

# Mobilising Regulatory and Funding Initiatives in Support of the South African Local Television Production Sector

A report by Justine Limpitlaw commissioned by the National Film and Video Foundation and the Independent Black Filmmakers Collective



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## ABBREVIATIONS

4IR	Fourth Industrial Revolution
ACHPR	African Commission on Human and Peoples' Rights
ACR	Annual Compliance Report
AfCFTA	African Continental Free Trade Agreement
AGOA	Africa's Growth and Opportunity Act
AMSD	Audiovisual Media Services Directive
AU	African Union
AV	audiovisual
AVCS	Audiovisual Content Services
B-BBEE	Broad-Based Black Economic Empowerment
BBC	British Broadcasting Corporation
CA	Communications Authority
CD	Compact Disc
CCC	Complaints and Compliance Committee
CPIX	Consumer Price Index
CPM Regs	Compliance Procedure Manual Regulations
DCDT	Department of Communications and Digital Technologies
DDCF	Digital Dividend Content Fund
DSAC	Department of Sport, Arts and Culture
DTCAG	Digital Television Content Advisory Group
DTH	Direct To Home
dtic	Department of Trade, Industry and Competition
DTT	digital terrestrial television
DVD	Digital Video Disc
DWP	Draft White Paper on Audio and Audio-Visual Content Services Policy Framework: A New Vision for South Africa
ECA	Electronic Communications Act, 2005
ECNS	Electronic Communications Network Services
ECS	Electronic Communications Services
EU	European Union
FESPACO	Pan-African Film & TV Festival of Ouagadougou
FPB	Films and Publications Board
GFC	Gauteng Film Commission
GRAP	Standards of Generally Recognised Accounting Practice
HDG	Historically Disadvantaged Groups
HDI	Historically Disadvantaged Individual

IBFC	Independent Black Filmmakers Collective
ICASA	Independent Communications Authority of South Africa
ICT	information and communications technology (or technologies)
IDC	Industrial Development Corporation
IP	Intellectual Property
IPO	Independent Producers' Organisation
KNFC	KwaZulu-Natal Film Commission
KZN	KwaZulu-Natal
LFC	Limpopo Film Commission
MA SBU	Media and Audiovisual Strategic Business Unit
MDDA	Media Development and Diversity Agency
NDP	National Development Plan
NEF	National Empowerment Fund
NFVF	National Film and Video Foundation
OTT	Over-The-Top
PAJA	Promotion of Administrative Justice Act, 2000
PFMA	Public Finance Management Act, 1999
PSEP	Presidential Employment Stimulus Programme
QSAPE	Qualifying South African Production Expenditure
ROI	Return On Investment
SA	South African
SARS	South African Revenue Service
SAAF	South African Audiovisual Forum
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
SASFED	South African Screen Federation
SETA	Sector Education and Training Authority
SMMEs	Small, Medium and Micro Enterprises
SPCV	special-purpose corporate vehicle
TV	television
USAF	Universal Service And Access Fund
WOCC	Window of Creative Competition
WSIS	World Summit on the Information Society

## **CHAPTER 1: INTERNATIONAL TRENDS AND BEST PRACTICES WITH REGARD TO LOCAL TELEVISION CONTENT PRODUCTION**

### **1. INTRODUCTION**

- 1.1. This report was commissioned by the National Film and Video Foundation (NFVF) and by the Independent Black Filmmakers Collective (IBFC) as an attempt to identify where challenges faced by independent television producers persist despite the clear goodwill of the government and of the to support South Africa's local cultural industries.
- 1.2. The report consists of five chapters:
  - 1.2.1 International Trends and Best Practices with Regard to Local Television Content Production;
  - 1.2.2 Local Content Requirements;
  - 1.2.3 Independent Production Requirements;
  - 1.2.4 Independent Production Support Entities and Requirements; and
  - 1.2.5 Futureproofing the Local Television Content Production Sector.
- 1.3. The report is a frank assessment of where South Africa stands on all of these issues and identifies challenges or problems which undermine the stated goals of local content and independent production development. It also contains detailed proposals of what ought to be done by government, including by statutory funding bodies and by the independent regulator to address these to bring about the robust, empowering, economic growth-enhancing local television content production sector that is waiting to be unleashed.

### **2. THE OBLIGATION TO HAVE LOCAL TELEVISION CONTENT ON BROADCAST AND OTT SERVICES<sup>1</sup>**

- 2.1. For the purposes of this section, it is important to note that there is no significant need to focus on international examples outside of Africa because of the plethora of African statements, protocols, declarations etc that require states to act to secure local content for their peoples.
- 2.2. However, where international statements or guidelines are particularly relevant they are included.

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<sup>1</sup> Much of this section of the chapter is adapted from Chapter 2 "Hallmarks of a Democratic Media Environment" published in Limpitlaw J, Media Law Handbook for Southern Africa. KAS (2021).

### 2.3. Relevant international instruments

- African Principles on Freedom of Expression and Access to Information Declaration<sup>2</sup>: The original Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights (ACHPR), a body established under the auspices of the AU. The ACHPR updated and replaced it in 2019 with the Declaration of Principles on Freedom of Expression and Access to Information in Africa.
- AU Declaration on Internet Governance<sup>3</sup>: The Declaration on Internet Governance and Development of Africa's Digital Economy was adopted by the Heads of State and Government of the African Union in 2018. It is not a treaty, capable of being signed or ratified and is, therefore, not legally binding on African states. Nevertheless, the Declaration on Internet Governance contains some important statements on internet governance, even if these are only aspirational.
- The SADC Protocol:<sup>4</sup> The Southern African Development Community Protocol on Culture, Information and Sport was adopted in 2001 and came into force in 2006.
- The WSIS Geneva Principles:<sup>5</sup> The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles cover mainly issues concerning universal access to information and communication technologies (ICTs), they also contain some important statements on the media more generally.

### 2.4. Relevant provisions in the international instruments

- Principle 11.3 of African Principles on Freedom of Expression and Access to Information Declaration states that '[s] shall take positive measures...which shall facilitate: ...The promotion of local and African languages, content and voices'.
- Article 15 of the AU Declaration on Internet Governance requires member states to 'promote local content'.
- Article 17(c) of the SADC Protocol requires member States to agree to cooperate in the area of information in order to ensure 'the ... [d]evelopment and promotion of local

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<sup>2</sup><https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia.> [accessed 16 June April 2020]

<sup>3</sup><http://saigf.org/AU-Declaration%20on%20IG.pdf> [accessed 28 April 2019]

<sup>4</sup>[https://www.sadc.int/files/3213/5292/8362/Protocol\\_on\\_Culture\\_Information\\_and\\_Sport2001.pdf](https://www.sadc.int/files/3213/5292/8362/Protocol_on_Culture_Information_and_Sport2001.pdf) [accessed 28 April 2019]

<sup>5</sup><http://www.itu.int/wsis/docs/geneva/official/dop.html> [accessed 28 April 2019]

culture by increasing local content in the media such as magazines, radio, television, video, film and new information technologies’.

- Article 17(e) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure ‘the [e]ncouragement of the use of indigenous languages in the mass media as vehicles of promoting local, national and regional inter-communication’.
- Principle 53 of the WSIS Geneva Principles states, in its relevant part, that ‘[t]he creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society ... the development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas’.

## 2.5. Summary

- Availability of content in a variety of African languages is essential for building an inclusive information society.
- Local content is essential to the development of local culture.
- Developing local content encourages social and economic development, including in rural areas.
- Local content should be available in all media: print, broadcasting and online.

## 2.6. Commentary

- While Africa has many different languages and cultures, there is often insufficient reflection of this in the print and electronic media. All too often media is available largely (although not exclusively) in ‘colonial’ languages, such as English, French, Portuguese or German. Encouraging the use of indigenous local languages is important to opening up conversations in societies and ensuring that marginalised people who can speak only these languages are included in public debate and discussion. The media must reflect a society back to itself, and it cannot do this effectively if large numbers of people are ‘silenced’ in the media because their language is not used.
- Owing to widespread poverty and other developmental challenges, Southern African governments often do not prioritise the development of local cultures.
- South Africa bucks the trend in Africa. As is clear from the following chapters in the report, South Africa:
  - obliges broadcasters to develop and flight local content television programming – see Chapter 2;



- obliges broadcasters to secure significant percentages of such local content television programming from independent producers – see Chapter 3;
- makes a number of funding schemes available to support the local production sector – see Chapter 4; and
- is also forward looking in that its Draft White Paper on Audio and Audio Visual Content Services Framework specifically makes and invites recommendations on how local audiovisual content is to be obliged to be carried on Over-The-Top (OTT) services too – see Chapter 5.

### **3. SUPPORTING AN INDEPENDENT PRODUCTION SECTOR – DEVELOPING COUNTRY LESSONS FROM CHINA, GHANA, INDIA, KENYA, NIGERIA**

3.1. Many developing countries have local content quotas for television and for OTT services but many do not and some countries to encourage the local film production sector through direct funding or via tax credits and also through funding (including via tax credits) for filming or post production work by a foreign film entity in the developing country where local people are employed to perform services in relation to the film.

#### **3.2. China**

3.2.1 Although China has the world's second largest economy, it is still considered to be a developing country<sup>6</sup>.

3.2.2 Primary sources of laws and regulations are difficult to access given the language barrier but it is reported that Chinese broadcasters do have local content quotas of, effectively, 75%. Or rather, the quota is framed negatively, that is, according to the World Economic Forum, “a quota of 25% exists for broadcasters to show foreign-produced content” and none of this foreign-produced content may be shown during peak hours (19h00 to 22h00 hours daily)<sup>7</sup>.

3.2.3 Importantly, it is reported that guidelines for both digital and linear content were consolidated in 2020 but it is not clear how, for example, peak vs off-peak local content requirements can be consolidated across linear (scheduled programming) and on-demand programming (unscheduled). Nevertheless, it is clear that online on-demand programming is clearly heavily regulated to ensure a high level of local content.

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<sup>6</sup> <https://www.investopedia.com/updates/top-developing-countries/#:~:text=China%20is%20a%20developing%20country.&text=Despite%20having%20the%20world's%20second,the%20criteria%20of%20most%20organizations.>

<sup>7</sup> <https://www.weforum.org/agenda/2020/12/streaming-platforms-in-india-a-case-for-more-freedom-or-regulation/>

3.2.4 In an article in Volume 11 of *Global Policy Journal*<sup>8</sup> Xialolan Zhou details how China also subsidised its “mainstream” films heavily. These are defined as films which serve a propaganda role for the Chinese state. While subsidised heavily, these films were losing traction with Chinese audiences<sup>9</sup> as a result of among other things, their stagnant overall quality and specifically, the stultification of story lines, characterisations and special effects. It is important to note that many of the beneficiary film production companies to which state subsidies were paid were state owned. This situation started to change in 2015 when the subsidy strategy was modified to focus on screening and attraction of audiences rather than production<sup>10</sup>. This has led to the greater success of mainstream films which has attracted private foreign investment (and actors) which, too, assists in winning popular support for these films.

### 3.3. Ghana

3.3.1 Ghana does not appear to have any legislative or regulatory local content requirements. While it was reported in 2017 that Government would roll out a policy to ensure that television stations broadcast at least 70% local content during prime time<sup>11</sup>, this does not appear to have been implemented.

3.3.2 The Ghanaian state has not traditionally made funding available to the local film production industry<sup>12</sup> but this has changed recently. In this regard:

3.3.2.1. In 2016 the Government passed the Development and Classification of Film Act<sup>13</sup>, 2016 which established the National Film Authority which administers the Film Development Fund. The Fund’s sources of income<sup>14</sup> include state monies such as charges on services rendered by the National Film Authority as well as moneys approved by Parliament but also private sector contributions such as “periodic contributions to be agreed by the Board of the National Film Authority from individual production houses” and donations. The National Film Authority appears to operate as an amalgamation of the equivalent of South Africa’s Films

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<sup>8</sup> Available at: <https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12831>

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/TV-stations-must-broadcast-70-local-content-at-prime-time-Minister-586347>

<sup>12</sup> Available at: <https://www.judicial.legal/legislation/akn/gh/act/2020/1048>

<sup>13</sup> [https://bcp.gov.gh/acc/registry/docs/Development%20and%20Classification%20of%20Film%20Act.%202016%20\(Act%20935\).pdf](https://bcp.gov.gh/acc/registry/docs/Development%20and%20Classification%20of%20Film%20Act.%202016%20(Act%20935).pdf)

<sup>14</sup> Section 34.

and Publications Board, in that it is responsible for film classifications and the like, and the NFVF in that it is responsible for funding qualifying film productions); and

3.3.2.2. In 2020 the Creative Industry Act, 2020<sup>15</sup>, came into force. Among other things it created a Creative Arts Agency<sup>16</sup> to administer the Creative Arts Industry Fund<sup>17</sup>.

3.3.2.3. Section 24 of the Creative Industry Act sets out the sources of income of the Creative Arts Industry Fund and it is important to note that sources include the state (moneys approved by Parliament) but also private sector including:

3.3.2.3.1 a 1 percent levy on revenue realised from the sale of products from the creative arts industry; and

3.3.2.3.2 periodic contributions determined by the board of the creative arts agency and paid into the fund by practitioners and operators in the creative arts industry domain. This is extremely widely defined in section 32 of the Act and includes: the music, fashion and beauty industry, the film and screen industry, the fine arts industry, the theatre, literary arts and book industries, the audiovisual industry including new media and creative services, intellectual property rights and collecting societies, heritage and cultural sites and the events industry.

3.3.2.4. In 2021 The Ghanaian President announced<sup>18</sup> the \$25 million Presidential Film Pitch Series (funded by sponsors including, Amazon and Netflix and DStv) which aims to create a platform for Canadian filmmakers to undertake projects within the Ghanaian ecosystem. Note that the Film Pitch Series is to be administered by the National Film Authority and not by the Creative Arts Agency. Indeed what the different roles, when it comes to the funding of films, are as between the National

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<sup>15</sup>

<http://ir.parliament.gh/bitstream/handle/123456789/1793/CREATIVE%20ARTS%20INDUSTRY%20ACT%2c%202020%20%28ACT%201048%29.pdf?sequence=1&isAllowed=y>

<sup>16</sup> Section 1.

That's worth sticking so some of these endnotes and some footnotes the receiver spaces everywhere please that these are needed to so that they all know is not anywhere until you get a businesses like super urgent and crazy so what I do think this nude show something soon as you start doing any kind of intent thing it goes suddenly goes bold and italic are particular numbers and why it does out so you save the snow and humility you <sup>17</sup> Section 22.

<sup>18</sup> <https://voyagesafriq.com/2021/04/29/ghana-targets-6000-jobs-film-industry-government-injects-25-million/>

Film Authority and the Creative Arts Agency remains unclear but is likely to evolve once the Creative Arts Agency is actually established and operating.

### 3.4. India

- 3.4.1 India has a somewhat chaotic regulatory environment and while foreign ownership of broadcasters up to 100% is allowed (subject to approval by the Minister of Information and Broadcasting)<sup>19</sup> this is subject to local licence conditions, permit requirements etc.
- 3.4.2 While there does not appear to be specific local content obligations as such, there are stringent must-carry rules for channels operated by Indian state broadcasters such as Doordarshan (now part of Prasar Bharti) as well as for the Parliamentary channels.
- 3.4.3 India's famed local film production industry "Bollywood" is legendary and there are a plethora of state and city funding initiatives for local film production. Indeed the Indian Film Facilitation Office has put out a 56-page booklet of Filming Incentives in India<sup>20</sup> which set out the film incentives available in 18 different states from Andhra Pradesh to Uttar Pradesh.
- 3.4.4 For our purposes, one recent development is particularly significant: the government of Delhi, the National Capital Territory of India, has approved the 2022 Delhi Film Policy<sup>21</sup>. The policy is, interestingly, entirely implemented by the Ministry of Tourism within the Government of Delhi. Key Aspects of the Policy are as follows:
- 3.4.4.1. The aim of the Policy is to "provide a friendly and efficient film-making ecosystem to producers"<sup>22</sup> and it is clear that the overall aim is to locate the film-production industry within the broader tourism sector.
- 3.4.5 The Policy proposes the establishment of a Delhi Film Fund with an initial capitalisation of Rs 50million crore (over a R10million)<sup>23</sup> with subsidies of up to the equivalent of R36 000.00 depending on the issues such as number of days filming in the city, local citizens employed etc

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<sup>19</sup> <https://www.lexology.com/library/detail.aspx?g=4975586a-c15b-4c0c-9103-cc4020265dcd>

<sup>20</sup> Available at: [https://ffo.gov.in/uploads/ffo\\_publication/Filming\\_Incentives\\_in\\_India\\_.pdf](https://ffo.gov.in/uploads/ffo_publication/Filming_Incentives_in_India_.pdf)

<sup>21</sup> Available at: <https://www.indiangovtscheme.com/2022/05/delhi-film-policy-2022.html>

<sup>22</sup> At paragraph 1.

<sup>23</sup> <https://www.outlookindia.com/national/govt-approves-delhi-film-policy-2022-to-promote-city-as-hub-of-film-shooting-news-183919>

- 3.4.6 Importantly the Policy proposes a “single-window e-film clearance portal...bringing over 25 agencies under it for various permissions related to film production” all of which the city undertakes to grant within 15 days, according to the Deputy Minister of Tourism for Delhi.<sup>24</sup>
- 3.4.7 The Policy not only aims to attract film productions from other Indian cities but also international producers who have never before shot a film in Delhi.
- 3.4.8 Finally, the Policy undertakes to fund and host an international film festival annually in the city.

### 3.5. Kenya

3.5.1 Kenya has the following local content requirements:

3.5.1.1. The Kenya Information and Communications Technologies Act (ICT Act)<sup>25</sup> (sections 35 and 46 particularly) and its Communications Authority’s (CA) Programming Codes (most recently the 2019 version<sup>26</sup> thereof at Section 9) specify a 40% local programming minimum within one year of initial license award across all free-to-air broadcast licenses (e.g. not subscription/DTH satellite platforms).

3.5.1.2. In the CA definition, local content has to fulfil any 5 of the following:

- the production is made in either Kenya’s indigenous or official languages;
- production and post-production was wholly or partly done in Kenya;
- the content deals with issues that are unique and relevant to Kenyan audiences;
- at least twenty percent (20%) of the share of the production company are owned by Kenyans;
- at least fifty percent (50%) of the leading actors and major supporting cast appearing in the program and technical crew are Kenyans;
- the location of shooting, in case of audiovisual programmes or performances was wholly or partly in Kenya;

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<sup>24</sup> Ibid.

<sup>25</sup> Available at: <https://www.ca.go.ke/wp-content/uploads/2021/02/Kenya-Information-and-Communication-Act-1998.pdf>

<sup>26</sup> Available at: <https://ca.go.ke/wp-content/uploads/2019/03/Programming-Code-for-broadcasting-Services-in-Kenya-March-2019.pdf>

- the author(s) of the program are Kenyan (whether or not the program is produced in conjunction with a co-producer, an executive producer or director who is not Kenyan).

3.5.1.3. For animation, a program has to satisfy at least three of the following requirements to be “local content:”

- the production designer is Kenyan
- the character designer is Kenyan
- the supervising layout artist is Kenyan
- the supervising storyboard artist is Kenyan
- The key background artist is Kenyan.

3.5.2 Besides these obligations, Kenya also intends to provide financial support for the production of Kenyan films according to the provisions of the 2021 Kenya Film Bill<sup>27</sup> which has yet to be enacted. The Bill, if enacted, will establish a Kenya Film Commission, which is to, *inter alia*, administer the Film Academy and Kenya Film Fund (ss 11 and 12 of the Bill). The Bill requires Cabinet to develop an integrated national film industry plan which is to be reviewed every three years (s7 of the Bill). However, the Bill has not yet come into law and so its many important provisions regarding proposed financial support for the Kenyan Film sector are not operational.

### 3.6. Nigeria

3.6.1 Nigeria’s National Broadcasting Commission Act<sup>28</sup> as amended requires minimum obligations of local television content to be regulated by the National Broadcasting Commission. There is a minimum requirement of 60% local content for free to air television broadcasting with a minimum of 20% on cable and satellite services.

3.6.2 There are also must-carry obligations that require all subscription services (terrestrial and satellite) to carry the public broadcasting television services at no charge.

3.6.3 Importantly, local audiovisual operators streaming signals into Nigeria requires a licence from the National Broadcasting Commission and must provide 80% local content. However, there are no specific regulations on the broadcast of foreign programmes via the Internet into Nigeria.

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<sup>27</sup> <https://ict.go.ke/wp-content/uploads/2021/01/DRAFT-KENYA-FILM-BILL-2021-FOR-VALIDATION.pdf>

<sup>28</sup> <http://lawsofnigeria.placng.org/view2.php?sn=276>

- 3.6.4 Nigeria currently has no specific tax incentives for the creation of feature films or TV series shot in Nigeria but film-makers report that the government is amenable to providing incentives “in kind” in the form of free location permits, free security detail and reduced rates at hotels as long as the project has a positive promotional benefit for the country<sup>29</sup>.
- 3.6.5 Further there is no national film commission although a Film Fund for the state of Lagos has been established<sup>30</sup> by Lagos Tourism. It is only open to residents of Lagos State and is in the form of loan funding/cash flow support to be repaid after completion of the film or otherwise within 24 months<sup>31</sup>.

#### **4. SUPPORTING AN INDEPENDENT PRODUCTION SECTOR – DEVELOPED COUNTRY LESSONS FROM THE EUROPEAN UNION, FRANCE AND THE UNITED KINGDOM**

- 4.1. The level of state support for the film production sector in countries such as Canada, Australia and New Zealand is well known.
- 4.2. However, the socio-economic differences between South Africa and any of these developed countries are legion and so a direct adoption of these countries’ film strategies would often not be appropriate or practical, particularly with regard to the level of state financial support that is given to local production industries.
- 4.3. Consequently, this section sets out certain noteworthy and novel aspects from three different countries/regions, namely the European Union, France and the United Kingdom which could be adopted/adapted by South Africa.
- 4.4. The European Union (EU)
- 4.4.1 The EU’s forward looking regulation of satellite broadcasters and online OTT services in order to protect its own audiovisual content sector constitutes international best practice. It is important to highlight the most recent development in this regard - the establishment of MediaInvest launched in May 2022 with the direct aim of stimulating “more private investment” to make the European media sector competitive at a global level<sup>32</sup>. In this regard:

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<sup>29</sup> <https://www.kftv.com/country/nigeria/guide/incentives>

<sup>30</sup> <https://www.vanguardngr.com/2022/09/nigerian-filmmaker-urges-fg-to-create-film-commission-to-boost-sectors-gdp-eyes-new-africa-narrative/>

<sup>31</sup> <https://lagostourism.lagosstate.gov.ng/film-fund>

<sup>32</sup> <https://digital-strategy.ec.europa.eu/en/news/commission-launches-mediainvest-boost-europes-audiovisual-industry#:~:text=Today%2C%20the%20Commission%20is%20launching,over%20a%207%2Dyear%20period.>

- 4.4.1.1. MedialInvest hopes to raise Euro 400 million to foster audiovisual production and distribution with an additional aim of assisting production companies to “better exploit their intellectual property assets”.<sup>33</sup>
- 4.4.1.2. MedialInvest is managed by the European Investment Fund and was designed by the European Commission.<sup>34</sup> The ultimate aim is to benefit audiovisual content production companies including the producers of films, series, videogames and immersive formats<sup>35</sup>.
- 4.4.1.3. MedialInvest is one of the outcomes of the EU’s 2020 Media and Audiovisual Action Plan<sup>36</sup> which was specifically designed to, inter alia, “help maintain European cultural and technological autonomy in the digital decade”<sup>37</sup>.
- 4.4.2 The enabling and empowerment aspects of the EU’s Media and AudioVisual Action Plan aim to:
  - 4.4.2.1. launch a dialogue with the audiovisual industry to agree on concrete steps to improve the access to and availability of European audiovisual content across the EU;
  - 4.4.2.2. foster European media talent;
  - 4.4.2.3. create pan-European production companies as opposed to nationally-based audiovisual content production companies<sup>38</sup>,
  - 4.4.2.4. providing a single interactive tool for the media sector on how to apply for available EU support – bundling all relevant EU funding opportunities for audiovisual and news media;<sup>39</sup>
  - 4.4.2.5. to ensure fair competition between broadcasters and video-on-demand platforms in promoting and investing in European content, including through the revised Audiovisual Media Services Directive’s<sup>40</sup> (AMSD) requirement of 30% European works in their catalogues;<sup>41</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> <https://digital-strategy.ec.europa.eu/en/library/mediainvest-factsheet>

<sup>35</sup> Ibid.

<sup>36</sup> <https://digital-strategy.ec.europa.eu/en/policies/media-and-audiovisual-action-plan>

<sup>37</sup> Ibid.

<sup>38</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0784>

<sup>39</sup> Ibid.

<sup>40</sup> <https://eur-lex.europa.eu/eli/dir/2010/13/oj>

<sup>41</sup> Ibid.



#### 4.5. France

- 4.5.1 Recent initiatives in France include the establishment of a funding scheme to be administered by France's National Film Board for French audiovisual content production and which is to be pre-financed exclusively by non-European platforms such as Netflix, Amazon and Disney Plus<sup>42</sup>.
- 4.5.2 The funding scheme obliges online streaming platforms to invest 20 to 25% of their French revenues back into French content as was enabled by the recent amendments to the EU's AMSD.<sup>43</sup>
- 4.5.3 France is the first country to have enacted such laws enabled by the AMSD.<sup>44</sup>

#### 4.6. The United Kingdom:

- 4.6.1 In 2008, the SABC, the South African Screen Federation (SASFED) and the Independent Producers Organisation (IPO) commissioned a report by Mkhabela, Huntley Adekeye Inc (as it was then) and Spoor and Fisher Inc titled "Unlocking The Creative And Economic Potential Of The South African Television Sector – Recommendations For Legal Regulatory And Commissioning Practice Changes" The Report investigated independent commissioning practices in a number of countries<sup>45</sup>.
- 4.6.2 Unfortunately, immediately after the production of the 2008 Report, the SABC became part of the so-called state capture project<sup>46</sup> and there was little interest in carrying through any of the recommendations contained therein regarding changing the commissioning practices at the public broadcaster.
- 4.6.3 Nevertheless, some of the important aspects of the UK section in that Report involved the changes in intellectual property practices as between broadcasters and in the independent production sector in the UK. The extract is worth repeating in full.
- 4.6.4 *An extremely significant legislative provision in relation to the independent production sector is section 285 of the Communications Act. Section 285 was included in the 2003 legislation as a result of concerted lobbying by the UK*

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<sup>42</sup> <https://variety.com/2021/digital/global/france-selective-subsidy-scheme-local-content-non-european-platforms-1235109175/>

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> The report has been made available to me by the IPO and I have its permission and that of SASFED to make use of it for the purposes of this report.

<sup>46</sup> See the Volume 2 of Part 5 of the Zondo Commission's Final Report. Available at: <http://www.saflii.org/images/state-capture-commission-report-part-5-vol2.pdf>

*Producer's organisation PACT and the section has been widely viewed as being critical to the blossoming of the independent production and distribution sectors. Section 285(1) requires each public service broadcaster to develop a code for commissioning independent productions. Section 285(3) lays out minimum criteria for such codes, namely that:*

- *negotiations for commissioning of independent content and to concluding commissioning agreements;*
- *there is sufficient clarity as to what rights (to broadcast or otherwise) are being disposed of as part of the commissioned production;*
- *there is transparency as to amounts paid for different types of rights;*
- *there are satisfactory arrangements about the duration and exclusivity of those rights;*
- *there are procedures for reviewing arrangements and for demonstrating compliance with the code, including reporting to Ofcom; and*
- *there be appropriate dispute resolution mechanisms.*

*In looking at commissioning practices in the UK – we shall focus on the two main providers of public broadcasting content, namely the BBC and Channel 4, as set out below.*

#### 4.6.5 BBC

4.6.5.1. *The British Broadcasting Corporation (“the BBC”) is the world’s largest broadcasting corporation, employing over 28 500 people in the UK alone and with an annual budget of over four billion pounds.<sup>47</sup> Public funding of the BBC, through licence fees, amounted to 3.36 billion pounds in 2007/8.<sup>48</sup> It is important to note the public services of the BBC cannot carry advertising and so its commercial income comes primarily from the exploitation of rights in and related to its programming.*

4.6.5.2. *The BCC is run according to a Charter, the latest version of which is the 2006 Charter.<sup>49</sup> The Charter is the foundation document for the BBC. For our purposes, its key provisions include that:*

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<sup>47</sup> <http://en.wikipedia.org/wiki/BBC>

<sup>48</sup> The UK Communications Market 2008. Ofcom. August 2008. At pg 169.

<sup>49</sup> <http://www.bbc.co.uk/BBCtrust/assets/files/pdf/regulatoryframeworkcharter-agreement/royalchartersealed-sept06.pdf>

4.6.5.2.1 *The public purposes of the BBC are:*<sup>50</sup>

- *sustaining citizenship and civil society;*
- *promoting education and learning;*
- *stimulating creativity and cultural excellence;*
- *representing the UK, its nations, regions and communities;*
- *bringing the UK to the world and the world to the UK; and*
- *in promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services, and, taking a leading role in the switchover to digital television.*

4.6.5.2.2 *The BBC is to be governed by two separate bodies, namely: the BBC Trust and the Executive Board. The BBC Trust is responsible for setting the overall strategic direction for the BBC and /or exercising general oversight of the work of the Executive Board. In this regard it has ultimate responsibility for the BBC's stewardship of the licence fee revenue. The Executive Board has executive authority for delivering BBC services in accordance with the priorities set by the Trust.*<sup>51</sup>

4.6.5.2.3 *The BBC has a wholly-owned subsidiary called BBC Worldwide Limited ("BBC Worldwide") which is responsible for the commercial exploitation of BBC programmes and other properties. BBC Worldwide not only distributes programming (including branded channels such as BBC Lifestyle, Knowledge, Entertainment etc) but also publishes consumer magazines, and licences and sells DVDs and CDs etc.*<sup>52</sup>

4.6.5.3. *The television licence costs 139.50 pounds a year for a colour TV and the amount is determined by Government. While the licence fee constitutes the vast majority of the BBC's income. Its income from commercial enterprises and from overseas sales of its catalogue of its*

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<sup>50</sup> Section 4 of the Charter.

<sup>51</sup> Section 7 of the Charter.

<sup>52</sup> <http://en.wikipedia.org/wiki/BBC>

*programmes has substantially increased over recent years and BBC Worldwide (the BBC's distribution arm) contributed 145 million pounds to the BBC's core public serviced business in 2005/6.<sup>53</sup>*

4.6.5.4. *In line with the requirements of section 285 of the Communications Act, the BBC has developed a Code of Practice on BBC's Dealings with the Independent Producers for Television Programmes Commissioned by the BBC<sup>54</sup> ("the BBC Code") which has been approved by Ofcom. We shall deal with only the key elements of the BBC Code in brief:*

4.6.5.4.1 *The Code recognises that it is in the interests of UK television audiences that there is a competitive and thriving independent production supply market and that the BBC has a role as the nation's principal public broadcaster to help stimulate and support the development of the independent production sector.<sup>55</sup>*

4.6.5.4.2 *The BBC retains final editorial control over all BBC versions of programmes commissioned from independent producers.<sup>56</sup>*

4.6.5.4.3 *A critically important part of the BBC Code is the section on rights, headed "Rights – Public Service Use and Commercial Exploitation". In brief it provides that its objective is to secure the rights it needs for its licence fee funded services and to secure its exclusivity in the domestic UK television market for the licence period. It therefore expects to obtain the following licence:<sup>57</sup>*

- (a) an exclusive licence in the UK television market and the right to use the programme on its licence fee funded services for a period of 5 years;*
- (b) an option to renew the licence for a further two years on an agreed basis with an additional payment calculated as a percentage of the licence fee;*
- (c) the licence period to run from delivery of the programme;*

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<sup>53</sup> <http://en.wikipedia.org/wiki/BBC>

<sup>54</sup> [http://www.bbc.co.uk/commissioning/tv/business/code\\_of\\_practice.pdf](http://www.bbc.co.uk/commissioning/tv/business/code_of_practice.pdf).

<sup>55</sup> Preamble to the BBC Code.

<sup>56</sup> The BBC Code section 2.1.

<sup>57</sup> The BBC Code section 3 read with section 4.1 and Appendix 1.

- (d) *in the case of a returning series, an option to renew the existing licence for all previous series while the programme is still being commissioned;*
- (e) *BBC has the right to exercise a hold back for the licence period which may be released by mutual consent if the BBC considers further exploitation of the programme would not conflict with the exclusive rights it has acquired; and*
- (f) *the initial licence fee payable would cover a specific number of uses such as broadcast runs on different BBC channels, related interactive uses on new media platforms.*

4.6.5.5. *Beyond the above, the producer retains all commercial exploitation rights in the programme although the BBC expects to share in the net revenue arising from such exploitation on an agreed basis. Note that the above arrangements do not apply where the commission is in relation to a BBC-created format/programme/idea etc.*

4.6.5.5.1 *Programme prices payable are to be determined by reference to a number of factors ie budget; value of the programme to the schedule; level of up front third party investment, if any; the production fee payable to the producer in line with the BBC's Terms of Trade and will include any development funding paid by the BBC. The BBC will also publish a tariff of indicative prices for particular programme genres.<sup>58</sup> Note that this has been done.<sup>59</sup> For example, the BBC's Drama Genre Tariffs contain four categories ie: daytime and low cost drama; lower to mid-cost drama; high cost drama and premium drama.*

4.6.5.5.2 *Payment processes are to be set out in the BBC's Terms of Trade but where appropriate the BBC may use a staged payment method at defined points in the production process.<sup>60</sup>*

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<sup>58</sup> The BBC Code sections 5 and 6.

<sup>59</sup> <http://www.bbc.co.uk/commissioning/tv/business/tariffs.html>

<sup>60</sup> The BBC Code section 7.

- 4.6.5.5.3 *The BBC will conduct negotiations in a timely and professional manner and will expect the producer to do the same.<sup>61</sup> In this regard it is important to note that the agreed standard time for the BBC to consider a proposal for the commissioning of entertainment and factual programming is 20 weeks from date of submission of the proposal by the producer to approval/rejection of the project by the Channel Controller.<sup>62</sup>*
- 4.6.5.5.4 *The BBC will publish Terms of Trade which will set out standard terms of business offered to all independent producers from whom the BBC commissions programmes.<sup>63</sup>*
- 4.6.5.5.5 *The BBC will provide Ofcom with a report, annually, which will review the operation of the BBC Code.<sup>64</sup>*
- 4.6.5.6. *In line with the requirements of the BBC Code, the BBC has also published the BBC's General Terms for the Production of Television Programmes by Independent Producers ("the BBC Terms of Trade").<sup>65</sup> These are extremely detailed and we shall deal in brief with only the key elements of the BBC Terms of Trade as they relate particularly to intellectual property issues:*
- 4.6.5.6.1 *The provisions regarding the rights granted to the BBC<sup>66</sup> in terms of the BBC Terms of Trade are extremely detailed and include provisions on:*
- (a) the granting of exclusive, royalty free and irrevocable licence to public service rights (these are set of 12 rights including, inter alia: the exclusive right to broadcast the programme on BBC's non-commercial television services, the right to exercise primary new media rights (including certain streaming and video on demand rights), the right to exhibit the programme at television festivals, the*

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<sup>61</sup> The BBC Code section 9.

<sup>62</sup> The BBC Code at pgs 21 and 22.

<sup>63</sup> The BBC Code section 10.

<sup>64</sup> The BBC Code section 13.

<sup>65</sup> [http://www.bbc.co.uk/commissioning/tv/business/general\\_terms.pdf](http://www.bbc.co.uk/commissioning/tv/business/general_terms.pdf)

<sup>66</sup> BBC Terms of Trade section 12.

- right to complete the programme, the right to sub-licence the above rights);*
- (b) the granting of an exclusive, royalty free and irrevocable licence to use the programme trade marks and to sub-licence these;*
  - (c) extract and clip use;*
  - (d) the grant of a first option to commission a radio programme based on the format of the programme; and*
  - (e) additional new media rights beyond those outlined above (note, and subject to certain restrictions).*

*Note that the provisions regarding rights in section 12 of the BBC Terms of Trade also contain restrictions on the producer (in particular regarding derivative programming/format use; on-line usage and characterisation) and particular protection of the BBC's copyright in relation to material created pursuant to the BBC's rights under the licence.<sup>67</sup>*

*4.6.5.6.2 The BBC Terms of Trade stipulate that the licence period<sup>68</sup> is for five years from the date of the BBC's acceptance of final delivery and that the BBC has an option to renew same for two years provided it pays an additional licence fee calculated as 3.5% of the original licence fee.*

*4.6.5.6.3 Importantly, the BBC Terms of Trade contain specific provisions regarding distribution / exploitation of commissioned content.<sup>69</sup> In terms of these, the BBC specifically acknowledges that the producer owns the distribution rights to the programme commissioned. However the BBC is to share in these: it is to receive 15% of Net Revenue<sup>70</sup> where it has not commissioned a pilot of the programme and 20% of Net Revenue where it has commissioned a pilot thereof.*

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<sup>67</sup> BBC Terms of Trade sections 12(4) and (5).

<sup>68</sup> BBC Terms of Trade section 14.

<sup>69</sup> BBC Terms of Trade section 16.

<sup>70</sup> Note that this is specifically defined in great detail in section 1 of the BBC's Terms of Trade.

- 4.6.5.6.4 *The BBC Terms of Trade also contain provisions granting the BBC the right to re-commission the producer to produce further programming on the same terms subject to variations of the licence fee agreed in good faith.<sup>71</sup>*
- 4.6.5.6.5 *It is important to note that the Terms of Trade are made up of some 26 sections, many of which are detailed, including on issues such as: take over by the BBC of the commissioned work; abandonment of production by the BBC; editorial processes; production and talent contracts; detailed financial provisions (including progress reporting, payment of invoices, audit rights) etc.*
- 4.6.5.7. *Once a programme has been approved for commissioning, the producer and the BBC then enter into a programme production agreement.<sup>72</sup> It is important to note that different payment options in relation to the licence fee are possible depending on whether the commission is cash-flowed or not.<sup>73</sup> The agreement also contains a section in which all other contributor rights which are covered by the licence fee are identified ie equity artists, writers, archive and stills, music etc.*
- 4.6.5.8. *Another critically important development for the independent production sector has been the BBC's Window of Creative Competition ("WOCC") initiative. WOCC opens up a further 25% of BBC content (ie beyond the 25% statutory minimum prescribed under the Communications Act) to the independent production sector through allowing it to compete with the BBC's in-house production capacity for commissions.<sup>74</sup> The effect of this is that up to 50% of BBC's public services content could be produced by the independent production sector. WOCC resulted in a significant structural reduction in BBC's in house production capacity.<sup>75</sup>*
- 4.6.6 Channel 4
- 4.6.6.1. *Channel 4 is a free to air public service television broadcaster which came on air in 1982. It is publicly owned and is operated by the Channel*

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<sup>71</sup> BBC Terms of Trade section 22.

<sup>72</sup> [http://www.bbc.co.uk/commissioning/tv/business/bbc\\_standard\\_programme\\_production\\_agreement.pdf](http://www.bbc.co.uk/commissioning/tv/business/bbc_standard_programme_production_agreement.pdf).

<sup>73</sup> See section 2.2.

<sup>74</sup> BBC's Response to the Review of the BBC's Royal Charter. May 2005. At pg 80.

<sup>75</sup> BBC's Response to the Review of the BBC's Royal Charter. May 2005. At pg 82.



*4 Television Corporation.*<sup>76</sup> *It broadcasts nationally (although some parts of Wales are covered by its Welsh language station S4C).*

- 4.6.6.2. *Channel 4 is licensed by Ofcom, the latest licence is from 2004. Section 7(1) of the licence restates the Communications Act's specific public service remit for Channel 4, namely to provide a broad range of programming which (in brief): demonstrates innovation, experiment and creativity; appeals to a culturally diverse society; makes a significant contribution to public service broadcasting especially with regard to education; and exhibits a distinctive character.*<sup>77</sup>
- 4.6.6.3. *Channel 4 is a very useful comparative example to consider from a South African perspective because it receives no public funding at all (that is, no licence fee revenue, government grants etc) - it is funded entirely by advertising, programme sponsorship, and through the exploitation of programme content and other intellectual property rights eg merchandising etc. Thus Channel 4 is a public service broadcaster that is entirely commercially funded. Importantly, Channel 4, like the SABC, also has no in-house production capacity<sup>78</sup> but instead commissions its UK programming from almost 300 independent production companies.<sup>79</sup> Traditionally Channel 4 owned the copyright and distribution rights of the programmes it commissioned and aired.<sup>80</sup>*
- 4.6.6.4. *Channel 4's licence also specifies at section 11(1) that Channel 4 must establish a Code of Practice setting out principles for the commissioning of independent production which is to include:*
- 4.6.6.4.1 *reasonable timetables for negotiations for the commissioning of content and concluding agreements thereon;*
  - 4.6.6.4.2 *clarity on what rights (broadcast rights, other use/exploitation rights) are being disposed of by the independent producer to Channel 4;*
  - 4.6.6.4.3 *transparency as to amounts to be paid for each category of rights;*

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<sup>76</sup> [http://en.wikipedia.org/wiki/Channel\\_4](http://en.wikipedia.org/wiki/Channel_4).

<sup>77</sup> Communications Act, section 265(3).

<sup>78</sup> Section 9(1) of Channel 4's licence specifies that Channel 4 shall not be involved in the making of programmes to be broadcast except to the extent as Ofcom may allow.

<sup>79</sup> <http://www.medialiteracy.org.uk/taskforce/channel4/>

<sup>80</sup> [http://en.wikipedia.org/wiki/Channel\\_4](http://en.wikipedia.org/wiki/Channel_4).

- 4.6.6.4.4 *satisfactory arrangements for the duration and exclusivity of such rights;*
- 4.6.6.4.5 *appropriate review procedures; and*
- 4.6.6.4.6 *appropriate dispute resolution mechanisms.*
- 4.6.6.5. *In line with the requirements of section 11(1) of its Licence, Channel 4 has developed the Channel 4 Code of Practice for Commissioning programmes from Independent Producers<sup>81</sup> (“the Channel 4 Code”) which has been approved by Ofcom. We shall deal with only the key elements of the Channel 4 Code in brief:*
- 4.6.6.5.1 *The Channel 4 Code recognises that supporting the diversity and vibrancy of the UK’s independent production sector has been a core aspect of Chanel 4’s public sector remit since the 1980s<sup>82</sup>.*
- 4.6.6.5.2 *Section 2 of the Channel 4 Code makes it clear that Channel 4 is to publish a comprehensive set of Terms of Trade. Further the section also makes it clear that where Channel 4 has developed a programme format or treatment internally before briefing a producer, Channel 4 may depart from the Channel 4 Code regarding intellectual property rights ownership and level of net revenue participation in recognition of Channel 4’s role in leading the creation of the underlying intellectual property in the programme.*
- 4.6.6.5.3 *A critically important part of the Channel 4 Code is section 3, headed “Rights Secured in Channel 4’s Commissioned Programmes” It is clear from section 3 of the Channel 4 Code that Channel 4 envisages a system whereby it licences Core Rights from a producer for a defined duration on an exclusive basis and returns the rights to the producer at the end of the licence period. In this regard:*
- (a) Core Rights include: rights to broadcast the programme on the core Channel 4 service; rights for contemporaneous programme support services eg*

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<sup>81</sup> [http://www.channel4.com/corporate/4producers/resources/documents/Code\\_of\\_Practice2003.pdf](http://www.channel4.com/corporate/4producers/resources/documents/Code_of_Practice2003.pdf)

<sup>82</sup> Introduction to the Channel 4 Code.

*synopsis rights, premium telephony rights, tele-text rights, interactive TV rights etc; national format rights;<sup>83</sup> and the ability to exercise holdback on the rights of others to exploit the programme on any platform targeted at the secondary broadcast market ie video on demand, pay per view, broadband Internet rights etc.*

- (b) *Secondary Rights include: international distribution rights via any media platform; national and international consumer products rights (ie, video, publishing, merchandising etc). Note however that as of June 2006, Channel 4 agreed a New Media Rights deal to allow it an exclusive 30-day window to exploit its programmes via on demand platforms such as broadband, mobile and cable.*
- (c) *The Channel 4 Code envisages two broad variations upon the Core Rights model, namely:*
  - i. *Licence model only: Channel 4 acquires, on an exclusive basis, the Core Rights for the licence period and the producer retains control of secondary rights although exploitation thereof is subject to a revenue-sharing arrangement with Channel 4: or*
  - ii. *Licence Plus Exploitation in Secondary UK television market: Channel 4 acquires, on an exclusive basis, the Core Rights for the licence period and will waive its holdback on the UK's secondary TV market and the producer will allow Channel 4 to distribute the programme with revenues to be shared between the producer and Channel 4.*
- (d) *Note however that the Channel 4 Code clearly expresses a willingness on the part of Channel 4 to*

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<sup>83</sup> It is important to note however that format rights cannot be warehoused by Channel 4 (not even for the duration of the licence) if it chooses not to re-commission a programme. Channel 4 must return format rights to a producer after a 12 month period.

*consider other models besides the two set out immediately above.*

- (e) *Section 3 read with section 6 of the Channel 4 Code also contains provisions in which Channel 4 undertakes to publish tariffs of prices it expects to pay for core rights reflecting cost variations by genre and by day-part ie peak vs off-peak. Channel 4 has stated that it intends to move away from a line by line negotiation of [add to recommendations] and it has said that the value of Core Rights is to be influenced by a range of factors including:*
- i. Level of editorial ambition ie days filming/ locations etc*
  - ii. Use of archive material*
  - iii. Use of on-off-screen talent*
  - iv. Use of computer-generated imaging technology*
  - v. Detailed schedule requirements*
  - vi. Number of episodes in a series*
  - vii. New or returning series*
  - viii. Whether a UK/overseas production*
- (f) *Section 3 of the Channel 4 Code also makes it clear that both the independent producer and Channel 4 itself will participate in revenues generated from the exploitation of the following rights:*
- i. Distribution to any Channel 4 channel*
  - ii. Distribution to any 3rd party UK secondary channel where the holdback has been waived by Channel 4*
  - iii. Distribution to any other 3rd party UK content distributors eg video on demand, broadband ISPS where the holdback has been waived by Channel 4*
  - iv. Exploitation of rights to operate contemporaneous UK programme support services*

- v. *Exploitation of secondary rights after the producer's deficit financing of the programme have been recovered and where Channel 4 has contributed to the value of the programme eg by editorial input, promotion and marketing, business affairs advice etc.*

4.6.6.5.4 *Section 4 of the Channel 4 Code sets out Channel 4's commissioning process. Key aspects thereof are:*

*(a) Channel 4 is to operate a clear four-step commissioning process within the following time frames:*

- i. Editorial approval – within two weeks of submission of editorial specification form by the producer*
- ii. Business Approval – initial response within 10 days of submission of budget by the producer*
- iii. Programme Finance Committee Approval – Note no time specified for this.*
- iv. Contract Approval – draft contract to be provided within two weeks from the date of PFC approval.*

4.6.6.5.5 *Channel 4 specifies that it will cash flow a production at the producer's request and that no unreasonable conditions will be attached thereto. Further, it is also prepared to commit development funding provided that it will have an exclusive 9-month option to commission the programme once development is completed and that the costs of development will be included within the overall price that Channel 4 is to pay for the commission.*

4.6.6.6. *Section 5 of the Channel 4 Code provides that Channel 4 is to review the Channel 4 Code annually.*

4.6.6.7. *In line with the requirements of the Channel 4 Code, Channel 4 has also published Terms of Trade 2004 (“the Channel 4 Terms of Trade”).<sup>84</sup> These are extremely detailed and we shall deal in brief with only the key elements of the Channel 4 Terms of Trade as they relate particularly to intellectual property or commissioning issues:*

4.6.6.7.1 *Section 4 of the Channel 4 Terms of Trade requires the commissioning agreement to contain a clear agreed description of the work to be undertaken in the form of an editorial specification which is to include detailed information on, inter alia, producer, director, principal case, contributors, presenters, storyline / script, programme description, length, locations, archive material, music, senior crew, and other details where agreed that they are appropriate. The editorial specification is to include an agreed production schedule and budget and it must be signed off by the producer and by Channel 4’s commissioning editor.*

4.6.6.7.2 *Section 7 is an important section in the Channel 4 Terms of Trade as it indicates that Channel 4 wishes to avoid “line by line” negotiation of budgets and so the section sets out the circumstances in which fixed price deals will be contracted, namely:*

- (a) series where the editorial specification is sufficiently detailed and agreed to in advance of pre-production;*
- (b) for second and subsequent series;*
- (c) when commissioning a producer that is an established programme supplier in that programme genre.*

*Section 8 of the Channel 4 Terms of Trade deals with programmes that are commissioned on a budget basis. Both the producer and Channel 4 are to agree upon a budget and cashflow schedule and the producer is responsible for working within the agreed budget and cashflow.*

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<sup>84</sup> <http://www.Channel4.com/corporate/4producers/resources/documents/TermsOfTrade2004.pdf>

4.6.6.7.3 *Section 12 of the Channel 4 Terms of Trade deals with production fees and these range from 25% (for production costs of up to 50 000 pounds) to 12.5% (for production costs of between 500 000 pounds to 1 million pounds. Note that production fees are to be negotiated for productions over 1 million pounds.*

4.6.6.7.4 *Sections 18 to 22 of Channel 4's Terms of Trade contain detailed provisions building upon the rights regime provided for in the Channel 4 Code, including provisions relating to, inter alia: archival usage, educational/non-theatrical usage, off-air usage, limited cable relay rights; repeat fees; net receipts (essentially defined as gross distribution revenue less distribution and other expenses including: royalties, distribution commission, recoverable overspend by the producer/Channel 4, third party deficit funding etc); UK format rights. We think that section 21 is the most critical of these as it set out the share of net receipts from exploitation of rights that Channel 4 expects to get, including:*

- (a) 50% of net receipts in respect of core rights until the expiry of the licence period;*
- (b) 50% of net receipts in respect of core secondary transmission rights until the expiry of the licence period if Channel 4 waived its holdback; and*
- (c) 15% of net receipts in respect of all secondary rights. [Add to recommendations and analysis?]*

#### 4.6.7 Commercial Practices Regarding Commissioning of Television content in the UK

##### 4.6.7.1. IP Rights and the Galvanisation of the Production Sector

4.6.7.1.1 *In 2007, the combined spend on external commissioning of content from the BBC, ITV1, Channel 4 and Five increased by 8.9% to 1.2 billion pounds while spend on in house productions was just over 1.2 billion.<sup>85</sup> The independent production sector experienced strong growth in 2007/8 with revenues increasing to 2.14 billion pounds.*

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<sup>85</sup> The UK Communications Market 2008. Ofcom. August 2008. At pg 15.

[Between 2005 and 2008] the compound annual growth of the sector has been 15.6%. While the majority of revenue continued to come from the television production business (1.89 billion pounds), non-TV revenue (that is pre-production and secondary television and additional rights) has more than doubled in the...[ period 2005 and 2008] to 242 million pounds.<sup>86</sup>

4.6.7.1.2 The public service broadcasters' commissioning of independent television production is broken down as follows:<sup>87</sup>

- entertainment: 27%
- sport: 25%
- factual: 17%
- factual entertainment: 10%
- hobbies/lifestyle: 6%
- children's: 5%
- drama 5%
- other 5%

4.6.7.1.3 The independent production sector comprises:<sup>88</sup>

- nine large groups (turnover in excess of 50 million pounds) each with between 3 and 10 constituent companies;
- around 20 midsize to large companies (turnover of 10-50 million pounds);
- over 100 midsize companies (turnover of 1-10 million pounds); and
- several hundred small companies (turnover of less than 1 million pounds).

4.6.7.1.4 The independent production sector attributes its growth to the coming into force of the Communications Act 2003 which ensured that producers of content held the intellectual property rights thereto and could profit from overseas sales, DVDs, multi-media and merchandising,

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<sup>86</sup> The UK Communications Market 2008. Ofcom. August 2008. At pgs 184/5.

<sup>87</sup> The UK Communications Market 2008. Ofcom. August 2008. At pg 189.

<sup>88</sup> 2007 Independent Production Census. KPMG, Bank of Ireland, Pact. At pg 6.



and also to the 2005 introduction of the BBC's Windows of Creative Competition which opened up a potential further 25% of the BBC's commissioning to independent producers on a competitive basis.<sup>89</sup> Indeed overseas sales now account for 20% of all industry revenue – with 87% thereof coming from the US.<sup>90</sup> Further there has been a 34% increase in the value of UK rights exploitation – more than double the overall rate of growth of the sector although this still accounts for just 7% of all industry revenue.<sup>91</sup> Perhaps most significant has been the increase in the rate of profitability of the independent sector from 7% in 2005 to 8.4% in 2007. Further, companies with revenue of less than 1 million pounds (ie the smallest production companies) have on average increased their profitability far in excess of the rest of the industry – they have almost doubled profits to match the industry average.<sup>92</sup> More than half of the increase in profitability in the sector has come from the exploitation of secondary rights ie distribution, format sales, secondary TV sales etc.<sup>93</sup>

4.6.7.1.5 *The industry has said: “The ability to retain secondary rights has clearly been at the heart of the industry’s transformation from a lifestyle business to one of the fastest growing and most profitable sectors of the UK’s creative economy”.<sup>94</sup> To indicate the unleashing of growth the Census supplement contrasts the size of the industry in 2005 when it was estimated at 1.6 billion pounds to the 2.14 billion pound industry it is in 2008.<sup>95</sup>*

4.6.7.1.6 *European Head of Media at KPMG Corporate Finance has emphasised the need to exploit rights: “it’s all very well having rights but you’ve got to exploit them. In order*

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<sup>89</sup> 2007 Independent Production Census. KPMG, Bank of Ireland, Pact. At pg 10.

<sup>90</sup> 2007 Independent Production Census. KPMG, Bank of Ireland, Pact. At pg 15.

<sup>91</sup> 2007 Independent Production Census. KPMG, Bank of Ireland, Pact. At pg 27.

<sup>92</sup> 2007 Independent Production Census. KPMG, Bank of Ireland, Pact. At pg 29.

<sup>93</sup> Independent Production Census 2007/9 Supplement. KPMG, Bank of Ireland, Key Findings.

<sup>94</sup> Independent Production Census 2007/9 Supplement. KPMG, Bank of Ireland, Pact. Foreword.

<sup>95</sup> Independent Production Census 2007/9 Supplement. KPMG, Bank of Ireland, Key Findings.

*to exploit them you must have a distribution platform”.*<sup>96</sup> Further, Bill Greaves, Global Head of Technology, Media and Telecoms at the Bank of Ireland Corporate Banking notes that “one of the key changes in the independent production sector is that there’s been a real trend towards the owners of independent production businesses actually acquiring the right financial and business acumen skills that they need, rather than focusing upon the creative side...key to the change in outlook has been the fact that independent producers are not able to retain rights in their programming.... Suddenly the business has real sustainable value... Such thinking has made those producers more attractive to investors.”<sup>97</sup> Indeed, within the first six months of the coming into operation of the Codes of Practice, three listings of production companies on the London stock exchange took place and private equity investment of over 160 million pounds in the independent production companies was made.<sup>98</sup>

#### 4.6.7.2. IP Rights and the Galvanisation of the Distribution Sector

4.6.7.2.1 Another critical development has been the rise of the independent distribution sector. Distribution companies are critical not just to sales of independent programming but also to providing funding to ensure that programming is actually produced. In 2008, distribution companies provided 23% of gap finance and co-productions, making use of distribution sector funds are likely to increase.<sup>99</sup> Indeed one of the interesting developments in the UK market has been the rise of independent ie non-broadcaster aligned distribution companies: “Distributors have had to smarten up their act. New players have entered the game, providing useful competition for the established broadcaster-owned operators. The days when a broadcaster could simply swallow up all the rights

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<sup>96</sup> Independent Production Census 2007/9 Supplement. KPMG, Bank of Ireland, Interviews.

<sup>97</sup> Independent Production Census 2007/9 Supplement. KPMG, Bank of Ireland, Interviews.

<sup>98</sup> European Coordination of Independent Producers: Impact Assessment – Retention of Rights. April 2006. At pg: 6.

<sup>99</sup> Independent Production Census 2007/9 Supplement. KPMG, Bank of Ireland, Interviews.

*almost for nothing, and then sit on them, are hopefully a thing of the past. It was a terrible waste of potential and meant that there was not enough money going back into the television market, much of which could have been invested in development and new productions”.*<sup>100</sup>

4.6.7.2.2 *Broadcast Magazine’s Distributors Survey 2008 (“the Distributor’s Survey”) heralded the fact that distribution sector’s total turnover topped 1 billion pounds for the first time in the 2007/8 financial year.<sup>101</sup> While the distribution arm of the BBC, BBC Worldwide, topped the list of the Top Distributors, there were numerous “independent” ie non-broadcaster aligned distributors listed in the UK’s top 36 distribution companies.*

4.6.7.2.3 *Interestingly, of those surveyed, their distribution businesses broke down as follows:<sup>102</sup>*

- *Finished programme sales:* 58.7%
- *Co-productions:* 10.7%
- *Formats:* 12.1%
- *Home entertainment:* 11.5%
- *New Media:* 3.8%
- *Licensing:* 3%

4.6.7.2.4 *The Distributor’s Survey also identified the world’s top 5 markets for UK distributors, namely: the UK, US, Australia, Germany and France. It also identified the top 5 emerging markets, namely: Eastern Europe, Russia, Latin America, Asia and India.<sup>103</sup> Africa does not feature – perhaps an opportunity for South African distributors?*

#### 4.6.7.3. Other Creative Talent’s Collecting Agencies

4.6.7.3.1 *Unlike South Africa, creative talent outside of the music industry is well organised and represented in the UK. There are a significant number of collecting agencies in the UK for actors (Equity), producers (PACT), directors*

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<sup>100</sup> “We are selling lots of programmes. But there’s far more we should do” L. Heggessy. The Independent (London) 24 April 2006.

<sup>101</sup> At pg 4.

<sup>102</sup> At pg 7.

<sup>103</sup> At pg 13.

*(Directors UK) and screen writers represented by the Writers Guild of Great Britain.*

- 4.6.7.3.2 *Each of these has particular arrangements with broadcasters to ensure that the creative talent that nurtures programming content is adequately financially compensated, including with regard to ongoing exploitation of the content. We shall use Directors UK as just one example of how these agencies work.*
- 4.6.7.3.3 *Directors UK has two broad functions: first, to act on behalf of directors in relation to negotiating secondary rights payments, second, to negotiate general pay and working conditions for directors.<sup>104</sup> It is a non-profit organisation and its financial base is the collection and distribution of payments to UK directors from abroad (currently 15 European countries) and from within the UK.*
- 4.6.7.3.4 *Currently the UK distribution scheme cover broadcasts on the following television services: the BBC, ITV, Channel 4, Channel Five, Sky, S4C (the Channel 4 channel in Wales). Under this scheme, Directors UK receives a pre-agreed lump sum every year from UK broadcasters which is then distributed to members on a carefully calculated points system (reflecting not only UK broadcasts but also sales of individual programmes). Broadcasters are required to issue reports detailing: repeat broadcasts, overseas sales, DVD sales etc every year. Similarly, independent production companies are similarly required to submit sales information for rights that they retain. Directors UK monitors programme broadcasts to ensure independent checking of information supplied.<sup>105</sup>*

#### 4.6.8 **Analysis of UK Regulatory Environment and Practice**

- 4.6.8.1. *In our view there can be little doubt that the regulatory regime and together with industry self-regulation with regard to commissioning independent producers to produce television content through the Codes of Practice and Terms of Trade, have had a clearly positive overall*

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<sup>104</sup> Directors UK: History and Functions. At pg 6.

<sup>105</sup> Directors UK: History and Functions. At pg 5.

*impact on the UK's broadcasting sector broadly. Indeed the depth of the so-called broadcast ecology, comprising not only broadcasters but producers, distributors and the creative talent involved in television production more broadly, appears approving of the huge changes in commissioning and rights practices that the Communications Act and Ofcom brought about. The success of this regulatory intervention is borne out by Ofcom in its 2006 Television Sector Review in which it decided that "there appeared to be no requirement for a major revision of regulatory intervention in the television production sector... Overall [Ofcom] recommended that the status quo of regulatory intervention should largely remain intact."<sup>106</sup>*

- 4.7. The UK remains the single best example of how a regulator actively involved itself in the minutiae of commercial arrangements between commissioning broadcasters and the independent production sector for the benefit of the sector as a whole and for broader economic growth. The lessons from the UK, particularly about the development, oversight and enforcement of commissioning terms of trade, including in respect of intellectual property rights, are instructive and ought to be taken up by South Africa's own regulator with the aim of bolstering the government's policy of developing a strong local content production sector.

## **5. CONCLUSION**

- 5.1. It is clear that the global trends are in favour of not only requiring local content and independent commissioning of such local audiovisual content, but also of supporting the creation of such local audiovisual content through regulation and monitoring and enforcement compliance as well as financial incentives and other support.
- 5.2. In the next four chapters, this report examines how South Africa fares on these issues and makes recommendations for changes across the support chain to meet the technological challenges posed by on-demand services available on online platforms and to address the existing regulatory and bureaucratic hurdles which hinder the flourishing of the sector.

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<sup>106</sup> "Review of the Television Production Sector – Statement" Ofcom. October 2006. At pg 3.

## **CHAPTER 2: LOCAL CONTENT REQUIREMENTS**

**The Brief:** This report contains an in-depth examination of what the local content requirements are for television: focusing on public and commercial (free to air and subscription) only. The report considers the statutory requirements, the regulations, as well as the licence conditions pertaining to local content for: SABC 1, 2 and 3, e-tv, as well for: M-Net, DStv, Starsat and Deukom. It considers the enforcement by ICASA of compliance with local content requirements for television across: free to air broadcasters (public and commercial) as well for satellite subscription broadcasters.

**Period Reviewed:** In 2008, SASFED and the IPO together with the SABC, commissioned a report into many of the problems facing independent producers. Unfortunately, the report's recommendations were never taken up by the incoming new management at the SABC and so the problems identified therein remain unaddressed. Also, since a 14-year period has elapsed since the production of the report, it was felt to be important to bring the learnings and the recommendations up to date. In this chapter, the focus is on the present, that is, for this report the focus is on the local content requirements as they currently are (2021), in respect of applicable statutes, regulations and licence conditions. However, the Chapter does reflect historical pronouncements on compliance as evidenced in ICASA's Annual Compliance Reports on these television operators set out above.

**Methodology:** Research was conducted by way of desk top research and interviews. A number of recommendations regarding amendments that are required to be made to the Electronic Communications Act, 2005 (the ECA), the relevant local content regulations prescribed in terms of the ECA, individual licence conditions developed in terms of the ECA read with the local content regulations and in relation to ICASA's monitoring and enforcement practices are made. Recommendations as to the appropriate courses of action that can be followed to secure the implementation of the recommendations are also made.

### **1. ICASA LOCAL CONTENT LEGAL REQUIREMENTS:**

#### **1.1. The Requirements of the Electronic Communications Act, 2005 (the ECA)**

- 1.1.1 Section 61 is titled "Preservation of South African Programming". Broadly this section gives the Independent Communications Authority of South Africa (ICASA) a number of powers with regard to local television content.
- 1.1.2 Section 61(3) specifically empowers ICASA to impose licence conditions in a television broadcasting licence "as prescribed" regarding, inter alia, local television content and this may include conditions:

- 1.1.2.1. to annually spend a sum of money, subject to reasonable yearly escalation, or alternatively, a specified minimum percentage of its gross revenue, on programmes which have local television content<sup>107</sup>; or
- 1.1.2.2. to allocate a specified minimum percentage of its total broadcasting time to television programmes which have local television content<sup>108</sup>.
- 1.1.3 S61(2)(a) of the ECA defines local television content, namely: a television programme (excluding sporting events and compilations, advertisements, teletext and continuity announcements) and which is produced:
- (i) by a broadcasting service licensee;
  - (ii) by a citizen of and permanent resident in South Africa;
  - (iii) by a juristic person (company for example) where a majority of the directors, shareholders or members are citizens of and permanent residents in South Africa. It is important to note that this is in the alternative, that is, as long as a majority of the directors are South African (that is, that control vests in South Africans) all shareholders (that is owners) can be foreign; or
  - (iv) in a co-production in which the persons referred to in (i), (ii) or (iii) above have at least a 50% financial interest (this term is defined in the ECA but only with respect to licensees, not a generally applicable one).

Note that the rest of the definition (v) and (vi) envisages one of the above already being in place (which makes it a local content production in any event) but contains additional wording regarding key personnel and production costs which do not, on their own, constitute local content. Consequently, the drafting by the legislature was weak and includes unnecessary overlap.

- 1.1.4 S61(5) of the ECA provides that in prescribing any amount or percentage in terms of subsection (3) (dealt with above), ICASA may prescribe the application thereof with regard to:
- 1.1.4.1. categories of broadcast service, that is, commercial or public;
  - 1.1.4.2. defined viewing times, where applicable;
  - 1.1.4.3. various categories of television programmes, where applicable; and

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<sup>107</sup> Section 61(3)(a)

<sup>108</sup> Section 61(3)(b)

- 1.1.4.4. the period within which the licensee must comply with the provisions of the section.

1.2. Commentary on the Local Content Provisions in the ECA:

- 1.2.1 It is noteworthy that the drafting of section 61 of the ECA is extremely poor.
- 1.2.2 As noted above, the definition of local television content is defective in that it contains superfluous criteria that rely on already existing criteria.
- 1.2.3 Further, the provisions of section 61(3) which are used to justify the passage of local television content regulations are not, surprisingly, a general authorisation to impose local content requirements by way of regulation. Instead they empower ICASA to impose licence conditions “as prescribed”. This is, of course, a legal absurdity as ICASA does not impose licence conditions by way of regulation, it does so by issuing licences to licensed television broadcasting service licensees AND it has prescribed local television content regulations (our emphasis).
- 1.2.4 It is important to note that section 1 of the ECA defines the word “prescribed” as meaning “prescribed by regulation made by the Authority in terms of this Act or the related legislation. “Related legislation” is defined in section 1 of the ECA as meaning “the Broadcasting Act, 1999 and the ICASA Act, 2000 as well as any regulations, determinations and guidelines made in terms of such legislation and not specifically repealed by this Act”. Again it is noteworthy that the ICASA Act also contains a definition of “prescribe” which means “prescribe by regulation”.
- 1.2.5 It is also unfortunate and problematic that the ECA does not require ICASA to prescribe local content regulations. Instead, section 61(3) uses the term “may” which is empowering without being peremptory.
- 1.2.6 It is important to point out these drafting errors and other issues in the ECA because they undergird a number of the problems that ICASA confronted when developing its local content regime. In my view what was intended by the drafters of section 61 is that ICASA:
- 1.2.6.1. would prescribe regulations for local content requirements; and
- 1.2.6.2. could also impose local-content-related licence conditions in individual licences issued to commercial and public television broadcasters subject to the minimum requirements set out in regulation.



1.2.7 Consequently, it is suggested that<sup>109</sup>:

1.2.7.1. section 61(2) of the ECA is amended:

1.2.7.1.1 to insert the word “or” after the semi-colon at the end of section 61(2)(iii);

1.2.7.1.2 to replace the semi-colon with a full stop at the end of section 61(2)(iv); and

1.2.7.1.3 by the deletion in their entirety of sub-section (v) and (vi);

1.2.7.2. the first part of section 61(3) of the ECA be amended to read as follows:

“The Authority **[may] must**, in respect of [the] television broadcasting, **[licence, impose and specify in that licence, as prescribed, regarding]** prescribe minimum requirements upon licensees for local television content and independent television production, and may impose and specify in any television broadcasting service licence, additional conditions, which without derogating from the generality of the foregoing, may include any **[conditions]** provisions requiring [the] a broadcasting service licensee-”; and

1.2.7.3. the first part of section 61(5) ought to be amended to read as follows: “In prescribing or imposing in any licence condition any amount or percentage in terms of subsections (3) or (4), the Authority may prescribe or impose in any licence condition the application thereof with regard to-”.

### 1.3. Local Television Content Regulations

1.3.1 ICASA has prescribed local television content regulations in Notice 346, published in Government Gazette No. 39844 dated 23 March 2016 (the TV Content Regs) which came fully into force (after a period of staggered implementation) on 24 March 2018. It is important to note the TV Content Regs replaced and repealed the previous (2006) TV Content Regs.

1.3.2 For the purposes of this report, the focus is on commercial and public local television only and reference to the TV Content Regs’ provisions on local television content for community television licensees is not made.

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<sup>109</sup> Although the provisions of section 61(4) are also required to be similarly amended, the required amendments are not dealt with as they pertain to the sound broadcasting sector and not the television sector.

1.3.3 Public Local Television Content Requirements (SABC 1 and 2) – regulation 3 of the TV Content Regs:

- 1.3.3.1. 65% of its programming, measured over a year, during the performance period (05h00 and 23h00 daily), must consist of local television content (as defined in the ECA) and spread evenly throughout the performance period and at prime time (18h00 and 22h00 daily) – regulation 3(1).
- 1.3.3.2. Further in complying with its obligations in terms of sub-regulation (1) a public broadcasting licensee must ensure that a minimum of all genres listed below is broadcast with the following percentages of local television content in that genre:
- (a) 35% of drama<sup>110</sup>;
  - (b) 80% of current affairs;
  - (c) 50% of documentary;
  - (d) 50% of knowledge building;
  - (e) 60% of educational; and
  - (f) 55% of children's.

1.3.4 Commercial Television Content Requirements (e-tv and SABC 3) – regulation 5 of the TV Content Regs read with regulation 3(3):

- 1.3.4.1. 45% of its programming, measured over a year, during the performance period (05h00 and 23h00 daily), must consist of local television content (as defined in the ECA. Note that there is no requirement that this be spread evenly throughout the performance period and at prime time (18h00 and 22h00 daily).
- 1.3.4.2. Further all programming genres listed below must be broadcast and with the following percentages of local television content:
- (a) 20% of drama;
  - (b) 50% of current affairs;
  - (c) 30% of documentary;
  - (d) 30% of knowledge building; and
  - (e) 25% of children's. (Note there is no requirement for educational programming).

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<sup>110</sup> It is important to note that the Regulations actually change the definition of local television content in respect of South African Drama which has its own definition (with a number of additional requirements) as provided for in s1 of the TV Content Regs.

1.3.5 Subscription Television Content Requirements (M-Net, DStv, Starsat and Deukom) – regulation 6 of the TV Content Regs:

- 1.3.5.1. 15% of the licensee’s annual content acquisition budget must be spent on local television content programming.
- 1.3.5.2. 15% of the licensee’s channel acquisition budget, measured across its service as a whole, is spent on channels with local television content that are compiled and uplinked from South Africa.
- 1.3.5.3. Note that the TV Content Regs specifically exclude existing free to air broadcasting services (public, commercial and community) that are carried on the subscription bouquet from counting towards meeting the subscription licensee’s local content requirements.

1.3.6 Format Factors for TV Broadcasters: s8 and 9 of the TV Content Regulations.

- 1.3.6.1. In order to support the making of particular kinds of local television content, the TV Content Regs contain a number of provisions which give additional points (making up percentages) for:
  - genres (drama, children’s, arts, non-listed genres eg: magazines, talk shows, game shows and religious shows)
  - languages (African languages)
  - Repeats (counts only 50% in various categories of repeats).
- 1.3.6.2. S8(2) provides that broadcasters shall obtain genre points for only one category of genre.

1.3.7 A table of the impacts of these regulations is as follows:

Requirement	Public	Commercial and Public Commercial	Subscription
Local Content	65%	45%	15% of content or channel acquisition budgets

1.3.8 Local content records to be kept by licensees: - s10 of the TV Content Regs

- 1.3.8.1. All television licenses must keep and maintain logs, statistical forms and programme records in a format prescribed by the authority for a period of 36 Months (our emphasis).

1.3.8.2. All subscription broadcasters must keep audited records of the amount of their expenditure on local content and independent production.

1.3.9 A contravention by a commercial or public television licensee of any of the provisions of the TV Content Regs is punishable by a fine not exceeding R5million or 10% of its annual turnover for every day or part thereof during which the contravention continued, in terms of regulation 11(1) of the TV Content Regs.

#### 1.4. Commentary on the Local Television Content Regulations:

1.4.1 The first drafting problem with the TV Content Regs is with sub-regulations 3(2) and 5(2) which talk about the need for free to air public (SABC 1 and 2), commercial (e-tv) and public-commercial (SABC 3) broadcasters to broadcast a minimum percentage of local content in specific genres but then do not say what the minimum percentage of that genre is to be broadcast. This is then presumably left to the respective licence conditions to deal with. However, there are serious anomalies that arise when one considers the licence conditions' provisions on these genres. For example, in respect of e-tv, there is no mention of "documentary" as a genre of required programming in its licence conditions although this is a requirement of sub-regulation 5(2)(c) of the TV Content regulations. Similarly, and also in respect of e-tv, there is no mention of "knowledge building" as a genre of required programming in its licence conditions although this is a requirement of sub-regulation 5(2)(d) of the TV Content regulations. Consequently, it is extremely unclear how:

1.4.1.1. all broadcasters are required to calculate their local content percentage requirements of specified genres; and, in particular

1.4.1.2. how e-tv is required to calculate its local content percentage requirements of documentary and knowledge building then there is no requirement in its licence conditions in relation to such programming, despite the minimum thresholds set in sub-regulation 5(2)(c) and (d) of the TV Content Regs.

1.4.2 Another drafting problem arises with sub-regulation 6(2) of the TV Content Regs: there is there is no indication as to how much local television content is to be on the channel that is compiled and uplinked from South Africa. The problem with this is that it is arguable that a channel compiled and uplinked from South Africa, even if there is only minimal local content actually on the channel, still meets sub-regulation 6(2)'s requirements.

1.4.3 Some of the problems with the reporting requirements set out in sub-regulation 10(1) of the TV Content Regs, include, that:

- 1.4.3.1. they deal primarily with drama reporting and completely ignore reporting on other required genres for free to air broadcasters, namely: current affairs programming, documentary programming, knowledge building programming, educational programming (for public free to air broadcasters only) and children's programming; and
  - 1.4.3.2. they appear to require a range of additional reporting on topics that are not definitive to establishing whether or not a programme constitutes SA TV content in terms of section 61(2)(a) of the ECA, namely: the nationalities of the creative, technical and performance staff and the roles the performance staff play.
- 1.4.4 Finally, the most significant drafting problem, with regard to local content, is that ICASA's prescribed formats for recording keeping as set out in its Compliance Procedure Manual Regulations<sup>111</sup> (CPM Regs) for the keeping and maintenance by all television licensees of the required logs, statistical forms and programme records which are required for the recording of:
- 1.4.4.1. full particulars of all SA content programming broadcast in each week, including each category of SA television content (presumably being genres – sub-regulation 10(1)(a);
  - 1.4.4.2. full particulars of the name(s) of the author(s) of the drama script indicating their nationalities, or that of the adaptor if it is drawn from a literary source – sub-regulation 10(1)(b);
  - 1.4.4.3. full particulars of the name(s) of the drama director(s) indicating their nationalities – sub-regulation 10(1)(c);
  - 1.4.4.4. a list of the creative and technical personnel involved in a drama production indicating their nationalities and, in the case of performers, the roles they play – s10(1)(d); and
  - 1.4.4.5. such other particulars as may be required by the Authority – s10(1)(e), are insufficient.
- 1.4.5 It is important to note that the CPM Regulations do not contain any prescribed forms for the format for reporting on local television content compliance by individual licensees *per se*:

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<sup>111</sup> Notice 902 published in Government Gazette 34863 dated 15 December 2011, as amended.

- 1.4.5.1. Form 8A is headed “Programme Record General Logsheet”. And it requires reporting on a range of genres including news, factual programmes, women’s programmes, children’s programmes and the like. However, it is important to note that all of the Forms 8, that is: Form 8, 8A, 8B, 8C, 8D, and 8E are applicable only to community broadcasting services and are therefore not relevant for this research report because they are not required to be submitted by any of the individual television licensees which are the focus of this report.
- 1.4.5.2. Forms 9, that is, Form 9, 9A, 9B, 9C are required to be submitted by individual broadcasting services. Unfortunately, none of these relates to local television compliance.
- 1.4.5.3. Form 9A is headed “General Logsheet” and it requires submission in accordance with the Standard Terms and Conditions Regulations, licence conditions and the SA Music Content Regulations – there is no mention of the TV Content Regs.
- 1.4.5.4. Section 2 of Form 9A requires a statement on programmes broadcast, broken down into three information categories, namely: timeslot, name of programme, a brief description of the programme. There is no requirement to make any stipulation in relation to TV Content Compliance.
- 1.4.5.5. Section 4 of Form 9A requires a statement on news and it requires daily and monthly minute breakdowns of the following categories of news: local, regional, national and international and whether the above is self-originated or from other sources, and the sources actually used.
- 1.4.5.6. Form 9C is headed “Format Factor Log Sheet for Radio” and is applicable to compliance with the SA Music Content Regulations only – it has no application to the TV Content Regs.
- 1.4.6 Form 10 is headed “General Logsheet” and although it does appear to have relevance to television broadcasters, requiring the reporting on time devoted to different genres of programming, the sub-heading of Form 10 is titled “Public Radio” and therefore it does not apply to any television licensees, public or commercial.
- 1.4.7 In interviews with ICASA staffers, it was clear that ICASA has declined to prescribe such formats because of a perceived difficulty of creating standard reporting

formats given the differing licence conditions pertaining to different licensees<sup>112</sup>. However, it is not lawful for ICASA to prescribe in a regulation that it is under a peremptory obligation to prescribe reporting formats (that is to put these formats into a regulation) and then fail to do so.

- 1.4.8 The failure to prescribe local content reporting formats is a violation of the Promotion of Administrative Justice Act, 2000 (PAJA) in a number of important respects but, most basically, of section 6(2)(b) of PAJA. Section 6(2)(b) of PAJA entitles a court or tribunal to judicially review administrative action if “a mandatory and material procedure or condition prescribed by an empowering provision was not complied with”. The word “prescribed” is clearly defined both in the ECA and in the ICASA Act as meaning prescribed in regulations. (emphasis added). The effect of this is that sub-regulation 10(1) of the TV Content Regs requires, as a matter of law, that ICASA prescribe regulations to setting out the formats for the logs, statistical forms and programme records which television licensees are required to keep in relation to SA TV content. Its failure to do so is reviewable under PAJA.
- 1.4.9 Besides the clear unlawfulness of ICASA’s failure to prescribe reporting formats, the fact that there are no prescribed forms for reporting on local content compliance means that the public has not had the opportunity of commenting on the draft prescribed forms, a process that is required in terms of section 4(4) of the ECA. This deprivation means that the public, including television viewers and members of the independent production sector, have been unable to comment on the current situation and are entirely voiceless, and even ignorant, in respect of ICASA’s methodology for local content reporting by public and commercial television licensees.
- 1.4.10 The overall effect of ICASA’s unlawful administrative action in failing to prescribe reporting formats in regulations has been to:
- 1.4.10.1. deprive the public of the ability to participate, through a public notice and comment procedure, on crafting reporting formats that materially and adversely affect them which is itself a violation of the provisions of section 4(1) of PAJA too; and
  - 1.4.10.2. allow for secretive and non-uniform reporting formats to be required of different television licenses despite the peremptory requirement that these be contained in regulations.

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<sup>112</sup> The meeting took place with key figures of the Monitoring and Compliance Department on Thursday 27 February 2019.

1.5. Television Licence Conditions regarding Local Content:

ICASA has imposed licensee-specific conditions in each of the public and commercial television licensees' individual broadcasting service licences. Some licences do deal with local content issues, and some do not. Each television broadcasting licence is dealt with below:

## 1.5.1 SABC 1:

This public free-to-air television broadcaster is operating under licence No: 001/PBS/TV/SEPT/08. The clauses of its licence that deal with local content programming requirements are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
3	Language	<ul style="list-style-type: none"> <li>• 16 hours, 24 minutes of official languages other than English and Marginalised Languages (isiNdebele, siSwati, Xitsonga and Tshivenda) in prime time per week</li> <li>• 1 hour, 48 minutes of Marginalised Languages (isiNdebele, siSwati, Xitsonga and Tshivenda) in prime time per week</li> <li>• 18 hours, 12 minutes of official languages other than English in prime time per week</li> <li>• 41 hours of official languages other than English in the performance period per week.</li> </ul>
5	Reporting Requirements	Quarterly reports on: <ul style="list-style-type: none"> <li>• Different genres broadcast</li> <li>• Use of each languages as per above but also broken down per genre.</li> </ul>
6.1.1.	Religion	Adequate reflection of SA's religions
6.1.4	Language	Reasonable provision for sign language during news bulletins in prime time and other genres throughout the day.
6.2	Genres	<ul style="list-style-type: none"> <li>• News: per week               <ul style="list-style-type: none"> <li>– 7 hours</li> <li>– 3 hours, 30 mins in prime time</li> </ul> </li> </ul>



		<ul style="list-style-type: none"> <li>– 30 mins packaged as a single programme daily</li> <li>• Current affairs: per week <ul style="list-style-type: none"> <li>– 7 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Informal knowledge building per week <ul style="list-style-type: none"> <li>– 16 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Documentary per week <ul style="list-style-type: none"> <li>– 5 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Drama: per week <ul style="list-style-type: none"> <li>– 24 hours</li> <li>– 8 hours in prime time (four hours of which is SA TV content)</li> </ul> </li> <li>• Children's: 20 hours per week</li> <li>• Educational: 10 hours per week.</li> </ul>
6.3	Repeats	To be measured as per regulations.

### 1.5.2 SABC 2:

This public free-to-air television broadcaster is operating under licence No: 002/PBS/TV/SEPT/08. The clauses of its licence that deal with local content programming and commissioning requirements are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
3	Language	<ul style="list-style-type: none"> <li>• 16 hours, 24 minutes of official languages other than English and Marginalised Languages (isiNdebele, siSwati, Xitsonga and Tshivenda) in prime time per week</li> <li>• 1 hour, 48 minutes of Marginalised Languages (isiNdebele, siSwati, Xitsonga and Tshivenda) in prime time per week</li> <li>• 18 hours, 12 minutes of official languages other than English in prime time per week</li> </ul>

		<ul style="list-style-type: none"> <li>• 41 hours of official languages other than English in the performance period per week.</li> </ul>
5	Reporting Requirements	<p>Quarterly reports on:</p> <ul style="list-style-type: none"> <li>• Different genres broadcast</li> <li>• Use of each languages as per above but also broken down per genre.</li> </ul>
6.1.1.	Religion	Adequate reflection of SA's religions
6.1.4	Language	Reasonable provision for sign language during news bulletins in prime time and other genres throughout the day.
6.2	Genres	<ul style="list-style-type: none"> <li>• News: per week <ul style="list-style-type: none"> <li>– 7 hours</li> <li>– 3 hours, 30 mins in prime time</li> <li>– 30 mins packaged as a single programme daily</li> </ul> </li> <li>• Current affairs: per week <ul style="list-style-type: none"> <li>– 7 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Informal knowledge building per week <ul style="list-style-type: none"> <li>– 16 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Documentary per week <ul style="list-style-type: none"> <li>– 5 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Drama: per week <ul style="list-style-type: none"> <li>– 24 hours</li> <li>– 8 hours in prime time (four hours of which is SA TV content)</li> </ul> </li> <li>• Children's: 20 hours per week</li> <li>• Educational: 10 hours per week.</li> </ul>
6.3	Repeats	To be measured as per regulations.

## 1.5.3 SABC 3:

This public-commercial free-to-air television broadcaster (note, its licence says public, but this is not correct) is operating under licence No: 003/PBS/TV/SEPT/08. The clauses of its licence that deals with local content programming and commissioning requirements are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
3	Language	10% of its weekly programme material in languages other than English
5	Reporting Requirements	<p>Quarterly reports on:</p> <ul style="list-style-type: none"> <li>• Different genres broadcast</li> <li>• Use of each official language</li> </ul> <p>In each case distinguishing between genres and providing the relevant details in relation to prime time and the SA Broadcast Period and expressing these as an aggregate in minutes and as a percentage of the total of all programming material.</p>
6.1.1.	Religion	Adequate reflection of SA's religions
6.1.4	Language	Reasonable provision for sign language during news bulletins in prime time and other genres throughout the day.
6.2	Heath, gender age	Provide programme material that caters for and has due regard to the interests of all sectors of SA society.
6.3	Language	Reasonable provision for sign language during news bulletins in prime time and other genres throughout the day.
6.4	Genres	<ul style="list-style-type: none"> <li>• News: per week <ul style="list-style-type: none"> <li>– 7 hours</li> <li>– 3 hours, 30 mins in prime time</li> <li>– 30 mins packaged as a single programme daily</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>• Current affairs: per week <ul style="list-style-type: none"> <li>– 5 hours</li> <li>– 1 hour in prime time</li> </ul> </li> <li>• Informal knowledge building per week <ul style="list-style-type: none"> <li>– 12 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Documentary per week <ul style="list-style-type: none"> <li>– 5 hours</li> <li>– 2 hours in prime time</li> </ul> </li> <li>• Drama: per week <ul style="list-style-type: none"> <li>– 24 hours</li> <li>– 8 hours in prime time (four hours of which is SA TV content)</li> </ul> </li> <li>• Children's: 12 hours per week</li> </ul>
6.3	Repeats	To be measured as per regulations.

#### 1.5.4 E-tv:

The only commercial free to air television broadcaster operates under two different licences:

1.5.4.1. The first is for a commercial television broadcasting service under licence No: 001/COMMERCIAL/TV/SEPT/08; and

1.5.4.2. The second is for a mobile television broadcasting service under licence No: 001/E.TV/MOBILE/SEP/10.

It is important to point out that e-tv also operates a DTH satellite service called OpenView HD. However, ICASA currently views this service as a set of digital incentive channels and subject these to no local content requirements of any kind<sup>113</sup>. The clauses of its licences that deal with local content programming and commissioning requirements are identical although the numbering is different. The requirements of the commercial licence are set out below in tabular form. To reiterate these are identical (albeit with different numbering) to the requirements of its mobile licence:

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<sup>113</sup> In terms of the Digital Migration Regulations, Notice 1070, Government Gazette No 36000 dated 14 December 2012, as amended and email to the author from senior executive in the Monitoring and Compliance Unit of ICASA dated 11 May 2020.

Clause No. of Schedule 2	Nature of Condition	Requirement
2(2)	Language	<ul style="list-style-type: none"> <li>Two hours of news and information programming per week in a wide range of official languages other than English.</li> <li>Sign language during prime-time news bulletin.</li> </ul>
2(3)	Language	Four hours of programming other than news and information in a wide range of official languages other than English.
2(4)(a)	Genre requirement	<p>10% of performance period to be SA <b>drama</b> in a wide range of official languages other than English. But:</p> <ul style="list-style-type: none"> <li>No requirement for whole programmes to be in languages other than English (ie multilingual)</li> <li>No excessive use of a single language other than English</li> <li>Language spread</li> </ul>
2(4)(b)	Genre requirement	<p>20% of broadcasting period must be SA <b>children's</b> programming in a wide range of official languages other than English.</p> <ul style="list-style-type: none"> <li>No requirement for whole programmes to be in languages other than English (ie multilingual)</li> <li>No excessive use of a single language other than English</li> <li>Language spread</li> </ul>
2(5)	Dubbing Requirement	Licensee to endeavour to dub some foreign children's programming into official languages other than English.
3(2)	Local Content	45% of performance period shall be local TV content, 15% of which can be rebroadcasts (ie repeats) measured over a year.

3(3)	Animation	To broadcast animations which reflect African and South African culture and lifestyles.
3(4)	Local Content	Provide SA programming outside of the performance period.
3(5)	Local Content Report	Quarterly logs to be submitted.
4(1) and (2)	Drama	<ul style="list-style-type: none"> <li>• 2 hours, 30 mins of SA drama weekly of which 2 hours, 20 minutes must be broadcast during prime time.</li> <li>• Of this – up to 50% can be re-broadcasts.</li> </ul>
4(3)	Drama	<ul style="list-style-type: none"> <li>• 10% of drama broadcast must be in a language other than English</li> <li>• No excessive use of a single language.</li> </ul>
5	Information	<ul style="list-style-type: none"> <li>• 19 hours of info programming a week.</li> <li>• 2 hours a week during prime time.</li> </ul>
6(1)	News and current affairs	Requires these to reflect local, regional and provincial events and developments
6(2)	News	2 hours of news a day, of which 30 minutes is packaged as a single prime time programme
7(1)	Children's	<ul style="list-style-type: none"> <li>• 16 hours of children's programming a week.</li> <li>• 20% of this to be local TV content.</li> </ul>
7(2)	Children's	The above is to be broadcast between: <ul style="list-style-type: none"> <li>• 13h00-18h00 weekdays</li> <li>• 07h00-13h00 weekends.</li> </ul>
7(3)	Youth drama	1 hr 30 minutes during prime time. Note this counts towards the children's programming requirement.

#### 1.5.5 M-Net:

This commercial subscription television broadcaster is operating under licence No: 001/SUBSCRIPTION/TV/SEPT/08. There are no clauses in its licence that deal with local content programming.

#### 1.5.6 DSTV:

This commercial subscription television broadcaster operates under two different licences:

The first is for a commercial subscription television broadcasting service under licence No: 002/COMM/SUB/TV/AUG/08; and

The second is for a mobile television broadcasting service which has yet to be provided by ICASA.

We assume, although cannot be certain, that as was the case with e-tv, these licences are identical. There are no clauses in its commercial licence that deal with local content programming. However, clause 11 of its Commercial licence requires DStv to contribute R5million annually in support of the SA broadcasting industry focused on HDGs, SMMEs, students and youths from HDGs. Further this is to be reported on annually within three months of the end of its financial year.

#### 1.5.7 Starsat:

This commercial subscription television broadcaster is operating under licence No: 003/COMM/SUB/TV/JUL/08. There are no clauses in its licence that deal with local content programming requirements.

#### 1.5.8 Deukom:

This commercial subscription television broadcaster is operating under licence No: 006/COMM/SUB/TV/JUN/12. There are no clauses in its licence that deal with local content programming. However, clause 9 of its Commercial licence requires Deukom to expend monies in lieu of local content requirements.

Clause No.	Nature of Condition	Requirement
9(1)	Beneficiary payments	5% of channel acquisition budget in respect of South African subscribers to be paid to beneficiaries nominated by ICASA.
9(4)	Beneficiary payments	5% of channel acquisition budget in respect of South African subscribers to be paid to train or sponsor SA black citizens resident in SA nominated by Deukom in TV production or TV content production.

## 1.6. Commentary on Television Licence Conditions Pertaining to Local Content: SABC 1 and 2

1.6.1 The licence conditions of clause 5 of SABC 1 and 2's conditions require quarterly reports on different genres broadcast and on each of the languages used (also broken down per genre). However the licence is silent as to how to report on the following:

1.6.1.1. The overall percentage compliance with the 65% SA television content requirements for SABC1 as provided for in sub-regulation 3(1) in the TV Content Regs; and

1.6.1.2. The local content percentages required for specific genres as provided for in sub-regulation 3(2) in the TV Content Regs. In this regard, nothing is stated regarding local content for the different genres in the licence conditions except in respect of drama. Clause 6(2) of SABC 1 and 2's licences requires four of the eight hours of prime-time drama to be SA TV Content. But it is silent on how much of the other drama, broadcast outside of prime time, is required to be local.

1.6.2 Overall, there is no indication of how general licence condition and regulatory compliance with regard to local content is to be reported on to ICASA in order to facilitate open, transparent and appropriate compliance oversight.

1.6.3 We also note that there are clear measurability issues with regard to certain of the wording of some of the SABC 1 and 2's licence conditions. For example, clause 6.1.1 requires an "adequate" reflection of South Africa's religions while clause 6.1.4 requires "reasonable provision" for sign language during news bulletins in prime time and other genres throughout the day. However, there is no clear indication of what "adequate" or "reasonable provision" means here. These issues are noted even although they are broader than the scope of the report's local content focus.



### 1.7. Commentary on Television Licence Conditions Pertaining to Local Content - SABC 3:

1.7.1 The licence conditions of clause 5 of SABC 3's conditions require quarterly reports on different genres broadcast and on each of the official languages used (also broken down per genre). However the licence is silent as to how to report on the following:

1.7.1.1. The overall percentage compliance with the 45% SA television content requirements for SABC 3 as provided for in sub-regulation 5(1) in the TV Content Regs; and

1.7.1.2. The local content percentages required for specific genres as provided for in sub-regulation 5(2) in the TV Content Regs. In this regard, nothing is stated regarding local content for the different genres in the licence conditions except in respect of drama. Clause 6(4) of the SABC 3 licence requires four of the eight hours of prime-time drama to be SA TV Content. But it is silent on how much of the other drama, broadcast outside of prime time, is required to be local.

1.7.2 Overall, there is no indication of how general licence condition and regulatory compliance with regard to local content is to be reported on to ICASA in order to facilitate open, transparent and appropriate compliance oversight.

1.7.3 We also note that there are clear measurability issues with regard to certain of the wording of some of the SABC 3 licence conditions. For example, clause 6.1.1 requires an "adequate" reflection of South Africa's religions; clause 6.2 requires programming that "caters for and has due regard to the interests of all sectors of South African society"; while clause 6.3 requires "reasonable provision" for sign language during news bulletins in prime time and other genres throughout the day. However, there is no clear indication of what "adequate" or "reasonable provision" means here or how one is to determine whether or not programming has "due regard to the interests of all sectors of South African society". These issues are noted even although they are broader than the scope of this report's local content focus.

### 1.8. Commentary on Television Licence Conditions Pertaining to Local Content – e-tv:

1.8.1 The licence conditions of clause 3(5) of e-tv's conditions require quarterly logs on local content to be submitted as a reporting obligation. However the licence is silent as to what that entails, that is, what the format is to be and whether or not this includes reporting on:

1.8.1.1. the precise breakdown of how e-tv reaches the 45% SA television content requirements for e-tv as provided for in sub-regulation 5(1) in the TV Content Regs given that its licence, at clause 3(2), specifically

provides that only a maximum of 15% of this 45% local content can consist of rebroadcasts;

- 1.8.1.2. the local content percentages required for specific genres as provided for in sub-regulation 5(2) in the TV Content Regs. In this regard, nothing is stated regarding local content for the different genres in the licence conditions except in respect of drama and children's programming: Clause 2(4)(a) of the e-tv licence requires 10% of the performance period to consist of South African drama and clauses 4(1) and (2) requires two hours and thirty minutes of SA drama weekly of which two hours and twenty minutes must be broadcast in prime time and up to 50% of this can be repeats. Clause 2(4)(b) read with clause 7(1) of the e-tv licence requires 20% of the performance period to consist of South African children's programming. Note that this is very differently worded to the clear requirements of the TV Content Regs which require that 20% of all drama is SA drama and that 25% of all children's programming is SA children's programming in terms of sub-regulations 5(2)(a) and (e) and so it is not clear how these fit together;
  - 1.8.1.3. the broadcasting of documentaries and knowledge-building (let alone local content requirements pertaining thereto) even although there are specific local content requirements for such programming in the TV Content Regs in sub-regulations 5(2)(c) and (d);
  - 1.8.1.4. local content requirements for current affairs programming even although there are specific local content requirements for such programming in the TV Content Regs in sub-regulations 5(2)(b);
  - 1.8.1.5. how much local content is to be broadcast outside of the broadcast period as required in terms of clause 3(4) of the licence.
- 1.8.2 Overall, there is no indication of how general licence condition and regulatory compliance with regard to local content is to be reported on to ICASA in order to facilitate open, transparent and appropriate compliance oversight.
- 1.8.3 We also note that there are clear measurability issues with regard to certain of the wording of some of the e-tv licence conditions. For example, clause 2.5 requires a licensee to "endeavour" to dub some foreign children's programming into official languages other than English; while clause 3(3) require animation content that reflects African and South African culture and lifestyles. However, there is no clear indication of what "endeavour" or "reflecting African and South African culture and life-styles" means here. These issues are noted even although they are broader than the scope of the report's local content focus.

1.9. Commentary on Television Licence Conditions Pertaining to Local Content – M-Net, DStv, Starsat and Deukom:

We note that nothing in any of the licences pertaining to these subscription television broadcasting services deals with local content programming. Consequently, the licence conditions do not indicate how general regulatory compliance with regard to local content is to be reported on to ICASA in order to facilitate open, transparent and appropriate local content compliance oversight.

1.10. ICASA's Role in Monitoring, Enforcement of Compliance with Local Content:

1.10.1 The writer was fortunate to be able to have a frank interaction with a number of ICASA staffers at a meeting called to discuss, among other things, local content monitoring and enforcement specifically. Where matters were discussed that relate specifically to legal issues, these have been dealt with in detail elsewhere in the report and are not included/repeated here. The key issues discussed in regard to monitoring and enforcement are set out below. In respect of each item, the issue, ICASA's response and the commentary thereon is set out.

1.10.2 The first issue discussed was the lack of a prescribed format for local content compliance reporting. ICASA reported that it was not possible to have a uniform format as the obligations of all broadcasters are different, not only as a result of the categorisation of television services in respect of the TV Content Regs but also because of the licensee-specific obligations imposed in terms of the licence conditions. Hence ICASA said they had developed a particular reporting format for each licensee. The commentary on this clarification is the following:

1.10.2.1. it is not legally permissible for ICASA to neglect or decline to perform a peremptory regulatory function such as to prescribe reporting and record keeping formats when these are required in binding regulations such as the TV Content Regs as is clear from section 6(2)(b) of PAJA;

1.10.2.2. given the importance of local content compliance for the development of the country's cultural industries, it is problematic that formats for compliance reporting are essentially secret and non-transparent and that the public had not had any opportunity to be heard on the nature of such formats, which is a violation of section 4 of PAJA;

1.10.2.3. ICASA must prescribe a format or formats for local content compliance reporting by way of regulation as required in the TV Content Regs such that the public has a notice and comment opportunity as required in terms of section 4 of PAJA.

1.10.3 The second issue discussed was why the public does not have access to the formats for compliance reports and to the reports actually submitted by television

broadcasters. In this regard it is important to differentiate between the fact that broadcasters appear to be submitting their required programming information and the fact that the reports were not made available to the writers by ICASA. ICASA stated that broadcasters claimed confidentiality in respect of the reports submitted, citing section 4D of the ICASA Act which empowers a person submitting information to ICASA to request that it be treated as confidential. ICASA is under a peremptory obligation to keep, *inter alia*, the following kinds of information confidential in terms of section 4D(4) of the ICASA Act, namely: financial and commercial information, the disclosure of which is likely to cause harm to the commercial or financial interests of such person; information that could put the person at a disadvantage in contractual negotiations or to prejudice the person in commercial competition. The writer's commentary on this clarification is the following:

- 1.10.3.1. The writer disagrees that the formats of the individual licensee's local content compliance reports could be covered by section 4D of the ICASA Act as no broadcaster information at all was contained therein; and
  - 1.10.3.2. Second, the writer disagrees that the reporting on actual local content flighted (including genres, format factors and repeats) could constitute commercially sensitive information as this was, by its very nature, in the public domain as it has, ostensibly, already been broadcast to the public.
- 1.10.4 The third issue is the issue of ICASA's monitoring capabilities. It is vitally important that a peremptory requirement prescribed by the TV Content regulations is capable of being independently verified by anyone in order to be able to hold ICASA and any errant licensee to account for any non-compliance with any local content requirement. In this regard, no third person is in a position, due, in the main, to the lack of transparency and openness displayed by ICASA and by the broadcasters, to assess the reliability and/or accuracy of ICASA's monitoring efforts. In the meeting held with ICASA representatives, ICASA made reference to electronic monitoring equipment procured in 2014 and also mentioned that it has only eight full time monitors for hundreds of radio stations as well as for the licensed television stations although it is able to employ temporary monitors as well. ICASA stated that it is able to assess local content compliance including with regard to format factors/repeats etc but obviously it was difficult to verify if that was indeed the case. Further, it is noted that in the recent case of *Extriserive (Pty) Ltd t/a LM Radio v*

*Gauteng Media Development Project NPC t/a Hot 91.9 FM*<sup>114</sup>, ICASA's own CCC held<sup>115</sup> that an Annual Compliance Report (ACR) emanating from a division of ICASA “remains hearsay, even if...it has been confirmed by the Complainant as being a true copy”. The CCC held that what was required was “confirmation by the relevant Division of ICASA”. The recommendation in this regard is that any Annual Compliance Report (ACR) published by, and obtained from, ICASA itself must be able to be relied upon as evidence of ICASA's own findings with regard to, *inter alia*, local content compliance.

1.10.5 The fourth issue was how few ACRs have been done in respect of public and commercial (free-to-air and subscription) television when assessing available records available on ICASA's web-page containing its ACRs: <https://www.icasa.org.za/pages/compliance-reports>) and from those provided by ICASA after requests therefor. None of the television broadcasters in fact has a record of actual ACRs. Often Compliance Reports are released after many years between reports. The latest compliance reports for the television licensees under consideration in this report are:

1.10.5.1. SABC, 1, 2 and 3 – 2009 (more than a decade ago);

1.10.5.2. E-tv - 2018 (some four years ago);

1.10.5.3. M-Net - 2021;

1.10.5.4. DStv - 2021;

1.10.5.5. Starsat – 2021; and

1.10.5.6. Deukom – 2017 (some five years ago).

1.10.6 The effect of this is that no 2022 ACR for any television broadcaster has been produced. Three of the eight reports were from last year (2021); one of the reports is five years old and another is four years old and three of the reports provided were over a decade old. The title “Annual” Compliance Report is misleading as ICASA does not in fact produce *annual* compliance reports for television broadcasters. The effect of this is that it is difficult not only to assess actual compliance by licensees with current local content requirements, but also to assess whether ICASA is complying with its own obligations to monitor licensees and enforce compliance

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<sup>114</sup> Available at: <https://www.icasa.org.za/complaints-and-compliance-committee/extriserive-vs-hot-91-9-fm-27-feb-2019-313-2018>.

<sup>115</sup> At paragraph 5(a).

with the applicable legislation, regulations and licence conditions pertaining to local content as it is required to do in terms of section 4(3)(b) and (d) of the ICASA Act.

- 1.10.7 The recommendation is therefore that ICASA must produce, annually, a compliance report for each licensee, particularly the public and commercial television licensees. It must be noted however that there has been a vast improvement in the number of ACRs in respect of television broadcasters that have been produced by ICASA (evidenced by the three in 2021).
- 1.10.8 The last issue of concern is that there is no public notice and comment procedure regarding ICASA's own monitoring and enforcement compliance mechanisms. In this regard:
  - 1.10.8.1. Section 3 and 4 of PAJA requires, at very least, a public notice and comment procedure where administrative action "materially and adversely affects the rights or legitimate expectations of any person and/or "materially and adversely" affects the rights of the public.
  - 1.10.8.2. The public's rights are materially and adversely affected if ICASA is failing to hold television licensees to the local content requirements of the TV Content Regulations and/or their licence conditions.
  - 1.10.8.3. Further, the creators of local content's right and legitimate expectations are materially and adversely affected if ICASA is failing to hold television licensees to the local content requirements of the TV Content Regulations and/or their licence conditions.
  - 1.10.8.4. Consequently, the recommendation is that a draft ACR for each licensee ought to be published for public notice and comment given the importance of local content compliance for the country's cultural industries and for the public's sense of national identity and ability to access local content. This would allow the public to comment on any aspect of concern or to raise any queries which may highlight issues that ICASA may have been blind to. Such transparency would not only assist ICASA in monitoring and compliance enforcement it would also assist in making ICASA more accountable to the public in respect of its monitoring and enforcement efforts.

## 2. RECOMMENDATIONS REGARDING HOW TO IMPROVE THE SOUTH AFRICAN LEGAL, AND REGULATORY REGIME REGARDING LOCAL TELEVISION CONTENT REQUIREMENTS

The commentary on the existing weaknesses and defects in the statutes, regulations and licence conditions pertaining to local content is set out above. For ease of actioning remedial measures, a summary of the suggestions for amendments and/or other actions, is set out below.

### 2.1. Amendments to the ECA:

It is suggested that:

#### 2.1.1 section 61(2)<sup>116</sup> of the ECA is amended:

2.1.1.1. to insert the word “or” after the semi-colon at the end of section 61(2)(iii);

2.1.1.2. to replace the semi-colon with a full stop at the end of section 61(2)(iv);  
and

2.1.1.3. by the deletion in their entirety of sub-section (v) and (vi);

2.1.2 the first part of section 61(3) of the ECA be amended to read as follows: “The Authority **[may] must**, in respect of [the] television broadcasting, **[licence, impose and specify in that licence, as prescribed, regarding]** prescribe minimum requirements upon licensees for local television content and independent television production, and may impose and specify in any television broadcasting service licence, additional conditions, which without derogating from the generality of the foregoing, may include any **[conditions] provisions** requiring [the] a broadcasting service licensee-”;

2.1.3 the first part of section 61(5) be amended to read as follows: “In prescribing or imposing in any licence condition any amount or percentage in terms of subsections (3) or (4), the Authority may prescribe or impose in any licence condition the application thereof with regard to-”;

2.1.4 the above amendments are necessary to ensure that ICASA has a clearly defined mandate that requires it to prescribe regulations requiring local television content and may impose additional local content requirements on any television licensee by way of licence conditions; and

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<sup>116</sup> Although the provisions of section 61(4) are also required to be similarly amended, these are not dealt with as they pertain to the sound broadcasting sector and not the television sector.

2.1.5 ICASA should be engaged with on the above proposed amendments, and should it agree therewith, it should make recommendations to the Minister on these amendments as it is empowered to do in terms of section 4(3)(a) of the ICASA Act. Further it should ensure that the proposed amendment suggestions are captured in its Annual Report to ensure that Parliament is made aware of the suggested legislative amendments as the Annual Report is required to be placed before Parliament by the Minister in terms of section 16(3) of the ICASA Act.

2.2. Amendments to the TV Content Regulations:

2.2.1 It is suggested that ICASA amends its TV Content Regulations in the following respects:

2.2.1.1. sub-regulations 3(2) and 5(2) talk about the need for free to air public (SABC 1 and 2), commercial (e-tv) and public-commercial (SABC 3) broadcasters to broadcast a minimum percentage of local content in specific genres but then do not say what the minimum percentage of that genre is to be broadcast. The minimum genre percentage to be broadcast by each category of free to air licensee be prescribed in the TV Content Regulations;

2.2.1.2. in sub-regulation 6(2) of the TV Content Regs, there is there is no indication as to how much local television content is to be on the channel that is compiled and uplinked from South Africa. The problem with this is that it is arguable that a channel compiled and uplinked from South Africa, even if there is only minimal local content actually on the channel, still meets sub-regulation 6(2)'s requirements. It is suggested that sub-regulation 6(2) be amended to clarify what the minimum actual local content requirements are for a channel compiled and uplinked from South Africa are; and

2.2.1.3. sub-regulation 10(1) is defective in respect of reporting requirements in a number of respects:

2.2.1.3.1 sub-regulations (b) to (d) thereof deal with drama reporting only and ignore reporting on other required genres for free to air broadcasters, namely: current affairs programming, documentary programming, knowledge building programming, educational programming (for public free to air broadcasters only) and children's programming; and

2.2.1.3.2 it appears to require a range of additional reporting on topics that are not definitive to establishing whether or not a programme constitutes SA TV content in terms of



section 61(2)(a) of the ECA, namely: the nationalities of the creative, technical and performance staff and the roles the performance staff play; and

- 2.2.1.3.3 mostly significantly, despite the peremptory requirements therefore in sub-regulation 10(1), ICASA has not in fact prescribed formats for the keeping and maintenance by all television licensees of the required logs, statistical forms and programme records which are required for the recording of full particulars of all SA content programming broadcast in each week, including each category of SA television content (presumably being genres – sub-regulation 10(1)(a) as well as for the additional requirements set out in sub-regulations 10(1)(b) to (e).

Consequently, it is suggested that either regulation 10(1) the TV Content regulations be amended to provide for the required format or, alternatively, that the Compliance Procedure Manual Regulations contained in Notice 902 published in Government Gazette 34863 dated 15 December 2011 (the Compliance Manual Regs) be amended to include the prescribed forms for the format for reporting on local television content compliance. To this end we have attached a draft compliance report format hereto. This format is for each television broadcaster and includes the requirements of local content and independent commissioning compliance both in respect of the TV Content regulations but also in respect of each broadcaster's licence condition requirements regarding local content and/or independent commissioning.

### 2.3. Amendments to Licence Conditions:

The report has set out in detail, the writer's comments with respect to local content-related licence conditions pertaining to each of the public, public commercial, commercial free to air and commercial subscription television licensees. In particular the following key problems are noted:

- 2.3.1 there is a lack of correlation between the licence conditions and the TV Content Regs which means that it is not clear which takes precedence when the provisions are contradictory or conflicting, including with regard to the amount of local content, genres of local content and reporting of local content obligations/compliance;
- 2.3.2 there are a number of licence conditions where the obligations are not sufficiently measurable, making compliance enforcement difficult or impossible.
- 2.3.3 To reiterate the suggestion (made in respect of amendments to the ECA) that the

licence conditions be used to create supplemental/additional local-content-related obligations specific to that licensee which are over and above those imposed upon that category of broadcaster in terms of the TV Content Regs. Further, that reporting obligations contained in licence conditions be made with reference only to the licensee-specific local content obligations and not with regard to reporting on compliance with the TV Content Regs which require a prescribed reporting format.

#### 2.4. Other Recommended Actions To Be Taken:

- 2.4.1 Reporting of actual local content flighted (including genres, format factors and repeats) and the amount of independently produced local content should not be considered confidential information in terms of section 4D of the ICASA Act as this is, by its very nature, in the public domain as it has, ostensibly, already been broadcast to the public.
- 2.4.2 ACRs published by, and obtained from, ICASA itself must be able to be relied upon as evidence of ICASA's own findings with regard to, *inter alia*, local content compliance.
- 2.4.3 ICASA's Draft ACR for each licensee ought to be published for public notice and comment given the importance of local content compliance for the country's cultural industries.

### **3. PROPOSED WAY FORWARD TO SECURE IMPLEMENTATION OF THE RECOMMENDATIONS**

- 3.1. No organ of state appears hostile to the concept of enforcing local content requirements. This is a useful starting point. It is proposed that ICASA be engaged on all of the above recommendations as it is the organ of state most involved in determining same and in securing the correct operations of local content regulation, including, target setting, monitoring and enforcement.
- 3.2. Independent producer representatives should engage ICASA personnel with regard to all of the accepted recommendations (subject to any amendments/comments that may be given/proposed by the NFVF, or by the IPO, the IBFC etc).
- 3.3. If ICASA personnel are amenable to the changes, it is proposed to work with them to assist in any way possible, including suggested regulatory/process and procedure changes.
- 3.4. As a last resort, there is the option of taking ICASA on review before the High Court to in relation to a number of legal issues, but this is unlikely to be necessary.

### **CHAPTER 3: INDEPENDENT PRODUCTION REQUIREMENTS**

**The Brief:** This chapter contains an in-depth examination of what the independent production requirements are for television: focusing on public and commercial (free to air and subscription) only. The report considers the statutory requirements and the regulatory requirements. It considers the enforcement by ICASA of compliance with independent production requirements for television across: free to air broadcasters (public and commercial) as well for satellite subscription broadcasters. And it considers the terms of trade of the broadcasters.

**Period Reviewed:** In 2008, SASFED and the IPO together with the SABC, commissioned a report into many of the problems facing independent producers. Unfortunately, the report's recommendations were never taken up by the incoming new management at the SABC and so the problems identified therein remain unaddressed. Also, since a 14-year period has elapsed since the production of the report, it was felt to be important to bring the learnings and the recommendations up to date. In these milestone reports however, the focus is on the present, that is, for this report the focus is on the independent commissioning requirements as they currently are, both in respect of applicable statutes, regulations, and licence conditions.

**Methodology:** Research was conducted by way of desk top research and interviews. A number of recommendations regarding amendments that are required to be made to the ECA, the relevant local content regulations prescribed in terms of the ECA, and in relation to ICASA's monitoring and enforcement practices are made. Recommendations as to the appropriate courses of action that can be followed to secure the implementation of the recommendations are also made.

#### **1. ICASA INDEPENDENT COMMISSIONING REQUIREMENTS**

##### **1.1. The Requirements of the Electronic Communications Act, 2005 (the ECA)**

- 1.1.1 Section 61 is titled "Preservation of South African Programming". Broadly this section gives the Independent Communications Authority of South Africa (ICASA) a number of powers with regard to the commissioning of independently produced local television content.
- 1.1.2 Section 61(1) empowers (but does not require) ICASA to prescribe regulations applicable to broadcasting services licensees' regarding the commissioning of independently produced South African programming.
- 1.1.3 Section 61(2)(b) provides a definition of "independent television production" which means "a production of local television content"
  - (i) By a person not directly or indirectly employed by any broadcasting service licensees; or
  - (ii) by a person who is not controlled by or is not in control of any broadcasting service licensee."

1.2. Commentary on the Independent Production Provisions in the ECA:

1.2.1 It is noteworthy that the drafting of section 61 of the ECA is poor. It is also unfortunate and problematic that the ECA does not require ICASA to prescribe independent commissioning requirements by way of regulation. Instead, section 61(1) uses the term “may” which is empowering without being peremptory.

1.2.2 Consequently, it is suggested that<sup>117</sup> section 61(1) of the ECA is amended to replace the word “may” with “shall” to ensure that the obligation to regulate independent production requirements is peremptory as opposed to discretionary.

1.3. Local Television Content Regulations – Independent Commissioning Provisions

1.3.1 Notwithstanding the discretionary nature of regulations in terms of section 61(1) of the ECA, ICASA has prescribed local television content regulations in Notice 346, published in Government Gazette No. 39844 dated 23 March 2016 (the TV Content Regs) which came fully into force after a period of staggered implementation on 24 March 2018. It is important to note the TV Content Regs replaced and repealed the previous (2006) TV Content Regs. The TV Content Regs also deal with independent production requirements.

1.3.2 It is important to note the provisions of section 2 of the TV Content Regs as it sets out the purpose of the regulations. Section 2 provides that “the purpose of these regulations is to develop, protect and promote national and provincial identity, culture and character.” Section 2(d) provides that “in achieving this, these regulations will seek to promote programming which... will establish a vibrant, dynamic, creative and economically productive South African film and television industry”.

1.3.3 Section 7(1) of the TV Content Regs provides that all TV licensees “must ensure that 40% of their local television content programming must consist of programmes which are independent television productions” and such productions must be spread evenly between: South African arts, drama, documentary, knowledge-building, children’s, and educational programming.

1.3.4 Section 7(2) of the TV Content Regs further requires that 50% of the annual independently produced programmes budget of a public, commercial and subscription television broadcasting licensee is “spent on previously marginalised local African languages and/or programmes commissioned from regions outside

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<sup>117</sup> Although the provisions of section 61(4) are also required to be similarly amended, the required amendments are not dealt with as they pertain to the sound broadcasting sector and not the television sector.

the Durban, Cape Town and Johannesburg Metropolitan cities”. Although the term “previously marginalised” is not defined in the TV Content Regs, it is presumed that this means languages other than English or Afrikaans.

1.3.5 A table of the impacts of these regulations is as follows:

<b>Requirement</b>	<b>Public</b>	<b>Commercial and Public Commercial</b>	<b>Subscription</b>
Local Content Requirements (on which independent commissioning is based)	65%	45%	15% of content or channel acquisition budgets
Independent Commissioning is 40% of the above.	26%	18%	6% of content or channel acquisition budgets
Additional requirements on independent commissioning ie African languages and non-major metro sourcing (provided all commissioning costs were equal) given the drafting anomalies set out above.	13%	9%	3% of content or channel acquisition budgets

1.3.6 Local content and independent commissioning records to be kept by licensees: - s10 of the TV Content Regs.

1.3.7 All television licenses must keep and maintain logs, statistical forms and programme records in a format prescribed by the authority for a period of 36 Months. However, It is important to note that the Compliance Procedure Manual Regulations contained in Notice 902 published in Government Gazette 34863 dated 15 December 2011 (the CPM Regs) do not contain any prescribed forms for the format for reporting on independent television programming production compliance.

1.3.8 All subscription broadcasters must keep audited records of the amount of their expenditure on local content and independent production.

1.3.9 A contravention by a commercial or public television licensee of any of the provisions of the TV Content Regs is punishable by a fine not exceeding R5million or 10% of its annual turnover for every day or part thereof during which the contravention continued, in terms of section 11(1) of the SA Content Regs.

#### 1.4. Commentary on the Television Content Regulations – Independent Commissioning Provisions

1.4.1 The provisions of section 7(2) problematic because they confuse budgets with actual programming flighted. The requirement of section 7(1) of the TV Content Regs measures the initial 40% independent commissioning requirement as against a percentage of programming broadcast and not as a percentage of programming budget, while the additional measures to promote marginalised languages and commissioning in non-major metropolitan cities is stipulated in terms of budget spend and not programming flighted; making monitoring and enforcement compliance difficult.

1.4.2 Chapter 1 deals with the format factors for SA TV Content. However, these are also relevant for independent commissioning. Besides repeats and general genre formats, the format factors relevant to marginalised languages and geographic areas as well as regarding production companies controlled by historically disadvantaged production companies provided for in:

1.4.2.1. section 9(2) of the TV Content Regs deal with format factors for African Language Drama (that is, official languages other than English and Afrikaans) – format factor is 4;

1.4.2.2. section 9(6) of the TV Content Regs deal with format factors for African languages (that is, official languages other than English and Afrikaans) in other genres (ie non-Drama), namely: documentary, children's, and arts programming – format factor is 3

1.4.2.3. section 9(5) of the TV Content Regs deals with format factors for independent commissioning diversity. In this regard the format factor for programming produced by an independent production company:

(a) based in Mpumalanga, the Northern Province, the North West, the Northern Cape, the Free State and the Eastern Cape, is 3;

(b) based in Kwazulu-Natal, is 2; and

(c) which is controlled by historically disadvantaged persons, is 3.

1.4.3 Note that these commissioning format factors provided for in section 9(2), (5) and (6) often do not correlate well to the provisions of section 7(2) with regard to independent television productions. For example:

- 1.4.3.1. a B-BBEE company producing English language programming in Johannesburg still obtains a Format Factor of 3 under section 9(5)(c) but does not qualify in terms of the criteria for diversity of commissioning in terms of section 7(2);
  - 1.4.3.2. a production company based in Durban, still obtains a Format Factor of 2 (for being in Kwazulu-Natal) under section 9(5)(b) but does not qualify in terms of the criteria for diversity of commissioning in terms of section 7(2);
  - 1.4.3.3. a production company based in George qualifies in terms of the criteria for diversity of commissioning set out in section 7(2) (being outside of the Cape Town Metropolitan city) but does not qualify for a Format Factor of 3 in terms of section 9(5)(a) as it is still in the Western Cape;
  - 1.4.3.4. a production company based in Tshwane qualifies in terms of the criteria for diversity of commissioning set out in section 7(2) (being outside of the Johannesburg Metropolitan city) but does not qualify for a Format Factor of 3 in terms of section 9(5)(a) as it is still in Gauteng; and
  - 1.4.3.5. an English or Afrikaans production produced in Johannesburg or Cape Town can still obtain a diversity factor of 3 (in terms of s9(5)(c)) provided the production company is controlled (note this does not necessarily mean owned) by historically disadvantaged persons. Note that the definition of historically disadvantaged persons includes black persons, women and people with disabilities. Consequently, production companies controlled by white women are able to benefit from this diversity factor too.
- 1.4.4 Finally, the most significant drafting problem, with regard to independent commissioning, is that despite the peremptory provisions of regulation 10(1) of the TV Content Regs, ICASA has not in fact prescribed formats for the keeping and maintenance by all television licensees of the required logs, statistical forms, and programme records. In this regard:
- 1.4.4.1. It is important to reiterate that the CPM Regs do not contain any prescribed forms for the format for reporting on independent commissioning.
  - 1.4.4.2. In interviews with ICASA staffers, it was clear that ICASA has declined to prescribe such formats because of a perceived difficulty of creating standard reporting formats given the differing licence conditions

pertaining to different licensees<sup>118</sup>. However, it is not lawful for ICASA to prescribe in a regulation that it is under a peremptory obligation to prescribe reporting formats (that is to put these formats into a regulation) and then fail to do so.

- 1.4.4.3. The failure to prescribe local content reporting formats is a violation of PAJA in a number of important respects but, most basically, of section 6(2)(b) of PAJA. Section 6(2)(b) of PAJA entitles a court or tribunal to judicially review administrative action if “a mandatory and material procedure or condition prescribed by an empowering provision was not complied with”. The word “prescribed” is clearly defined both in the ECA and in the ICASA Act as meaning prescribed in regulations. (emphasis added). The effect of this is that sub-regulation 10(1) of the TV Content Regs requires, as a matter of law, that ICASA prescribe regulations to setting out the formats for the logs, statistical forms and programme records which television licensees are required to keep in relation to independent commissioning. Its failure to do so is reviewable under PAJA.
- 1.4.4.4. Besides the clear unlawfulness of ICASA’s failure to prescribe reporting formats, the fact that there are no prescribed forms for reporting on the commissioning of independently-produced SA TV content means that the public, and interested parties such as the producers themselves, have not had the opportunity of commenting on the draft prescribed forms, a process that is required in terms of section 4(4) of the ECA. This deprivation means that the public, including television viewers and members of the independent production sector, have been unable to comment on the current situation and are entirely voiceless, and even ignorant, in respect of ICASA’s methodology for independent commissioning reporting by public and commercial television licensees.
- 1.4.4.5. The overall effect of ICASA’s unlawful administrative action in failing to prescribe reporting formats in regulations has been to:
  - 1.4.4.5.1 deprive the public of the ability to participate, through a public notice and comment procedure, on crafting reporting formats that materially and adversely affect

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<sup>118</sup> The meeting took place with key figures of the Monitoring and Compliance Department on Thursday 27 February 2019.



them which is itself a violation of the provisions of section 4(1) of PAJA too; and

- 1.4.4.5.2 allow for, essentially, secretive reporting formats to be required of different television licenses despite the peremptory requirement that these be contained in regulations.

## 1.5. Independent Commissioning Regulations

1.5.1 ICASA has prescribed Independent Commissioning regulations in Notice 1596, published in Government Gazette No. 32767 dated 1 December 2009 (the Commissioning Regs). Note that these regulations have not been amended or updated in 13 years.

1.5.2 Section 3 of the Commissioning Regs requires all commercial and public television licensees to compile and maintain a commissioning protocol for independently produced local television programming which is required to be submitted to ICASA for approval (including amendments thereto). These are required to be on the website of the licensee. Note that StarSat's and Deukom's websites do not contain their commissioning protocols in contravention of the Commissioning Regulations.

1.5.3 The protocols are required to contain, as a minimum, the details specified in Annexure A to the Commissioning Regs. These include:

1.5.3.1. Terms of trade (s1) which are required to be fair, transparent, non-discriminatory and should be structured to achieve a number of objectives including:

- relationship improving (licensees and independent producers)
- promoting innovation and creativity
- raise quality
- advance competition
- promote diversity in broadcasting and production sectors
- promote skills development and creation of a sustainable production sector
- advance transformation.

1.5.3.2. Commissioning Processes (s2) which are simple and transparent, and which deal with the following:

- Objectives

- Processes
  - Names and contact details of commissioning personnel
  - Clear process for unsolicited program proposals
  - Timetables that the licensee will follow
- 1.5.3.3. Editorial Standards (s3) which deal with the following:
- Technical and editorial standards required for specific types of programmes
  - Process to be followed where a producer seeks to deviate from the standards and guidelines
  - Guidelines on the delivery of programming for viewing before broadcast.
- 1.5.3.4. Programme Fees (s4): these are to stipulate factors to be taken into account when determining programme prices, including:
- Retail prices index
  - Changes in technology or production techniques
- 1.5.3.5. Distribution Arrangements, Archival Usage and Rights (s5): the licensee is to provide a clear and transparent framework for the distribution and payment for commissioned programming including taking into account standard industry distribution practices and stipulating processes and terms for:
- Re-runs
  - On-selling to other licensees
  - Exploitation of secondary rights through other platforms eg DVDs, merchandising
  - Research rights
  - Broadcast archival material.
  - Contracting options for intellectual property rights re: types of programming to be procured (trade in intellectual property rights to be based on mutual agreement in accordance with the Copyright Act, 1978).

- 1.5.3.6. Ethical Standards (s6): licensee to adhere to the highest ethical standards in the conduct of its business through clear codes of conduct and anti-corruption policies and is to include its procurement policies in its protocol.
- 1.5.3.7. Complaints-handling mechanism (s7): for independent producers to complain about commissioning practices and providing name and contact details of personnel who deal with such complaints.
- 1.5.4 Further, Licensees must submit an annual report on independent commissioning to ICASA (s4) which is to include:
  - 1.5.4.1. A List of names of independent producers used;
  - 1.5.4.2. Number of programmes and episodes commissioned;
  - 1.5.4.3. Number of programmes commissioned from historically disadvantaged individuals and from Small and Medium producers;
  - 1.5.4.4. Total amount spent by the licensee on independently produced local television content; and
  - 1.5.4.5. Details of any disputes that occurred.
- 1.5.5 The penalty for non-compliance with regulation 3 (Protocols) and 4 (reporting) is R1million with an additional R1million for repeated contravention of the Commissioning Regs.
- 1.6. Commentary on the Independent Commissioning Regulations
  - 1.6.1 The Annexure to the Independent Commissioning Regs requires terms of trade to stipulate the factors that are taken into account when determining their programme prices and they include examples such as movements in the retail prices index. This is a term of art that is used primarily in the United Kingdom and is a form of measurement of inflation. South Africa does not use a retail prices index, instead it uses the Consumer Price Index (CPIX). In this regard:
    - 1.6.1.1. Independent production sector representative bodies such as the IPO, the South African Screen Federation, and the IBFC have long been concerned about the lack of inflation-based increases in cost per minute allowances for independently commissioned television content, particularly in respect of the public broadcaster the SABC.
    - 1.6.1.2. Inflation-based annual increases in cost per minute allowances for independently commissioned television content ought to be peremptory provision in a licensee's terms of trade given that it is specifically mentioned in the Independent Commissioning Regulations. However,

only one of the broadcasters, e-tv, mentions “inflation” in its Commissioning Protocol while none of the SABC’s, StarSat’s nor DStv/M-Net’s Commissioning Protocols mentions CPIX or the retail prices index<sup>119</sup>.

1.6.2 It is important to note that Deukom does not commission local content and instead pays over an amount to the NFVF in terms of an agreement with ICASA and that StarSat also does not commission local content as is clear from its 2021 ICASA Compliance Report and instead buys local content ready-made. Note that this is despite having an Independent Commissioning Protocol although it is not published on its website as required in terms of the Commissioning Regs.

1.6.3 It is noteworthy that the Commissioning Regs do not appear to require any reporting on the geographic area in which the independent producer is based, or the language of the programme commissioned despite these being required to determine whether or not the 50% of the amounts require to be spent on independently-commission production in line with section 7(2) of the TV Content Regs.

#### 1.7. Enforcement of Compliance with the Independent Commissioning Requirements of the TV Content Regs and the Commissioning Regs

##### 1.7.1 SABC:

1.7.1.1. Shockingly, we have been able to find only one compliance report for the SABC and that is from 2009 and reflects back on a period of monitoring in 2008, some 14 years ago.

1.7.1.2. The assessments in that that report are of little value today as they relate to the 2006 TV Content Regs that have since been repealed and replaced and the report pre-dates the Commissioning Regs.

##### 1.7.2 E-tv:

1.7.2.1. ICASA’s latest compliance report for e-tv is for the 2017/2018 period. It reflects that e-tv is complying with TV Content Regs but only deals with percentages of local content and genres broadcast and provides no indication as to whether or not e-tv is complying with the requirements

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<sup>119</sup> However, it is important to note that DStv/M-Net’s Commissioning Protocol has a gap between clauses 35.5 and 35.8 of its Commissioning Protocol that is on its website, and which sets out factors they take into account when determining programming prices.

of section 7(2) regarding language and geographic diversity of independently commissioned content.

- 1.7.2.2. ICASA's compliance report failed to even mention its Commissioning Regs much less investigate or report on whether or not e-tv complies therewith.

### 1.7.3 DStv:

- 1.7.3.1. In the 2021 compliance report on DStv for the period 2019/2020, ICASA found that DStv was compliant with the TV Content Regs because DStv spent 15% of its channel acquisition budget on channels with local content that are compiled and uplinked in South Africa.

- 1.7.3.2. However, it made no findings at all on DStv's compliance with regulation 7 of the TV Content Regs, that is on ensuring that 40% of the spend is independently commissioned and that 50% of that figure is spend in marginalised areas or on marginalised languages.

- 1.7.3.3. ICASA's compliance report also failed to even mention its Commissioning Regs much less investigate or report on whether or not DStv complies therewith.

### 1.7.4 M-Net

- 1.7.4.1. In the 2021 compliance report on M-Net for the period 2019/2020, ICASA found that M-Net was compliant with all elements of the TV Content Regs including with respect to independent commissioning obligations.

- 1.7.4.2. ICASA also found M-Net compliance with its Commissioning Regs.

### 1.7.5 StarSat:

- 1.7.5.1. In the 2021 compliance report on Starsat for the period 2019/2020, ICASA found that Starsat was not compliant with its TV Content Regs having spent less than 15% of its content acquisition budget on local content.

- 1.7.5.2. ICASA also found Starsat was not compliant with its Commissioning Regs which is not surprising given that Starsat reported to ICASA that it "does not produce or commission the production of local...content."

## 1.7.6 Deukom:

1.7.6.1. ICASA's latest (2017) compliance report for Deukom is for the 2015/2016 period, that is, before the current TV Content Regs were in force.

1.7.6.2. Although not explicitly stated in its compliance report, it is clear that ICASA has, *de facto*, exempted Deukom from the obligations of the TV Content Regs and from the Independent Commissioning Regs because it has, instead, set out a range of obligations relating to funding local cultural activities in its licence (see paragraph 3.9 of the compliance report).

1.7.6.3. In its assessment of compliance therewith, ICASA found only partial compliance.

1.8. Television Licence Conditions regarding Independent Commissioning and Commentary Thereon:

ICASA has imposed licensee-specific conditions in each of the public and commercial television licensees' individual broadcasting service licences. Some licences do deal with independent commissioning of television content, and some do not. Each television broadcasting licence is dealt with below:

## 1.8.1 SABC 1:

The only requirement that impacts particularly on independent commissioning are the provisions of clause 3 of the schedule to the licence because they deal with languages other than English and also with marginalised languages (note these are defined in the licence as: isiNdebele, siSwati, Xitsonga and Tshivenda) which is important given the commissioning requirements and or format factors regarding supporting marginalised languages as provided for in section 7(2), 9(2), 9(5) and 9(6) of the TV Content Regulations and the reporting obligations thereon. The clauses of its licence that deals with these issues are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
3	Language	<ul style="list-style-type: none"> <li>16 hours, 24 minutes of official languages other than English and Marginalised Languages (isiNdebele, siSwati, XiTsonga and TshiVenda) in prime time per week</li> </ul>

		<ul style="list-style-type: none"> <li>• 1 hour, 48 minutes of Marginalised Languages (isiNdebele, siSwati, XiTsonga and TshiVenda) in prime time per week</li> <li>• 18 hours, 12 minutes of official languages other than English in prime time per week</li> <li>• 41 hours of official languages other than English in the performance period per week.</li> </ul>
5	Reporting Requirements	Quarterly reports on: <ul style="list-style-type: none"> <li>• Use of each languages as per above but also broken down per genre.</li> </ul>
6.1.2.	Regional Representation	Licensee to take reasonable steps to provide programming that reflects...all of its...regions to audiences.

### 1.8.2 SABC 2:

There are a number of licence conditions that impact on independent commissioning, namely clause 3 of the schedule to the licence because they deal with languages other than English and also with marginalised languages (note these are defined in the licence as: isiNdebele, siSwati, XiTsonga and TshiVenda) and clause 6 which deals with reflecting the regions to audiences. These are important given the commissioning requirements and/or format factors regarding supporting marginalised languages and geographic areas as provided for in section 7(2), 9(2), 9(5) and 9(6) of the TV Content Regulations as well as certain reporting obligations regarding language use in clause 5. The clauses of its licence that deals with these issues are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
3	Language	<ul style="list-style-type: none"> <li>• 18 hours, 6 minutes of official languages other than English (excluding) Languages (isiNdebele, siSwati, XiTsonga and TshiVenda) in prime time per week</li> <li>• 1 hour, 54 minutes of Marginalised Languages (isiNdebele, siSwati, XiTsonga and TshiVenda) in prime time per week</li> </ul>

		<ul style="list-style-type: none"> <li>• 19 hours, 36 minutes of official languages other than English in prime time per week</li> <li>• 41 hours of official languages other than English in the performance period per week.</li> </ul>
5	Reporting Requirements	<p>Quarterly reports on:</p> <ul style="list-style-type: none"> <li>• Use of each official language broadcast distinguishing between genres and what is broadcast in prime time and during the SA TV broadcast period and expressed as an aggregate in minutes and as a percentage of the total of all such programming material.</li> </ul>
6.1.2.(b)	Regional Representation	Licensee to take reasonable steps to provide programming that reflects...all of its...regions to audiences.

### 1.8.3 ***Commentary on Television Licence Conditions Pertaining to Independent Commissioning: SABC 1 and 2:***

1.8.3.1. The licence conditions of clause 5 of SABC 1 and 2's conditions require quarterly reports on different genres broadcast and on each of the languages used (also broken down per genre). However the licence is silent as to how to report on the licence condition obligation to ensure that programming reflects all of South Africa's regions to his audiences. In this regard, there are clear measurability issues regarding what kind of "reflection" in terms of regional programming representation is required.

1.8.3.2. Overall, there is no indication of precisely how general licence condition and regulatory compliance with regard to independent commissioning is to be reported on to ICASA in order to facilitate open, transparent, and appropriate compliance oversight. In particular:

1.8.3.2.1 there is no indication of how licensees are to report on compliance with the Commissioning Regs' requirements around terms of trade, including expected cost per minute price increases paid for commissioned local content;



- 1.8.3.2.2 there is no indication of how licensees are to report on compliance with the TV Content Regs' requirements regarding:
- 1.8.3.2.3 the overall requirement that 40% of local content broadcast is to be commissioned from independent producers (independent commissioning requirements – s7(1));
- 1.8.3.2.4 commissioning from marginalised provinces (format factor requirements - s9(5));
- 1.8.3.2.5 commissioning from marginalised metro areas (commissioning requirements - section 7(2)); and
- 1.8.3.2.6 commissioning of content from historically disadvantaged individuals (format factor requirements - s9(5)).

#### 1.8.4 **SABC 3:**

The only requirements that impact particularly on independent commissioning are the provisions of clause 3 because they deal with languages other than English which is important given the commissioning requirements and/or format factors regarding supporting marginalised languages as provided for in section 7(2), 9(2) and 9(6) of the TV Content Regulations. The clauses of its licence that deal with languages other than English (although note that this includes Afrikaans whereas section 7(2) in my view excludes Afrikaans) and reporting requirements are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
3	Language	10% of its weekly programme material in languages other than English
5	Reporting Requirements	Quarterly reports on: <ul style="list-style-type: none"> <li>Use of each official language - distinguishing between genres and providing the relevant details in relation to prime time and the SA Broadcast Period and expressing these as an aggregate in minutes and as a percentage of the total of all programming material.</li> </ul>

1.8.5 **Commentary on Television Licence Conditions Pertaining to Independent Commissioning - SABC 3:**

Overall, there is no indication of precisely how general licence condition and regulatory compliance with regard to independent commissioning is to be reported on to ICASA in order to facilitate open, transparent, and appropriate compliance oversight. In particular:

- 1.8.5.1. there is no indication of how licensees are to report on compliance with the Commissioning Regs' requirements around terms of trade, including expected cost per minute price increases paid for commissioned local content;
- 1.8.5.2. there is no indication of how licensees are to report on compliance with the TV Content Regs' requirements regarding:
  - 1.8.5.2.1 the overall requirement that 40% of local content broadcast is to be commissioned from independent producers (independent commissioning requirements – s7(1));
  - 1.8.5.2.2 commissioning from marginalised provinces (format factor requirements - s9(5));
  - 1.8.5.2.3 commissioning from marginalised metro areas (commissioning requirements - section 7(2)); and
  - 1.8.5.2.4 commissioning of content from historically disadvantaged individuals (format factor requirements - s9(5)).

1.8.6 **E-tv:**

There are a number of requirements that impact particularly on independent commissioning including requirements regarding provincial commissioning as well as those dealing with languages other than English which are important given the commissioning requirements and/or format factors regarding supporting marginalised languages as provided for in section 7(2), 9(2) 9(5) and 9(6) of the TV Content Regulations. The clauses of its licence that deal with languages other than English (although note that this includes Afrikaans whereas section 7(2) in my view excludes Afrikaans) and reporting requirements are set out in tabular form below:

Clause No.	Nature of Condition	Requirement
2(2)	Language	Two hours of news and information programming per week in a wide range of official languages other than English.
2(3)	Language	Four hours of programming other than news and information in a wide range of official languages other than English.
2(4)(a)	Language	10% of performance period to be SA <b>drama</b> in a wide range of official languages other than English.
2(4)(b)	Language	20% of broadcasting period must be SA children's programming in a wide range of official languages other than English.
3(1)	Provincial requirements: independent commissioning	In procuring programming produced in South Africa, the licensee shall commission programming from the different provinces. Such programming shall reflect provincial diversity, cultures, and characters.
3(5)	Local Content Report	Quarterly logs of local television content to be submitted.

### 1.8.7 **Commentary on Television Licence Conditions Pertaining to Independent Commissioning – e-tv:**

1.8.7.1. The licence condition contained in clause 3(5) of e-tv's licence requires quarterly reports on "local television content broadcast by the licensee". However the licence is silent as to how to report on the obligations contained in section 3(1) of its licence that it shall "commission programming from the different provinces and that such programming "shall reflect provincial diversity". In this regard, there are clear measurability issues regarding what kind of "reflection" in terms of provincial diversity is required and how much programming from the different provinces is required to be commissioned but it is clear that this is meant to be an obligation in addition to the requirements of section 7(2) of the TV Regs otherwise that obligation could be met by simply ensuring that 50% of all independently commissioned local content programming is in marginalised languages.

1.8.7.2. Overall, there is no indication of precisely how general licence condition and regulatory compliance with regard to independent commissioning is to be reported on to ICASA in order to facilitate open, transparent, and appropriate compliance oversight. In particular:

1.8.7.2.1 there is no indication of how licensees are to report on compliance with the Commissioning Regs' requirements around terms of trade, including expected cost per minute price increases paid for commissioned local content;

1.8.7.2.2 there is no indication of how licensees are to report on compliance with the TV Content Regs' requirements regarding:

1.8.7.2.2.1 the overall requirement that 40% of local content broadcast is to be commissioned is to be commissioned from independent producers (independent commissioning requirements – s7(1));

1.8.7.2.2.2 commissioning from marginalised provinces (format factor requirements - s9(5));

1.8.7.2.2.3 commissioning from marginalised metro areas (commissioning requirements - section 7(2));  
and

1.8.7.2.2.4 commissioning of content from historically disadvantaged individuals (format factor requirements - s9(5)).

#### 1.8.8 **M-Net:**

Has no language or independent commissioning-related licence conditions.

#### 1.8.9 ***Commentary on Television Licence Conditions Pertaining to Independent Commissioning – M-Net:***

Overall, there is no indication of precisely how regulatory compliance with regard to independent commissioning is to be reported on to ICASA in order to facilitate open, transparent, and appropriate compliance oversight. In particular:

1.8.9.1. there is no indication of how licensees are to report on compliance with the Commissioning Regs' requirements around terms of trade, including expected cost per minute price increases paid for commissioned local content;

1.8.9.2. there is no indication of how licensees are to report on compliance with the TV Content Regs' requirements regarding:

- 1.8.9.2.1 the overall requirement that 40% of local content broadcast is to be commissioned from independent producers (independent commissioning requirements – s7(1)); and
- 1.8.9.2.2 commissioning from marginalised metro areas and/or in marginalised languages (commissioning requirements - section 7(2)).

1.8.10 **DStv:**

Has no language or independent commissioning-related licence conditions.

1.8.11 ***Commentary on Television Licence Conditions Pertaining to Independent Commissioning – DStv:***

Overall, there is no indication of precisely how regulatory compliance with regard to independent commissioning is to be reported on to ICASA in order to facilitate open, transparent, and appropriate compliance oversight. In particular:

- 1.8.11.1. there is no indication of how licensees are to report on compliance with the Commissioning Regs' requirements around terms of trade, including expected cost per minute price increases paid for commissioned local content;
- 1.8.11.2. there is no indication of how licensees are to report on compliance with the TV Content Regs' requirements regarding:
  - 1.8.11.2.1 the overall requirement that 40% of local content broadcast is to be commissioned from independent producers (independent commissioning requirements – s7(1)); and
  - 1.8.11.2.2 commissioning from marginalised metro areas and/or in marginalised languages (commissioning requirements - section 7(2)).

1.8.12 **Starsat:**

Has no language or independent commissioning-related licence conditions.

1.8.13 ***Commentary on Television Licence Conditions Pertaining to Independent Commissioning – Starsat:***

Overall, there is no indication of precisely how regulatory compliance with regard to independent commissioning is to be reported on to ICASA in order to facilitate open, transparent, and appropriate compliance oversight. In particular:

- 1.8.13.1. there is no indication of how licensees are to report on compliance with the Commissioning Regs' requirements around terms of trade, including expected cost per minute price increases paid for commissioned local content;
- 1.8.13.2. there is no indication of how licensees are to report on compliance with the TV Content Regs' requirements regarding:
- 1.8.13.3. the overall requirement that 40% of local content broadcast is to be commissioned from independent producers (independent commissioning requirements – s7(1));
- 1.8.13.4. commissioning from marginalised metro areas and/or in marginalised areas (commissioning requirements - section 7(2)).

**1.8.14 Deukom:**

Section 4 of its licence provides that its principal language is German. As this is not an official language is not relevant to the local content commissioning or format factors provided for in the TV Content Regulations. However, clause 9 of its Commercial licence requires Deukom to expend monies in lieu of local content requirements:

Clause No.	Nature of Condition	Requirement
9(1)	Beneficiary payments	5% of channel acquisition budget in respect of South African subscribers to be paid to beneficiaries nominated by ICASA.
9(4)	Beneficiary payments	5% of channel acquisition budget in respect of South African subscribers to be paid to train or sponsor SA black citizens resident in SA nominated by Deukom in TV production or TV content production.

**1.8.15 *Commentary on Television Licence Conditions Pertaining to Independent Commissioning – Deukom:***

- 1.8.15.1. ICASA has already made it clear that, as Deukom is not required to have any spend on local content, the Commissioning Regs and the TV Content Regs do not directly apply.

- 1.8.15.2. However, it is noteworthy that the licence conditions regarding the amounts payable to the NFVF in lieu of compliance with such regulations are in fact now ultra vires the provisions of the commissioning provisions of the TV Content Regs because the licence conditions require a total spend of only 10% of the content acquisition budget whereas the TV Content Regs require a total spend of 15%.
- 1.8.15.3. We are of the view that ICASA ought to amend Deukom's licence in terms of section 10(1)(a) read with section 10(1)(b) and 10(1)(f) of the ECA to consistency and fairness as between licensees and to ensure the achievement of the objectives of the ECA with regard to local content and the development of the local production industry.
- 1.8.15.4. The amendment ought to increase the total contributions by Deukom to 15% of its channel acquisition budget in respect of South African subscribers.

#### 1.9. ICASA's Role in Monitoring, Enforcement of Compliance with Local Content:

- 1.9.1 The writer was fortunate to be able to have a frank interaction with a number of ICASA staffers at a meeting called to discuss, among other things, independent commissioning monitoring and enforcement specifically. Where matters were discussed that relate specifically to legal issues, these have been dealt with in detail elsewhere in the report and are not included/repeated here. The key issues discussed in regard to monitoring and enforcement are set out below. In respect of each item, the issue, ICASA's response and the commentary thereon is set out.
- 1.9.2 The first issue discussed was the lack of a prescribed format for independent commissioning compliance reporting. ICASA reported that it was not possible to have a uniform format as the obligations of all broadcasters are different, as a result of the categorisation of television services in respect of the TV Content Regs. Hence ICASA said they had developed a particular reporting format for each licensee. The commentary on this clarification is the following:
- 1.9.2.1. it is not legally permissible for ICASA to neglect or decline to perform a peremptory regulatory function such as to prescribe reporting and record keeping formats when these are required in binding regulations such as the TV Content Regs as is clear from section 6(2)(b) of PAJA;
- 1.9.2.2. given the importance of local content compliance for the development of the country's cultural industries, it is problematic that formats for compliance reporting are essentially secret and non-transparent and that the public had not had any opportunity to be heard on the nature of such formats, which is a violation of section 4 of PAJA.

- 1.9.3 ICASA has prescribed requirements for its annual reporting on independent commissioning compliance by way of regulation as is done in section 4 of the Commissioning Regulations. However, this is insufficiently comprehensive because, for example, it omits an obligation to report on issues that are critical to the financial viability of the independent production sector such as: Cost per minute price increases over time in line with inflation as measured by CPIX or the term actually used in section 4 of the Annexure to the Commissioning Regulations, “movements in the retail prices index”. It is vital that the Commissioning Regulations be amended to require on-going reporting of fees charged, that is, cost-per-minute rates payable by a broadcaster for independently commissioned content so that the regulator is in a position to ascertain whether or not broadcasters are paying inflation-adjusted rates for content. When this issue was raised directly with ICASA’s monitoring and compliance staff, they agreed that they had no idea if broadcasters were making inflation-adjusted increases in cost-per-minute fees payable to the independent producers despite this being a requirement in the actual Commissioning Regulations.
- 1.9.4 Further, ICASA has failed to prescribe a format or formats for independent commissioning compliance reporting by way of regulation as required in the TV Content Regs such that the public has a notice and comment opportunity as required in terms of section 4 of PAJA, in particular, there is no format for reporting on:
- 1.9.4.1. the overall requirement that 40% of local content broadcast (or of the 15% of channel acquisition budget for local programming for subscription broadcasters) is to be commissioned from independent producers (Independent Commissioning Regs – s7(1));
  - 1.9.4.2. the overall requirement that 50% of the annual independent produced programmes budget is spent on programming commissioned from marginalised metro areas and/or in previously marginalised local African languages (Independent Commissioning Regs - section 7(2)); and
  - 1.9.4.3. in respect of Free-to-Air broadcasters only, the commissioning of content:
    - 1.9.4.3.1 from marginalised provinces (format factor requirements - s9(5));
    - 1.9.4.3.2 in marginalised languages (commissioning requirements - section 9(2) and 9(6)); and
    - 1.9.4.3.3 from historically disadvantaged individuals (format factor requirements - s9(5)).
- 1.9.5 The second issue discussed was why the public does not have access to the



formats for compliance reports and to the reports actually submitted by television broadcasters. In this regard it is important to differentiate between the fact that broadcasters appear to be submitting their required programming information and the fact that the reports were not made available to the writers by ICASA. ICASA stated that broadcasters claimed confidentiality in respect of the reports submitted, citing section 4D of the ICASA Act which empowers a person submitting information to ICASA to request that it be treated as confidential. ICASA is under a peremptory obligation to keep, *inter alia*, the following kinds of information confidential in terms of section 4D(4) of the ICASA Act, namely: financial and commercial information, the disclosure of which is likely to cause harm to the commercial or financial interests of such person; information that could put the person at a disadvantage in contractual negotiations or to prejudice the person in commercial competition. The writer's commentary on this clarification is as follows:

- 1.9.5.1. The writer disagrees that the formats (our emphasis) of the individual licensees' independent commissioning compliance reports could be covered by section 4D of the ICASA Act as no broadcaster information at all is contained therein; and
- 1.9.5.2. Second, the writer disagrees that the reporting certain details on content commissioned from the independent production industry and flighted (including names and geographic locations of production companies, languages used, etc) could constitute commercially-sensitive information as this is, by its nature, in the public domain as such information has already been broadcast, including by way of film credits, to the public, although we accept that itemised fees paid for particular content would of course be able to be confidential as was done in the Compliance Report
- 1.9.5.3. The third issue is the issue of ICASA's monitoring capabilities. It is vitally important that a peremptory requirement prescribed by the TV Content or Commissioning Regs is capable of being independently verified in order to be able to hold ICASA and any errant licensee to account for any non-compliance with any independent commissioning requirement. In this regard, no third person is in a position, due, in the main, to the lack of transparency and openness displayed by ICASA and by the broadcasters, to assess the reliability and/or accuracy of ICASA's monitoring efforts. In the meeting held with ICASA representatives, ICASA made reference to electronic monitoring equipment procured in 2014 and also mentioned that it has only eight full time monitors for hundreds of radio stations as well as for the licensed television stations although it is able to employ temporary monitors as well. ICASA stated

that it is able to assess independent commissioning compliance but obviously it was difficult to verify if that was indeed the case. Further, it is noted that in the recent case of *Extriserve (Pty) Ltd t/a LM Radio v Gauteng Media Development Project NPC t/a Hot 91.9 FM*<sup>120</sup>, ICASA's own CCC held<sup>121</sup> that an ACR emanating from a division of ICASA "remains hearsay, even if...it has been confirmed by the Complainant as being a true copy". The CCC held that what was required was "confirmation by the relevant Division of ICASA." The recommendation in this regard is that any ACR published by, and obtained from, ICASA itself must be able to be relied upon as evidence of ICASA's own findings with regard to, inter alia, local content compliance.

1.9.5.4. The fourth issue is that it is clear that ICASA is not, in fact, able to conduct Compliance Reports for television broadcasters annually. ICASA's compliance reports are published on its website here: <https://www.icasa.org.za/pages/compliance-reports>. A review of all reports at the time of writing reflects that the most up to date Compliance Reports for the various commercial and public broadcasters are as follows:

- SABC 1, 2 and 3: Compliance report of 2009, covering a period in 2008;
- E-tv: Compliance report of 2018 (some four years ago);
- M-Net: 2021;
- DStv: 2021;
- Starsat: 2021; and
- Deukom: 2017 (some five years ago).

The effect of this is that no 2022 ACR for any television broadcaster has been produced. Three of the eight reports were from last year (2021); one of the reports is five years old and another is four years old and three of the reports provided were over a decade old. The title "Annual" Compliance Report is misleading as ICASA does not in fact produce *annual* compliance reports for television broadcasters. The effect of this is that it is difficult not only to assess actual compliance by licensees with current independent commissioning requirements, but also to

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<sup>120</sup> Available at: <https://www.icasa.org.za/complaints-and-compliance-committee/extriserve-vs-hot-91-9-fm-27-feb-2019-313-2018>.

<sup>121</sup> At paragraph 5(a).

assess whether ICASA is complying with its own obligations to monitor licensees and enforce compliance with the applicable legislation, regulations and licence conditions pertaining to independent commissioning as it is required to do in terms of section 4(3)(b) and (d) of the ICASA Act.

- 1.9.5.5. The recommendation is therefore that ICASA must produce, annually, a compliance report for each licensee, particularly the public and commercial television licensees. It must be noted however that there has been a vast improvement in the number of ACRs in respect of television broadcasters that have been produced by ICASA (evidenced by the three in 2021).
- 1.9.5.6. The last issue of concern is that there is no public notice and comment procedure regarding ICASA's own monitoring and enforcement compliance mechanisms. In this regard:
  - 1.9.5.6.1 Section 3 and 4 of PAJA requires, at very least, a public notice and comment procedure where administrative action "materially and adversely affects the rights or legitimate expectations of any person and/or "materially and adversely" affects the rights of the public.
  - 1.9.5.6.2 The public's rights are materially and adversely affected if ICASA is failing to hold television licensees to the independent commissioning requirements of the TV Content Regulations, the Independent Commissioning Regulations and/or their licence conditions.
  - 1.9.5.6.3 Further, the creators of local content's right and legitimate expectations are materially and adversely affected if ICASA is failing to hold television licensees to the independent commissioning requirements of the TV Content Regulations, the Independent Commissioning Regulations and/or their licence conditions.
  - 1.9.5.6.4 Consequently, the recommendation is that a draft ACR for each licensee ought to be published for public notice and comment given the importance of independent commissioning compliance for the country's cultural industries and for the public's access to independently produced content. This would allow the public to comment on any aspect of concern or to raise any queries which may highlight issues that ICASA may have been blind to. Such transparency would not only assist ICASA in

monitoring and compliance enforcement it would also assist in making ICASA more accountable to the public in respect of its monitoring and enforcement efforts.

## **2. RECOMMENDATIONS REGARDING HOW TO IMPROVE THE SOUTH AFRICAN LEGAL, AND REGULATORY REGIME REGARDING INDEPENDENT COMMISSIONING REQUIREMENTS**

The commentary on the existing weaknesses and defects in the statutes, regulations and licence conditions pertaining to independent commissioning is set out above. For ease of actioning remedial measures, a summary of the suggestions for amendments and/or other actions, is set out below. Note that where suggestions for amendments have already been made in the Milestone One Report, these are not repeated here.

### **2.1. Amendments to the ECA:**

2.1.1 It is suggested that section 61(1) is amended to replace the word “may” with “must” to make the promulgation of regulations regarding independent commissioning a peremptory, as opposed to a discretionary, obligation of ICASA.

2.1.2 ICASA should be engaged with on the above proposed amendment, and should it agree therewith, it should make recommendations to the Minister on this amendment as it is empowered to do in terms of section 4(3)(a) of the ICASA Act. Further it should ensure that the proposed amendment suggestions are captured in its Annual Report to ensure that Parliament is made aware of the suggested legislative amendment as the Annual Report is required to be placed before Parliament by the Minister in terms of section 16(3) of the ICASA Act.

### **2.2. Amendments to the TV Content Regulations:**

It is suggested that ICASA amends its TV Content Regs in the following respects:

2.2.1 ICASA ought to amend the wording of section 7 of the TV Content Regs to ensure that it speaks specifically to subscription broadcasters which are not required to flight a certain percentage of local content but only to spend a certain percentage of their annual content acquisition budgets thereon. The current wording is tailored to meet the requirements and obligations of free to air broadcasters although the obligation to comply therewith is expressly imposed upon subscription broadcasters too.

2.2.2 ICASA ought to consider the lack of consistency in as between its treatment of marginalised provinces (section 9(5)) vs marginalised metro areas (section 7(2)) and standardise the areas which receive recognition as “marginalised” to avoid the kinds of problems identified in paragraph 1.4.3 above.

2.2.3 Sub-regulation 10(1) is defective in respect of reporting requirements in respect of independent productions in a number of respects:

2.2.3.1. it simply does not require reporting on the percentage of SA content broadcast that is independently commissioned (required to be 40% of local content broadcast for free to air broadcasters and 40% of the amount to be spent on local programming for subscription broadcasters – section 7(1));

2.2.3.2. it does not require reporting on the percentage of independently commissioned works which are required to be commissioned from marginalised metro areas or in marginalised local African languages (required to be 50% of the independent commissioning requirements - section 7(2));

2.2.3.3. further, it does not deal specifically with reporting on commissioning diversity in respect of marginalised provinces and people from historically disadvantaged groups – section 9(5); and

2.2.3.4. mostly significantly, despite the peremptory requirements therefore in sub-regulation 10(1), ICASA has not in fact prescribed formats for the keeping and maintenance by all television licensees of the required logs, statistical forms and programme records which are required for the recording of full particulars of all independently commissioned content broadcast in each week.

2.2.4 Consequently, it is suggested that the Compliance Procedure Manual Regulations contained in Notice 902 published in Government Gazette 34863 dated 15 December 2011 (the Compliance Manual Regs) be amended to include the prescribed forms for the format for reporting on independent commissioning compliance. To this end we have attached a draft licensee compliance report format as hereto. This format is for each television broadcaster and includes the requirements of local content and independent commissioning compliance both in respect of the TV Content and Commissioning Regs but also in respect of each broadcaster's licence condition requirements regarding local content and/or independent commissioning.

### 2.3. Amendments to ICASA's Commissioning Regs:

It is suggested that ICASA amends its Commissioning Regs in the following respects:

2.3.1 First, while a number of reporting requirements are set out in section 4 of the Commissioning Regs, one of the most important, from an independent production

sector viability point of view, is neglected, namely the obligation upon broadcasters to adjust programme fees payable based on various factors, including inflation (see section 4 of the Annexure to the Commissioning Regs).

- 2.3.2 It is recognised that the actual rates payable for particular programming is confidential information and can be exempt from public disclosure, but ICASA itself has to have a mechanism to assess whether or not broadcasters are taking factors such as inflation into account when determining programming prices payable. If this is not done, ICASA will not be able to assess whether or not the independent production sector is being compensated in a manner that is fair over time.
- 2.3.3 It is important that the independent commissioning reporting formats be standardised across both the TV Content and Commissioning Regs as well as taking licence conditions into account. Consequently it is suggested that the Compliance Procedure Manual Regulations contained in Notice 902 published in Government Gazette 34863 dated 15 December 2011 (the Compliance Manual Regs) be amended to include the prescribed forms for the format for reporting on independent commissioning compliance. To this end a draft licensee compliance report format is attached hereto. This format is for each television broadcaster and includes the requirements of local content and independent commissioning compliance in respect of the TV Content Regs but also in respect of each broadcaster's licence condition requirements regarding local content and/or independent commissioning.
- 2.4. Amendments to Licence Conditions:

The report has set out in detail, the writer's comments with respect to independent commissioning-related licence conditions (where these even exist) pertaining to each of the public, public commercial, commercial free to air and commercial subscription television licensees. In particular the following key problems are noted:

- 2.4.1 there is a lack of correlation between the licence conditions and the TV Content Regs which means that it is not clear which takes precedence when the provisions are contradictory or conflicting, including with regard to the percentage of annual spend by a subscription broadcaster (Deukom) on local content obligations;
- 2.4.2 the suggestion (made in respect of amendments to the ECA) is reiterated that the licence conditions be used to create supplemental/additional independent commissioning-related obligations specific to that licensee which are over and above those imposed upon that category of broadcaster in terms of the TV Content Regs and/or the Commissioning Regs is reiterated; and
- 2.4.3 it is reiterated that any reporting obligations contained in licence conditions be deleted as these ought to be incorporated into the overall reporting formats to be

prescribed as set out in paragraph 2.3.2 above.

2.5. Other Recommended Actions To Be Taken:

- 2.5.1 Reporting of the percentage of independently produced local content flighted should not be considered confidential information in terms of section 4D of the ICASA Act as this is, by its very nature, in the public domain as it has, ostensibly, already been broadcast to the public.
- 2.5.2 Reporting the percentage of annual content budgets spent on independently produced local content should not be considered confidential information in terms of section 4D of the ICASA Act as this is simply a percentage figure and, if not specifically broken down by payment per show or per producer will not result in any information being communicated that could harm the commercial interests of a broadcaster. An excellent example of a reflection of some of the independent production reporting requirements is contained in M-Net's Compliance Report of 2011/12. Similar reporting is sadly lacking in respect of all other television broadcasters, including, in M-Net's later Compliance Reports.
- 2.5.3 ACRs published by ICASA itself must be able to be relied upon as evidence of ICASA's own findings with regard to, *inter alia*, independent commissioning compliance.
- 2.5.4 ICASA's Draft ACR for each licensee ought to be published for public notice and comment given the importance of independent commissioning compliance for the country's cultural industries.

**3. PROPOSED WAY FORWARD TO SECURE IMPLEMENTATION OF THE RECOMMENDATIONS**

- 3.1. No organ of state appears hostile to the concept of enforcing independent commissioning requirements. This is a useful starting point. It is proposed that ICASA be engaged on all of the above recommendations as it is the organ of state most involved in determining same and in securing the correct operations of independent commissioning regulation, including, target setting, monitoring and enforcement.
- 3.2. Independent producer representatives should engage ICASA personnel with regard to all of the accepted recommendations (subject to any amendments/comments that may be given/proposed by the NFVF, or by the IPO, the IBFC etc).
- 3.3. If ICASA personnel are amenable to the changes, it is proposed to work with them to assist in any way possible, including suggested regulatory/process and procedure changes.
- 3.4. As a last resort, there is the option of taking ICASA on review before the High Court to in relation to a number of legal issues, but this is unlikely to be necessary.

## **CHAPTER 4: INDEPENDENT PRODUCTION SUPPORT ENTITIES AND REQUIREMENTS**

**The Brief:** This Chapter contains an in-depth examination of what support structures/initiatives have been set up for the independent production sector in respect of production local television content for free to air and subscription broadcasters and for OTT/online services only. The report considers the statutory bodies and institutions reporting to various executive departments of government and their respective requirements for such support.

**Period Reviewed:** In 2008, SASFED and the IPO together with the SABC, commissioned a report into many of the problems facing independent producers. Unfortunately, the report's recommendations were never taken up by the incoming new management at the SABC and so the problems identified therein remain unaddressed. Also, since a 14-year period has elapsed since the production of the report, it was felt to be important to bring the learnings and the recommendations up to date. In these milestone reports however, the focus is on the present, that is, for this report the focus is on the local content support initiatives as they currently are, and while they touch on Covid-19-related support that was promised, this is not a major focus of this Chapter given that the Covid Pandemic is largely something that the country has grown to live with and is no longer hampering the production of film and video content.

**Methodology:** Research was conducted by way of desk top research and interviews.

### **1. INTRODUCTION**

1.1. There are a number of local television content production support bodies, including: the National Film and Video Foundation, the Media Diversity and Development Agency, the Industrial Development Corporation and the Department of Trade, Industry and Competition (dtic), the South African Broadcast Production Advisory Body, and ICASA's Digital Terrestrial Content Advisory Group. We deal with these bodies and their various support initiatives below.

### **2. SA BROADCAST PRODUCTION ADVISORY BODY**

2.1. Section 38(1) of the Broadcasting Act, 1999 (the Broadcasting Act) requires the Minister (currently the Minister of Communications and Digital Technologies) to establish a South African Broadcast Production Advisory Body to advise him or her on how the development, production and display of local television content can be supported.

2.2. In particular s38(3) requires the Advisory Body to advise the Minister on how to encourage, facilitate and offer guidance and advise in respect of any scheme and to promote:

- (a) Production of broadcast materials to meet SA's cultural needs
- (b) Screening of SA content on television
- (c) Awareness of local content in SA and foreign markets
- (d) Distribution/exhibition of local content in foreign markets



- (e) Correction of imbalances in content production industry
  - (f) Human resource development to provide skills and training to local content providers; and
  - (g) Co-productions and the concluding of international agreements.
- 2.3. Section 38(4) of the Broadcasting Act requires the Advisory Body (after consultation with the NFVF and the broadcasting industry) to make recommendations to the Minister for her to determine (after consultation with the Ministers of Arts, Culture, Science and Technology, Trade and Industry, and Finance):
- (a) Policy and strategies to give effect to the production and display of local content;
  - (b) Financing strategies to support production and display of local content;
  - (c) Supply-side measures and initiatives to support the production of local content; and
  - (d) Policies to enhance the production of local content for the multi-channel and digital broadcasting environment.
- 2.4. However, despite initial calls for nominations for the Advisory Body made in 2010 by the then-Department of Communications, which was extended into 2014 and beyond, it appears that the Advisory Body was in fact never properly established and so did not complete any of the tasks set out required of it in terms of section 38 of the Broadcasting Act.

### **3. DIGITAL TELEVISION CONTENT ADVISORY GROUP (DTCAG):**

- 3.1. Section 14(1) of the Digital Migration Regulations published in Notice 1070, Government Gazette No. 36000 dated 14 December 2012 (the Digital Migration Regs) (Annexure O) requires ICASA to establish the Digital Television Content Advisory Group (DTCAG) made of up representatives of the terrestrial television broadcasting licensees and representatives of the independent television production industry and civil society. In this regard:
- 3.1.1. DTCAG is required to advise ICASA, in terms of section 14(2) of the Digital Migration Regulations on “the most effective way to ensure the supply of digital television content...as well as monitoring and compliance with content obligations.
  - 3.1.2. DTCAG is operational and has produced advisory reports, including a significant one in 2015. In the 2015 Report, the DTCAG developed four recommendations to support digital television content production. DTCAG has since developed a follow up draft report in 2019.
- 3.2. The recommendations and latest updates thereon<sup>122</sup> are as follows:

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<sup>122</sup> Note that the process of finalisation was delayed due to the onset of the Covid-19 Pandemic which disrupted DTCAG’s processes.

- 3.2.1. **Initial Recommendation:** ICASA would engage with the NFVF regarding the NFVF's interpretation of the definition of film and video in its governing legislation as prohibiting the support of television production, including obtaining a legal opinion on the correct interpretation thereof. Note that the NFVF Act does not contain definitions of "film" or "video" at all.
- 3.2.2. **Follow up:**
- (a) NFVF clarified that it does fund television production except for reality TV and television series;
  - (b) NFVF clarified that it funds the development (ideas, script writing etc) of: fiction and non-fiction features, short films, television programme formats and animation (in respect of television);
  - (c) NFVF clarified that it funds the production of: fiction and non-fiction features, short films, television documentaries, and animation (in respect of television);
  - (d) NFVF clarified that broadcasters' commissioning practices made it impossible to fund commissioned work. NFVF clarified that its mandate is to fund individuals and production companies and not broadcasters.
  - (e) NFVF clarified that the current Intellectual Property (IP) regime was not conducive to empowering producers<sup>123</sup>.
- 3.2.3. **Initial Recommendation:** ICASA would engage the dtic (Note that the lower case is how the Department refers to itself) to lower the rebate thresholds which were at, then (2015), R2.5million. This was higher than many television production budgets and therefore could not be accessed by local TV producers.
- 3.2.4. **Follow up:**
- (a) dtic lowered the general minimum threshold to R1.5million (and the documentary threshold to R500 000.00)<sup>124</sup> with effect from 1 September 2018 as part of the SA Production Incentive;
  - (b) dtic developed an incentive for SA Co-productions;

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<sup>123</sup> This is doubtless because our Copyright Act provides for a legal presumption (that can be altered by contractual terms) that the person who commissions a commissioned work holds the intellectual property thereto.

<sup>124</sup> We have corrected information where ICASA's 2019 follow up report has incorrectly reflected commitments or statements by other entities.

- (c) dtic developed an additional incentive, the South African Emerging Black Filmmakers Incentive applicable to black filmmakers with a minimum threshold of R500 000.00 only; and
- (d) ICASA has recommended further engagement with the dtic to further reduce these thresholds so that television producers can access them and to ensure that administrative processes are streamlined and simplified.
- 3.2.5. **Initial Recommendation:** ICASA would review SA TV content regulations to ensure that nothing therein prohibits public-public, public-community or public-private partnerships which could open up financing for local content eg educational, health content for digital terrestrial television (DTT). **Follow up:** The 2019 Report does not follow up on this recommendation.
- 3.2.6. **Follow Recommendation:** ICASA would consider whether the licensing of high demand spectrum for the mobile broadband could be subject to conditions which would accelerate consumer adoption of DTT, in particular through supporting the creation of original content. This could be done in two ways:
- 3.2.6.1. ECNS licensees awarded high demand spectrum could make a financial contribution directly to a Digital Dividend Content Fund (DDCF); or
- 3.2.6.2. If high demand spectrum is auctioned, a percentage of the auction proceeds could be allocated to fund DTT content production.
- 3.2.7. **Follow up:** The 2019 Report does not follow up on this recommendation. ICASA issued an Information Memorandum regarding its intentions for the licensing of high demand spectrum in Notice 597, published in Government Gazette No 42820, dated 1 November 2019. Nothing is specifically stated therein about any contributions to a DDCF by licensees or to proceeds from the envisaged auction(s) going to a DDCF. While section 6.5 of the Notice is headed “social obligations for the industry”, the only reference to social obligations are universal service and access obligations “as determined by the Authority”, that is, ICASA, and no reference to content obligations is made.
- 3.2.8. **Follow up Recommendation:** DTCAG has also, in its 2019 Follow Up Report referred to the Media Development and Diversity Agency (MDDA), (which is not relevant for our purposes as it does not fund commercial or public television) and to the Industrial Development Corporation and stated that its (relevant) focus areas include: the production of “locally relevant and internationally palatable content) including: animation, TV series, production/post-production studios (infrastructure). The dtic outlined its three main funding mechanisms as being: cash-flowing dtic incentives as well as pre-sales, venture loans and quasi-equity.

- 3.3. It remains to be seen how effective DTCAG will be. It seems that the ongoing delays in the actual introduction and wide-spread adoption of DTT have undermined any sense of urgency that might have existed for DTCAG. Certainly the draft has not been updated recently and implementation of its recommendations (or those of the 2015 Report) has not proceeded.
- 3.4. While the spectrum auction has already gone ahead, garnering some R14.4billion<sup>125</sup> as a result, the following is clear:
- 3.4.1. The Analogue Switch-off Date has still not been announced by the Department of Communications and Digital Technologies (DCDT) and so digital television is still out of reach for over 36% of the population according to research by the Broadcast Research Commission of South Africa<sup>126</sup> as per the key case on the issue handed down just months ago (at the time of writing) by the Constitutional Court.
- 3.4.2. None of the monies paid for the spectrum has been ear-marked for the development of local content production or indeed for any kind of broadcasting support specifically as ICASA has confirmed that all of the monies were paid into the National Fiscus.

#### 4. THE NATIONAL FILM AND VIDEO FOUNDATION (NFVF)

- 4.1. The National Film and Video Foundation Act, 1997 (NFVF Act)
- 4.1.1. The NFVF Act establishes the National Film and Video Foundation, the objects of which are stated to include to encourage the development and distribution of local film and video products – section 3(c).
- 4.1.2. In order to do so, the NFVF may render financial support to any person, organisation and institution – section 4(1)(a) and advise the Minister of Sports, Arts and Culture on matters concerning the film and video industry – s4(2)(a).
- 4.1.3. The NFVF is empowered, in terms of section 11 to establish advisory panels for every field of the film and video foundation it deems necessary. To date, the NFVF has established four advisory panels on the following:

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<sup>125</sup> <https://www.icasa.org.za/news/2022/icasa-concludes-successful-spectrum-auction-and-collects-more-than-r14-4-billion-proceeds#:~:text=ICASA%20concludes%20successful%20spectrum%20auction.Communications%20Authority%20of%20South%20Africa>

<sup>126</sup> <https://www.concourt.org.za/index.php/judgement/474-e-tv-pty-limited-and-others-v-minister-of-communication-and-digital-technologies-and-11-others-cct89-22-cct92-22>

- 4.1.3.1. non-fiction/documentary production and development;
  - 4.1.3.2. fiction production and development;
  - 4.1.3.3. education and training (including bursaries); and
  - 4.1.3.4. marketing and distribution of local productions.
- 4.1.4. In terms of section 18 of the NFVF Act, the NFFV is required to administer two separate funds established in terms of the NFVF Act, namely:
- 4.1.4.1. the Film and Video Initiative which is to provide funding for feature films and video projects. Unfortunately, neither of these terms has been defined and it is not clear what is included thereunder; and
  - 4.1.4.2. the Film Development Fund which is to provide funding for a number of aspects, including “short and specialised film and video productions”. Again neither of these terms is defined and it is not clear what is included thereunder.
- 4.1.5. In response to written questions, representatives of the NFVF clarified in written responses<sup>127</sup>, that despite the NFVF Act stating that it brought the two funds into being, the two Funds have never existed in reality as a result of “budgetary constraints”.
- 4.1.6. Importantly, section 16(2)(a) of the NFVF Act specifies that “at least 75 per cent of the funds contemplated in subsection (1)(a) [its allowable sources of income] shall be distributed as grants in support of the film and video industry, unless otherwise approved in writing”. In this regard:
- 4.1.6.1. it is not clear if this 75% threshold had in fact been lowered in accordance with the provisions. In its 2020 Annual Report, the NFVF notes that the actual budget of the NFVF for that period is “as per the decision of the Foundation to assess the 75/25 which was approved to be increased to 70/30”.<sup>128</sup> In answer to specific questions<sup>129</sup>, the NFVF clarified that it “never took a decision to change the split” but it was an escalation of “operational costs” which resulted in the NFVF using more than the stipulated 25%. The NFVF stated that when this was queried by the Treasury, the Minister was engaged which resulted in Ministerial approval of the split change only in 2021. Despite requests therefor, the

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<sup>127</sup> Email Response from the NFVF dated 22 February 2022.

<sup>128</sup> At pg. 109.

<sup>129</sup> Email Response from the NFVF dated 22 February 2022.

required written approval of the split change by the Minister was not provided - with the NFVF explaining the engagements were “confidential”. The obvious implication of the split change is that a lower percentage (some 5% reduction) of the monies available to the NFVF is spent on grants in support of the film and video industry. Further, the permission was said to have been granted in 2021 which is after the period covered by the 2020 Annual Report and so was granted retrospectively and after the finalisation of the Annual Report; and

- 4.1.6.2. it is important to note the provisions of section 16(6) which requires the NFVF to submit a statement to the Minister for approval of the NFVF’s “estimated income and expenditure during the coming financial year”. In terms of section 16(2)(b) the NFVF may “with the approval of the Minister utilise any balance of such money remaining at the end of the financial year of the [its NFVF] for any expenses in connection with the performance of its functions” however this appears to “be subject to paragraph (a)”, that is the 75% threshold for grant distribution. This can potentially be abused. For example, in the 2020 NFVF Annual Report, the actual total income was R173 703 704.00, but the budgeted-for income was only R140 308 000.00<sup>130</sup>. This represents an under-budgeting of R33 395 704.00 or relative to income, approximately 24%. If the NFVF is interpreting section 16(2)(b) as allowing it to use any such unbudgeted-for income for its own purposes without having to consider section 16(2)(a) then this would undermine the purposes and intentions of section 16(2)(a) which are to ensure that 75 or 70% (as ostensibly approved by the Minister) of the income of the NFVF is spent on grants. However, in response to questions, the NFVF clarified that:

- (a) it is required to adopt a zero-based budget as per the National Treasury Guidelines which is based on the estimated annual allocation granted by the Department of Sport, Arts and Culture (DSAC);
- (b) the actual funding received by the NFVF included other income, besides the DSAC grant, including from sources such as: investment interest, sponsorships, donations, and from SETAs and these were not budgeted for as they are uncertain/not guaranteed.

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<sup>130</sup> At pg. 109.

#### 4.2. NFVF 2020 Annual Report

- 4.2.1. It is clear that in the period covered by the 2020 Annual Report, and which was prior to the stated change in the percentage split (which was in 2021 according to the NFVF), there appears to have been significant non-compliance with this peremptory provision of the NFVF Act if one reviews the Audited Financial Statements contained in the 2020 Annual Report. In this regard, the required split applicable at the time was 75/25% - and the 2020 the NFVF's Financial Statements reflect a total income of R173 703 704.00 which would have required a grant spend of R130 277 778.00 but in fact the actual total grant expenditure was only R85 875 802.00<sup>131</sup>. This means that the NFVF spent only 49.43% of its income on grants instead of the statutorily required 75%. What is more worrying is that the budgeted amount for total grant expenditure (which was not met) was only R98 216 000.00 which is still only 56.54% of the total income received and is, again, not close to the statutorily required 75%. The effect of this is that it appears that the NFVF was acting unlawfully in that it failed to comply with the statutory obligation provided for in its governing legislation. In its written response<sup>132</sup> the NFVF explains that the allocation from DSAC was R140million and that it is this figure that the grant funding spend should be calculated on. Further the NFVF stated that the reason it underspent on its proposed expenditure on grant funding was due to Covid lockdowns. However the period covered by the 2020 NFVF Annual Report was before the Covid 19 Pandemic.
- 4.2.2. Section 37 of the Financial Statements constitutes Notes on Compliance with Section 16(2). It is somewhat confusing as the notes refer to a proposed and actual budget of only R140 308 000.00 and does not refer to the actual income of R173 703 704.00. Again, this represents an under-budgeting of some 24% of income actually received – an amount of R33 395 704.00 and it is not clear why no estimate of income received from sources other than the DSAC grant can be made.
- 4.2.3. It is also noteworthy that only R42 772 319.00 or 49.8% of the NFVF's actual grant expenditure was spent on the development and production of content<sup>133</sup>. While this is not contrary to the provisions of the NFVF Act, it goes to show that only 24.62% of the NFVF's income was spent on grants for the development and production of content.

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<sup>131</sup> At pg. 80.

<sup>132</sup> See emailed written responses to written questions dated 22 February 2022.

<sup>133</sup> Paragraph 21 at pg. 98.

- 4.2.4. Further, according to at least one of the interviewees<sup>134</sup>, a related problem is that the marketing and distribution of local productions budget is also deemed to be grant funding when it is often spent on NFVF expenses on work the NFVF does to market local productions. The Financial Statements reflect that the amount of R25 159 976.00 spent on “Local and global positioning”<sup>135</sup> which constitutes 14.46% of the NFVF’s income but it is not clear how much of this was spent of NFVF’s own expenses for marketing local productions. The NFVF, in its written responses, clarified that of this, R10million was “awarded to filmmakers”; R14million and R11million “was spent on marketing and distribution for the benefit of film-makers” and R3million was spent on NFVF administration expenses “necessary for the execution of these programs.”
- 4.2.5. Perhaps more worrying are the findings by the Auditor-General<sup>136</sup> in paragraphs 27-29<sup>137</sup> on the Internal Control Deficiencies she identifies in respect of the NFVF’s financial reporting and finances generally, in which she found:

***The accounting officer did not adequately exercise oversight responsibility regarding financial and performance reporting and compliance with legislation. The entity did not have adequately implemented monitoring and reviewing controls to ensure that financial and performance report submitted for auditing were accurate and complete.***

***Senior management lacked the necessary implementation of controls over financial and performance reporting and compliance with key legislation. As a result, there were inadequate year-end reconciliations, a lack of review of reports and a lack of monitoring over proper control implementation. Furthermore, there was a lack of a proper record management system that could support the information reported in the financial statements and the annual performance report. As a result, material errors were identified during the audit process.***

***Senior management did not ensure that adequate reviews are performed on the submitted financial statements to ensure that they are accurate and complete and compliant with the GRAP, which resulted in material amendments to the annual financial statements.***

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<sup>134</sup> A full list will be part of the final report.

<sup>135</sup> Paragraph 21 at pg. 98.

<sup>136</sup> September 2020.

<sup>137</sup> At pg. 77.



- 4.2.6. The above assessment is damning.
- 4.2.7. Further, it is clear that the peremptory grant funding requirements of the NFVF Act were not complied with. This failure to expend the statutory minimum required percentage of income on grant funding is reviewable administrative action on at least four grounds in terms of the PAJA in that:
- 4.2.7.1. a mandatory and material procedure of condition prescribed by an empowering provision was not complied with – s6(2)(b);
  - 4.2.7.2. the action itself contravened a law or was not authorised by the empowering provision – s6(2)(f)(i);
  - 4.2.7.3. the action concerned consisted of a failure to take a decision – section 6(2)(g); and/or
  - 4.2.7.4. the action was otherwise unconstitutional or unlawful – s6(2)(i).
- 4.2.8. Lastly, it is unlikely that the reduction of the percentage to be spent on grant funding (from 75% to 70%) which was ostensibly approved by the Minister in 2021 could have been lawfully done without any public process involving the film production sector itself. The PAJA requires<sup>138</sup> that administrative action that impacts the rights or legitimate expectations of any person or of the public must be subject to, at very least, a notice and comment procedure. It is clear that this did not happen and that the approval ostensibly granted came years after that split was already *de facto* implemented by the NFVF as is clear from its 2020 Annual Report.
- 4.3. The NFVF's 2020 Funding Policy
- 4.3.1. The NFVF's 2020 Funding Policy (Funding Policy) was adopted in August 2020, but unfortunately, the Funding Policy does not talk coherently to the terms used in the NFVF Act and does not correlate with the two funds established in terms of the NFVF Act, that is, the Film and Video Initiative Fund and the Film Development Fund – section 18(1) of the NFVF Act.
  - 4.3.2. The NFVF Act requires the NFVF to establish two funds as was set out above in brief. These are:
    - 4.3.2.1. the Film and Video Initiative which is to provide funding for “feature films and video projects” - s18(1) read with s18(3);
    - 4.3.2.2. the Film Development Fund which is to provide funding for:

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<sup>138</sup> See sections 3 and 4.

- (a) entry-level producers and first-time directors;
- (b) bursaries for studying filmmaking;
- (c) short and specialised film and video productions;
- (d) script development – s18(1) read with section 18(4).

- 4.3.3. Instead of establishing these two funds with their relatively narrow focus as required in terms of the NFVF Act, the NFVF's Funding Policy provides that it supports members of the motion picture community by providing funding for "Training, Development, Production, Distribution and Marketing" – a far broader ambit. While this is in line with the general objects of the NFVF as set out in section 3 of the NFVF Act, it is not in line with the provisions of the NFVF Act that relates to the distribution of monies from the two funds required to be established in terms of the NFVF Act and which are subject to peremptory provisions regarding the percentage of income that the NFVF is to spend on such grant funding.
- 4.3.4. The NFVF is entitled, in terms of section 4 to determine which field of the film and video industry should have preference for the purpose of support thereof. And the NFVF has done so as is set out in section 5 of the Funding Policy. It is imperative to note that no NFVF funding goes to any Commissioned Programmes (defined as "an audiovisual production that is produced as a result of the commission by broadcaster or distributor of any kind"). And so, the NFVF does not support work commissioned by any broadcaster or OTT service such as Netflix.
- 4.3.5. In respect of television or OTT content, the NFVF also does not fund the following formats: current affairs, music videos, news, panel programmes, public and sports events, reality programmes, soaps, talk shows and variety programmes – s 5(2) of the Funding Policy; even where these have not been commissioned by a broadcaster or distributors.
- 4.3.6. In respect of training funds, the NFVF does not fund educational qualifications in the performing arts – s5.3 of the Funding policy.
- 4.3.7. The NFVF's funding streams are as follows:
- 4.3.7.1. **Development:** feature films (fiction); feature films (documentary); short film (fiction); short film (documentary); TV formats; animation short films; feature film (animation); TV feature series (animation) – s13 of the Funding Policy
  - 4.3.7.2. **Production** – s14 of the Funding Policy: this is broken down into two broad categories:
    - (a) Fiction: feature film; TV film; short films; TV formats (pilot); feature

film (animation); short film (animation); and web series – s14.1; and  
 (b) Non-Fiction/Documentary: Feature film; short film; TV feature series  
 (2 - 3 part) – s14.2.

- 4.3.7.3. **Post-production** – s15 of the Funding Policy: feature film (fiction); feature film (documentary); and archive;
  - 4.3.7.4. **Archive footage** – s16 of the Funding Policy;
  - 4.3.7.5. **Slates** – s17 of the Funding Policy: fiction slate (emerging to experienced); female slate (developmental); youth slate (developmental); documentary slate; animation slate and disabled filmmaker slate.
  - 4.3.7.6. **Festival Hosting** – s18 of the Funding Policy;
  - 4.3.7.7. **Marketing and Distribution** – s19 of the Funding Policy; and
  - 4.3.7.8. **Market and Festival Attendance** – s20 of the Funding Policy;
- 4.3.8. It is not clear how these eight different grant streams fit into the two funds and associated categories specified/required in terms of the NFVF Act. What is clear – when one looks at the provisions of section 18 of the Act which deals with grant funding, is that three of the categories ie festival hosting, market and festival attendance and marketing and distribution, are not activities that are listed in the various provisions of grant-funded activities specified in section 18.
- 4.3.9. The effect of this is that it appears that while the NFVF Act intended for the funding to be made available in terms of that Act was to primarily sustain local productions, it appears that other focal areas receive a far greater proportion of the funds than was intended. This is borne out by the amounts spent on actual production support from income received by the NFVF for the 2020 period as detailed in section 4.2 above.

#### 4.4. Other NFVF-related Funding Initiatives:

- 4.4.1. NFVF and Netflix<sup>139</sup>:
  - 4.4.1.1. The NFVF and Netflix have established a joint fund of R28million to fund six South African micro-budget feature films:
    - (a) four films by emerging film agree-makers capped at R4million each;

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<sup>139</sup> <https://www.nfvf.co.za/home/index.php?ipkMenuID&ipkArticleID=762> [Last accessed 23 May 2021]

and

(b) two films by established filmmakers capped at R6million each.

4.4.1.2. All six films are to premier on Netflix.

4.4.2. This kind of initiative ought not to be confined to partnerships with OTT providers such as Netflix but should also be encouraged of broadcasters that operate within the South African market too. The aim of all funding initiatives should be the development of local audiovisual content for enjoyment by the public and internationally.

4.4.3. NFVF and TikTok<sup>140</sup>

4.4.3.1. The NFVF and TikTok have developed an initiative called Rising Voices to fund 100 Black content creators in developing their digital skills.

4.4.3.2. While this may, of course, lead to such content creators making the leap from creating TikTok videos to made-for-television productions, the initiative is not aimed at funding local television or OTT content production.

4.5. It was noteworthy how often members of the independent production sector spoke of the clear changes that have taken place within the NFVF in the recent past. Producers spoke of a much-improved environment of trust between them and the NFVF and also of the greater transparency that was evident under the new board and management. Producers spoke of the willingness on the part of current NFVF officials to, for example, share draft budgets and to allow for much more involvement by the independent producers on funding-related discussions. This level of trust is also evident in the primary role that most independent producers appear to want the NFVF to play as the interface organisation between the production sector and all governmental entities with regards to funding and incentive initiatives.

## 5. THE DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION (dtic)

The dtic has a number of financial support incentives for the local film and television production sector<sup>141</sup>. We focus on those that support local television productions and so have excluded the Foreign Film and Television Production and Postproduction Incentive (Foreign Film)<sup>142</sup>.

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<sup>140</sup> <https://newsroom.tiktok.com/en-africa/tiktoklaunchesrisingvoicesincubatorproject> [Last accessed 23 May 2021]

<sup>141</sup> <http://www.thedtic.gov.za/financial-and-non-financial-support/incentives/film-incentive/> [Last accessed 23 May 2021]

<sup>142</sup> <http://www.thedtic.gov.za/financial-and-non-financial-support/incentives/film-incentive/foreign-film-and-television-production-and-post-production-incentive-foreign-film/> [Last accessed 23 May 2021]

### 5.1. The SA Film and Television Co-production Incentive<sup>143</sup>

Key aspects thereof are as follows:

5.1.1. This incentive provides a reimbursable grant of 35% of Qualifying South African Production Expenditure (QSAPE) to a maximum of R50million to South Film and Television Co-productions. This can be increased to 40% of QSAPE for productions hiring at least 20% black South African citizens as heads of department and procuring at least 30% of the QSAPE from 51% South African black owned entities which have been operating for at least a year.

5.1.2. The key eligibility criteria are as follows:

5.1.2.1. It is available to qualifying official treaty co-productions only<sup>144</sup> as approved by the Minister of Sports, Arts and Culture<sup>145</sup>. According to the NFVF website<sup>146</sup>, South Africa has co-production treaties with: Canada, Germany, Italy, the United Kingdom, France, New Zealand, Australia, Ireland, and the Netherlands. Besides being a co-production, there are a number of additional requirements<sup>147</sup>:

5.1.2.2. The applicant must be a South African production company and the holding company thereof must have a majority of South African shareholders, at least one of which must play an active role in the production and be credited therefor.

5.1.2.3. Productions must have a minimum QSAPE of R2.5million for all qualifying production formats and a minimum of R500 000.00 for documentaries.

5.1.2.4. The applicant must have secured at least 25% of the total production budget.

5.1.2.5. The applicant must register a special-purpose corporate vehicle (SPCV) solely dedicated for the production of the film or television project.

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<sup>143</sup> <http://www.thedtic.gov.za/financial-and-non-financial-support/incentives/film-incentive/sa-film-tv-production-and-co-production-sa-film/> [Last accessed 23 May 2021] and [http://www.thedtic.gov.za/wp-content/uploads/SA\\_Film-Guidelines.pdf](http://www.thedtic.gov.za/wp-content/uploads/SA_Film-Guidelines.pdf) [Last accessed 23 May 2021].

<sup>144</sup> See clause 3.3 of the Guidelines.

<sup>145</sup> See clause 5.2.2.1 of the Guidelines.

<sup>146</sup> <http://www.nfvf.co.za/home/index.php?ipkContentID=42> [Last accessed 10 March 2020]

<sup>147</sup> See clause 4 headed "Mandatory Conditions", 5.2 "Project Eligibility Requirements", 5.3 "Format Eligibility Requirements" in the Guidelines.

- 5.1.2.6. At least 14 calendar days and 50% of principal photography must be filmed in South Africa - this can be waived for productions with a minimum QSAPE of R50million.
- 5.1.2.7. The following levels of South African participation are required although each can be waived if inclusions of non-South Africans are required by the producers: director, writer and producer; at least two highest-paid performers; the majority of the film's heads of department and key personnel; the holding company must achieve a B-BBEE level 3 status and the SPCV must achieve a B-BBEE level 4 status.
- 5.1.2.8. The applicant must procure a minimum of 20% of qualifying goods and services from entities which are 51% black-owned by South African citizens and have been operating for at least a year.
- 5.1.2.9. The applicant must demonstrate that they adhere to an industry specific code of professional standards that include sexual harassment and health and safety protocols.
- 5.1.2.10. Only the following formats are eligible for this incentive: feature films, tele-movies, documentary (and documentary series and features), animation, television drama and drama mini-series, digital content.
- 5.1.2.11. There are a number of non-qualifying production costs which are set out at clause 9.2 of the Guidelines.
- 5.1.3. It is critical to note that "*commissioned projects owned by a broadcaster*" are expressly excluded from being able to access the incentive<sup>148</sup>.
- 5.1.4. The Incentive Scheme's interaction with other sources of funding<sup>149</sup>:
- (a) if other SA incentive funding is claimed – it must be deducted from the gross QSAPE before calculation of the incentive (except for SETA funds);
  - (b) a project of private investors that is eligible for tax benefits under s12O<sup>150</sup> of the Income Tax Act, 1962, is eligible for the rebate;
  - (c) if national, provincial, local government and its agencies are funding a project – that project is still eligible for the incentive provided that the total state funding does not exceed 80% of the budget.

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<sup>148</sup> See clause 6.1.3 of the Guidelines.

<sup>149</sup> See clause 7 "Interaction of this Incentive with other sources of funding" of the Guidelines.

<sup>150</sup> That is the exemption in respect of films.

5.1.5. It appears that with a few critical changes in the way that commissioning protocols and terms of trade in relation to commissioning operate, this incentive could be used by producers for radically increasing production values for content commissioned by the public broadcaster, the SABC. This For example, the incentive clearly allows for up to 80% of the project to be funded from state resources. This ought to allow for SABC-commissioned work to be eligible too. The critical problem is that the SABC currently insists on owning all commissioned projects (this will be dealt with in detail in the Milestone 4 Report) as it considers itself hamstrung by the Public Finance Management Act, 1999 (PFMA) in terms of flexibility to assign copyright/ownership of commissioned work to independent producers. Therefore, if the SABC were to fund 80% of a commissioned work and assign the ownership/copyright thereof to the local production company that otherwise meets all criteria for the incentive, the commissioned television production would be able to qualify for the incentive.

## 5.2. The SA Film and Television Production Incentive<sup>151</sup>:

5.2.1. This incentive provides a reimbursable grant of 35% of QSAPE to a maximum of R50million to South Film and Television. This can be increased to 40% of QSAPE for productions hiring at least 30% black South African citizens as heads of department and procuring at least 30% of the QSAPE from 51% South African black owned entities which have been operating for at least a year.

5.2.2. The key eligibility criteria are as follows:

5.2.2.1. The applicant must be a South African production company and the holding company thereof must have a majority of South African shareholders, at least one of which must play an active role in the production and be credited therefor.

5.2.2.2. Productions must have a minimum QSAPE of R1.5million for all qualifying production formats and a minimum of R500 000.00 for documentaries.

5.2.2.3. The applicant must have secured at least 25% of the total production budget.

5.2.2.4. The applicant must register an SPCV solely dedicated for the production of the film or television project.

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<sup>151</sup> <http://www.thedtic.gov.za/financial-and-non-financial-support/incentives/film-incentive/sa-film-tv-production-and-co-production-sa-film/> and [http://www.thedtic.gov.za/wp-content/uploads/SA\\_Film-Guidelines.pdf](http://www.thedtic.gov.za/wp-content/uploads/SA_Film-Guidelines.pdf) [Last accessed 23 May 2021]

- 5.2.2.5. At least 14 calendar days and 60% of principal photography must be filmed in South Africa - this can be waived for productions with a minimum QSAPE of R50million.
- 5.2.2.6. The majority of intellectual property must be owned by South African citizens.
- 5.2.2.7. The following levels of South African participation are required: director, writer, and producer; a majority of the five highest-paid performers; the majority of films heads of department and key personnel; the holding company must achieve a B-BBEE level 3 status and the SPCV must achieve a B-BBEE level 4 status.
- 5.2.2.8. The applicant must demonstrate that they adhere to an industry specific code of professional standards that include sexual harassment and health and safety protocols.
- 5.2.2.9. Only the following formats are eligible for this incentive: feature films, tele-movies, documentary (and documentary series and features), animation, television drama and drama mini-series, digital content. And the following formats are expressly ineligible for this incentive: reality television, discussion programmes, current affairs, panel programmes, public and sports events, soapies, news, advertising programme or commercial, video gaming, variety programme, training programme and pilots.
- 5.2.3. It is critical to note that “*commissioned projects owned by a broadcaster*” are expressly excluded from being able to access the incentive<sup>152</sup>.
- 5.2.4. The Incentive Scheme’s interaction with other sources of funding<sup>153</sup>:
- (a) If other SA incentive funding is claimed – it must be deducted from the gross QSAPE before calculation of the incentive (except for SETA funds).
- (b) a project of private investors that is eligible for tax benefits under s12O<sup>154</sup> of the Income Tax Act, 1962, is eligible for the rebate;

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<sup>152</sup> See clause 6.1.3 of the Guidelines.

<sup>153</sup> See clause 7 “Interaction of this Incentive with other sources of funding” of the Guidelines.

<sup>154</sup> That is the exemption in respect of films.



- (c) If national, provincial, local government and its agencies are funding a project – that project is still eligible for the incentive provided that the total state funding does not exceed 80% of the budget.

5.2.5. It appears that with a few critical changes in the way that commissioning protocols and terms of trade in relation to commissioning operate, this incentive could be used by producers for radically increasing production values for content commissioned by the public broadcaster, the SABC. This For example, the incentive clearly allows for up to 80% of the project to be funded from state resources. This ought to allow for SABC-commissioned work to be eligible too. The critical problem is that the SABC currently insists on owning all commissioned projects (this will be dealt with in detail in the Milestone 4 Report) as it considers itself hamstrung by the PFMA in terms of flexibility to assign copyright/ownership of commissioned work to independent producers. Therefore, if the SABC were to fund 80% of a commissioned work and assign the ownership/copyright thereof to the local production company that otherwise meets all criteria for the incentive, the commissioned television production would be able to qualify for the incentive.

### 5.3. The SA Emerging Black Filmmakers Incentive<sup>155</sup>:

- 5.3.1. This incentive provides a reimbursable grant of 50% of QSAPE to a maximum of R50million to emerging black filmmakers.
- 5.3.2. The key eligibility criteria are as follows:
  - 5.3.2.1. The applicant must be a South African production company and the holding company thereof must have at last 65% South African black citizens (this appears to be shareholding), the majority of whom must play an active role in the production and be credited therefor.
  - 5.3.2.2. Productions must have a minimum QSAPE of R500 000.00 for all qualifying production formats.
  - 5.3.2.3. The applicant must have secured at least 10% of the total production budget.
  - 5.3.2.4. The applicant must register an SPCV solely dedicated for the production of the film or television project.

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<sup>155</sup> <http://www.thedtic.gov.za/financial-and-non-financial-support/incentives/film-incentive/sa-emerging-black-film/> and [http://www.thedtic.gov.za/wp-content/uploads/SA\\_Emerging\\_Black-Guidelines.pdf](http://www.thedtic.gov.za/wp-content/uploads/SA_Emerging_Black-Guidelines.pdf) [Last accessed 23 May 2021].

- 5.3.2.5. At least 14 calendar days and 80% of principal photography must be filmed in South Africa – this can be waived for productions with a minimum QSAPE of R50million.
- 5.3.2.6. The QSAPE must account for at least 75% of the total production budget.
- 5.3.2.7. The majority of intellectual property must be owned by South African citizens.
- 5.3.2.8. The following levels of Black South African participation are required: director, writer, and producer; the majority of the five highest-paid performers; the majority (51%) of the heads of department and key personnel.
- 5.3.2.9. The applicant must demonstrate that they adhere to an industry specific code of professional standards that include sexual harassment and health and safety protocols.
- 5.3.2.10. Only the following formats are eligible for this incentive: feature films, tele-movies, documentary (and documentary series and features), animation, television drama and drama mini-series, digital content.
- 5.3.2.11. There are a number of non-qualifying production costs which are set out at clause 9.3 of the Guidelines.
- 5.3.3. It is critical to note that “*commissioned projects owned by a broadcaster*” are expressly excluded from being able to access the incentive<sup>156</sup>.
- 5.3.4. The Incentive Scheme’s interaction with other sources of funding<sup>157</sup>:
  - (a) if other SA incentive funding is claimed – it must be deducted from the gross QSAPE before calculation of the incentive (except for SETA funds);
  - (b) a project of private investors that is eligible for tax benefits under s12O<sup>158</sup> of the Income Tax Act, 1962, is eligible for the rebate;
  - (c) if national, provincial, local government and its agencies are funding a project – that project is still eligible for the incentive provided that the total state funding does not exceed 80% of the budget.

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<sup>156</sup> See clause 6.1.3 of the Guidelines.

<sup>157</sup> See clause 7 “Interaction of this Incentive with other sources of funding” of the Guidelines.

<sup>158</sup> That is the exemption in respect of films.

- 5.3.5. It appears that with a few critical changes in the way that commissioning protocols and terms of trade in relation to commissioning operate, this incentive could be used by black producers for radically increasing production values for content commissioned by the public broadcaster, the SABC. For example, the incentive clearly allows for up to 80% of the project to be funded from state resources. This ought to allow for SABC-commissioned work to be eligible too. The critical problem is that the SABC currently insists on owning all commissioned projects (this will be dealt with in detail in the Milestone 4 Report) as it considers itself hamstrung by the PFMA in terms of flexibility to assign copyright/ownership of commissioned work to independent producers. Therefore, if the SABC were to fund 80% of a commissioned work and assign the ownership/copyright thereof to the local black production company that otherwise meets all criteria for the incentive, the commissioned television production would be able to qualify for the incentive.
- 5.4. It is interesting to reflect on the amounts actually spent by dtic as recorded in its Incentives Report 2020<sup>159</sup>.
- 5.4.1. From the report, the dtic spent:
- 5.4.1.1. R255 675 800.00 in terms of the Emerging Black Filmmakers Incentive in return for a QSAPE spend, domestically, of R503 171 309.00<sup>160</sup> constituting 41% of approvals and resulting in black-owned entities making up 65% of Film and Television Production Incentive entities overall<sup>161</sup>; and
- 5.4.1.2. R208 807 901.00 in terms of the Film and Television Production and Coproduction Incentives in return for a QSAPE spend, domestically, of R554 799 211.00<sup>162</sup>.
- 5.4.2. Further, the vast majority of funded projects were in Gauteng and the Western Cape although there was one approved project in the Northern Cape<sup>163</sup> and three in Kwazulu-Natal<sup>164</sup>.

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<sup>159</sup> <http://www.thedtic.gov.za/wp-content/uploads/dtic-Incentives-Report-2020.pdf>

<sup>160</sup> At page 83.

<sup>161</sup> At page 83.

<sup>162</sup> At page 83.

<sup>163</sup> At page 83.

<sup>164</sup> At page 84.

## 6. FUNDING BY THE INDUSTRIAL DEVELOPMENT CORPORATION (IDC)

- 6.1. The IDC has developed the Media and Audiovisual Strategic Business Unit (MA SBU)<sup>165</sup>.
- 6.2. The goal of the MASBU is to drive the development “of a sustainable media and audiovisual value chain in South Africa” and to that end “to fund a range of activities including “the production of locally relevant and internationally palatable content, with an emphasis on feature films, animation as well as television series”<sup>166</sup>.
- 6.3. The funding can take the form of bridging finance, venture capital, rebate incentives etc.
- 6.4. Importantly, the IDC states that it “seeks projects geared towards the realisation of greater transformation within the media and audiovisual value chain and encourages increased IP ownership by independent producers”.
- 6.5. The IDC offers financial support of up to R1billion<sup>167</sup>.
- 6.6. The IDC’s minimum requirements in respect of funding criteria are:
  - 6.6.1. security (form to relate to the applicant’s specific circumstances);
  - 6.6.2. compliance with international environmental standards;
  - 6.6.3. Shareholders are expected to make some financial contribution (note that the contribution by historically disadvantaged people under special circumstances may be lowered); and
  - 6.6.4. that the project/business must exhibit economic merit in terms of profitability and sustainability.

## 7. INCOME TAX REBATES

### 7.1. Section 12O – Exemption in Respect of Films

- 7.1.1. Section 12O of the Income Tax Act, 1962 exempts from normal tax, receipts and accruals in respect of income derived from the exploitation rights of a film for a period of 10 years – s12O(2). A film is defined in section 12O(1) as “a feature film, a documentary or documentary series or an animation which conforms to the requirements stipulated by the dtic in the guidelines for the South African film and television production and coproduction incentives” provided that the NFVF has

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<sup>165</sup> <https://www.idc.co.za/wp-content/uploads/2019/05/IDC-October-2018-Newsletter.pdf> [Last Accessed 23 May 2021]

<sup>166</sup> Ibid. At pg. 1.

<sup>167</sup> <https://www.idc.co.za/wp-content/uploads/2019/03/Media-Audio-Visuals.pdf> [Last accessed 23 May 2021] at pg. 2.

approved the film as a local production or coproduction and the income is derived from the exploitation of the film.

- 7.1.2. Note that s12O(3) prohibits a broadcaster from obtaining such an exemption.
- 7.1.3. Section 12O(5) also entitles a person to deduct from the income of the taxpayer an amount in respect of any expenditure incurred to acquire exploitation rights provided the exploitation rights was not funded from a loan, credit, or similar financing.
- 7.1.4. Section 12O(6) also exempts SPCVs in respect of any amount received by way of a grant payable by the state under the dtic's South African film and television production and coproduction incentives.

7.2. Section 12J – Deductions in respect of expenditure incurred in exchange for issue of venture capital company shares

- 7.2.1. Section 12J of the Income Tax Act, 1962 allows a deduction from the income of the taxpayer in respect of expenditure actually incurred by the taxpayer in acquiring any venture capital shares issued during the year of assessment. The section is complex and legalistic and there are many qualifications and requirements. But the section has been used for allowing deductions by investors in film SPCVs.
- 7.2.2. It is important to note however, that the deduction is being phased out as section 12J(11) provides that no deduction is to be allowed under section 12J in respect of shares acquired after 30 June 2021.

## 8. THE NATIONAL EMPOWERMENT FUND (NEF)

- 8.1. The NEF was established as a trust in terms of section 2 of the NEF Act, 1998.
- 8.2. The object of the NEF is to “facilitate the redressing of economic inequality” – s3 – and one of the ways in which it does this is through “promoting and supporting business ventures pioneered and run by historically disadvantaged persons” – s3(c).
- 8.3. Although there is a particular funding stream for the Arts and Cultural Venture Capital Fund, the criteria funding appears to be geared towards live performances.
- 8.4. Consequently, the NEF's general funds are those which are available to black people in the independent production sector for use in funding their film and video productions. The eligibility criteria<sup>168</sup> for accessing these funds are as follows:

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<sup>168</sup> <https://www.nefcorp.co.za/products-services/funding-criteria/> [[Last accessed 23 May 2020]

- 8.4.1. commercial viability of the business case being presented;
  - 8.4.2. minimum of 50.1% black ownership interest and operational involvement at managerial and board levels by black people;
  - 8.4.3. the business must be able to repay the NFVF funding;
  - 8.4.4. job creation potential, particularly in rural or economically depressed areas;
  - 8.4.5. co-funding with private or public sector institutions is encouraged in larger projects.
- 8.5. The funding instruments available include: secured debt, unsecured debt (or equity) and a hybrid of the two<sup>169</sup>.

## 9. PROVINCIAL FILM COMMISSIONS

There are a number of provincial film commissions:

### 9.1. The Gauteng Film Commission (GFC):

9.1.1. The GFC is an agency of the Gauteng Provincial Government and it is tasked with the development and promotion of the audiovisual industries, including film, television, documentary production and animation in Gauteng<sup>170</sup>. In the 2019/20 financial year it spent R11 354 461.00 in support of the audiovisual industry<sup>171</sup>.

9.1.2. However, it is important to bear in mind that the income for the same period was over R37 925 087.00 in government grants<sup>172</sup>. This means that less than a third of the GFC's income was spent on actual production-related support.

### 9.2. The KwaZulu-Natal Film Commission (KNFC)<sup>173</sup>:

9.2.1. The KNFC was established in terms of a piece of provincial legislation, the Kwazulu-Natal Film Act, 2010 and the KNFC has established a film fund to provide funding for KZN-based companies and companies producing films in KwaZulu-Natal<sup>174</sup>.

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<sup>169</sup> <https://www.nefcorp.co.za/funding-solutions/funding-instruments/> [Last accessed 23 May 2020].

<sup>170</sup> [https://provincialgovernment.co.za/entity\\_annual/616/2020-gauteng-gauteng-film-commission-\(gfc\)-annual-report.pdf](https://provincialgovernment.co.za/entity_annual/616/2020-gauteng-gauteng-film-commission-(gfc)-annual-report.pdf) [Last accessed 23 May 2020].

<sup>171</sup> Ibid at pg. 18.

<sup>172</sup> Ibid at pg. 65.

<sup>173</sup> <https://kznfilm.co.za/> [Last accessed 23 May 2021].

<sup>174</sup> <https://kznfilm.co.za/funding1/about-funding/> and <https://kznfilm.co.za/wp-content/uploads/2020/05/Revis> [Last accessed 23 May 2021].

- 9.2.2. It provides funding in five broad categories: development, production, audience development, marketing and distribution, and markets and festivals<sup>175</sup>.
- 9.2.3. The focus is on supporting a KwaZulu-Natal story<sup>176</sup> including:
- 9.2.3.1. a story located in KwaZulu-Natal;
  - 9.2.3.2. a story of cultural, historical, or social relevance to KwaZulu-Natal;
  - 9.2.3.3. a story portraying the Zulu culture; or
  - 9.2.3.4. a story shot in KwaZulu Natal, with the location representing another location outside of KwaZulu Natal.
- 9.2.4. To qualify for production or development funding, 50% of the total production budget must be spent in KwaZulu Natal. Further only KZN-based applicants can access development funding<sup>177</sup>.
- 9.2.5. The guidelines developed by the KNFC set out a range of funding options. The maximum amounts of funding available are:
- 9.2.5.1. R1.5m for feature length and animation films (recoupable);
  - 9.2.5.2. R1m for documentary and TV series (of at least 220 minutes) (recoupable).
- 9.2.6. The guidelines expressly exclude: talk shows, music videos, talk or current affairs shows, game shows, events, and adult content<sup>178</sup>.
- 9.2.7. According to its 2020 Annual Report<sup>179</sup>, its total revenue was R94 590 601.00<sup>180</sup>. Of that, it spent R19 212 794.00 on production and development costs<sup>181</sup> and R14 293 402.00 on marketing and projects costs<sup>182</sup>. Together this is slightly more than a third of the revenue obtained by the KNFC in that period.

### 9.3. The Limpopo Film Commission (LFC):

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<sup>175</sup> <https://kznfilm.co.za/wp-content/uploads/2020/05/Revised-Funding-Overview-2020-21.pdf> [Last accessed 23 May 2021].

<sup>176</sup> <https://kznfilm.co.za/funding1/about-funding/> [Last accessed 23 May 2021].

<sup>177</sup> <https://kznfilm.co.za/wp-content/uploads/2020/05/Revised-Funding-Overview-2020-21.pdf> [Last accessed 23 May 2021].

<sup>178</sup> At pg. 3.

<sup>179</sup> <https://kznfilm.co.za/wp-content/uploads/2021/02/KZN-Film-Commission-Annual-Report-2019-2020.pdf> [Last accessed 23 May 2021]

<sup>180</sup> At pg. 78.

<sup>181</sup> At pgs. 78 and 109.

<sup>182</sup> At pg. 108.

The Limpopo Film Commission was established in 2016<sup>183</sup> but not appear to be operational and there is no readily available evidence of funding activities on its part.

## 10. THE MEDIA DEVELOPMENT AND DIVERSITY AGENCY (MDDA)

The MDDA was established in terms of the MDDA Act, 2000 (the MDDA Act). Its projects that it funds, are, in terms of section 19(3) read with 19(4) of the Act, community and small commercial media projects and research projects. The effect of this is that the MDDA is not particularly relevant for the purposes of this research as it does not support commercial or public television content development.

## 11. THE IMPACT OF COVID ON THE LOCAL TELEVISION PRODUCTION SECTOR AND COVID RELIEF FUNDING

11.1. Covid hit the local content production industry severely as Lockdown restrictions made it difficult for production to take place, particularly with regards to the hard lock down restrictions and the restrictions on inter-provincial travel.

11.2. Another crucial blow to the independent television content production sector was delivered by ICASA when it, upon request by the National Association of Broadcasters but without any public consultation, promulgated s4(8A) of its Covid ICT Disaster Regulations<sup>184</sup> which provided that: “television broadcasting service licensees are exempted from compliance with the local television content quotas... during the National State of Disaster” with effect from 5 May 2020. While ICASA has since called for public comments on the impacts of its Covid ICT disaster regulations, it has thus far declined to repeal section 4(8A) despite intense criticism from the independent production sector and from parliament regarding the lack of any public notice and comment procedure pertaining to these provisions.

11.3. The South African Cultural Observatory has issued a report in May 2020 entitled “Measuring the Impact of Covid-19 Crisis on the Cultural and Creative Industries in South Africa: An Early Assessment”<sup>185</sup>. Some key impacts include:

11.3.1. 95% of respondents had experienced cancellation or indefinite postponement of work<sup>186</sup>;

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<sup>183</sup> <https://www.observer.co.za/23627/limpopo-film-commission-launched/> [Last accessed 23 May 2021]

<sup>184</sup> Notice 238, published in Government Gazette Notice 43207, dated 6 April 2020, as amended.

<sup>185</sup> [https://www.southafricanculturalobservatory.org.za/download/comments/533/df877f3865752637daa540ea9cbc474f/KDI\\_Measuring+the+Impact+of+the+Covid-19+crisis+on+the+CCI+sector](https://www.southafricanculturalobservatory.org.za/download/comments/533/df877f3865752637daa540ea9cbc474f/KDI_Measuring+the+Impact+of+the+Covid-19+crisis+on+the+CCI+sector) [Last accessed 23 May 2021]

<sup>186</sup> At pg. 20.



- 11.3.2. only 18% of respondents operating in a face-to-face environment were able to continue to pay all staff as normal<sup>187</sup>.
- 11.4. In March 2020, the Department of Sports, Arts and Culture announced the establishment of R150million Covid relief fund which is now in its third funding phase. Unfortunately, there is very little information available as to how the monies have been allocated and to whom, leading to protests regarding the lack of transparency and alleged corruption.
- 11.5. In August 2020, the NFVF established its Covid-19 Relief Fund<sup>188</sup> aimed at supporting independent freelance practitioners, technical and production crew. The relief provided was R10 000.00 per applicant.
- 11.6. In October 2020, the Presidential Employment Stimulus Programme (PSEP) issued a specific call for sport, cultural and creative industries to apply for a share of the PSEP<sup>189</sup> and allocated R300million for the cultural sector<sup>190</sup>. In respect of the audiovisual industry, the NFVF was appointed as the implementation organisation of the relief funds.
- 11.7. There is very little information provided as to how any of the above funds have been actually allocated.

## 12. LOOKING FORWARD WHAT IS TO BE DONE?

### 12.1. Recommendations by the South African Film Summit 2019

- 12.1.1. In February 2019, the then-Department of Arts and Culture hosted the South African Film Summit which brought together over 900 delegates over two days to discuss the theme: “*Transformation and innovation in the South African Film/Audiovisual Industry and the 4th Industrial Revolution. Are we geared for change?*”<sup>191</sup>
- 12.1.2. The key recommendations that are relevant to this report are those of *Commission 4: Funding and Resourcing for Growth: How do we Improve Funding, Financing, and Investment of the South African Audiovisual Industry?*<sup>192</sup>
- 12.1.3. There were five key recommendations:

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<sup>187</sup> At pg. 26.

<sup>188</sup> <https://www.nfvf.co.za/home/index.php?ipkMenuID&ipkArticleID=722> [Last accessed 23 May 2020]

<sup>189</sup> [https://www.gov.za/speeches/open-call-artists-30-oct-2020-0000?gclid=CjwKCAjw-geFBhAsEiwA2G7Nly-e63W-0NM8rK5sD8jVCbSYnsCQWT7oZN4cbH\\_pyi4O-tlWWJ-PHxoCJh8QAvD\\_BwE](https://www.gov.za/speeches/open-call-artists-30-oct-2020-0000?gclid=CjwKCAjw-geFBhAsEiwA2G7Nly-e63W-0NM8rK5sD8jVCbSYnsCQWT7oZN4cbH_pyi4O-tlWWJ-PHxoCJh8QAvD_BwE) [Last Accessed 23 May 2020]

<sup>190</sup> <https://news.artnet.com/art-world/south-africa-funding-crisis-1956008> [Last Accessed 23 May 2020]

<sup>191</sup> <http://www.dac.gov.za/sites/default/files/Full%20Final%20report%20of%20SA%20Film%20Summit%2018.4.2019.pdf> [Last accessed 24 May 2020]

<sup>192</sup> From pg. 58ff.

- 12.1.3.1. Greater investment into film and audiovisual development to encourage and support creativity and innovation: In this regard the specific recommendations were as follows:
    - (a) establish a youth and gender film fund within the NFVF;
    - (b) increase the NFVF budget to at least R250million of which at least 60% must go towards development and production;
    - (c) establish a dtic incentive for experienced and competent sales and distribution companies for South African audiovisual products;
    - (d) Important to encourage township cinema and to ensure that all cinemas are required to contribute to the development of local films;
    - (e) Require the Universal Service And Access Fund (USAF) to ring-fence 3-5% for the local film production sector; and
    - (f) Require the tourism levy to ring fence 5% for the local film production sector;
  - 12.1.3.2. Government to encourage private sector investment in the film industry through better use of sections 12O and 12J of the Income Tax Act, 1962;
  - 12.1.3.3. Strengthen the South African Audiovisual Forum (SAAF); and
  - 12.1.3.4. Ensure that by 2025, fund allocations are representative of the demographics of the country.
- 12.1.4. It appears that none of these recommendations has been acted on.

## **CHAPTER 5: FUTURE-PROOFING THE LOCAL TELEVISION CONTENT PRODUCTION SECTOR**

**The Brief:** This Chapter contains an in-depth examination of what the latest proposals from the ruling party, government, ICASA, the DCDT and the industry itself in relation to what is needed to secure a sustainable, even vibrant future for the independent production sector in respect of the production of local television content for free to air and subscription broadcasters and for OTT services. The work included a review of global practices in both developed and developing countries (See Chapter 1 of the Report) to ascertain if the current and proposed initiatives to support the local television (indeed all audiovisual) production sector being made in South Africa are in line with best practice.

**Period Reviewed:** In 2008, SASFED and the IPO together with the SABC, commissioned a report into many of the problems facing independent producers. Unfortunately, the report's recommendations were never taken up by the incoming new management at the SABC and so the problems identified therein remain unaddressed. Also, since a 14-year period has elapsed since the production of the report, it was felt to be important to bring the learnings and the recommendations up to date. In this chapter the focus is on the market, policy and regulatory challenges that current and future technology changes are bringing and will bring. It contains suggestions for how to deal with these in line with international best practice.

**Methodology:** Research was conducted by way of desk top research and interviews. Several recommendations regarding policy amendments that are required to be made to, among others, the ECA, via the Draft White Paper on Audio and Audiovisual Content Services Policy Framework, 2020, with a particular focus on increasing the pool of private-sector funding available for the local television production sector, including via funding obligations on OTT services. Recommendations as to the appropriate courses of action that can be followed to secure the implementation of the recommendations are also made.

### **1. INTRODUCTION**

- 1.1. This report examines a number of upcoming key policy proposals that have been put forward by Government and in some cases, by the Ruling Party, for adoption and discusses the independent production industry's response thereto. It develops proposals for how best to tackle the challenges facing the sector going into the future – in order to secure a sustainable thriving independent audiovisual, including television, production sector with all of the consequential positive knock-on effects for the cultural industries sector generally and for the broader economy.
- 1.2. The starting point for this report is to note the number of policy processes that are underway currently which relate to the local audiovisual production sector. These include the Masterplan being developed by the Department of Sports, Arts and Culture and the Department of Small Business Development; the Draft White Paper on Audio and Audiovisual Content Services being developed by the DCDT as well as the ruling party's own internal policy proposals for its upcoming 2022 conference which states "*funding of*

*local content as a way of promoting local culture and heritage should be encouraged...the consideration should be for both regulated quotas and funding that promotes locally produced content*<sup>193</sup>, as well as ongoing developments with regard to the dtic rebates and other support mechanisms for the sector.

- 1.3. This report is to focus on those issues that directly relate to the television and on-demand audiovisual services sector and where the broadcasting and electronic communications regulator, as well as the NFVF, can directly involve themselves in ensuring a fairer, more successful, independent local television production sector.
- 1.4. The ultimate goal of this report is to develop a set of recommendations that can be encapsulated in a set of clear and legally-binding regulations applicable to all relevant licensees which are in line with international best practice.

## **2. THE DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES**

- 2.1. The Draft White Paper on Audio and Audio-Visual Content Services Policy Framework: A New Vision for South Africa (the DWP) was released in Notice 1081, published in Government Gazette 43797 dated 9 October 2020, by the DCDT.
- 2.2. The DWP appears to be forward-looking with regard to the independent production sector, having an entire section, section 6, of the DWP being devoted supporting to the domestic audio and audiovisual production and creative industries sector.
- 2.3. Indeed, the opening paragraph of Section 6 the DWP states that “[t]he funding and support for South African audiovisual content is a key success factor for the new policy framework” given the need for increased amounts of content in a multi-platform/channel environment, particularly television content.
- 2.4. This is all well and good but sadly, the rest of the section is very disappointing from an actual policy point of view. In this regard:
  - 2.4.1. Section 6.1 contains a broad overview (sketched in the most basic terms) of the mandates of the following organisations with regard to supporting audiovisual content production: the NFVF, the IDC, the dtic, South African Revenue Service (SARS), the National Lotteries Distribution Trust Fund, the MDDA and the regional Film Commissions.

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<sup>193</sup> African National Congress, Umrabulo – Policy Conference 2022 Special Edition. Pg. 50/51.

2.4.2. The only actual clear policy proposals made in the entire DWP with regard to supporting local television production (or any other kind of cultural industries support) are contained in paragraph 6.2.1 which contains only three actual proposals:

2.4.2.1. First, the need to conduct a national policy and institutional review to assess not only policy alignment but also the optimal institutional alignment of key entities involved in the sector. In this regard:

- (a) The envisioned additional national policy development process and institutional review should be incorporated into the DWP process as the DWP, being entirely focused on the audio and audiovisual sectors, is, clearly, the proper vehicle for in fact conducting said policy and institutional review.
- (b) It is a missed opportunity that the DWP has failed to set out what the policy for the sector actually is.

2.4.2.2. Second, the need for greater co-ordination between strategic industry partners is critical. In this regard:

- (a) The DWP ought to have set out which industry partners the government consider strategic. It is obviously the state-aligned funding bodies set out in paragraphs 6.1.3 to 6.1.9 of the DWP but clearly there are other critical partners, including: the SABC, ICASA, the Films and Publications Board (FPB) and the DCDT itself.
- (b) Further, nowhere in the DWP does the DCDT set out which industry bodies it considers important and strategic to have relationships with, for example: the IBFC, the IPO and SASFED.
- (c) Lastly, the DWP is a missed opportunity to not set out what such strategic partners coordination could look like/what this would actually mean in real terms. For example in the United Kingdom the broadcasters and the independent producers have established a forum for agreed basic terms of trade including with the involvement of Ofcom which has fundamentally changed the matrix of the industry and have resulted in the United Kingdom's growing from a multi-million GB Pound industry to a multi-billion GB Pound industry. In South Africa properly regulated institutional oversight and enforcement of fair terms of trade between commissioning broadcasters and independent producers including with respect to intellectual property rights, is essential and is a significant gap in the legal and regulatory framework that supports local television content production.

- 2.4.2.3. Third, the DWP states that an institutional framework for the coordination and management of the funding of audiovisual content nationally as well as provincially is required. In this regard:
- (a) Again, this speaks to an additional, future, ad hoc and separate institutional framework development when this ought to be contained in the policy proposals set out in the DWP itself.
  - (b) However, the proposal itself is interesting and useful because of the focus on the need to manage the funding of audiovisual content. This clearly acknowledges the somewhat haphazard spread of potential funders that are not necessarily easy to access for filmmakers, particularly for new market entrants without many resources, individually.
- 2.4.3. What is fascinating is that the summary of the proposals in the DWP<sup>194</sup> are far more candid than the actual policy provisions of the DWP themselves. In this regard:
- 2.4.3.1. The summary states: “There are numerous Ministries, Departments and national public entities that are involved in the development and funding of the audiovisual content industry, resulting in a confusing mess that creatives and aspirant independent producers have to navigate through to find funding for their projects.”
  - 2.4.3.2. The summary also states: “The [DWP] proposes that there be a national policy and institutional review to ensure that institutional framework that supports the optimum funding of audiovisual content at national provincial and local level in South Africa is put in place to reduce this confusion and stimulate the 4IR.” This reference to local level funding is not mentioned anywhere else in the DWP. Again, it is unfortunately that this framework wasn’t simply developed by the DCDDT as part of the overall DWP policy development process as there is unlikely to be another policy opportunity that impacts all relevant stakeholders again for years, if not decades.

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<sup>194</sup> At pg 134 of the DWP.

### 3. KEY POSITIONS ON THE DWP ADOPTED BY RELEVANT INDEPENDENT PRODUCTION SECTOR-STAKEHOLDERS

3.1. Numerous key stakeholders made written representations to the DCDT on the DWP. These contain a number of important new proposals based on credible international research undertaken by these stakeholders. However SASFED, the IBFC and the IPO (collectively the Industry) all agreed on the following key positions for taking the industry forward, I include here a summary thereof:

3.1.1. The problems with the existing regulatory framework of local content and independent production quotas, including ICASA's lack of capacity to monitor and enforce compliance therewith. In this regard:

3.1.1.1. The Industry stated that it was essential that the entire local content and independent commissioning classification and verification process be simplified to guard against platform shopping by Audiovisual Content Services (AVCS), that is, to create more equitable and implementable regulatory obligations as between qualifying broadcasting and qualifying On-demand AVCS.

3.1.1.2. On the role of the regulator, the Industry submitted that ICASA must be required, empowered and funded to be able to conduct monitoring and enforcement of compliance with all local content broadcast and local original production quotas, including funding obligations and independent production obligations. It stated that these monitoring and enforcement obligations must include being able to monitor and enforce compliance with terms of trade requirements such as annual inflationary increases on the cost per minute paid. This latter monitoring and enforcement is currently not being carried out by ICASA.

3.1.1.3. The Industry submitted the first and second IBFC Draft Reports of this NFVF project (on local content and independent commissioning regulatory issues) to demonstrate to the DCDT the nature of the difficulties being experienced. In particular that:

(a) ICASA appears to find it difficult to monitor/report on in a transparent and independently-monitorable way due to the lack of a prescribed reporting form for television broadcasters that provides for all regulatory and licence condition local content and independent production variables.

(b) It was essential that local content/independent production obligations set out in terms of regulations and licence conditions are amended and simplified so that they are workable and enforceable and so that monitoring is transparent and able to be checked by the

independent production industry too. In this regard, the Industry thought it important that outside stakeholders who should be entitled to cross-check the regulator's monitoring and compliance efforts of qualifying broadcasters and on-demand AVCS include: government, members of the public, competitor broadcasters and the Industry's representative bodies (for example, SASFED, the IBFC, the IPO and other industry representative bodies).

- (c) The Industry pointed out how few ACRs there are for television broadcasters, particularly that the SABC has only ever received one ACR for television, in 2008.
- (d) The overall recommendations that were made is that all qualifying broadcasting and qualifying on-demand AVCS be required to submit compliance reports to ICASA in a properly prescribed format and that all reports are to be made immediately available on the ICASA website. Thereafter, ICASA's draft ACRs in respect of each service is to be published for public notice and comment to allow for cultural industries and other interested parties to comment on compliance matters. Further ICASA must issue finalised compliance reports on each qualifying service annually.

3.1.2. The need to continue with local content and independent production quotas in respect of the amount of local and independently-produced content to be flighted on AVCS. In this regard:

- 3.1.2.1. In broad terms the Industry wants to see both quotas in respect of the amount of local content to be flighted on various audiovisual platforms AND the imposition of financial obligations to "spend" a percentage of turnover revenue on original local production and independently commissioned content.
- 3.1.2.2. The Industry submitted that without proper regulation of South Africa's AV sector to take account of the disruption brought about by the 4th IR, economic power will be concentrated in this area and the country's cultural identity will be eroded.
- 3.1.2.3. Therefore, the Industry proposed that all AVCS meeting the regulatory thresholds (whatever these are ultimately to be) will have obligations to flight local content.
- 3.1.2.4. There are two aspects to its proposals on the content and independent production quota issue:



3.1.2.5. Broadcast quota:

- (a) The Industry submitted that all qualifying television broadcasters must be required to flight local television content as a percentage of the hours of programming flighted on any linear broadcasting service.
- (b) For legacy terrestrial free-to-air television broadcasters, the Industry suggested that there be no reduction in the overall local content percentage requirements applicable to public, commercial and community services. However, in order to take account of the African Continental Free Trade Agreement (AfCFTA), it suggested that a small percentage (of not more than five percent) to be imposed on top of the local content quota for content from other African Union countries, but only where there are reciprocal, bi-lateral agreements with such other African Union countries that impose a reciprocal quota to encourage the flighting of South African content.
- (c) For new free-to-air terrestrial and satellite television broadcasters, the percentage of programming required to be local is to be 20% initially, with an obligation to climb to the following quotas within five years: 45% for commercial operators; and 65% for community operators and for the SABC's television services.
- (d) For existing subscription television broadcasters, the Industry suggested that the percentage of programming across the bouquet required to be local is to be 15%.
- (e) For new subscription television broadcasters, the Industry submitted that the percentage of programming required to be local is to be 5% with an obligation to climb to 15% within five years.

3.1.2.6. Local Original Production Spend Quota:

Consequently, the Industry proposed that the following minimum financial spend quotas be included as a matter of policy by the DCDT in the next version of the draft White Paper:

- (a) commercial and community terrestrial free to air or subscription television broadcasters, funded through subscription, advertising or a mix of them, should spend a minimum of 20% of their annual turnover on the production or coproduction of original local content;
- (b) the public terrestrial broadcaster (SABC) should spend a minimum of 25% of its annual turnover on the production or coproduction of original local content;

- (c) satellite broadcasters should spend a minimum of 10% of their annual turnover on the production or coproduction of original local content;
- (d) qualifying on-demand AVCS should spend a minimum of 15% of their annual South African turnover on the production or coproduction of original local content; and
- (e) further, that a minimum of 65% of all amounts referred to subparagraphs (a) to (d) immediately above, be spent on *independently-commissioned productions*. (my emphasis).

3.1.3. The need for a special fund to be created, funded by all who benefit financially from the broadcast, flighting or carriage of content. The Industry was of the view that, in addition to the local and original local content and independent commissioning obligations set out above, it is essential that there be a properly resourced fund (the Industry suggests that this be named the Creative Audiovisual Production Industry Fund (the Fund) to support the production of local content. The contributions ought to be made by all entities that benefit from content-driven income, including: television broadcasters, AVCS as well as ECS and ECNS licensees, all of whom benefit from, and are dependent on, the content flighted on or over their services/networks for advertising revenues, subscriptions, data income, network/signal distribution fees etc. This suggestion is in line with new developments internationally and is not dissimilar to new funding requirements which have been introduced in Ghana and in the European Union (see Chapter 1). In this regard:

- 3.1.3.1. The Industry submits that all Electronic Communications Network Services (ECNS), Electronic Communications Services (ECS) and qualifying AV operators (whether broadcasters or on-demand AVCS) must contribute to a local audiovisual content fund to support the production of local content and the South African independent creative production industry as a whole.
- 3.1.3.2. All beneficiaries of the AV content distribution chain who benefit from the distribution of audiovisual content ought to contribute to such an audiovisual content fund which fund supports the production of independent original South African audiovisual content.
- 3.1.3.3. The Industry proposes that this be done on the basis of an annual levy based on a percentage of turnover generated in South Africa to be paid into the fund and it suggests that such percentages be as follows:

- (a) 3% on annual turnover of qualifying AVCS whether broadcasters or on-demand AVCS; and<sup>195</sup>
- (b) 1% of annual turnover of all ECNS and ECS.

3.1.3.4. The Industry was non-committal as to which organisation should administer the Fund. It noted that while the NFVF has a particularly developmental mandate, it is of the view that the Fund should have a commercial mandate with the aim of rapidly growing the sector as a whole.

3.1.4. The incorporation of the so-called Industry Masterplan into a single national effort spearheaded through the DWP process, precisely to avoid the existing “confusing mess” so characterised by the DCDT in the DWP. This requires that amalgamation of the different reviews/policy development processes being undertaken by, among others, ICASA’s Digital Terrestrial Content Action Group, the Department of Science, Arts and Culture’s Reference Group’s efforts and the Small Business Department’s Masterplan. In this regard:

3.1.4.1. The Industry recognised that an overarching review of these initiatives is, of course, required to be undertaken, as the DCDT correctly sets out on page 134 of the DWP but that it must be undertaken jointly (by the dtic, DSAC, Treasury, SARS and, importantly, the main industry producer organisations) and together with a review of all current funding mechanisms and instruments for the sector, including with regard to:

- (a) Assessing the current production rebate system in the context of incentive systems such as tax credits that exist in other jurisdictions, and are administered by the revenue services of those countries, to determine if one or the other, or a mix, is more optimal for South Africa;
- (b) Whether tax credits, rebates or tax incentives, the administration of these must be reliable in the manner of VAT refunds so that they can be financed by regular banks; and
- (c) The considerations of other tax benefits such as Section 12O (an incentive to stimulate the production of films within the country; an exemption from normal tax, specifically income derived from the exploitation rights of a film) and 12J (incentivises South African

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<sup>195</sup> Note that the IPO submission also suggested that this be levied on turnover of cinema operators too but I think that this may prove too difficult in an environment where they are not regulated by ICASA and so I have left this suggestion out of the summary of the IPO’s submission.

taxpayers to invest in local companies and to receive a tax deduction of up to 100%) of the Income Tax Act 58 of 1962 (as amended) in regard to their current usefulness so that they better fulfill their purpose of encouraging more private investment in the sector.

- 3.1.4.2. Importantly, the Industry argued that direct public funding that is distributed via the national government, provincial governments, local governments, and any other public service funding based on state obligations to particular groupings, including Broad-based Black Economic Empowerment, language usage, youth, women, disabled people, regional representation and the like, is another key area of support that is required to be dealt with in the overarching review; and
- 3.1.5. The need to address specific concerns regard the South African Broadcasting Corporation (SABC), the NFVF and other funding bodies and certain other miscellaneous matters. In this regard:
  - 3.1.5.1. In relation to the SABC, the Industry made a number of submissions, including:
    - (a) First, the provisions of the PFMA together with certain relevant and certain Treasury requirements, were said to make it impossible for the SABC to react with any agility to coproduction opportunities including with regards to intellectual property in respect of commissioned content. The Industry submitted that this results in significant international content sales opportunities being lost for commissioned content. The Industry suggested that the National Treasury be approached to delegate a certain level of authority to the SABC itself enabling it to make decisions in respect of the commercial licensing of commissioned content with requiring all necessary PFMA permissions.
    - (b) Second, the Industry noted that the SABC's Terms of Trade were moribund. For example, despite the provisions of the Annexure to the Commissioning Regulations which require Terms of Trade to set out price determinants such as inflation, no inflationary-linked adjustments have been made by the SABC for at least the past decade and so commissioning fees are effectively 40% of what they were a decade ago in terms of pricing parity. The Industry submitted that the final version of the White Paper must stipulate an annual inflation/CPIX-based Terms of Trade review, negotiated with the recognised producing bodies and as facilitated and approved by

ICASA. The IPO submitted that the White Paper must deal with this issue in detail as ICASA has failed to act to safeguard independent commissioning to the extent required by the regulator of these issues.

- 3.1.5.2. In relation to the NFVF and other funding bodies, as well as on related issues, the Industry made the following submissions:
- (a) That the Industry has specific concerns regarding the operations of the NFVF, the dtic and the IDC all of which are supposed to play a critical role in the sustainability of the local production sector.
  - (b) The Industry submitted that the dtic rebates must count towards the Independent Producer's share of a project.
  - (c) The Industry stated that there must be more transparency in respect of the NFVF's income and funding. For example, audited accounts of the NFVF should be publicly available so that independent assessments can be made as to whether or not the NFVF is complying with the statutory obligation of ensuring that 75% (or 70% as the NFVF says is the currently agreed split – see Chapter 4) of Treasury funding is paid out as 'grants' in compliance with the NFVF Act and not used internally for marketing or other expenses.
  - (d) That any funds received by the NFVF, for example from Deukom in lieu of investing in local content, must be in addition to the 75% statutorily required to be spent on grants and not be absorbed into the NFVF's operational budget.
  - (e) That the NFVF must assist, where requested, in administrating a project that requires liaison with other funding bodies such as the dtic and the IDC etc to obtain/justify tax credits, loans, guarantees and the like. This is particularly important for new market entrants.
  - (f) That the NFVF must be staffed by people with specialist cultural industry expertise with a particular focus on audiovisual content.
  - (g) That the NFVF Act be amended to make provision for an industry liaison/advisory grouping to meet with NFVF at least quarterly to discuss issues of mutual concern with industry representatives from bodies such as: IPO, SASFED, IBFC etc.
  - (h) That government funding of the NFVF should be increased from R140million to R250 – R300 million to support the development of commercially viable content with universal market appeal and investment recoupment potential as low-budget productions will not be able to be saleable internationally. Similarly, NFVF Development and Production grant allocations to be increased from R150 000,00

for script development to R350 000.00, and production funding should be increased from R1.8million to R3.8million as this will attract investment from other investment agencies such as the IDC, the NEF, private equity investors and also secure interest from international distributors/ sales agents and broadcasters.

- (i) Intellectual Property/exploitation rights must be negotiated within the Term of Trade negotiations with broadcasters and on-Demand AVCS to ensure producers retain rights in the medium to long term bases and to secure future income from their work. This is in line with international developments for example, this single change kickstarted a wave of industry growth and investment in the UK.
- (j) The IPO (note that SASFED did not concur in these submissions) stated that Copyright Amendment Bill and the Performers Protection Bill present significant threats to the financial viability and growth of the independent production sector and ALL workers therein. It said that this had been tacitly recognised by the Presidency which referred the Bills back to Parliament in June 2020 citing constitutionality concerns. The IPO urged that any further amendments be informed by a series of consultations with all relevant government departments and all affected stakeholders, facilitated by experts in this field and taking into account international best practice, to ensure a copyright and royalties regime that will stimulate rather than stifle the sector.
- (k) The Industry submitted that the financing criteria of the IDC's Film Finance Division needs to be realigned from the current investment principle of "last in, first out" to "first in, last out" as this would ensure the capacity to carry Return on Investment (ROI) for longer periods. It stated that this was in accordance with the need to "resuscitate the industry", also to attract other private equity investors, including distributors.

### 3.2. Additional Submissions by SASFED:

The SASFED contribution is noteworthy for the breadth of the representation, across the industry, that comprises SASFED, a national federation of independent film, television and audiovisual industry organisations and its current membership includes: the Documentary Filmmakers' Association, the IBFC, the IPO, the Personal Managers Association, Animation South Africa, the South African Guild of Actors, Sisters Working in Film and Television, the South African Guild of Editors and the Writers Guild of South Africa. In this regard:

- 3.2.1. The SASFED submission emphasised the contributions to the economy that are made by the local production sector highlighting its potential to contribute to the

country's economic recovery and growth: it creates thousands of jobs, from world-class cast and crew to new unskilled entrants to the workplace who can create a sustainable successful career in the industry (playing a meaningful role in the NDP 2030 goals); it attracts billions in foreign direct investment; it rapidly injects capital throughout the economy (67% of production spend flows to other sectors, the bulk of which is spent during the shooting period of the production); throughout the value chain and supply network it contributes substantial taxes, the immense "soft" but critical value of promoting our stories, national identity and culture, locally and globally, which only this sector can do; and promotes brand South Africa.

- 3.2.2. SASFED also set out the exportable nature of South Africa's audiovisual products and emphasised that before the Covid 19 lockdown, the local production sector "was starting to enjoy a seismic shift in international recognition and marketability. On a global level, the last few years have been characterised by the merger of the film and TV world and, fuelled by the multiplication and the growth of giant streaming platforms, the explosion of the demand for scripted content also described as the "Golden age of TV". South Africa benefited from this phenomenon by attracting massive productions with recurring income such as *Raised by Wolves*, *Black Sails* and *Warrior*, giving rise to billions of Rands of foreign direct investment the creation of thousands of local jobs and global recognition of our world-class studio infrastructure and skilled labour. Our feature films, documentaries and TV series have been shown and applauded at festivals and received major awards around the world, including Sundance, FESPACO, Durban, Cannes, Tribeca, Berlin, Toronto, the Oscars, the International Emmy awards etc".
- 3.2.3. Importantly, it too decried the piecemeal nature of interventions that have been put forward by government and the lack of coordination and holistic overview that has seen disparate, standalone policy and regulatory initiatives, including:
- 3.2.3.1. The Presidential Creative Industries Masterplan which is currently being led by the Department of Small Business but had stalled following the initial round of public comments but engagements are again underway
- 3.2.3.2. The Film and Publications Amendment Regulations 2022, the Draft of which, SASFED said, was out of sync with the commercial realities of the film and television production sector. Note that these have now come into force<sup>196</sup> and were significantly amended prior to their coming into force.

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<sup>196</sup> Published in Notice No. 2436, Government Gazette 46843 dated 26 August 2022.

3.2.3.3. South Africa's position with regard to the Generalised System of Preferences in terms of Africa's Growth and Opportunity Act (AGOA): The US Trade Representative is reviewing South Africa's ability to participate in AGOA including with respect of intellectual property protections and other matters.

3.2.3.4. SASFED has called for the incorporation of all current initiatives into a single national effort "spearheaded through the DWP process".

### 3.3. Additional submissions by the IBFC:

Besides supporting the overall proposals set out in paragraph 3.1 above, the IBFC's submission focused on the "particular position that independent black film-makers find themselves in because it is particularly dire and requires urgent and ongoing attention, beyond the attention that is required to be paid to the sector as a whole". In this regard, the IBFC's submission emphasises that:

3.3.1. Black filmmakers are often among the last to be approached by broadcasters in respect of independently commissioned or co-produced works because the patterns of the past continue to favour mainly white-owned or white-managed companies because the film industry is one of the most untransformed industries.

3.3.2. It is imperative the black filmmakers and black filmmaking companies have access to earmarked resources of funds and projects and there should be measures that ensure that black independent filmmakers are not excluded from the industry because of systemic racism. If this is not addressed, black owned film companies and black filmmakers themselves or continue to find themselves on the periphery of the local production sector and the transformation of the local production sector will remain unfinished.

### 3.4. Submissions by the NFVF:

3.4.1. The submissions made by the NFVF are wide-ranging and include discussions on the impact of the Fourth Industrial Revolution (4IR) on the film and video sector. However the most significant of the proposals is found in the section dealing with funding – doubtless given the expertise of the NFVF in this area.

3.4.2. The NFVF is of the view that existing funding models do not meet the needs of the local market.

3.4.3. The NFVF proposes the establishment of an Innovation Fund to promote the creation of original works.

3.4.4. It is of the view that all funding processes must be simplified, reorganised and integrated (including by way of inter-departmental cooperation) so that it is "more tactical, efficient and available to film-makers, producers and distributors".



- 3.4.5. The NFVF calls for more responsibility and openness as to how funding is allocated and awarded, recognising that delays in allocating and awarding funding is damaging to the industry.
- 3.4.6. The NFVF recognises that broadcasters should promote non-exclusive licence or commissioning deals so that content can be used on new distribution platforms – the so-called “multiple screens approach”.
- 3.4.7. The NFVF calls for a three tier, ring-fenced approach, to funding the development, marketing and distribution of South African audiovisual content as follows:
  - 3.4.7.1. Tier 3 – a transformation fund to develop new entrants;
  - 3.4.7.2. Tier 2 – a fund for filmmakers with limited experience but who have developed and produced at least one theatrical feature film, television fiction, documentary, short film and or commercial; and
  - 3.4.7.3. Tier 1 – a fund for experienced producers.
- 3.4.8. It also calls for a Youth and Gender Film Fund within the NFVF but does not articulate how this would fit into the three-tier funding model set out above.
- 3.4.9. It is clear that the NFVF shares some of the Industry’s concerns regarding the Copyright Amendment Bill, calling for a transparent and independent regulatory impact assessment to be conducted to measure the impact of the Bill on the cultural and creative industries.

#### **4. THE DCDT COLLOQUIUM ON THE DWP**

In February 2022, the DCDT held a colloquium with stakeholders providing them with a power point presentation setting up the latest/updated policy proposals as part of the DWP process. Importantly the DCDT undertook that the next iteration of the DWP would again be published as part of a public notice and comment procedure and this would take place before the end of June 2022 (note however, that to date no such next iteration has been published). At the Colloquium, the DCDT presented additional policy proposals relevant to the independent production of television content that went far beyond what had initially been contained in the DWP and it is clear that many of these came from the submissions made by the independent production sector (as summarised above) and by the NFVF. These were as follows:

- 4.1. That the DCDT supports the proposal put forward by the independent production sector on the entire local content and independent commissioning classification and verification [that

- is, monitoring] process being simplified so as to ensure a level playing field as between broadcasters and online audiovisual content providers<sup>197</sup>.
- 4.2. That the DCDT will engage with ICASA about the need to empower it and require it to be able to monitor and enforce local content and independent commissioning quotas for the entire audiovisual content sector (that is beyond broadcasting) – this was a key submission by the independent production sector<sup>198</sup>.
  - 4.3. That the DCDT will consider both the suggested 30% local content on OTT content providers' catalogues [note that the 30% catalogue issue was not in fact suggested by the independent production sector] as well as the suggested OTT additional financial contributions to funding local television production as suggested by the independent production sector<sup>199</sup>.
  - 4.4. That the DCDT welcomes and agrees with the following proposals put forward by the independent production sector<sup>200</sup> although it did say that certain of these proposals, namely those set out in paragraphs 4.4.5 to 4.4.8 below, would require a regulatory impact assessment to be undertaken and extensive consultation with ICASA:
    - 4.4.1. That all AVCS will have obligations to flight local content.
    - 4.4.2. All qualifying television broadcasters will have to flight a certain percentage of hours of programming on any linear broadcasting service.
    - 4.4.3. For existing free to air television broadcasters there should be no reduction in the percentage of local content required to be broadcast on public, commercial and community television broadcasters.
    - 4.4.4. That a small percentage (up to 5%) additional African local content quotas be imposed for non-South African but African content provided there are reciprocal, bilateral agreements with other African countries imposing a similar quota in respect of their own television broadcasters.
    - 4.4.5. That for new free to air television market entrants, the percentage of broadcasting required to be local will be 20% initially, with an obligation to climb to the following quotas within five years:
      - 4.4.5.1. Commercial: 45%; and

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<sup>197</sup> At slide 25.

<sup>198</sup> At slide 25.

<sup>199</sup> At slide 26.

<sup>200</sup> At slides 27 to 32.

- 4.4.5.2. Community and SABC: 65%.
- 4.4.6. That for existing subscription television operators, the percentage of local content required to be flighted should be 15%.
- 4.4.7. That for new subscription television market entrants, the percentage of local content required to be flighted should be 5%, increasing to 15% within five years.
- 4.4.8. That all operators who derive revenue from and who are involved in the audiovisual sector must be subject to financial obligations in the form of a percentage of revenues to be spent on original content local content production, namely: broadcasters, AVCS (including on-demand AVCS), Electronic Communications Network Services (ECNS) providers, Electronic Communications Services (ECS) providers as all of these benefit from/are dependent on the content flighted on or over their services for revenues, whether advertising, subscription, data income, network/signal distribution fees and the like, as follows:
  - 4.4.8.1. All terrestrial broadcasters except for the SABC: 20% of annual turnover.
  - 4.4.8.2. SABC television: 25% of annual turnover.
  - 4.4.8.3. Satellite and AVCS: 10% of annual turnover.
  - 4.4.8.4. Qualifying on-demand AVCS: 15%
  - 4.4.8.5. And 65% of all of the above percentages must be spent on independently commissioned productions.
- 4.5. The DCDT was non-committal on other policy proposals put forward by the independent production sector and related industry partners (such as the NFVF, the South African Audio-Visual Reference Group and the National Community Radio Forum) relating to copyright and intellectual property matters, although it did agree that institutional arrangements did indeed require reviewing and realignment as between various government departments and institutions and that the issue of collecting agencies and an equitable royalties system needed to be developed.<sup>201</sup>
- 4.6. The DCDT accepted that there was a need to reconsider and reorganise the funding of independently-produced local television content as proposed by the NFVF, including a three-tier system to fund: new market entrants; producers with some although limited

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<sup>201</sup> At slides 49.

experience and a fund for experienced producers, and undertook to engage with all relevant government entities to update the section in the DWP on funding of local content<sup>202</sup>.

- 4.7. Further the DCDT agreed with the submissions made by the IBFC that certain Treasury Regulations (which impact the SABC in particular) hampered commissioning and funding of independent television content production and that there had to be a comprehensive review involving all role-players including the dtic, the National Treasury, SARS and the DSAC of funding mechanisms and instruments for the local content production sector. Further, the National Association of Broadcasters also wanted to ensure that broadcasters could have access to any local content production fund in order to develop public interest programming.<sup>203</sup>
- 4.8. On institutional arrangements, Multichoice (the operator of DStv) recommended that the DWP must include detailed provisions relating to the capacity, funding and organisational structure of ICASA, including providing that the FPB is absorbed into ICASA and a co-regulatory model adopted by government to regard to regulating audiovisual content across platforms. However the DCDT didn't respond in depth other than to say this would be discussed with all relevant government departments and entities.<sup>204</sup>

## 5. OTHER FUNDING SOURCES – CONCERNS OF THE SECTOR

- 5.1. Chapter 4 of this Report sets out a number of funding sources and itemised some of the challenges experienced by the industry in accessing these.
- 5.2. It is important to note the results of an internal survey which was developed by the IPO but which members of SASFED were also invited to participate in, which polled IPO and SASFED members on certain key suggestions regarding the rebate funding by the dtic, in April 2022.
- 5.3. The results are instructive:
  - 5.3.1. Respondents had 29 outstanding projects totally unpaid monies of R292 621 056.00.
  - 5.3.2. There were complaints about unexplained and extreme delays in processing milestone payments (some late by many years).
  - 5.3.3. Respondents complained about urgent requests for additional information/ documentation being requested by dtic years after projects had been approved and

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<sup>202</sup> At slide 50.

<sup>203</sup> At slide 50.

<sup>204</sup> At slide 51.

after consistent communications with no indication of outstanding information being an issue prior to the requests being made.

- 5.3.4. Respondents complained about the handling by the dtic of B-BBEE (Broad-based Black Economic Empowerment) issues, particularly the rejection of B-BBEE credentials without cause.
- 5.3.5. The majority of respondents said that they had experienced instances of the relevant dtic Secretariat behaving in an unprofessional manner including:
  - 5.3.5.1. not responding to correspondence and telephone calls;
  - 5.3.5.2. using threatening language;
  - 5.3.5.3. losing documentation or else repeatedly asking for documentation already submitted<sup>205</sup>; and
  - 5.3.5.4. not providing information regarding appeals processes;
- 5.3.6. Many respondents gave heart-breaking testimony on the impact the above has had on their businesses, a sample of these include:
  - 5.3.6.1. *I have lost international partners, staff and crew... No one wants to do business with me so far because everything fell apart;*
  - 5.3.6.2. *I have been unable to pay back private equity investors for years in some cases, inhibiting my ability to approach them for investment in the future as they do not feel comfortable with the volatility of the rebate;*
  - 5.3.6.3. *I am being sued by the crew, cast and suppliers for non-payment and breach of contracts;*
  - 5.3.6.4. *Internationally we are unable to find any partners willing to coproduce in South Africa or for whom we can provide production services because everyone, everywhere in the world has heard that the South African dtic do not pay their rebates on time or at all. Our business is practically at an end; and*
  - 5.3.6.5. *I have suffered huge financial distress and reputational harm... My life was threatened by some unpaid crew members.*
- 5.3.7. A majority of respondents (55.6%) supported the dtic rebates being moved to another government agency for administration. Significantly, this percentage

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<sup>205</sup> 76% of respondents said they had experienced this.

increased to 61.1% when the suggestion was that it be moved to the NFVF. In this regard:

5.3.7.1. Positive responses to the suggestion include:

- (a) *that would be amazing. Please, please, please. We need people who know about film to be managing the process;*
- (b) *the New Zealand film commission looks after both the grant funding side of the New Zealand film and the rebate administration housing the dtic administration in one body enables the body to develop greater expertise and knowledge of the industry and people in the one agency have experience on both sides;*
- (c) *we have applied and received funding from the NFVF and also applied for the co-production advance rulings and in both processes, the management and administrative work was not as stressful and repetitive as with the dtic;*
- (d) *the NFVF at least understands how the industry works and the challenges we face; and*
- (e) *The NFVF management team proved its operational efficiency with the distribution of the president's economic stimulus package in January 2002... I was impressed by the professionalism, transparency and non-biased, non-racist approach of the NFVF's new management team.*

5.3.7.2. Negative responses to the suggestion include:

- (a) *the NFVF has similar issues like the dtic;*
- (b) *the NFVF is already at capacity and often struggles to handle their own mandate;*
- (c) *I don't think the NFVF currently has the staff capacity to handle the scheme;*
- (d) *it would be great if the NFVF house it but it would mean the NFVF mandate should be expanded by Parliament.*

5.3.8. One submission appeared to sum up the overall thrust of the views expressed in the survey: "If the government would like a rebate to operate there is one fundamental rule: the rebate has to be easy to apply for. The due diligence on the application phase has to be comprehensive so that when a rebate is granted a contract then exists between the parties and the rebate is paid within set timeframes. If the government cannot have a certain and knowable system like this in place, then it should abandon the rebate system because having a rebate system that does not pay destroys lives, livelihoods and reputations."

## 6. RECOMMENDATIONS ON THE WAY FORWARD

6.1. It is clear from the provisions of this Chapter that there is significant industry (and government) support for expanding:

6.1.1. the sources of funding for local television content production; and

6.1.2. obligations upon qualifying AVCS beyond those currently applicable to licensed television broadcasters regulated by ICASA.

This is entirely in line with international developments that aim to ensure that a percentage of the income generated by large multi-national tech giants which provide AVCS across the globe, including Amazon, Netflix, Google and the like.

6.2. At the same time, across all governmental and industry representative stakeholder groups involved in or connected with the independent production sector, there is agreement on a number of key principles for regulatory interventions to support the production of local television content, namely: simplicity, measurability, transparency, enforcement and transformation. These become hugely important in the context of the government support for expanding local content support obligations.

### 6.3. Simplicity

6.3.1. As is clear from the First Milestone Report, the arcane and complex regulatory system that has developed around the setting of local content quotas and targets, including in respect of independently-commissioned content that is applicable to television broadcasters, simply does not work:

6.3.1.1. There is no certainty on exactly how the broadcasters report compliance, particularly with regard to repeats, format factors, independent commissioning and terms of trade.

6.3.1.2. There is no prescribed reporting format that categorises all of the legally-required information.

6.3.1.3. Consequently, attempting to impose the overly-complex existing obligations carried by broadcasters (the actual reporting on which would require the kind of prescribed reporting format set out in the Annexure hereto) on other platform operators such as, particularly, on on-demand AVCS, will not succeed and is likely to only encourage further non-compliance, including by existing broadcasters and AVCS (as and when they are brought into the regulatory net via new legislation resulting from the DWP).

6.3.2. This has been recognised by the sector and by the DCDT as is clear from the Colloquium Roundtable.

6.3.3. It is clear that the proposals put forward by the independent production sector itself are in line with global best practices for local content and independent commissioning quotas as well as with new funding streams which harness revenues generated by the large tech platforms and by telecommunications operators. It is critical to simplify local content obligations (with this Report focusing on local television content production) into three broad categories:

6.3.3.1. Obligations to flight a prescribed percentage of South African television Content:

In this regard, the industry has proposed the following percentages of SA television content to be flighted, that:

- (a) SABC 1 and 2 and existing community television broadcasters: 65%
- (b) SABC 3 and e-tv: 45%
- (c) For new free-to-air terrestrial and satellite television broadcasters: 20% initially, with an obligation to climb to the following quotas within five years:
  - 45% for commercial/public commercial channels;
  - 65% for community any new SABC public channels.
- (d) Existing subscription television broadcasters: 15% measured across the bouquet.
- (e) New subscription television broadcasters: 5% with an obligation to climb to 15% within five years.
- (f) For all of the above, an additional small percentage (of not more than five percent) for content from other African Union countries, but only where there are reciprocal, bi-lateral agreements with such other African Union countries that impose a reciprocal quota to encourage the flighting of South African content.

6.3.3.2. Local Original Production Spend Quota:

The sector has proposed that at all qualifying AVCS have a minimum spend quota expressed as a percentage of their annual turnover in respect of the production of original local content (including co-productions) in the following percentages:

- (a) All commercial (free to air or subscription) and community terrestrial television broadcasters: 20%;
- (b) SABC: 25%;
- (c) Satellite broadcasters: 10%



- (d) Qualifying on-demand AVCS<sup>206</sup>: 15% of their annual South African turnover:
- (e) And that a minimum 65% of all amounts referred to sub-paragraphs (a) to (d) immediately above, be spent on *independently-commissioned productions*. (my emphasis). In this regard:
- As was pointed out in Chapter 3, the independent commissioning regime has itself become unworkably complex with the Local Content Regulations requiring 50% of the percentages of commissioned content to be spent on marginalised languages and/or production companies based outside of Durban, Cape Town and Johannesburg Metropolitan Areas while the format factor for work commissioned in KZN directly contradicts the above Durban exclusion, for example and while none of these issues appears on the prescribed reporting format in terms of the Compliance Manual Regulations; and
  - Certain of the above issues do not appear to be measured in any systematic industry-wide manner and it is critical is to support the independent television production sector as a whole through having measurable and relatively simple obligations for both local content and independent production as is set out above.
- (f) One of the critical aspects that must be clarified in the proposed new regulatory scheme would be to have clarity on how to define an independent production. In this regard I think it useful to have regard to the IPO's 2020 submission to the dtic<sup>207</sup> which proposed the following checklist for determining whether or not a project for is a genuinely independently-produced one:
- Is the producer/production company independent of any broadcaster?
  - Does the underlying copyright reside either with the producer or with a corporate entity controlled by the producer?

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<sup>206</sup> For the sake of clarity, this would include Netflix, Amazon Prime etc but would not include video-sharing platform services as defined in the DWP.

<sup>207</sup> A copy of which was provided electronically to the author.

- Is the original licence granted to the broadcaster a limited one that is no more than two years exclusively followed by no more than three years non-exclusively?
- Does the producer retain final editorial control?
- Does the producer control a minimum of 50% of the back-end revenue after recoupment?
- Does the producer control contracting with third parties?
- Does the contract contain a 'no alteration' clauses?
- If the broadcaster is also distributing the content, is the agreement a separate one from the co-funding agreement and is the commission no more than 30% and are the distribution rights limited to five years?
- If the broadcaster receives a 'presents' or 'original' attribution is its investment greater than 25% of the total budget?
- If the agreement gives the broadcaster a right to subsequent series or spinoffs are the terms of that no less favourable than the original agreement's terms?

#### 6.3.3.3. Financial contributions to a Creative Audiovisual Production Industry Fund (the Fund)

The Fund is to be made up of contributions by all licensed operators that benefit financially from the broadcast, flighting or carriage of audiovisual content, and is in addition to the above the local content, original local content and independent commissioning obligations set out above, to support the production of local content, by way of an annual levy based on a percentage of turnover generated in South Africa to be paid into the fund, such percentages to be as follows:

- (a) 3% on annual turnover of qualifying AVCS whether broadcasters or on-demand AVCS; and<sup>208</sup>
- (b) 1% of annual turnover of all ECNS and ECS.

6.3.4. It is important to be clear about what would no longer be applicable from the current regulatory regime as a result of the simplification (note, not the reduction) of the local content obligations. The current regulatory obligations in respect of: genres of

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<sup>208</sup> Note that the IPO submission also suggested that this be levied on turnover of cinema operators too but I think that this may prove too difficult in an environment where they are not regulated by ICASA and so I have left this suggestion out of the summary of the IPO's submission.

local content programming; geographic specifications in respect of production companies; format factors, including particular languages, geographic and Historically Disadvantaged Individual (HDI) sourcing, and repeat flighting of local content, would fall away. Further, the financial spend obligations set out in paragraph 6.3.3.2 above would mean that operators would not be in a position to subject audiences to a diet of old local content and would have to be commissioning original local content (that is, new local content) annually.

- 6.3.5. While language and genre obligations would of course continue to be relevant, these would be dealt with licence condition obligations and not be part of the local content quota and independent commissioning regulations regime.
- 6.3.6. Another critical issue to simplify are the rebates and other funding processes available for the independent television production sector.
- 6.3.7. As was evidenced in Chapter 4 and in this Chapter, dissatisfaction has been expressed by the independent television production sector regarding the plethora of state funding bodies that the sector has to interact with to try to obtain funding, with the most dissatisfaction expressed being in relation to the dtic rebates not being paid despite approval letters existing and, on a lesser scale, concerns with the distribution of NFVF funds in support of actual productions.
- 6.3.8. It seems to me that there is support for a massively-increased funding role for the NFVF with it:
  - 6.3.8.1. being responsible for its existing funding mandate under the NFVF Act and for the distribution of the funds allocated to it annually in terms of that Act by Parliament in the budget;
  - 6.3.8.2. being responsible for collecting and distributing the monies to be levied off licensees referred to in paragraph **Error! Reference source not found.** above and to be distributed, inter alia, to independent television producers in accordance with the proposals for a Creative Audiovisual Production Industry Fund.
- 6.3.9. The monies referred to in paragraphs 6.3.8.1 and 6.3.8.2 would dovetail well with the NFVF's own proposals to develop a tiered approach, namely:
  - 6.3.9.1. Tier 3 – a transformation fund to develop new entrants;
  - 6.3.9.2. Tier 2 – a fund for filmmakers with limited experience but who have developed and produced at least one theatrical feature film, television fiction, documentary, short film and or commercial; and
  - 6.3.9.3. Tier 1 - a fund for experienced producers.

6.3.10. In addition to the above, I think it critical to make the following recommendations which have been long-standing concerns of the television production sector and these are in line, in certain respects, with proposals made in the research commissioned jointly by the SABC and the IPO and SASFED in 2008, namely that it must be recognised by ICASA in law:

6.3.10.1. via the SA Television Content Regulations, that the automatic vesting of all intellectual property rights in an independent television production in perpetuity, in the broadcaster commissioning such production, renders a production inherently not independent of the broadcaster such that it cannot constitute independently-commissioned content even although it is commissioned content; and

6.3.10.2. via the now in place Commissioning of Local Content Regulations, that:

(a) the acquisition by a commissioning broadcasting licensee (or licensed AVCS) of more than 50% of all intellectual property rights in perpetuity in an independent production is to result in such production being deemed to not be an independent production; and

(b) the terms of trade regime must be fundamentally altered to ensure that the process of reaching agreement on the terms of trade is regulated and is subject to oversight and intervention by ICASA. In this regard, the Independent Commissioning Regulations are required to be entirely overhauled to include detailed provisions regarding:

- that terms of trade agreements are to be filed with the regulator;
- that disputes between commissioning licensees (broadcasters or qualifying on-demand AVCS) and independent producers over the terms of trade are to be referred to ICASA for resolution and that ICASA acts as arbitrator in such disputes if so requested by either party;
- minimum requirements including broadcasters or qualifying on-demand AVCS make provision for annual inflation-based increases in cost-per-minute rates payable for independently-commissioned content or are otherwise deemed to be unfair and unlawful; and
- minimum requirements for the exploitation of independently commissioned content to ensure that the producer obtains at least 50% of the back-end revenue after recoupment.

#### 6.4. Measurability

- 6.4.1. One of the most important features of the proposed new local content regime would be the massively reduced difficulty in accurate reporting by operators and measurability by the regulator and by other interested parties.
- 6.4.2. The complexity of format factors and genre and geographic origination etc obligations provided for in existing regulations (and which are currently simply not provided for, for example, in the relevant reporting form in the Compliance Procedure Manual Regulations) would fall away.
- 6.4.3. The result would be a simple set of easily verifiable mathematical calculations one or all of which are applicable depending on the type of licensed operator that you are:
  - 6.4.3.1. Number of hours of local content vs total number of broadcast hours;
  - 6.4.3.2. Total turnover vs spend on original local content;
  - 6.4.3.3. Spend on original local content vs spend on independently commissioned local content;
  - 6.4.3.4. Percentage of intellectual property rights held in independently-commissioned local content; and
  - 6.4.3.5. Total turnover vs spend on the Fund.
- 6.4.4. This would allow for a prescribed uniform reporting form for all qualifying licensees to be included in the Compliance Procedure Regulations in relation to local content and independent commissioning.

#### 6.5. Transparency:

- 6.5.1. One of the most pernicious aspects of the current regime for local content and independent commissioning is the fact that interested parties and the public are effectively locked-out of participating in the reviewing of the success or failures of the regime.
- 6.5.2. This is obviously deleterious for the independent production sector and is also harmful for the regulatory oversight of the regime.
- 6.5.3. It can only be beneficial to ICASA for the public (and interested parties such as other broadcasters, funding bodies such as the NFVF, and members of the independent production sector) to have sight of the reports of qualifying operators/licensees, in order to advise ICASA in the event that they spot anomalies or information that does not tally with:
  - 6.5.3.1. programming actually flighted;

- 6.5.3.2. with intellectual property rights actually held by independent producers; and/or
  - 6.5.3.3. programming and commissioning spend provided for in publicly-available annual financial statements.
  - 6.5.4. All submitted compliance reports in respect of the flighting and funding of local content, original local content and independently commissioned local content must be made publicly available on ICASA's website and each must be subject to a notice and comment procedure that specifically invites comments (even if the period for such comments is short) on such submitted compliance report.
  - 6.5.5. It is essential that ICASA develop draft ACRs in respect of every licensed entity and ensure that these too are made publicly available on ICASA's website, and each must be subject to a public notice and comment procedure that specifically invites comments on such draft ACR to allow the public to provide additional information that ICASA may not be aware of.
  - 6.5.6. In this way, qualifying operators will be assisted to comply with legal obligations and ICASA will be assisted in the oversight thereof and the ongoing lack of trust and general frustration towards ICASA by the independent production sector will be a thing of the past.
- 6.6. Enforcement
- 6.6.1. ICASA's failures with regard to enforcement of its existing, overly complex local content and independent commissioning regime are legion and have been set out in detail in Chapters 2 and 3. It is recommended that the critical mechanisms set out below will assist the regulator and the sector to secure appropriate regulatory obligation oversight.
  - 6.6.2. First, having to file terms of trade contracts with ICASA for all commissions together with a deadlock breaking mechanism (namely by way of ICASA intervention) to assist in the event of a dispute arising between a broadcaster or a qualifying AVCS and an independent producer.
  - 6.6.3. Second, it is important to ensure compliance with ICASA's obligation to produce ACRs for all broadcasters, as this is essential to fulfil its statutory obligation to monitor and enforce compliance with legislation, regulations and licence conditions as this has, historically, not been adhered to by ICASA. These ACRs are the foundational mechanism for the holding of licensees accountable for failures to comply with legislation, regulations and licence conditions – without them, ICASA is unable to bring complaints against licensees to its CCC in terms of the ICASA Act, 2000 (the ICASA Act). And the only mechanism ICASA has for holding

licensees accountable for compliance failures is via the CCC which operates on the basis of complaints or referrals to it including by ICASA.

- 6.6.4. It is essential, as is set out in paragraph 6.5.5 above, that ICASA develop draft ACRs in respect of every licensed entity and ensure that these too are made publicly available on ICASA's website and each must be subject to a notice and comment procedure that specifically invites comments (even if the period for such comments is short) on such draft ACR.
- 6.6.5. In this way, the public will be able to advise ICASA of any potential errors or matters it may have overlooked in producing its draft ACR in respect of a particular licensee and will be assisted in the oversight of licensees and again, the ongoing lack of trust and general frustration towards ICASA by the independent production sector will be a thing of the past as the sector will have a mechanism for ventilating concerns regarding enforcement directly with the regulator.
- 6.7. Transformation:
- 6.7.1. The industry is in agreement with government that the transformation of the independent production sector is vital and is an important goal of governmental initiatives in the sector.
- 6.7.2. The IBFC, in particular, has been in the forefront of efforts to secure funding and additional support for black content creators, and particularly, for black female content creators.
- 6.7.3. All industry bodies further recognise that all women are disadvantaged in the sector and that it is, still, a male-dominated sector. Consequently, efforts need to be made to secure funding and additional support for female film-makers.
- 6.7.4. It is proposed that in each of the categories or categories for funding that are proposed by the NFVF, namely:
- 6.7.4.1. Tier 3 – a transformation fund to develop new entrants;
- 6.7.4.2. Tier 2 – a fund for filmmakers with limited experience but who have developed and produced at least one theatrical feature film, television fiction, documentary, short film and or commercial; and
- 6.7.4.3. Tier 1 – a fund for experienced producers,
- that priority be given to qualifying black and female applicants in all tiers with the proviso that all monies earmarked for the different categories, that is, for new entrants, limited experience filmmakers and experienced producers, will be paid out to qualifying applicants if funds are available even if the applicants do not meet the transformation criteria.

## 7. CONCLUSION AND IMPLEMENTATION

- 7.1. The two urgent and critical challenges that face the independent production sector are to ensure that:
  - 7.1.1. local content and independent production-related obligations are clearly set out in law and that ICASA, the sector regulator, begins to involve itself directly in the negotiations that take place between broadcasters and qualifying AVCS on the one hand and independent producers on the other and in the rigorous and transparent enforcement of local content and independent commissioning obligations; and
  - 7.1.2. significant additional sources of funding be regulated for by ICASA and be distributed fairly, efficiently and transparently by the NFVF.
- 7.2. This report supports the tentative initiatives backed by the DCDT that all qualifying AVCS including television broadcasters and on-demand AVCS are to contribute to local content and independent commissioning of such content which are clearly in line with international trends as set out in Chapter 1.
- 7.3. The industry understands that not all recommendations in this report can be achieved right away or all at once. In particular, regulatory obligations in respect of currently un-licensed AVCS cannot be imposed. However, once the DWP is finalised, it is appropriate to suggest that the NFVF work closely with ICASA and the DCDT to ensure that the relevant legislative amendments are drafted - including those to expand the NFVF's mandate and those relevant to the expanding ICASA mandate, namely to regulate and oversee on-demand AVCS and to impose local content and independent commissioning obligations thereon.
- 7.4. Further – existing local content and independent commissioning regulations can be amended right away (without the need to finalise the DWP or indeed any consequential legislative amendments) to make provision for:
  - 7.4.1. Simplified local content criteria as suggested in this report;
  - 7.4.2. Additional financial contributions as suggested in this report;
  - 7.4.3. Additional terms of trade obligations as suggested in this report;
  - 7.4.4. Transparency criteria with regard to compliance reports submitted by broadcasters and ICASA's own draft ACRs; and
  - 7.4.5. Improved enforcement mechanisms to secure compliance by broadcasters to all of the above.



**ANNEXURE:**  
**Proposed Reporting Formats for Local Content and Independent Commissioning Compliance,**  
**Including Licence Conditions**

**1. SABC 1 AND SABC 2**

Programmes broadcast during the Performance Period - per programme/per day: This table is to be completed for every programme.

Name of Programme	Timeslot:	Day	Genre	Repeat Status	Language	Independent Production	Commissioning Diversity
		<input type="checkbox"/> Mon <input type="checkbox"/> Tues <input type="checkbox"/> Wed <input type="checkbox"/> Thu <input type="checkbox"/> Fri <input type="checkbox"/> Sat <input type="checkbox"/> Sun	<input type="checkbox"/> SA Drama – once-off <input type="checkbox"/> SA Drama: series of up to 60 minutes weekly <input type="checkbox"/> SA Drama: series of more than 60 minutes weekly <input type="checkbox"/> Non-SA Drama <input type="checkbox"/> SA Current Affairs <input type="checkbox"/> Non-SA Current Affairs <input type="checkbox"/> SA Documentary <input type="checkbox"/> Non-SA Documentary <input type="checkbox"/> SA Knowledge Building <input type="checkbox"/> Non-SA Knowledge Building <input type="checkbox"/> SA Educational <input type="checkbox"/> Non-SA Educational <input type="checkbox"/> SA Children’s: general <input type="checkbox"/>	<input type="checkbox"/> First run <input type="checkbox"/> First Repeat <input type="checkbox"/> First run - from <input type="checkbox"/> another channel <input type="checkbox"/> Rebroadcast of <input type="checkbox"/> a week’s episode <input type="checkbox"/> Second or more <input type="checkbox"/> repeat status	<input type="checkbox"/> Afrikaans <input type="checkbox"/> English <input type="checkbox"/> isiNdebele <input type="checkbox"/> Sepedi <input type="checkbox"/> Sesotho <input type="checkbox"/> Setswana <input type="checkbox"/> siSwati <input type="checkbox"/> Tshivenda <input type="checkbox"/> Xitsonga <input type="checkbox"/> isiXhosa <input type="checkbox"/> isiZulu <input type="checkbox"/> Sign language	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Mpumalanga, Limpopo, North West, Northern or Eastern Cape or Free State <input type="checkbox"/> Kwazulu-Natal <input type="checkbox"/> Prod. Company controlled by HDIs <input type="checkbox"/> Prod. Company in Gauteng but outside Johannesburg <input type="checkbox"/> Prod. Company in Western Cape but outside Cape Town <input type="checkbox"/> Prod. Company in Kwazulu-Natal but outside Durban

			<input type="checkbox"/> SA Children's: Drama <input type="checkbox"/> SA Children's: Knowledge Building <input type="checkbox"/> Non-SA Children's <input type="checkbox"/> SA Arts Programming (excluding <input type="checkbox"/> music videos) <input type="checkbox"/> Non-SA Arts Programming <input type="checkbox"/> SA Other (eg magazine, talk, religious, game show) specify _____ <input type="checkbox"/> Non-SA Other (eg magazine, talk, religious, game show) specify _____ <input type="checkbox"/> News				
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1.1. Overall Statistics for the Month – SA TV Content Regulations:

1.1.1 The licensee broadcast a weekly average of \_\_\_\_\_% (\_\_\_\_\_ percent) local television content during the performance period.

1.1.2 The spread of local television content broadcast during the performance period, measured as a weekly average:

(a) \_\_\_\_\_% (\_\_\_\_\_ percent) of local television content was broadcast during prime time.

(b) \_\_\_\_\_% (\_\_\_\_\_ percent) of local television content was broadcast during non-prime time.

1.1.3 The spread of local content in respect of genres broadcast during the performance period, measured as a weekly average:

(a) \_\_\_\_\_% (\_\_\_\_\_ percent) of drama programming consists of South African drama.

(b) \_\_\_\_\_% (\_\_\_\_\_ percent) of current affairs programming consists of South African current affairs.

- (c) \_\_\_\_\_% (\_\_\_\_\_ percent) of documentary programming consists of South African documentary programming.
- (d) \_\_\_\_\_% (\_\_\_\_\_ percent) of knowledge building programming consists of South African knowledge building programming.
- (e) \_\_\_\_\_% (\_\_\_\_\_ percent) of educational programming consists of South African educational programming.
- (f) \_\_\_\_\_% (\_\_\_\_\_ percent) of children's programming consists of South African children's programming.

1.1.4 In respect of each drama programme, provide:

- (a) names/nationalities of the author(s) of the drama script or adaptor(s) if it is drawn from a literary source \_\_\_\_\_.
- (b) names/nationalities of the drama director(s) \_\_\_\_\_.
- (c) names/nationalities of creative and technical personnel involved in a drama production and in the case of performers, the roles that they play.  
This is to be attached as an Annexure.

1.1.5 Independent Commissioning:

- (a) \_\_\_\_\_% (\_\_\_\_\_ ) of local content programming during the performance period that was commissioned from Independent Producers.
- (b) \_\_\_\_\_% (\_\_\_\_\_ ) of independently commissioned programming flighted during the performance period that was commissioned from regions outside the Durban, Cape Town and Johannesburg Metropolitan Cities.
- (c) \_\_\_\_\_% (\_\_\_\_\_ ) of independently commissioned programming flighted during the performance period in marginalised local African languages (that is, excluding English and Afrikaans).

1.2. Licence Conditions – Statistics for the Month (note where obligations cut across licence conditions and regulations, they are not repeated)

(a) Language Obligations

- (i) Average hours and minutes of official languages other than English, isiNdebele, siSwati, Xitsonga, and Tshivenda per week \_\_\_\_\_

- (ii) Average hours and minutes of isiNdebele, siSwati, Xitsonga, and Tshivenda per week \_\_\_\_\_.
- (iii) Average hours of official languages other than English in prime time per week \_\_\_\_\_.
- (iv) Average hours of official languages other than English in the performance period per week \_\_\_\_\_.

(b) Genres to be broadcast per week

- (i) News: Average hours and minutes per week \_\_\_\_\_
- (ii) News: Average hours and minutes per week in prime time \_\_\_\_\_
- (iii) News: Average hours and minutes per week as a single 30-minute packaged programme \_\_\_\_\_.
- (iv) Current Affairs: Average hours and minutes per week \_\_\_\_\_
- (v) Current Affairs: Average hours and minutes per week in prime time \_\_\_\_\_.
- (vi) Informal Knowledge Building: Average hours and minutes per week \_\_\_\_\_
- (vii) Informal Knowledge Building: Average hours and minutes per week in prime time \_\_\_\_\_
- (viii) Documentary: Average hours and minutes per week \_\_\_\_\_
- (ix) Documentary: Average hours and minutes per week in prime time \_\_\_\_\_
- (x) Drama: Average hours and minutes per week \_\_\_\_\_
- (xi) Drama: Average hours and minutes per week in prime time \_\_\_\_\_
- (xii) Drama: Average hours and minutes of SA Drama in prime time \_\_\_\_\_.
- (xiii) Children's programming: Average hours and minutes per week \_\_\_\_\_.
- (xiv) Educational: Average hours and minutes per week \_\_\_\_\_.

(c) Genres and languages used:

- (i) SA Drama – once-off: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (ii) SA Drama series of up to 60 minutes weekly: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.
- (iii) SA Drama series of more than 60 minutes weekly: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.
- (iv) Non-SA Drama: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (v) SA Current Affairs: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (vi) Non-SA Current Affairs: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (vii) SA Documentary: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (viii) Non-SA Documentary: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (ix) SA Knowledge building: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (x) Non-SA Knowledge building: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xi) SA Educational: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xii) Non-SA Educational: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xiii) SA Children's General: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (xiv) SA Children's Drama: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xv) SA Children's Knowledge building: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.
- (xvi) Non-SA Children's: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xvii) SA Arts Programming excluding music videos: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.
- (xviii) Non-SA Arts Programming excluding music videos: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.
- (xix) SA Other (eg magazine, talk, religious, game show): specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.

- (xx) Non- SA Other (eg magazine, talk, religious, game show): specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_  
 English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
 siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
 Sign language \_\_\_\_\_.
- (xxi) News: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_  
 Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_  
 Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxii) Local News: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
 isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
 Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxiii) Regional News: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
 isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
 Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxiv) National News: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
 isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
 Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxv) International News: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
 isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
 Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxvi) Self-Originated News: specify hours and minutes per week \_\_\_\_\_.
- (xxvii) News from Other Sources: specify hours and minutes per week \_\_\_\_\_. Attach an annexure specifying the news sources used.



## 2. SABC 3 AND E-TV

Programmes broadcast during the Performance Period: Compliance with SA TV Content and Independent Commissioning Regulations – the following table is to be completed per programme/per day

Name of Programme	Timeslot:	Day	Genre	Repeat Status	Language	Independent Production	Commissioning Diversity
		<input type="checkbox"/> Mon <input type="checkbox"/> Tues <input type="checkbox"/> Wed <input type="checkbox"/> Thu <input type="checkbox"/> Fri <input type="checkbox"/> Sat <input type="checkbox"/> Sun	<input type="checkbox"/> SA Drama – once-off <input type="checkbox"/> SA Drama: series of up to 60 minutes weekly <input type="checkbox"/> SA Drama: series of more than 60 minutes weekly <input type="checkbox"/> Non-SA Drama <input type="checkbox"/> SA Current Affairs <input type="checkbox"/> Non-SA Current Affairs <input type="checkbox"/> SA Documentary <input type="checkbox"/> Non-SA Documentary <input type="checkbox"/> SA Knowledge Building <input type="checkbox"/> Non-SA Knowledge Building <input type="checkbox"/> SA Educational <input type="checkbox"/> Non-SA Educational <input type="checkbox"/> SA Children's: general <input type="checkbox"/> SA Children's: Drama <input type="checkbox"/> SA Children's: Knowledge Building <input type="checkbox"/> Non-SA Children's	<input type="checkbox"/> First run <input type="checkbox"/> First Repeat <input type="checkbox"/> First run - from another channel <input type="checkbox"/> Rebroadcast of a week's episode <input type="checkbox"/> Second or more repeat status	<input type="checkbox"/> Afrikaans <input type="checkbox"/> English <input type="checkbox"/> isiNdebele <input type="checkbox"/> Sepedi <input type="checkbox"/> Sesotho <input type="checkbox"/> Setswana <input type="checkbox"/> siSwati <input type="checkbox"/> Tshivenda <input type="checkbox"/> Xitsonga <input type="checkbox"/> isiXhosa <input type="checkbox"/> isiZulu <input type="checkbox"/> Sign language	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Mpumalanga, Limpopo, North West, Northern or Eastern Cape or Free State <input type="checkbox"/> Kwazulu-Natal <input type="checkbox"/> Prod. Company controlled by HDIs <input type="checkbox"/> Prod. Company in Gauteng but outside Johannesburg <input type="checkbox"/> Prod. Company in Western Cape but outside Cape Town <input type="checkbox"/> Prod. Company in Kwazulu-Natal but outside Durban

			<input type="checkbox"/> SA Arts Programming (excluding <input type="checkbox"/> music videos) <input type="checkbox"/> SA Other (eg magazine, talk, religious, game show) specify _____ <input type="checkbox"/> Non-SA Other (eg magazine, talk, religious, game show) specify _____ <input type="checkbox"/> News				
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2.1. Overall Statistics for the Month – SA TV Content Regulations:

2.1.1 The licensee broadcast a weekly average of \_\_\_\_\_% (\_\_\_\_\_ percent) local television content during the performance period.

2.1.2 The spread of local content in respect of genres broadcast during the performance period, measured as a weekly average:

(a) \_\_\_\_\_% (\_\_\_\_\_ percent) of drama programming consists of South African drama.

(b) \_\_\_\_\_% (\_\_\_\_\_ percent) of current affairs programming consists of South African current affairs.

(c) \_\_\_\_\_% (\_\_\_\_\_ percent) of documentary programming consists of South African documentary programming.

(d) \_\_\_\_\_% (\_\_\_\_\_ percent) of knowledge building programming consists of South African knowledge building programming.

(e) \_\_\_\_\_% (\_\_\_\_\_ percent) of children's programming consists of South African children's programming.

2.1.3 In respect of a drama programme, provide:

(a) names/nationalities of the author(s) of the drama script or adaptor(s) if it is drawn from a literary source \_\_\_\_\_.

(b) names/nationalities of the drama director(s) \_\_\_\_\_.

- (c) names/nationalities of creative and technical personnel involved in a drama production and in the case of performers, the roles that they play.  
This is to be attached as an Annexure.

2.1.4 Independent Commissioning:

- (a) \_\_\_\_\_% (\_\_\_\_\_percent) of local content programming that was commissioned from Independent Producers.
- (b) \_\_\_\_\_% (\_\_\_\_\_percent) of independently commissioned works was commissioned from regions outside the Durban, Cape Town and Johannesburg Metropolitan Cities.
- (c) \_\_\_\_\_% (\_\_\_\_\_ ) of independently commissioned programming flighted during the performance period in marginalised local African languages (that is, excluding English and Afrikaans).

2.2. Licence Conditions – Statistics for the Month (note where obligations cut across licence conditions and regulations, they are not repeated) for SABC 3:

- (a) Language Obligations: Average percentage of weekly programme material in languages other than English \_\_\_\_\_
- (b) Genres to be broadcast per week
- (i) News: Average hours and minutes per week \_\_\_\_\_
- (ii) News: Average hours and minutes per week in prime time \_\_\_\_\_
- (iii) News: Average hours and minutes per week as a single 30-minute packaged programme \_\_\_\_\_.
- (iv) Current Affairs: Average hours and minutes per week \_\_\_\_\_
- (v) Current Affairs: Average hours and minutes per week in prime time \_\_\_\_\_.
- (vi) Informal Knowledge Building: Average hours and minutes per week \_\_\_\_\_
- (vii) Informal Knowledge Building: Average hours and minutes per week in prime time \_\_\_\_\_
- (viii) Documentary: Average hours and minutes per week \_\_\_\_\_

- (ix) Documentary: Average hours and minutes per week in prime time \_\_\_\_\_
- (x) Drama: Average hours and minutes per week \_\_\_\_\_
- (xi) Drama: Average hours and minutes per week in prime time \_\_\_\_\_
- (xii) Drama: Average hours and minutes of SA Drama in prime time \_\_\_\_\_.
- (xiii) Children's programming: Average hours and minutes per week \_\_\_\_\_.

(c) Genres and languages used:

- (i) SA Drama – once-off: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (ii) (ii) SA Drama – once-off: specify hours and minutes for each language per week in prime time and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (iii) SA Drama series of up to 60 minutes weekly: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (iv) SA Drama series of up to 60 minutes weekly: specify hours and minutes for each language per week in prime time and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (v) SA Drama series of more than 60 minutes weekly: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (vi) Non-SA Drama: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (vii) SA Current Affairs: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (viii) Non-SA Current Affairs: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (ix) SA Documentary: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (x) Non-SA Documentary: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (xi) SA Knowledge building: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xii) (x) Non-SA Knowledge building: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xiii) SA Educational: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xiv) Non-SA Educational: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xv) SA Children's General: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xvi) SA Children's Drama: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (xvii) SA Children's Knowledge building: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xviii) Non-SA Children's: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xix) SA Arts Programming excluding music videos: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xx) Non-SA Arts Programming excluding music videos: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxi) SA Other (eg magazine, talk, religious, game show): specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxii) Non- SA Other (eg magazine, talk, religious, game show): specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (xxiii) News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes:  
 Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_  
 Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_  
 isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxiv) Local News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_  
 Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_  
 isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxv) Regional News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_  
 Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_  
 isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxvi) National News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_  
 Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_  
 isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxvii) International News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_  
 Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_  
 isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xxviii) Self-Originated News: specify hours and minutes per week \_\_\_\_\_.
- (xxix) News from Other Sources: specify hours and minutes per week \_\_\_\_\_. Attach an annexure specifying the news sources used.



2.3. Licence Conditions – Statistics for the Month (note where obligations cut across licence conditions and regulations, they are not repeated) for e-tv:(a) Language Obligations:

- (i) Average hours and minutes of news and information programming broadcast per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_  
isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_  
Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (ii) Average hours and minutes of non-news and information programming broadcast per week per language: Afrikaans \_\_\_\_\_  
English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
Sign language \_\_\_\_\_.

(b) Local Content Obligations:

- (i) Percentage of SA TV Content during the performance period that consists of rebroadcasts/repeats \_\_\_\_\_.
- (ii) Percentage of SA TV Content broadcast outside of the performance period \_\_\_\_\_.

(c) Genres and languages used:

- (i) SA Drama: Average hours and minutes of SA drama broadcast weekly \_\_\_\_\_.
- (ii) SA Drama: Average hours and minutes of SA drama broadcast weekly in prime time \_\_\_\_\_.
- (iii) SA Drama: Percentage of SA Drama constituting rebroadcasts/repeats per week \_\_\_\_\_.
- (iv) Information programming: Average hours and minutes of Information programming broadcast weekly \_\_\_\_\_.
- (v) Information programming: Average hours and minutes of Information programming broadcast weekly in prime time \_\_\_\_\_.
- (vi) SA Drama: Average hours and minutes of SA drama broadcast weekly in prime time \_\_\_\_\_.
- (vii) Animation: Average hours and minutes of SA TV Content animation broadcast per week \_\_\_\_\_.

- (viii) Animation: Average hours and minutes of African animation broadcast per week \_\_\_\_\_.
- (ix) Children's: Average hours and minutes of children's programming broadcast per week per language: Afrikaans \_\_\_\_\_  
 English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_  
 siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_  
 Sign language \_\_\_\_\_.
- (x) Overall percentage of the broadcast period, measured weekly, made up of Children's programming: \_\_\_\_\_.
- (xi) Average number of hours and minutes during the broadcast period, measured weekly, made up of Children's programming: \_\_\_\_\_.
- (xii) Average number of hours and minutes during the broadcast period, measured weekly, made up of Youth Drama: \_\_\_\_\_.
- (xiii) Overall percentage of the broadcast period, measured weekly, made up of Children's programming in languages other than English:  
 \_\_\_\_\_.
- (xiv) Children's: Average hours and minutes of children's programming dubbed from foreign languages broadcast per week per language:  
 Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_  
 Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_  
 isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xv) Children's: Provide details of children's programming broadcast outside of the hours: 13h00 – 18h00 on weekdays and 07h00 – 13h00 on weekends in a separate Annexure.
- (xvi) News: specify hours and minutes for each language per week: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_  
 Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_  
 Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.

- (xvii) Local News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xviii) Regional News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xix) Provincial News: specify hours and minutes for each language per week and the percentage of the total of all programming material this constitutes: Afrikaans \_\_\_\_\_ English \_\_\_\_\_ isiNdebele \_\_\_\_\_ Sepedi \_\_\_\_\_ Sesotho \_\_\_\_\_ Setswana \_\_\_\_\_ siSwati \_\_\_\_\_ Tshivenda \_\_\_\_\_ Xitsonga \_\_\_\_\_ isiXhosa \_\_\_\_\_ isiZulu \_\_\_\_\_ Sign language \_\_\_\_\_.
- (xx) Self-Originated News: specify hours and minutes per week \_\_\_\_\_.
- (xxi) News from Other Sources: specify hours and minutes per week \_\_\_\_\_. Attach an annexure specifying the news sources used.

**3. SUBSCRIPTION BROADCASTERS: M-NET, DSTV, STARSAT AND DEUKOM**3.1. Overall Statistics for the Month – SA TV Content Regulations (not applicable to Deukom):

- 3.1.1 (\_\_\_\_\_) (%) (\_\_\_\_\_percent) of the annual content acquisition budget that is spent on local television content programming.
- 3.1.2 (\_\_\_\_\_) (%) (\_\_\_\_\_percent) of the budget spent on local television content programming that is spent on independent productions.
- 3.1.3 (\_\_\_\_\_) (%) (\_\_\_\_\_percent) of the budget spend on local television content independent productions is spent on programming commissioned from regions outside of the Durban, Cape Town and Johannesburg Metropolitan Cities.
- 3.1.4 (\_\_\_\_\_) (%) (\_\_\_\_\_percent) of the budget spend on local television content independent productions is spent on programming in previously marginalised local African languages.

3.2. Licence Conditions – Annual - for DStv:

(R\_\_\_\_\_) (\_\_\_\_\_Rands) expended on supporting the SA broadcasting industry focused on HDGs SMMEs, students and youth from Historically Disadvantaged Groups

3.3. Licence Conditions – Annual for Deukom:

- 3.3.1 (\_\_\_\_\_) (%) (\_\_\_\_\_percent) of the annual channel acquisition budget paid to beneficiaries nominated by ICASA.
- 3.3.2 (\_\_\_\_\_) (%) (\_\_\_\_\_percent) of the channel acquisition budget in respect of South African subscribers to be paid to train/sponsor black South African citizens resident in South Africa and nominated by Deukom in TV and/or TV Content Production.