of the debate on regulatory parity and the decisions on what content is or not regulated, is the issue of cross-border audio-visual services. The internet has global reach. New technologies will therefore allow South Africans to access content from across the world and provide opportunities for South African stories to reach an international audience. International and local audio-visual and audio content delivered via the internet will increasingly compete with traditional South African channels and stations for audiences, advertising and subscription revenue.

This Green Paper process has to recognise such off-shore services in order to ensure a new policy framework is balanced. A key issue of the policy process will be how to reinforce South African broadcasting and other content services to ensure they can effectively compete with these international services.

## 8.5 Licensing and spectrum

Current policies relating to broadcasting are largely met through licences (both individual and class). This allows specific requirements to be set for individual broadcasting services. The broadcaster is a South African registered legal entity which is held accountable for requirements set in licence conditions and relevant regulations.

In line with this, sections of the radio frequency spectrum are set aside for terrestrial broadcasting services. Licensing processes then consider, among other things, the target audience needs, what other services are available, how the aspirant licensee intends to meet key objectives (such as South African content and language mandates) and the requirements in legislation of diversity. Satellite services also require a broadcasting licence, although they do not utilise sections of the spectrum set aside for broadcasting services.

Broadcasting licences typically determine a licence area to ensure there is no interference with other services and promote diversity and fair competition. With the migration to DTT, sections of the radio frequency spectrum currently allocated to broadcasting services will be freed for use by other sectors and therefore increase access to, for example, mobile broadband. New services using the spectrum previously allocated to broadcasting will undoubtedly provide content services to drive take up and these could directly compete with licensed broadcasters. Spectrum currently allocated to electronic communications services and networks will also be used to distribute audio-visual and audio content. As noted previously, at the moment, many of these services will be competing with traditional broadcasters, but will not necessarily require a broadcasting licence or therefore have to meet public interest obligations linked to broadcasting. The notion of a “licence area” for particular services will also be irrelevant in these circumstances.

## 8.6 The three tier system

Several Framing Paper submissions highlighted areas where current policy objectives for the different tiers have not necessarily been met and therefore suggested that the mechanisms in place in the White Paper, related to legislation and/or regulations be reviewed during this policy process. Both Government and Parliament have highlighted in particular the need to review the role of the public broadcaster, the governance of the SABC and funding for public broadcasting.

The three tier system (public, private and community broadcasting) is one of the key means in the current regulatory framework to facilitate freedom of expression and ensure objectives relating to, for example, diversity of ownership and content are met.

- The **public broadcaster** has a specific mandate set out in a legislative Charter to fulfil key public goals such as universal access, providing a range of programming in all official South African languages and airing educational programming.
- Current policy recognises the positive role that can be played by the **private commercial broadcasting sector** (free to air and subscription) in fostering diversity of services, content, employment for producers, artists and broadcasters as well as increasing diversity of ownership. The regulator in licensing new services has to have due consideration for diversity, along with the demand and need for the proposed station or channel. Policy also stipulates that the regulator must set specific requirements in relation to public interest objectives such as the airing of South African content, broadcasting news and information programmes and commissioning of independent producers. More extensive conditions are placed on the free-to-air private commercial sector than the subscription sector.

- The **community broadcasting sector** further extends diversity of ownership and content to the community level. Community broadcasters must provide a distinct broadcasting service dealing specifically with community issues that are not normally addressed by other broadcasting services available.

## 8.7 Public Broadcasting

The transformation of the SABC from a state broadcaster to a public broadcaster began in 1993 with the appointment of the first independent board of the Corporation.

The 1998 White Paper on Broadcasting took these transformation processes further. Among other things, it:

- Introduced a legislated Charter for Public Broadcasting outlining the SABC's mandate,
- Clarified the relationship between the public broadcaster and the regulator.
- Considered how the SABC mandate should be funded; and
- Separated the broadcaster into two divisions – public and public commercial.

As noted in Chapter3, the SABC currently includes:

- Fifteen public radio stations, including eleven full-spectrum services broadcasting in each of the official languages;
- Three public commercial radio services;
- Two national public television channels (SABC 1 & 2) with mandates to, among other things, treat all official languages (including sign language) equitably, and include educational programming; and
- One national public commercial television service (SABC 3).

A further two regional SABC licences (SABC 4 & 5) were granted by ICASA in 2005 but the licences were never issued pending confirmation of sufficient funding for these services. The migration from analogue to digital television will change the structure of the SABC and enable it to air many more television channels. With analogue, each spectrum channel or multiplex delivers a single analogue television channel. In the digital television environment, the multiplex can deliver up to eight channels. This will enable the public broadcaster to better meet its public mandate across its television services as, for example, it has been restricted by the number of channels in ensuring all languages are treated equitably. The time passed since the introduction of the White Paper together with the move to DTT however requires a review of this mandate. It is also crucial to review the funding model of the broadcaster and its governance structures as part of the ICT policy review process.

It is also important in such a review to consider how to ensure that public interest content is easily accessible by audiences given convergence. In many countries around the world it is recognised that public broadcasting services play a critical role in a democracy and in ensuring that society's social and cultural needs and objectives are met.

### 8.7.1 The Role and Mandate of the South African Broadcasting Corporation

The White Paper identified the need for the public broadcaster to play a fundamental and leading role in fulfilling public interest obligations set out for the sector as a whole. The White Paper identified the need to restructure the SABC in order for it to prioritise its public mandate while at the same time generating cash from its commercial activities. A Charter was developed and detailed in the Broadcasting Act, no 36 of 2005, to codify this mandate.

The White Paper and the Broadcasting Act required the SABC to apply for new licences from ICASA for each of its services so that it would be bound by conditions linked to its

charter obligations. The initial licensing process was finalised in 2005. In line with the law and policies, SABC public services have to fulfil obligations outlined in the law, while public commercial stations and channels need to meet the requirements set for the commercial sector by the regulator.

The Act further requires the SABC to develop a range of editorial policies taking its mandate into account through a public process. The extent to which the SABC can fulfil all its mandate requirements on television has been limited due to the number of channels it operates. This will change with the migration to DTT and, for example, its ability to treat all official languages equally on television will be enhanced.

### **8.7.2 Regulatory and Licensing framework of the SABC**

The SABC is bound by both licence conditions and regulations set by ICASA. The White Paper and Broadcasting Act required the SABC to apply for new licences and indicates that the public services of the SABC must be primarily responsible for delivery on public interest goals set in policy. Public commercial services have to comply with the legal and regulatory standards set for privately owned commercial services while adhering to "*the values of the public broadcasting service in the provision of programmes and service*". ICASA's content regulations outline minimum requirements for public and commercial services for radio and television.

The content regulations for television are more detailed and set minimum quotas for the different genres of programming, as well as overall percentages for content.

#### **TV Content Quotas**

The SABC has stated in its annual reports that it has generally complied with and often exceeded these quotas. ICASA has not held any hearings into alleged non-compliance with these – though it should be highlighted that members of the public have raised questions about whether or not the regulator is effectively monitoring compliance.

#### **Licence Conditions**

ICASA has set licence conditions for each radio station and television channel. They set out the universal service requirements for each of the channels and stations.

### **8.7.3 Funding the public mandate**

The SABC in line with policy and regulation is funded by government, licence fees, advertising/sponsorship and other incidental income (sale of programmes etc). As noted above, one of the reasons for the division of the SABC into public and public commercial divisions was to protect the public mandate by allowing for cross-subsidisation of the public wing by commercial services.

The SABC has not to date published separate accounts for the divisions, and it is thus difficult to thoroughly review whether or not the division of the SABC has, as envisaged in the White Paper and Broadcasting Act, enabled the cross-subsidisation of the mandate by the commercial services.

The SABC continues to rely predominantly on commercial revenue (about 80% of its income is from advertising and sponsorship). Licence fees contribute about 18% and government funding about 3%. Allocations from government are approved through the parliamentary process and have included annual funding as well as funds for specific projects (such as elections and the migration to DTT).

In its application for a Government Guarantee in 2009, the SABC highlighted the need for any policy review process to review the funding mechanisms in place for the public broadcaster. It specifically highlighted challenges in relation to the licence fee system.

#### **8.7.4 Structure of the SABC**

The section on funding has highlighted the need to review the structure of the SABC along with a review of the entire funding model for public broadcasting. The introduction of DTT and the increased number of television channels also requires the policy to consider whether or not these will be divided along public and public commercial lines as previously and if so, how such a division will be effected.

As noted previously, it is difficult to assess the effectiveness of the division on the funding model of the SABC as the broadcaster has not produced audited separate accounts for the two wings as required by law. It is thus not possible to, for example, assess the extent to which the three commercial radio services, have cross subsidised public interest content provided across the public radio stations.

#### **8.7.5 Governance of the Public Broadcaster**

Major issues regarding governance at the SABC have been raised recently. One of the core issues raised in parliamentary and other forums relating to this have been about poor governance. Parliament has raised concerns about the lack of accountability of the SABC, and has considered evidence in audit and other reports of poor financial and other management controls.

A key underlying issue raised by government, parliament and members of the public has been an apparent failure to effectively hold the SABC to account. Parliament has raised the need to clarify accountability mechanisms in the law to make clear, for example, the lines of accountability between the SABC and the Minister as shareholder on behalf of government, ICASA and Parliament. The Broadcasting Act together with the Public Finance Management Act, no 1 of 2000, sets out the following reporting lines in relation to the SABC:

- Parliament
- Government
- ICASA

#### **8.7.6 Appointment and Constitution of the Board**

The Board of the SABC is made up of 12 non-executive members and three executive members (the Group Chief Executive Officer, the Chief Operating Officer and the Chief Financial Officer).

The Broadcasting Act states that the Board controls the affairs of the Corporation and that the executive committee (made up of the three executive directors and no more than 11 members) administer the affairs of the Board. The executive committee is directed by the Board. The Board is the accounting authority in terms of the PFMA and as such bears overall responsibility for ensuring sound financial management.

The appointment of executive members of the Board is outlined in the memorandum and articles of association. The appointment process of non-executive members of the Board is managed by Parliament.

The Act also sets out the processes to be followed to remove non-executive members of the Board or dissolve the entire governing body. In the event of the dissolution of the Board, the Act states that Parliament can recommend the appointment of an Interim Board made up of five non-executive members for a term of no more than six months.

Given the recent history of challenges at a Board level, it is important to discuss and review whether or not this process does ensure that the best candidates are appointed. Such a review of the appointment process is not about casting aspersions on the structures involved but a genuine attempt to analyse if the system can meet the desired outcomes. It must also be highlighted that given the role of political parties in the appointment process via Parliament, the process does not ensure that the process is free from party-political influences.

In reviewing the appointment processes, the role and functions of the Board must also be looked at to ensure that this process best assists in fulfilling these – and to consider how those appointed are held to account.

## **8.8 Commercial Broadcasting**

The licensing framework for different services is aimed at promoting fair competition while ensuring diversity of ownership and content. As highlighted, though they are privately owned and funded, the policy and legislative framework emphasise that commercial radio and television services also have to meet defined public interest objectives, such as airing South African music and television content.

It is important in a policy review process to examine each of the commercial broadcasting sectors separately, as well as consider how they impact on each other. The possible impact of convergence and digitisation in future must also be considered.

### **8.8.1 Commercial Television**

There is one privately owned national terrestrial free to air television broadcaster licensed currently (e.tv). E.tv (like SABC) will have the capacity to air more channels with the migration to DTT. ICASA has also indicated that it will be considering when to licence new terrestrial FTA private players after the digital migration process has commenced. Two new satellite FTA services were launched in 2013 (OpenView and FreeVision).

E.tv has to air a minimum of 45% South African content rather than the minimum regulatory requirement of 35%. The channel first broke even in 2004 – five years after its launch. It is now the third largest service in terms of audience (with a viewership of close to 69% of adult South Africans).

As noted previously, the introduction of DTT will increase the potential number of channels on air operated by either existing and/or new licensees - and therefore potentially the capacity to meet key public interest programming objectives. At the same time though, the increase in the number of channels will result in an increase in competition for audiences, advertising revenues, sponsorships and programming. This competition, in the absence of the corresponding growth in advertising revenues, will limit investments in South African content production by free-to-air broadcasters. At the same time these broadcasters will face increased competition from content services that are currently not regulated as broadcasters.

### **8.8.1.1 Television Services**

Subscription television services have shown extremely strong growth in audiences in recent years. This has been driven by an increase in subscribers to DSTV rather than increased competition in the sector. There were three subscription television services on air by October 2013 – satellite subscription services, DSTV, and terrestrial pay TV operator M-Net – both part of Nasionale Pers' MultiChoice – and new player TopTV/StarSat. As noted in other sections, TopTV/StarSat is the only one of five additional subscription services licensed by ICASA in 2009 to go on air. It has faced challenges – and was placed under business rescue in 2012. ICASA has recently invited applications for new subscription services and was considering these applications at the time of finalising this Green Paper.

The growth of DSTV (in terms of number of subscribers and therefore both subscription revenue and its share of adspend) is linked to its strategy to increase penetration by offering a range of different and cheaper bouquets targeting different sections of the population. DSTV has also in recent years increased the number of South African channels it airs (including the introduction of a range of Mzansi channels) – thus contributing towards the public interest objective of ensuring that South African audiences have access to South African content across all platforms. This increase has been driven by commercial imperatives rather than regulatory requirements. The four FTA channels (SABC 1, 2, 3 and e.tv) which are simulcast by DSTV are among the most popular services on the platform.

Subscriptions to M-Net have declined over the period – from 16% of the adult population in 1998 (4,1 million viewers) to under 10% in 2012 (2.41 million) . The pay-tv service has stated that this is in part due to delays in the launch of DTT as it stopped marketing the sale of analogue set top boxes pending the launch. M-Net is one of the key channel providers to DSTV. It will be able to offer an increased number of channels to subscribers with the migration to digital transmission.

Given the dramatic changes in the pay-TV market since the development of the White Paper, it may need to be necessary to review many of the policy and legislative provisions that currently apply to these services. In the 2013 parliamentary hearings on amendments to existing laws, for example, other licensees suggested that subscription services access to advertising should be further limited as they claimed this threatened the viability of the FTA services. Parliament indicated that such issues should rather be discussed through a holistic review of broadcasting related policies. The existing White Paper recognises that commercial free to air broadcasters rely almost entirely on advertising and sponsorship revenue to meet key public interest objectives. It therefore stipulated that subscription services should rely primarily on subscription fees and that free to air services must have access to “revenues that are sufficient to allow them to meet their public service obligations”. Given the number of subscribers to DSTV and M-Net at the time, it was believed that this would sufficiently limit such services access to advertising. The situation has however changed and the overall subscription revenue now exceeds that of overall television advertising revenue.

### **8.8.2 Commercial Radio**

Commercial radio broadcasters do not face the same immediate challenges in relation to digitisation as television services – though there are an increasing number of South African internet radio stations and international and local music streaming providers.

As commercial radio broadcasters are licensed to cover different licence areas, and/or to provide different formats and services, the current licensing framework is aimed at ensuring that services do not directly compete with each other. These measures are further aimed at promoting diversity of services and content available to audiences.

There are though a number of other questions which need to be considered in this policy review process. These include the following:

- The current White Paper envisaged commercial radio services being licensed across the country. While there are now services available outside of the urban areas, and new licence applications being considered in the Eastern Cape, the viability of these stations in these secondary towns needs to be carefully evaluated..
- Private commercial radio stations are all licensed to cover relatively limited areas. (This is in part limited by spectrum availability.)
- Commercial radio stations are however still broadcasting predominantly in English (with some also including Afrikaans and others, such as Igagasi in KwaZulu-Natal also broadcasting in isiZulu).

## **8.9 Community Broadcasting**

The current White Paper outlines the vision for the community broadcasting sector as a whole and states that it “must provide a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by other broadcasting services covering the area in question. It is a non-profit sector in terms of law, and stations and channels have to involve their targeted communities in the governance and operations of services.

Early challenges faced by the sector as a whole (and community radio in particular) of slow and cumbersome licensing processes have been addressed by the introduction of the EC Act. The sections of the EC Act dealing with class licensing, while ensuring quick turnaround times for decisions on registration (60 days) may limit the ability of the regulator to scrutinise applications to ensure they meet all the envisaged objectives and requirements for the sector. ICASA, for example, is not specifically empowered in terms of the Act to refuse an application if it has, for example, not met requirements relating to community participation set out in Section 50 of the EC Act. The Act further does not empower the Authority to suspend, revoke or refuse to renew a class licence – even if the licensee has for example repeatedly violated legislative, regulatory or licensing requirements.

### **8.9.1 Community radio**

The White Paper on Broadcasting of 1998 emphasises the need for the regulator and Department of Communications to develop a planned roll out strategy to ensure that communities in need are specifically targeted. In addition, government in 2002 took its commitment to supporting community media further – establishing as a public private partnership the Media Development and Diversity Agency (MDDA).

Much has changed in this regard since the publication of the White Paper seemingly evidence of the success of the Department of Communications programmes, the MDDA support to the sector and the policy’s focus on disadvantaged areas. Whereas at the time of finalising the paper, most stations on air were either community of interest stations (for example religious or Afrikaner) or based in urban areas and many broadcast in English, the number of stations broadcasting in disadvantaged and rural communities has grown along with the listenership levels.

### **8.9.2 Community television**

There are now six community television services on air centred around the major cities of South Africa. All of the community television services are also transmitted to a national audience via the DSTV platform. DTT policies and regulations have set aside capacity for community television channels (on Multiplex 1). The funding mix of the community stations includes advertising, donations and sponsorships.

The greatest challenge facing the development of community television is funding. Funding constraints operate at two levels. It limits the number of communities that can launch their own services to those with access to donors or other resources, and is an ongoing challenge for those that are licensed. The cost to distribute channels in the digital terrestrial environment will also play a fundamental role in the future developments as the distribution costs together with programme costs consume most of the operational budgets.

### **8.10 Fair competition**

Promotion of fair competition is critical to ensuring the viability of the broadcasting system as a whole, including the commercial broadcasting sector. Several stakeholders in their submissions to the Framing Paper highlighted a need to review current provisions and mechanisms aimed at reinforcing fair competition to both address challenges that may have been faced in meeting the objectives and to ensure that current provisions are updated in line with new challenges given the new converged multi-channel environment.

In terms of the current policy framework, ICASA and the competition authorities have complementary roles to play in ensuring fair competition in the electronic communications and broadcasting sectors. The EC Act further clarified the regulator's role in relation to this and set out the processes that should be followed by ICASA in dealing with competition related matters it is responsible for. The regulator has held one specifically broadcasting linked competition inquiry in terms of the Act – an inquiry into broadcasting transmission. A number of other issues relating to fair competition in the television sector are also important to consider in a policy review process.

The issue of access to premium content is one such issue that has been considered in a number of countries. Access to premium content such as sports or movies is crucial to the success of platforms such as free-to-air, subscription and mobile television. Competition issues may arise when buyers acquire exclusive rights to such premium content that effectively lock out competition. Given convergence, there is also the potential for rights bundling across platforms (one operator bundles rights across subscription television or internet protocol television—IPTV—or mobile). Ultimately, this may deprive audiences of choice and quality. The way rights are bundled and the period of such exclusivity, are often means through which these issues are addressed by regulatory authorities (both sector specific ones and/or competition bodies).

At the same time it must be recognised that the sale of distribution rights on an exclusive basis can result in higher prices for rights holders, which in turn can support industry development in sport and content development generally.

### **8.11 South African music and audio-visual content**

The 1998 White Paper on Broadcasting recognises that “broadcasting plays an integral role in developing and reflecting a South African identity, its character and cultural diversity within the framework of national unity”. It focuses on television content across a broad range of genres and formats and on the promotion of South African music on radio. The White Paper states that South African content regulation and policy must serve both cultural and economic objectives.

The White Paper outlines the following key interventions to achieve these objectives:

- Radio Television broadcasters must provide a mix of their own productions and of programmes produced by independent South African producers.
- South African music will be prioritised in the South African broadcasting system.

- Programming on all broadcasting services should be “predominantly South African” and the regulator should monitor compliance.
- Local independent production industries must have sufficient resources to be able to provide content competitive with the international products available.

ICASA has in line with this developed regulations setting out minimum requirements for each sector (public, community and FTA and subscription commercial broadcasters). It has indicated that it is currently reviewing requirements. They must not only meet local content obligations but also make all efforts to ensure that South African content is of a quality that will draw listeners and viewers.

At least 40% of the South African content must be commissioned from independent producers. ICASA has stated that broadcasters generally comply with the provisions, though it should be noted that some stakeholders have raised questions about whether or not its monitoring of broadcasters is effective at ensuring compliance. However, it is evident that audience demand for South African drama and other content has resulted in broadcasters focusing on these genres in order to attract viewers and/or subscribers. This has resulted in services such as DSTV recently increasing the number of local channels available – exceeding the requirements set for them.

The requirements for terrestrial television were developed mostly for analogue services and the approach will need to be reviewed given the multi-channel environment.

A range of other government initiatives have also focused on promoting the film and television production industries. According to research published by both DTI and the National Film and Video Foundation (NFVF), the film and television production industries have contributed to economic growth in the country. The Department of Trade and Industry (DTI) in its latest Industrial Policy Action Plan (IPAP) 2013-2016 strategic plan states that the film industry contributed R8bn to the economy between 2008 and 2012. This is a total and includes international movies made in South Africa and local productions. It states that the television industry in particular has performed strongly since 2008/2009 – growing by 13,4% from R20,326bn to R23,051bn.

A 2013 study by the NFVF states that the film and television industries together have created over 25 000 full-time equivalent jobs and contributed over R650 million to the fiscus. It should be noted though that the independent production industry was particularly hard hit by the 2009 SABC financial crisis and a number of television focused companies closed down as a result of this as they were predominantly reliant on the public broadcaster.

### **8.11.1 Radio**

In terms of radio, the regulations state that public and community radio stations must air at least 40% South African music and commercial radio stations at least 25%. As noted in other sections, many commercial broadcasters actual licence conditions exceed these minimum requirements as they are bound to promises of performance made during a competitive licence bid.

A 2011 report from the Copyright Review Commission appointed by the Minister of Trade and Industry made a number of recommendations on issues relating to the music industry, including suggestions on the regulatory framework for radio broadcasters. Among other things the Commission recommended that:

- Definitions for South African music in the EC Act be amended;
- The regulatory quotas for music content be increased;
- Music quotas should be extended to television services as well.

While considering the effectiveness of existing provisions, it is also crucial to look at how a policy framework can ensure continued and enhanced availability of South African content in a multi-channel and convergent environment.

## **8.12 Diversity of Content**

One of the cornerstones of South Africa's broadcasting related policies is diversity of content; different types of content in different languages, from different sources, at a national, provincial and local level. The policy framework emphasises and encourages this through, amongst other things, the three tier system, South African content and music requirements and the emphasis on news and information programming. Diversity of ownership, content offering and services are critical considerations in decisions on licensing. The EC Act states that broadcasting services collectively should "*promote the provision and development of a diverse range of sound and television broadcasting services*" to meet the needs of all audiences.

Digitisation and convergence create more opportunities to further the principle of diversity – audiences will be able to access a wide range of content, across different platforms and channels packaged by South African and international traditional broadcasters as well as audio-visual and audio material generated by users and other content providers. Audiences will have increased opportunities to choose when, how, where and what content they view and listen to. The audio-visual industry will at the same time be able to explore new services and innovative ways to reach audiences. New technologies are also increasingly reshaping the relationship between audiences and content providers – enabling suppliers to get to know their audiences better and match content more closely to their needs. A much more engaged and intense relationship with audiences is possible.

Experiences in other countries have however shown that this abundance of content distributed over a range of platforms can threaten, for example, the development and distribution of unique programming and the cultural and linguistic diversity of content. Threats to the viability of South African broadcasters and audio and audio-visual content producers can result, for example, in an emphasis on "tried and tested" entertainment formats that appeal to a mass audience, rather than promote innovation and creativity and an emphasis on local issues. The proliferation of 24-hour news services around the world, for example has been charged with increased homogeneity rather than diversity – with different news providers focusing on the same stories and using the same images and audio clips, rather than actually increasing the range of sources and perspectives available to audiences.

Content providers (both traditional broadcasters and others) may also feel increased pressure to appeal to broader audiences and therefore not focus on reflecting and celebrating local cultural diversity and covering issues of local importance in local dialects and languages. Alternative voices moreover might be drowned out by big global companies. A policy framework needs to address these issues.

### **8.12.1 Promoting access to public interest content in a converged environment**

The importance of ensuring easy access across all platforms and devices to public interest content becomes increasingly important in a converged environment. This will be a key means to ensure that South African audiences continue to be able to access content that is relevant to them and meets the key cultural, social, linguistic and economic needs identified in the policy objectives.

Policies that focus on these issues are aimed at ensuring prominence of public interest content across all platforms. They include, for example, obligations requiring subscription broadcasters to carry public broadcasting content services, rules on positioning of public interest broadcasters on any electronic programme guides (EPGs) and rules to ensure that key sporting events are aired free to air.

What are called “**must carry**” rules requiring, for example, subscription broadcasters to re-transmit public broadcasting services, are prevalent in a number of countries and are aimed at ensuring that audiences have easy access to public interest content. They are intended to ensure that audiences do not have to switch platforms to access such content. Rules have also been set in some countries to ensure that public broadcasting or free-to-air channels are featured prominently on any **electronic programming guides** (sometimes referred to as “must-be-found” requirements) – and are thus easy for audiences to find.

The Electronic Communications Act states that ICASA must develop regulations to ensure that subscription broadcasters must carry “*subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee*”. The regulator finalised “must carry” rules for the analogue environment in 2008. There is a need to reflect on whether or not the legislative requirements on “must carry” have had the intended effects in South Africa and have achieved the underlying objectives of these requirements. In developing a new policy framework it is also important to consider whether or not such provisions will remain relevant in a new converged environment.

The 1998 White Paper and related legislation have also put in place mechanisms to ensure that **national sporting events** are aired free to air and not only over subscription services. The policy framework highlights that a list of national sporting events should be developed in consultation with the Minister of Sport and the law states that pay-tv broadcasters may not acquire exclusive rights that stop the free-to-air broadcasting of such national events. ICASA has developed regulations to implement these provisions.

In some countries such stipulations also extend to other types of programming – for example to major cultural events in Australia. Laws and policies need to balance the need to ensure key events are aired free to air, while recognising that rights to, for example, certain sporting events, are critical to the viability of the subscription broadcasting model.

### **8.13 Content standards and protection of children**

There is currently a co-regulatory approach to the development and enforcement of South African broadcasting content standards. The EC Act requires ICASA to develop a Code of Conduct for broadcasters and stipulates that all broadcast licensees must adhere to this unless they are “a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body”. Such a self-regulatory code and the mechanisms to enforce compliance to it have to be approved by ICASA in terms of the law. Section 55 stipulates that advertising falls under the Code determined by the Advertising Standards Authority of South Africa.

Complaints regarding alleged breaches about the ICASA Code are adjudicated by its Complaints and Compliance Committee (CCC) – which is also responsible for deciding on complaints about breaches of licence conditions. Broadcasters have established their own self-regulatory body in line with the above provisions of the Act.

The Codes developed by both ICASA and the Broadcasting Complaints Commission of South Africa (BCCSA) are very similar. Both focus on protection of children and providing viewers and listeners with sufficient information about programme content to make decisions about

what to watch or listen to through advisories. Content delivered over other platforms is currently regulated via a range of different bodies in line with the Film and Publications Act. Convergence raises a number of new issues in relation to ensuring audience expectations regarding classification of audio-visual content and protection of children.

Given the volume of content that will be available over different platforms and channels, many countries around the world are considering ways to strengthen self-regulatory and co-regulatory arrangements. There is also an increased focus on media literacy to equip audiences and parents with information on tools available to protect in particular children from accessing harmful content.

Inconsistent treatment of content can be confusing for those accessing the services and for those that provide services. It can also raise competition and parity issues, where, for example, some content providers are forced to fund the costs associated with regulation while competitors might not have similar costs.

#### **8.14 Signal distribution**

The 1998 White Paper sets out specific objectives for broadcasting signal distribution. While there are specific requirements in legislation for broadcasting transmission services, broadcasting signal distributors are also governed by electronic communications facilities provisions set out in sections 43-47 of the EC Act. These sections state that ECNS licensees must, on request, lease facilities to other licensees “unless such request is unreasonable”. Leasing agreements must be “non-discriminatory...and not be of a lower technical standard and quality than the technical standard and quality provided by such (ECNS) licensee to itself or to an affiliate”.

ICASA initiated a competition inquiry into the broadcasting signal distribution market in 2010 and has stated that it will further be looking into tariff regulation of Sentech. Broadcasting services are allowed to self-provide signal distribution on obtaining an ECNS licence. Many community radio stations have opted to self-provide their signals on this basis.

#### **8.15 Intellectual Property**

The broadcasting sector is a major developer of content and South African intellectual property (IP) rights and law apply. Content generation is set to expand in the future with the migration to digital and with increased data storage and distribution across the Internet. In fact, content and intellectual property related to that content is and will be a continued source of income generation in the future. The sector needs to encourage this development and grow and support content generation and the expansion of this industry. However, the challenges related to enforcement of intellectual property (IP) rights and copyright will increase, especially as property pirating and infringement becomes more sophisticated globally.

Control of IP should not restrict access to and sharing of content and as such policies should balance the need for content creators to realise the value of their work while not unfairly limiting access to content.

There is further a need to consider whether or not the framework in place for rights clearance is sufficiently simple to ensure audiences have easy access to broadcasters' online services or distribution of content on different platforms. Increasing the amount of content easily available legally undoubtedly assists in combating piracy.

While legislation relating to IP falls under the Department of Trade & Industry (DTI), the issue of copyright in relation to the broadcasting sector is important to any overarching policy

framework. Other related issues include the need to, for example, protect subscription broadcasters from piracy of signals.

## 8.16 Conclusion

This chapter focuses essentially on asking questions on how the policy framework can ensure audiences can reap the full benefits of convergence and have ongoing access to public interest content. The focus is on how best a policy framework in a multi-channel, multi-platform environment can ensure that the key policy objectives are met.

The list of issues identified above is not necessarily exhaustive. Stakeholders are encouraged to identify other issues that the policy framework should address.

### **Policy Questions:**

1. What new regulatory approaches should be adopted to support innovation, access to affordable services and the creation and promotion of a diverse range of high-quality South African public interest programming to all audiences?
2. Is there a need to review the definition of broadcasting services, given the changing environment, in order to ensure that identified public interest objectives for the sector are met? If so, how?
3. How should policy ensure that there is diversity of services and content and that audiences have access to international, national, provincial and local news, information and other programming of relevance to them given that new services will not be limited to specific licence areas?
4. What key issues should be considered in relation to spectrum allocation to ensure that the public interest, cultural, social and economic objectives linked to audio-visual and audio content services are met?
5. What objectives should the SABC prioritise? How should the mandate of the SABC, as described, be funded? Are the current funding arrangements adequate to fulfill all the requirements placed on the SABC in law? What should the role of government as the shareholder of the SABC on behalf of the public be?