GHANA INDEPENDENT BROADCASTERS ASSOCIATION

28 April 2021

The Honourable Minister
Ministry of Information
Accra

Dear Sir,

Re: Stakeholders' consultative meeting on broadcasting in Ghana: Request for Inputs

1 We refer to your letter dated 20 April 2021 and to the stakeholders' consultative meeting held on 16th April 2021 on the above matter.

2 We wish to express our gratitude for the consultative approach that the Ministry has adopted on the issue of unethical broadcasting and the draft Broadcasting Bill ("the draft Bill").

3 We commend and support the continuing initiative to establish a clear and appropriate regulatory and licensing framework for broadcasting services, which we believe will promote growth, stability, innovation and investment. We are grateful to contribute constructively to the development of such a framework.

4 Please find attached our comments and proposals on the draft Bill and on the various emerging issues raised in your letter of 20 April 2021.

5 Please accept the assurance of our highest esteem.

Yours faithfully,
For the Ghana Independent Broadcasters Association

Gloria Hiadzi
Executive Secretary

GHANA INDEPENDENT BROADCASTERS ASSOCIATION

GIBA'S SUBMISSION ON THE DRAFT BROADCASTING BILL

Introduction

1 GIBA supports the initiative to develop a comprehensive, appropriate and enabling broadcasting legislative framework, which we trust will ensure that our broadcasting industry is kept abreast with domestic and international developments in the communications industry.

2 Below we set out our comments and proposals on the draft Broadcasting Bill ("the draft Bill"), including some of the emerging issues identified in your letter of 20 April 2021.

3 In summary, our key proposals are as follows:

3.1 Broadcasters and broadcast infrastructure operators (i.e. multiplex / platform operators) be required to obtain one authorisation from one regulator, namely the National Media Commission ("the Commission") prior to establishment. This would be more reasonable and less intrusive of the restriction in Article 162(3) of the Constitution

3.2 The National Communications Authority ("the Authority") should continue to have general control and supervision of frequency spectrum and responsibility for allocation, within the frequency plan, of frequency spectrum or bands used for broadcasting services. The Commission should work internally with the Authority to determine the availability of spectrum before giving approval to any application for broadcasting authorisation. Once the Commission's Broadcasting Authorization Committee has decided to grant a broadcasting authorization to an applicant, the Authority must assign specific frequency spectrum to specific broadcasting services.

3.3 The draft Bill must provide details on the consequential amendments to these laws, and indicate the extent and manner of such amendments for consideration during this consultation process. Laws that need to be amended include National Communications Authority Act, 2008 and Electronic Communications Authority Act, 2008. The TV Licensing Decree, 1966 will also have to be repealed.

3.4 Given that the current television licence model has proved to be ineffective, we have proposed a TV license fee reform that changes the collections method from a fee based on device ownership to a more effective “ring fenced” public broadcasting levy, collected by national revenue services when they collect income tax or utility charges from individuals and corporations in Ghana.

3.5 The provisions in the draft Bill that relate to the independence and governing body of the public service broadcaster be expanded to apply

to the national DTT platform operator. In this regard, we propose that the governing body of the national DTT platform operator be appointed by the Commission.

3.6 While there may be some rationale for regulating OTT services, it is not appropriate to simply extend traditional national terrestrial broadcasting regulation and analogue thinking to cover OTT services. Any attempt to bring OTT services into the regulatory and licensing framework must be cognizant of these characteristic features and the diminishing rationale for regulation. Given that OTTs are multi-national (and potentially global), give viewers unlimited variety and choice and give viewers full control over what to watch and when to watch it, we propose that they be licensed and regulated in the same manner as DTH subscription services. In this regard, we propose that OTT service providers be required to appoint a subscriber management service provider in Ghana to ensure that consumers in Ghana are able to approach a local service provider regarding consumer related issues. This will also stimulate local participation in the OTT subsector, and contribute to the local economy through job creation and skills transfer.

3.7 Considering the high cost of investment, and bearing in mind the vested rights and interest of existing broadcasters, transitional provisions ought to ensure that pre-existing broadcasting services are permitted to continue to operate under the same terms and conditions of any authorisation that was in place prior to the Act's coming into force.

3.8 We support the inclusion of content standards that apply to broadcasting services in the draft Bill to the extent that such standards are consistent with the 1992 constitution and the judgment of the Supreme Court in Ghana Independent Broadcasters Association v Attorney General and Another J1/4/2016) [2017].

3.9 The draft Bill must define "subscriber management services" and provide guidance to the Commission as to the regulations to be made regarding subscriber management services.

4 Our detailed comments and proposals are set out below.

Authorisation of broadcasting services

5 The draft Bill proposes dual authorization and regulation of broadcasting services. Prior to their establishment, broadcasting services must obtain an authorization from the Commission and frequency authorisation (which includes approval to use frequency and programme channels) from the Authority.

6 In order to obtain these authorisations, applicants will be subjected to qualifying criteria and licensing adjudication processes before both the Commission and the Authority.

7 No legal justification has been provided for the dual authorization requirements and regulation, which is not only administratively burdensome, costly and obstructive to the entry of new players in the broadcasting sector, but is also not reasonably necessary for the protection of national security, public order and public morality. In this regard, it is important to bear in mind the following statements by the Supreme Court:

> "The framers of the Constitution were very clear in their mind that they were giving the media freedom to operate subject only to such restrictions or limitations as the Constitution itself has prescribed under Article 164 or any other relevant provision thereof or other law not inconsistent with the Constitution. Therefore any law that seeks to impose restrictions on the enjoyment of the right to freedom of expression must find legal justification.
>
> Thus where a legislation seeks to impose restrictions, it must be able to justify it by saying that it is reasonably required in the national security interest (like disclosing military strategies in public), or of public order (like prohibiting broadcast of ethnocentric materials), public morality (like for instance prohibition of pornographic materials on TV) and for protecting the rights, freedoms and reputations of other persons. These must be clearly stated in the legislation, without leaving room for inferences and conjectures." [1]

8 It would be more reasonable and less intrusive of the restriction in Article 162(3) of the Constitution if broadcasters were required to obtain one authorization from one regulator prior to establishment. We propose that that regulator be the Commission.

9 In this regard, we propose that–

9.1 the Authority continue to have general control and supervision of frequency spectrum and responsibility for allocation, within the frequency plan, of frequency spectrum or bands used for broadcasting services; and

9.2 The Commission should work internally with the Authority to determine the availability of spectrum before giving approval to any application for broadcasting authoritisation. Once the Commission's Broadcasting Authorization Committee has decided to grant a broadcasting authorization to an applicant, the applicant must be deemed to have been granted the required frequency spectrum. .

10 In addition, in order to ensure consistency of laws, we propose that s94 of the draft Bill be expanded to provide for the amendments necessary to those sections of the National Communications Authority Act, 2008, the Electronic Communications Act, 2008 and the Electronic Communications Regulations,

[1] Ghana Independent Broadcasters Association v Attorney General and Another J1/4/2016) [2017] GHASC 45 (3 November 2017) at pg. 29

2011, which empower the Authority to issue frequency authorisations in respect of broadcasting services, and to provide for issuing of broadcasting frequencies to all successful applicants for broadcasting authorizations.

Funding of public service broadcasting and the national DTT platform

11 We note that the draft Bill seeks to set up the National Broadcasting Development Fund ("the Fund") to, among others, support public service broadcasting.[2] The draft Bill also proposes that the money for the Fund will be sourced from, among others, television receiving set licence fees or equivalent levy, advertising revenue, authorisation fees, fees from broadcasting service providers and revenue generated from the commercial activities of public service broadcasters.[3] In addition, s87 of the draft Bill provides for the imposition of a licence fee on those who install or use a television receiving set.

12 Furthermore, we note that there have been ongoing discussions regarding the best model for funding the national DTT platform. The draft Bill is silent on this issue.

13 The TV licence fee system is, however, no longer the most appropriate or efficient way to raise revenue to fund public service broadcasting because–

13.1 it is regressive – all pay the same flat rate regardless of ability to pay or size of household;

13.2 it is anachronistic (out of step with the modern world) in a multimedia world where people access TV and TV-like content from a wide-range of delivery platforms and mobile devices;

13.3 there is no freedom of choice and failure to pay results in prosecution;

13.4 it is expensive to administrate and collect; and

13.5 there is a high evasion rate as it is difficult to determine who has receiving devices.

14 Faced with the problem of evasion and increasing collection costs, several countries have reconsidered the television licence fee and have abolished it or changed their method of collection. These include Australia, Belgium (Femish region), Bosnia and Herzegovina, Cyprus, Finland, Germany, Greece, Hungary,

2 s71 and 72(c) of the draft Bill

3 s73(a) of the draft Bill

Iceland, India, Macedonia, Malaysia, Malta, the Netherlands, New Zealand, Portugal, Singapore and Slovakia.[4]

15 Given that the current television licence model has proved to be ineffective, we propose a TV license fee reform that changes the collections method from a fee based on device ownership to a more effective "ring fenced" public broadcasting levy, collected by national revenue services when they collect income tax or utility charges from individuals and corporations in Ghana.

16 This method of collection is expected to eliminate the high cost of collecting the TV license fee, reducing the high default rates while maintaining the rights of other stakeholders and individuals, as guaranteed by the1992 Constitution.

17 We propose the following funding options which achieve the same revenue objectives, but without the same challenges, as the TV license fee.

Carriage/distribution fees for authorised television broadcasters

18 The first line of revenue to the DTT platform, is from the various authorized broadcasting entities - free-to-air (FTA) broadcasters, who are required to pay an amount to be determined for carriage on the national DTT platform and pay TV operators, who may co-locate on the national DTT platform. This fee ought to be reasonable in order to support FTA broadcasters who are hosted on the only national DTT platform (recognising the fact that they contribute largely to public interest broadcasting) to continue the delivery of their services to the nation.

Flat rate percentage added to ECG bills (Post and prepaid) for viewers:

19 The use of the electricity billing framework as a means of collection to fund public broadcasting is done in Portugal, Serbia, Romania and other countries.

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[4] For example –

- Australia abolished TV licence fees in 1974 and has since funded public broadcasting services through government grants and commercial activities of the public broadcaster;
- Bosnia and Herzegovina still have a TV license fee, however to deal with high evasion rates the problem has been partly resolved by collecting the license fee as part of the household's monthly telephone bill;
- Finland scrapped the TV licence fee in 2013 and replaced it with a public service broadcasting tax called YLE Tax, based on a person's income;
- Germany reformed its public finance system in 2013 and introduced a new household levy (called the "Rundfunkbeitrag"), a universal flat fee payable per household irrespective of whether they own a television or radio set;
- Hungary, where the TV license fee still exists for commercial entities (e.g. businesses, hotels, bars, etc.), but government now pays for individuals, meaning that public broadcasters are funded from general taxation;
- the Netherlands abolished the television licence fee in 2000 due to excessive collection costs and increased the income tax in order to pay for public broadcasting; and
- France collects the TV licence fee as part of local taxes.

20 It will be the most effective method for Ghana, due to the universal use of electricity across the country, the fact that electricity is required in order to receive television and radio broadcasting services, and the established and properly tiered billing structure, which enables exemption of the poor or low-income groups based on power consumption.

21 This model further eliminates less efficient collection methods available in Ghana such as door-to-door, subscription payments, house rates, income tax and telephone bills (mostly post-paid) which do not guarantee efficient, timely and fair collection in Ghana.

22 A TV levy of GHS0.005 per kWh towards broadcasting with an estimated 7.3 million[5] payments of an average monthly bill of GHS156.05 provides a revenue of GHS 13.38 million per month through well-established and accessible collection point/channels. Annually this comes to about GHS160.6 million, several times in excess of any budgeted or actual collection through the current method established by law (Please see the table below). In terms of the cost to the individual, the levy of GHS0.005 per kWh for the said average bill of GHS156.05 translates to a monthly payment of GHS0.78025 and an annual payment of GHS9.36. This proposal therefore results in a drastic reduction in payment from the current TV license fee of GHS36.00 per annum to only GHS9.36 which is less than a third of the prevailing fee.

SCENARIO 1: Normal billing

Calculation information

From	To	Item	Units/Kwh	Price (GHS)	Amount
1/5/19	1/6/19	Lifeline	50	0	0
1/5/19	1/6/19	Energy First 300	300	0.4229	126.87
1/5/19	1/6/19	Energy Next 300	66.67	0.5489	36.59516
1/5/19	1/6/19	Energy Above 600	0	0.6098	0
1/5/19	1/6/19	Service Charge	31 days	0.1308	4.0548
1/5/19	1/6/19	Subsidy 3 First 300	300	-0.0347	-10.41
1/5/19	1/6/19	Subsidy 3 Next 300	66.67	-0.045	-3.00015
1/5/19	1/6/19	Subsidy 3 First 600	0	-0.05	0
1/5/19	1/6/19	Government Levy	366.67	0.0002	0.073334
1/5/19	1/6/19	Street Light	366.67	0.0001	0.036667
			Current Bill		154.2198
			Previous Bill		0
			Amount Payable		154.2198

SCENARIO 2: Proposed billing with "TV Levy"

From	To	Item	Units/Kwh	Price (GHS)	Amount
1/5/19	1/6/19	Lifeline	50	0	0
1/5/19	1/6/19	Energy First 300	300	0.4229	126.87
1/5/19	1/6/19	Energy Next 300	66.67	0.5489	36.595163
1/5/19	1/6/19	Energy Above 600	0	0.6098	0
1/5/19	1/6/19	Service Charge	31 days	0.1308	4.0548
1/5/19	1/6/19	Subsidy 3 First 300	300	-0.0347	-10.41
1/5/19	1/6/19	Subsidy 3 Next 300	66.67	-0.045	-3.00015
1/5/19	1/6/19	Subsidy 3 First 600	0	-0.05	0
1/5/19	1/6/19	Government Levy	366.67	0.0002	0.073334
1/5/19	1/6/19	Street Light	366.67	0.0001	0.036667
		TV Levy	366.67	0.005	1.83335
			Current Bill		156.053164
			Previous Bill		0
			Amount Payable		156.053164

This is a scenario of a TV Levy of GHS0.005 per kWh (1.17%) which does not impact on Lifeline customers

This gives an estimated average revenue as below:

Electricity Consumer	TV Levy /month	Total/month	Total/year
7,300,000	1.83	13,383,455.00	160,601,460.00

23 This model also results in the least administration and collection costs, as the necessary systems already exists. It will also result in a rapid increase in revenue

[5] According to Energy Commission's 2018 Energy (Supply and Demand) Outlook for Ghana (April 2018, p.18), the annual Electricity Consumption per Household in Kwh in the year 2020 is expected to be 5000Kwh. Electricity consuming households are expected to number 7.3 million.

for the public broadcasting service, since people are less inclined to default on paying electricity bills.

Communication Service Tax adjustment for consumers

24 The upward adjustment of Communication Service Tax (CST), which is currently at 5%. The CST is not a new tax and can easily be adjusted without major challenges.

25 Adjusting the CST will be very effective due to the fact that it encompasses all communications services, including broadcasting services (who make use of frequency spectrum), other networks and the Internet where audiovisual media services are accessible to the public.

26 However, this method does not allow for ring-fencing of poor and low income households based on the rate of utilization.

27 However, a holding adjustment of VAT may need to be considered, to ensure the industry doesn't get an impact of increased VAT payments due to the CST adjustments. Alternatively, the adjustment could be translated into reduced import duties for broadcasting equipment and devices (e.g. transmitters, decoders, phone handsets, etc.) to ensure lower economic access to these devices and increased market access for the telecommunication and broadcast industry, thus increasing the CST collected.

The National DTT Platform

28 Although the draft Bill extensively deals with public service broadcasting, including as regards the objects of public service broadcasting, independence of the state broadcaster and all other broadcasting services, accountability of a public service broadcaster and the governing body of the state owned media,[6] the draft Bill is silent on the National DTT Platform.

29 In our view, it would be inappropriate to seek to de-link or separate transmission services (multiplex operators) from the provision of content by broadcasting service providers.

30 The content and the tools used to deliver that content to the viewers form part of one value chain – if any activities that form part of the value chain are hampered or controlled separately, it will amount to an impediment on the operations of the broadcasting services.

31 Broadcasting which includes the transmission of media contents, sits at the gateway of public communications with the capacity to determine whose ideas get communicated within the public sphere. It would be detrimental to democracy to leave the control of such gateway to public communications in the hands of a

6 s8 to18 of the draft Bill

state agency that is appointed and controlled by government, under our current constitutional dispensation. As a people, we all agreed that, allowing governments to control the gateway to public communication would introduce vulnerabilities into the constitutional firewalls of free expression in Ghana.

32 In this regard, it is important to note that the independence of broadcasting services cannot be guaranteed if the instruments that broadcasters use to deliver their services to their viewers are controlled or managed by the government.

33 The Constitution mandates the Commission to appoint management boards for the management of state owned media, including broadcast services, which obviously includes the transmission service, as the main enabler for mass communication to take place.

34 We therefore propose that the provisions in the draft Bill that relate to the independence and governing body of the public service broadcaster be expanded to apply to the national DTT platform operator. In this regard, we propose that the governing body of the national DTT platform operator be appointed by the Commission.

Should broadcast platform (multiplex/transmission operators) applying to the NCA for authorisation also be subject to the dual authorisation provisions under the draft Bill?

35 We propose that broadcast platform (multiplex/transmission operators), like other operators in the broadcasting sector, be required to apply to the Commission for authorisation. The Commission should then engage with the Authority for the necessary allocation of spectrum needed for such services.

36 As discussed above, the Authority can continue the functions of spectrum management, but ought to work with the Commission's Broadcasting Authorisation Committee as regards the technical aspects of assignment of frequency spectrum. In this regard, the Commission will act as a regulatory interface between the broadcast platform operator and the Authority, and dealings with the broadcast platform operator on spectrum matters ought to only be through the Commission or the Commission's Broadcasting Authorisation Committee. Having satisfied all requirements, the final authorisation ought to be issued by the Commission.

37 In addition, we propose that FTA DTT broadcast platform (Multiplex/transmissions) operators be required to provide fair, reasonable and non-discriminatory access for parties wishing to provide television services on their platforms.

38 Furthermore, an FTA broadcast platform (Multiplex/transmissions) operator, which carries programmes and services from other broadcasters, ought to not be permitted to itself be a television programmes service provider, unless it was

created as a consortium of all the services carried on the network. This will prevent conflict of interest and ensure fair competition.

Regulation of Internet based content services

39 We note that the Ministry is considering how to regulate Internet based services. In this regard, the Ministry has asked us to consider the following:

39.1 Should the definition of broadcasting be expanded to include Internet-based broadcasting and why?

39.2 Should Internet based broadcasting be required to register with the NMC as is the case of newspapers / print publishers?

40 It is not clear what the Ministry means by "Internet based broadcasting". To the extent that the Ministry is referring to provision of a broadcasting service over the Internet (i.e Internet Protocol Television or IPTV), this would already be covered in the draft Bill, which defines a broadcasting service to include the transmission of images and/or sound through any means for reception by the general public.[7]

41 To the extent that the Ministry is referring to the distribution of audiovisual content via the Internet to smart TVs, mobile devices, tablets, computers and other devices (i.e. Over The Top (OTT) audiovisual media services), then our views are set out below.

41.1 OTT services are still unlicensed and unregulated in most countries. Some countries have begun to grapple with whether, and if so, how, to regulate OTT services. Countries with mature frameworks such as the EU, UK, Canada and Australia[8] have embarked on comprehensive policy, and sometimes legislative, consultation processes to investigate these issues, which involved several distinct steps and role-players, and have typically taken several years and are still not complete.[9] Canada and Australia do not license OTT services at all.[10]

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7 See definition of "broadcasting service" in s90 of the draft Bill

8 In Canada OTT services are exempt from broadcasting regulation. After a thorough consultation process and a comprehensive independent expert panel legislative review and report, in November 2020 the Government of Canada introduced a bill to amend the Broadcasting Act in order to bring OTT services into the regulatory framework. Australia made detailed policy recommendations to bring OTT services within the broadcasting regulatory framework, but the recommendations were ultimately not adopted, and OTT services are still not regulated as broadcasting services

9 It is clear the issues are complex, the stakes are high, and a cautious, thorough approach is prudent. It is unwise to regulate OTTs (a) prematurely and (b) without first rigorously assessing the challenges, costs and benefits of OTT regulation at the level of policy and then legislation. A clear and considered policy and legislative framework is required before licensing and regulating OTT services

10 In the EU and UK, which have the most advanced and comprehensive OTT regulatory framework, the OTT framework has evolved over many years, is still being refined, and is not yet final

41.2 OTT services are usually global, or at least regional, platforms that appeal to wide audiences across multiple countries, delivered over the Internet. Their success depends on their appeal to a broad subscriber base across multiple countries. They also offer consumers unprecedented access to quality, quantity and variety of content. These unique characteristics and complexities of OTT services require a thorough, considered, nuanced and appropriate approach to the development of OTT policy, legislation and regulation.

41.3 While there may be some rationale for regulating OTT services, it is not appropriate to simply extend traditional national terrestrial broadcasting regulation to cover OTT services.

41.4 As the Authority and various regulators across Africa, have recognised in relation to DTH satellite services, it is not feasible to license and regulate multi-national services in every country in which they are available. Nor is there any rationale to regulate OTT services in the same way as single channel domestic broadcasting services. Historically, traditional broadcasting regulation has been justified by the scarcity of spectrum in the analogue terrestrial television environment and the significant influence of broadcasting as the main means of mass communication, information and entertainment.

41.5 Any attempt to bring OTT services into the regulatory and licensing framework must be cognizant of these characteristic features and the diminishing rationale for regulation. It must be considered, reasonable and proportionate to the services' impact and user control. OTT services should be regulated no more than necessary to achieve clearly defined public interest objectives, to the extent that those objectives cannot be achieved through market forces and self-regulation.

41.6 Given that OTTs are multi-national (and potentially global), give viewers unlimited variety and choice and give viewers full control over what to watch and when to watch it, we propose that they be licensed and regulated in the same manner as DTH subscription services. In this regard, we propose that OTT service providers be required to appoint a subscriber management service provider in Ghana to ensure that consumers in Ghana are able to approach a local service provider regarding consumer related issues. This will also stimulate local participation in the OTT subsector, and contribute to the local economy through job creation and skills transfer.

Transitional provisions

42 We support the inclusion of transitional provisions at s92 of the draft Bill, which aims to ensure that pre-existing broadcasting services are able to continue operating under the terms of their existing authorisations.

43 Since broadcasting services have, to date, been authorised to operate by the Authority, operators have negotiated and agreed the terms under which they operate with the Authority and considering the high cost of investment of such operations, we propose that apart from the annual regulatory renewals, pre-existing broadcasting services be permitted to continue to operate under the same terms and conditions of the actual authorisation/licences that was in place prior to the Act's coming into force for a limited period of time.

44 We therefore suggest that s92(1) be amended as follows:

> "A broadcasting service in operation before the commencement of this Act shall be deemed to have satisfied the requirements for the grant of authorization under this Act for a period not more than five years for sound broadcasting and not more than 10 years for television broadcasting upon qualification for renewal of the actual authorization, based on the requirements from the date of expiry of the existing authorization."

Consequential amendments to other laws

45 The draft Bill proposes a significant change in the licensing and regulatory framework of broadcasting services. As a result, a number of changes will need to be made to various other laws to align it with the draft Bill. These include, for example, the National Communications Authority Act, 2008 and Electronic Communications Authority Act, 2008. It will also require that some laws be repealed, including the TV Licensing Decree, 1966.

46 These have however not been dealt with in s94 of the draft Bill. We propose that the draft Bill provide details on the consequential amendments to these laws, and indicate the extent and manner of such amendments for consideration during this consultation process.

Content standards

47 We note that the Ministry is considering whether the "proposed NMC media content standards" be treated under the draft Bill or in a separate legislation.

48 We support the inclusion of content standards that apply to broadcasting services in the draft Bill to the extent that such standards are consistent with the 1992 constitution and the judgment of the Supreme Court in Ghana Independent Broadcasters Association v Attorney General and Another J1/4/2016) [2017]. In this regard, while there may be some overlap between broadcasting and other media, the content standards for broadcasting services require specific consideration of the nature of broadcasting services.

49 s61 and 62, read with the Second Schedule to the draft Bill, empower the Commission, in consultation with various stakeholders, to make regulations regarding content standards.

50 We support clause 2(a) of the Second Schedule, which provides for differential application of broadcasting standards to broadcasting services depending on whether they are public, commercial or community services. However, given that broadcasting services may vary vastly, a one size fits all approach to regulating broadcasting content, even with the differential application envisaged, would not be appropriate – for example, requirements that apply to single channel broadcasting services would not be appropriate for multichannel broadcasting services which acquire complete channels.

51 We therefore suggest that the draft Bill empower the Commission to prescribe different standards for different categories of broadcasting services depending on their nature, mandate and funding. We accordingly propose that section 61 be amended to require the Commission to prescribe different broadcast standards for different broadcasting services based on their nature, mandate and funding.

52 We further propose that a new section 61(2) be included in the draft Bill as follows:

> "(2) Broadcasting service providers shall comply with those content standards which are applicable to their category of broadcasting service, as prescribed by the Commission."

53 In addition, in line with international best practice, we propose that the draft Bill allow for a system of self-regulation by broadcasters, namely a code of conduct developed by the broadcasting industry and enforced by an industry body, which will be best placed to deal with issues immediately as they arise. The draft Bill ought to allow broadcasting services to draft a code of conduct and to allow this industry body to enforce the code. The code would have to be acceptable to the Commission, and the Commission would need to be satisfied that broadcasters adhere to the code. Different categories of broadcasting services ought to be permitted to develop different codes of conduct, appropriate to their services.

54 We therefore propose the insertion of a new section 61(3) as follows:

> "(3) A broadcasting service provider who is a member of a body which has proved to the satisfaction of the Commission that its members subscribe to and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms as acceptable to the Commission may elect to subscribe to the industry code instead of the Code prescribed in terms of sub-section (2)."

Film Classification

55 A critical aspect of protecting children and other vulnerable persons from unsuitable content is the classification of content.

56 Most countries adopt a co-regulation (which rely on codes of practice developed by industry and registered with the regulatory authorities) or self-classification (where broadcasters are required to, either based on the channel supplier's or their own classifications, provide audio and visual advisory assistance to audiences and include guidelines as to age) approach to classification of films.[11]

57 We propose that the draft Bill include a provision that requires broadcasting service providers to self-classify the films on their services in accordance with standards developed by the relevant classification authority in consultation with stakeholders and in line with the relevant classification law for the time being in place.

Regulation of DTH Free-To-Air Services

58 Equally important to consider is the DTH Free-to-Air broadcasting services. Due to the technical nature of DTH operations, DTH Free-to-Air broadcasting services like DTH subscription broadcasting services are borderless in nature[12] and DTH satellite service providers cannot tailor their services for each country within their satellite footprint. It is therefore not feasible for a multi-national satellite service provider to tailor the content between countries to any significant degree to specific clients. In addition, communications authorities from various jurisdictions do not issue the frequencies or spectrum used for these satellite broadcast services.

59 To protect consumers of DTH Free-to-Air services, we propose that unlike the DTH subscription services, DTH Free-To-Air services (multichannel bouquet platforms) should be authorized to operators, who should take responsibility for the content they provide to consumers.

Subscriber management services

60 We support s53(3) of the draft Bill, which empowers the Commission to make regulations for the authorisation of broadcasting subscriber management services.

61 Subscription management service licensing has evolved as a regulatory solution in Ghana and many other countries,[13] to protect consumers of foreign (DTH) subscription broadcasting services. In this regard, similar to DTH FTA services, subscriber management service licensing and regulation is premised on the recognition (a) of the borderless nature of DTH satellite services; (b) the fact that

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11 These include Australia, Canada, New Zealand, South Africa, the United Kingdom, and the United States of America

12 Satellite cannot be "programmed" so that signals do not reach a certain area in its footprint. The signals transmitted from a satellite are accessible in the entire footprint of the satellite. It means that all of the channels available in a DTH service are uplinked to the relevant satellite, and are available to all of the countries within the satellite footprint

13 Botswana, Kenya, Malawi, Mozambique, Tanzania, Uganda, Zambia and Zanzibar

a DTH satellite service provider cannot tailor its service for each country in the satellite footprint;[14] (c) that it is not feasible for a multi-national service provider to tailor the content between countries to any significant degree, and that to do so would drive up the service's operating costs, without affording it a corresponding return; (d) of the increasing role played by third party content over which the DTH provider has no editorial control[15]; and (e) that it is not feasible for multi-national DTH services to be licensed and regulated as a broadcasting service in every country in which they are received.

62 However, the draft Bill does not define "subscriber management services" or provide guidance to the Commission as to the regulations to be made.

63 Subscriber management services are not broadcasting services. They are purely administrative services to manage subscriptions to a subscription broadcasting service. They do not involve the provision of content, or the use of an electronic communications network or frequency spectrum.

64 It should be made clear that those provisions in the draft Bill which apply to broadcasting will not apply to subscriber management services.

65 We propose that the term "subscriber management services" be defined in s90 of the draft Bill as follows:

> '"broadcasting subscriber management service' means a service which consists of the provision of support services to a subscription broadcasting service which support services may include, but are not limited to, subscriber management support, subscription fee collection, call centres, sales and marketing, and technical and installation support, but does not include the provision of a broadcasting service."

66 We also propose that a new subsection be included at s53 of the draft Bill to cater specifically for the appointment of a subscriber management services provider by satellite broadcasting and multichannel distribution services provided

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[14] A satellite cannot be "programmed" so that signals do not reach a certain area in its footprint. The signals transmitted from a satellite are accessible in the entire footprint of the satellite. It means that all of the channels available in a DTH service are uplinked to the relevant satellite, and are available to all of the countries within the satellite footprint

[15] Third party content, over which the DTH provider has no editorial control, comprises a greater proportion of multi-channel services, in stark contrast to the traditional single-channel broadcasting services with broadcaster-made content on which traditional broadcasting regulatory models were initially premised. This is another reason why programming cannot be customized for each country in which it is received. Third party content providers do not allow content changes or insertions to be made without their consent, since this would undermine the brand of the channel through the insertion of different content. Even if channel suppliers were to allow content changes (which is very unusual), the DTH service provider would require substantial technical equipment, and the investment of substantial time and resources, to make any changes to a channel, which would be prohibitively expensive and unfeasible to do

from outside Ghana. In this regard, we propose that this subsection read as follows:

> "A subscription broadcasting service provided from outside Ghana which is receivable by subscribers in Ghana must appoint a subscription management service provider to provide subscription management services to its subscribers in Ghana."

Prevention of dominance in broadcasting

67 The objects of the Act include "the prevention of dominance by the government or a section of society in the consumption, ownership, management, production or distribution of broadcasting services".[16]

68 s59 of the draft Bill empowers the Commission to make regulations for the control and ownership of subscription, multichannel and satellite broadcasting to preclude dominance by one or more persons or authorisation holders.

69 The draft Bill provides no guidance to the Commission as to how to determine dominance, or whether regulations, or any other interventions to preclude dominance are, in fact, necessary or beneficial to the sector.

70 The presumed need to preclude dominance is based on the assumption that dominance is, in itself, anti-competitive. However, this is not necessarily the case. Intervention is necessary only when the dominant firm acts in such a way so as to prevent or lessen competition by engaging in anti-competitive acts. We are therefore concerned that provisions in the draft Bill which seek to prevent dominance are not in line with sound competition law principles or international best practice.

71 In any event, Government is in the process of drafting competition legislation of general application, to maintain, promote and sustain fair competition in the market, to prevent practices having substantial adverse effects on competition and to protect the welfare and interests of consumers and the economy in Ghana, and to establish a Competition Commission for this purpose.

72 Not only are the objectives of the broadcasting legislation and the competition legislation different, but the institutional design of these statutes is very different. The examination of the behaviour and economic activities of entities requires a body that has the ability and expertise to regulate competition effectively. The competition authorities are likely to be better resourced for this purpose and therefore more effective than the Commission in regulating competition concerns. Furthermore, competition legislation typically provides detailed guidance as to how competition issues are to be dealt with, whereas the draft Bill does not (and is not expected to).

[16] s3(h) of the draft Bill

73 The inclusion of provisions empowering the Commission to make regulations to preclude dominance by one or more persons under the draft Bill is likely to result in jurisdictional disputes, and in different and sometimes inconsistent or conflicting jurisprudence around competition law developments and forum shopping.

74 We therefore propose that competition issues be dealt with under the competition legislation and that s3(h) and s59(2) of the draft Bill be deleted.

Public interest obligations of commercial broadcasters

75 s20 of the draft Bill requires the Commission to, among others, ensure that commercial broadcasting providers' programmes that in aggregate are of diverse range, reflect and respond to the diversity of society, promote the public interest and are in a broad range of languages.

76 We have no objection to this requirement. However, internationally, different types of broadcasting services are regulated differently based on their nature, mandate, influence and funding. For example, public service broadcasters have a broad public service mandate as they are primarily funded by public monies (i.e. by licence fees and/or government grants), have a broad reach and are accordingly far more influential. Thus, the norm internationally is that the primary responsibility of achieving public interest objectives is borne by the public broadcaster. Commercial broadcasters are assigned lesser public interest obligations taking into account their nature, mandate and funding.

77 In exercising its powers under s20, we propose that the Commission be required to bear in mind the need to balance public interest objectives with the commercial realities of free to air and subscription commercial broadcasting.

Local content requirements

78 s89(1)(b) of the draft Bill empowers the Commission to make regulations "on the use of local content by broadcasting services". It is not clear what is meant by "use of local content". This power is therefore extremely broad and vague, and no guidance is provided to the Commission in this regard.

79 In addition, s89(1)(a) of the draft Bill empowers the Commission to make regulations to prescribe the minimum percentage of airtime for local productions and local languages in community broadcasting. Similarly, s22(2) provides that commercial and multi-channel broadcasting services may be required to carry local programme channels and items that reflect local themes, culture and history as may be determined by the Commission in accordance with criteria prescribed by it.

80 We understand and support initiatives aimed at promoting the broadcasting of local programmes and channels. However, a broadcaster's ability to broadcast local programmes or channels depends on the availability of local programmes

or channels. Accordingly, any initiatives to promote the development and broadcasting of local programmes or channels, must take cognizance of the maturity of the production industry.

81 In order to guard against excessive local content requirements, local content requirements should be put in place only after an assessment of the production industry and broadcasters' ability to comply with the requirements.

82 In addition, local programme or channel obligations must be determined taking into consideration the nature, funding and mandate of broadcasting services. The highest obligations ought to be imposed on public broadcasters, followed by fewer obligations on commercial broadcasting services. The draft Bill ought to therefore include factors that the Commission must consider when determining the local content requirements applicable to broadcasting services and ensure that the requirements are appropriate to the nature of the broadcasting service.

83 Furthermore, if the intention is to promote and encourage greater investment in the production of local programmes and channels, then flexibility is key. Broadcasters should be encouraged to innovate and the widest possible range of initiatives should be incentivised. For instance, some broadcasters may choose to broadcast local content programmes or channels, others may choose to invest in the development of the production industry through skills development, training, provision of equipment, enterprise development or other investment that contribute to the growth of the production industry. Some broadcasters may choose a combination of initiatives.

84 We therefore propose that s89(1)(b) of the draft Bill be amended to empower the Commission to make regulations as may be reasonably necessary for the progressive implementation of initiatives aimed at promoting the broadcasting of local programmes and channels, bearing in mind the different categories of broadcasting services.

Syndication of programmes

85 s69 of the draft Bill empowers the Commission to "make regulations for the syndication of programmes among local broadcasting services as well as between foreign broadcasting services and local broadcasting services to ensure plurality of voices, avoid dominance by one or a few broadcasting services and ensure fair competition in commercial broadcasting".

86 "Syndicated programme" is defined as "broadcast material transmitted by another broadcaster contemporaneously with the original broadcaster or at different time schedules".[17]

87 It accordingly appears that the provision contemplates a regulated sharing of content, such that the same content is broadcast on multiple services. It is

[17] s90 of the draft Bill

premised on the misconception that syndication is necessary and that the lack thereof may be anti-competitive or restrict plurality and diversity.

88 Broadcasting one of a kind content enables broadcasters to distinguish their services from their competitors, thus enabling broadcasting services to compete in an extremely competitive broadcasting industry.

89 Attempts to mandate syndication will have negative impact on the broadcasting industry and would encourage free-riding on the efforts of others, discourage innovation and productivity, deter investment and decrease the quality and choice of content for consumers.

90 Mandatory syndication would also unduly interfere with the commercial activities of broadcasters. It would also unjustifiably infringe on the intellectual property rights of content or channel providers and broadcasting rights holders in that it would dictate to them how and to whom they should allow access to their rights.

91 In addition, broadcasters do not have control over whether or not content can be syndicated. It is the rights owner or channel supplier who decides whether content may be syndicated, and the terms of syndication. In general, rights owners and channels suppliers do not permit syndication of content. Syndication would require the permission of the rights owner or channel supplier, and the rights that permit syndication of programme are usually more expensive.

92 Furthermore, if the same content is syndicated by all broadcasters, consumers will have access to the same content across different broadcasting services – this will negatively impact on plurality, diversity and competition within the broadcasting industry. Regulated syndication would not ensure plurality or fair competition. Rather, it will decrease the quality, diversity and choice of programming available on our broadcasting services.

93 Regulated syndication of programmes is accordingly inappropriate and excessive interference with the rights of broadcasters and rights owners, will result in a reduction in growth and competition in the broadcasting sector. To the extent that broadcasters wish to syndicate programming, they should be free to do so subject to commercially agreed terms.

94 We therefore propose that s69 of the draft Bill be deleted.

Funding of commercial subscription broadcasting services

95 s24 of the draft Bill provides that the funds of a commercial subscription broadcasting service may include income from subscription, advertising and sponsorship, provided that advertising or sponsorship may not constitute the major source of income, meaning not more than 40% of the income or as may be prescribed by the Commission.

96 We understand this provision to be aimed at protecting advertising revenue for free to air broadcasting services. However, subscription broadcasting services do not pose significant threat to the advertising revenue of free to air services. This provision is therefore unnecessary and we propose that it be deleted.

97 In this regard, the fastest growing advertising segment in Ghana is the Internet.[18] Free to air broadcasters face increased competition for advertising revenue from services provided over the Internet, such as Amazon and Google.

How should deliberate disinformation be treated under the draft Bill?

98 Currently there are civil tort action remedies available to persons who suffer damage due to deliberate disinformation. We are of the view that these are sufficient to deter deliberate disinformation.

99 However, to the extent that the Ministry intends to include provisions in the draft Bill to address deliberate disinformation, we suggest that a prohibition on knowingly broadcasting misleading information be included in the content standards made in the draft Bill to the extent that such prohibition is consistent with the Constitution.

Should local Information Centres be classified under Community Broadcasting?

100 Although local information centres are used to disseminate information to the community, they do not involve transmission of images and/or sound to the public, sections of the public or subscribers to be received by reception devices such as radio receivers, television sets, mobile phones or other appropriate receiving equipment. They therefore do not constitute broadcasting services.

101 They make use of equipment such as a microphone, a recorder, an amplifier, horn speakers, vans and "gong gong" beaters to get their messages to the public without the need for a receiving equipment.

102 While we agree that there is a need to put in place measures to address any nuisance they may cause and promote social accountability, we do not believe that they ought to be regulated under the draft Bill as they do not constitute broadcasting services.

Should the NCA be given powers to disallow or pull-down URLs that refuse to comply with NMC findings and warnings for unethical content?

103 Provisions regarding taking down of illegal or unlawful content online is already dealt with in s94 of the Electronic Transactions Act, 2008, which requires that any person who claims that an electronically published matter is illegal or unlawful must send a take-down notification to the intermediary or service

[18] PWC "Entertainment and media outlook: 2018 – 2022: An African perspective", pg. 37, accessed at https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2018-2022.pdf

provider. The intermediary or service provider will then take down the offending content.

104 We suggest that the Commission make use of this provision to take down. In this regard, once the Commission has completed its internal processes and the respondent has exhausted all relevant procedures, the Commission may submit, to the intermediary or service provider, the take down notice. There is therefore no need to empower the Authority to disallow or pull-down URLs that refuse to comply with Commission's findings and warnings for unethical content.

Should all broadcasters be obliged to moderate audience interaction or commentary in the interest of national security, public morality, etc. and what are the sanctions for non-compliance?

105 We propose that moderation of audience interaction or commentary be dealt with in the content standards.

Reference to the repealed Companies Act

106 References have been made in s38(1)(a) and 53(1) to the Companies Act, 1963 (Act 179). This Act has been repealed and replaced by the Companies Act, 2019 (Act 992). The references should therefore be made to Act 992 instead of Act 179.