Independent Communications Authority of South Africa

The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences

Position Paper

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PART A: INTRODUCTION

The Authority's Constitutional and statutory mandate requires it to regulate broadcasting activities in the public interest.[1] Accordingly, the Authority always strives to ensure that the statutory mechanisms for regulating broadcasting activities serve the public interest. In order to achieve this objective, the Authority is empowered to:

- undertake inquiries on all matters within its jurisdiction;[2]
- conduct research on all matters affecting broadcasting in order to perform its regulatory role;[3]
- make recommendations to the Minister of Communications ("the Minister") for amendments to the Independent Broadcasting Authority Act, No.153 of 1993 ("the IBA Act") and the Broadcasting Act, No.4 of 1999 so as to align those statutes with the prevailing industry and public policy environment. [4]

The Authority is also empowered to conduct inquiries, from time to time, into any matter relevant to:

- the achievement of the objects and the application of the principles enunciated in section 2 of the IBA Act; [5] and
- the exercise and performance of its powers, functions and duties in terms of the IBA Act.[6]

Further, whenever the Authority deems it necessary in view of developments in broadcasting technology or for the purpose of advancing the objects enunciated in section 2 of the IBA Act, it may, after due inquiry in terms of section 28 of the IBA Act, make recommendations to the Minister regarding the amendment of the existing restrictions on control of commercial broadcasting services. The Minister must in turn table such recommendations in Parliament within 14 days after receipt of those recommendations. [7]

There are a number of other factors which motivated the Authority to conduct this inquiry. Firstly, in the Position Paper on Private Sound Broadcasting[8] the Authority gave consideration to the second phase of licensing of commercial sound broadcasting licensees. In Annexure 1 to that Position Paper, the Authority stated the following:

> "For reasons of viability, the Authority has invited eight applications in the area of Gauteng, Cape Town and Durban. These areas have high population densities which may mean greater chances of profitability. The exact parameters of the frequencies will be determined in consultation with the successful applicants. The Authority will invite expressions of interest for private sound broadcasting services in areas other than Cape Town, Durban and Johannesburg. These expressions of interest should take the form of proposals to the Authority identifying the area and broadly describing the format of the station and its prospects in relation to financial viability."

[1] See section 192 of the Constitution and the preamble to and section 2 of the IBA Act. In seeking to promote the public interest, the Authority is guided by the objects enunciated in section 2 of the IBA Act and section 2 of the Broadcasting Act. For present purposes, it is important to note that section 2(h) of the IBA Act states that one of the objects of the IBA Act is to ensure that broadcasting services are not controlled by foreign persons (a sentiment which is echoed in section 2(n) of the Broadcasting Act, which requires that broadcasting services be effectively controlled by South Africans). Likewise, section 2(j) of the IBA Act provides that one of the objects of the IBA Act is to impose limitations on cross-media control of commercial broadcasting services.

[2] Section 13(1)(f) of the IBA Act, which also empowers the Authority to conduct public hearings.
[3] Section 13(1)(i) of the IBA Act.
[4] Section 13(1)(k) of the IBA Act.
[5] Section 28(1)(a) of the IBA Act.
[6] Section 28(1)(b) of the IBA Act.
[7] Sections 49(7) and 50(4) and (5) of the IBA Act. Also see section 50(6) of the IBA Act.
[8] Available online on http://www.icasa.org.za.

In the light of the Authority's interest in exploring the viability of awarding commercial sound broadcasting licences to licensees in areas other than Gauteng, Cape Town and Durban (so-called "secondary town" licensees), the Authority committed itself to investigating the viability of commercial sound broadcasting licences in secondary towns.

Secondly, the White Paper on Broadcasting Policy, 1998, stated that "the government is keen to increase investment opportunities in the South African broadcasting services so as to enable South Africa to participate fully in the global market". According to the White Paper, Government was of the view that the 20% limit on ownership and control of broadcasting services should be raised.[9]

The Authority has, since 1996, licensed fourteen commercial sound services. The Authority's Triple Inquiry Report, 1995, recommended that a number of the SABC's regional stations be sold.[10] The sale of these stations, which included KFM, Algoa, East Coast, Oranje, Highveld and Jacaranda, commenced the process of transforming the sound broadcasting landscape of South Africa.

The Authority's Position Paper on Private Sound Broadcasting, 1996, gave consideration to the second phase of licensing commercial sound broadcasting licensees. The new commercial sound broadcasting services were licensed in 1997 in Gauteng, Kwazulu-Natal and Western Cape. These new services are known as the Greenfields stations and they are Kaya FM, Y-FM, Classic FM, Cape Talk, P4 Cape Town and P4 Durban. Two more commercial stations, Punt Gesels in Gauteng and Western Cape closed down in 2000.

In the 1996 Position Paper the Authority decided not to licence national commercial radio stations.

Currently there are thirteen commercial sound broadcasting services. The Authority is in the process of re-licensing Capital Radio in Kwazulu-Natal and Eastern Cape and will also re-licence the two MW frequencies forfeited by Punt Gesels Radio[11]. This will bring the number of commercial sound broadcasting licensees to sixteen. In the context of this review, the Authority has also considered the licensing of further, additional commercial broadcasting services.

The increased competition for advertising revenue, coupled with the relatively small size of the South African market, has meant that media companies face low margins and revenues. In order to offset these constraints, some owners of broadcasting services have expressed the view that the existing ownership and control restrictions should be liberalised. Broadcasters have argued that liberalisation would allow them to derive economy of scale benefits, thereby reducing their costs through shared service facilities, like marketing, and allowing them to build revenues through multiple channels.[12]

Furthermore, technology trends and market pressures have created the need for further capitalisation. Broadcasters and their shareholders have faced obstacles in their attempts to source further capital for their operations. Accordingly, these pressures have seen a number of applications, in terms of section 52 of the IBA Act, for amendments to broadcasting licence terms and conditions. Many of these applications have been as a result of the increased, sometimes unforseen, capitalisation requirements for Greenfields broadcasting businesses.

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[9] The White Paper on Broadcasting Policy, 1998, at page 19.
[10] The Triple Inquiry Report, 1995, at page 41.
[11] The Authority will re-licence these frequencies taking into account the Terrestrial Broadcast Frequency Plan.
[12] ICASA's Discussion Paper on "The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences", September 2002, at page 17.

Broadcasters are of the opinion that the consolidation of their broadcasting interests would promote the development of the industry through, amongst other things, training, technical development and support for community radio.[13] Opponents of consolidation are concerned about issues seen as threats to diversity of opinion and anti-competitive behaviour.

Against this background, the Authority has conducted a review of:

- the statutory limitations on ownership and control of broadcasting services, as set out in sections 48, 49 and 50 of the IBA Act;
- the commercial sound broadcasting sector, particularly the so-called Greenfields licences; and
- the feasibility of issuing additional commercial sound broadcasting licences.

More specifically, this inquiry was intended to stimulate debate on the impact of the IBA Act on:

- the Authority's statutory mandate and its approach to the regulation of the broadcasting industry;
- the meaning and effect of legal concepts such as "ownership", "control" and "empowerment", both in the specific context of the IBA Act and in the general context of South African company law and competition law;
- the imperatives of, and the prerequisites for, foreign and local investment (both in terms of funding and expertise) in the South African broadcasting industry;
- policy and political considerations concerning black economic empowerment, diversity of ownership and related issues; and
- the feasibility of commercial sound broadcasting licences in secondary towns.

This inquiry was informed by written and oral responses to the Discussion Paper titled "The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences" which was published on 27 September 2002 ("the Discussion Paper").

The Authority received nineteen submissions. Eighteen of these indicated their wish to make oral presentations. Oral hearings were held at the Authority's offices from 10 to 18 February 2003.

In analysing the framework for the regulation of ownership and control of commercial broadcasting services, the Authority has been guided by, amongst other things:

- the need to encourage investment in the broadcasting industry;
- the need to promote stability within the broadcasting industry;
- the need to encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
- the need to promote the most efficient use of the broadcasting services frequency bands;
- the need to ensure that broadcasting services, when viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa;
- the need to ensure the protection and viability of public broadcasting services; and
- as well as ensuring fair competition between broadcasting licensees.[14]

[13] Ibid.
[14] Section 2 of the IBA Act, 1993

The Position Paper is divided into four parts, namely Introduction, Submissions, Findings and Proposed Amendments.

Part B: Submissions reflects questions posed by the Discussion Paper and also summarises the written and oral submissions on these and related questions.

Part C: Findings sets out the Authority's policy on commercial sound broadcasting with respect to matters that were the subject of this inquiry. This includes the Authority's approach to amendments to the legislation, consolidation and plans for licensing additional commercial sound broadcasters.

Part D deals with Proposed Amendments and sets out the Authority's proposed legislative amendments to Schedule 2 and sections 48, 49 and 50 of the IBA Act. In this regard and in the interests of further public participation, the Authority has decided to gazette the contents of Part D for written comment. After comments have been taken into account, the Authority will submit the proposed amendments to the Minister in terms of section 13(1)(k) of the IBA Act read with sections 49(7) and 50(4).

PART B: SUBMISSIONS

A summary of the views expressed by interested parties and stakeholders, in interviews and written and oral submissions, is set out below. This summary is not exhaustive and is merely reflective of some of the important arguments raised during the inquiry.

1. Consolidation and Diversity

The Discussion Paper stated that one result of the trend toward liberalisation of broadcasting is the formation of complex entities offering a more varied portfolio of products and services within existing markets. "These same entities can also reach into new geographic markets, establishing a national, or even an international, presence. Thus, what was a local or national business, often highly fragmented, is undergoing consolidation that puts a premium on size and often leaves smaller enterprises more vulnerable".[15]

As they seek to improve their profit margins, broadcasters may develop a corporate strategy with an eye on diversification, or they may develop new in-house capabilities. Several broadcasters have invested in creating programming assets, keeping those costs inside the company, while at the same time developing a new revenue stream from sales to third parties. Advanced media often generates higher profit margins, and several companies are investing in digital platforms, complementary Internet ventures, and the like.

The Discussion Paper sought guidance on the potential benefits, or dangers, of consolidation in the South African broadcasting market. The National Association of Broadcasters ("the NAB") submitted that there are definite benefits to consolidation. The NAB submitted that these benefits to consolidation include:

- significant cost savings for broadcasting companies, through the pooling of resources and the rationalisation of cost centres;
- the development of corporate expertise in, and commitment to, the broadcasting sector as a whole, through the experience of holding a number of different broadcasting licences; and
- the development of large local broadcasting companies that are able to compete internationally by producing export broadcasting products of a high standard.

The NAB also submitted that there are potential drawbacks to consolidation. "Most significantly is the potential threat to the diversity of views available to the public via broadcasting services. However, the NAB submits that the dangers of this can be mitigated through the imposition of licence conditions to ensure editorial independence of particular broadcasting services and that each broadcasting service has its own news team"[16].

The commercial free-to-air television broadcaster, Midi TV (trading as e.tv), submitted that the limitation on the number of radio services which may be controlled by a single entity has inhibited the consolidation and development of significant media players, most of whom are black empowerment companies. "The dominance of the SABC in the commercial radio market has further inhibited the growth of other players. The SABC's ability to cross-promote radio and television gives it added advantages over regional commercial competitors".[17]

[15] The Discussion Paper at page 11.

[16] The NAB's submission to ICASA on the Discussion Paper ("the NAB submission") at page 24.

[17] Midi TV's submission to ICASA on the Discussion Paper ("Midi TV's submission") at page 4.

Sentech Pty Ltd ("Sentech") submitted that consolidation within the media and communications industries is already becoming a reality and in time to come may become a necessity in order to ensure that the desired economies of scale are achieved for effective competition. "The move towards consolidation will probably be driven by two other imperatives, namely, the programming dictates of the market and the increasing trend towards convergence. South Africa should strive to ensure that an appropriate regulatory environment is created to embrace changes brought by technological catalysts".[18]

New Africa Investments Limited ("NAIL") submitted that the advantages of consolidation include the creation of economies of scale in respect of technology as well as possible networking and synergies of licensees' operations without compromising the format or South African content requirements in the industry. "The networking and synergy of operations can create profitability which results in an increase in market capital which can lead to investment. In addition, stakeholders have been able to transfer technical expertise and skills critical for the development and growth of the industry".[19]

Makana Investment Corporation ("Makana") submitted that the consolidation of radio ownership will generate substantially more benefits than only the rationalisation of back office functions. "Relaxing the current ownership and operational restrictions will enable radio station owners to create critical financial mass".[20]

Makana further submitted, however, that consolidation if not properly regulated, may mean continued marginalisation of Greenfield licences. "This will happen if the established, market leading and dominant radio stations are allowed to consolidate due to their format and target market similarity, albeit over different coverage areas. This will hamper diversity of content as media owners seek to syndicate programming, network and package news centrally, leverage managerial skills and entrench their already dominant positions with advertisers".[21]

2. Definitions of Control, Deemed Control and Financial Interest

Sections 48, 49 and 50 of the IBA Act are all concerned with the "control" of commercial broadcasting services. Section 1(2) of the IBA Act provides that, for the purposes of that Act, a person shall control, have control or be in control of or be in a position to exercise control over, a broadcasting licensee, a newspaper or a company, *inter alia* in the circumstances contemplated in paragraphs 1, 2 and 3, respectively, of Schedule 2 of the IBA Act.

The Discussion Paper raised the question whether the definition of "control" set out in Schedule 2 to the IBA Act was appropriate and sufficiently clear. It also stated that stakeholders had criticised the definition of "financial interest" in section 1 of the IBA Act as contradicting the provisions of paragraphs 1 and 3 to Schedule 2, thereby creating confusion and possible inconsistencies in the IBA Act. The Discussion Paper sought guidance on whether (and, if so how) the IBA Act should be amended.

The NAB submitted that the examples of *de facto* control of a broadcasting licensee as set out in section 1 of Schedule 2 to the IBA Act are as clear as they are appropriate. "The NAB respectfully suggests that given its

[18] Sentech's submission to ICASA on the Discussion Paper ("Sentech's submission") at pages 3 and 4.
[19] NAIL's submission to ICASA on the Discussion Paper ("NAIL's submission") at page 3.
[20] Makana's submission to ICASA on the Discussion Paper ("Makana's submission") at pages 9 and 10.
[21] Makana's submission at page 10.

suggestions for how to regulate ownership issues, there is no need to have a complex definition of "deemed control" as is currently provided in section 3 of Schedule 2 to the IBA Act".[22]

The National Community Radio Forum ("the NCRF") and Classic FM submitted that the definition of control is appropriate and sufficiently clear.[23] The NCRF suggested that the Authority should add a clause on `corporate accountability' to strengthen the Schedule.[24]

Johnnic Publishing ("Johnnic") submitted that control should be defined as when an entity has more than 50% of the equity share capital or possesses more than 50% of the voting power in the company. [25]

Makana submitted that control needs to be considered broadly and should include an assessment of the level of operational involvement of the Black Economic Empowerment ("BEE") groups together with their level of economic and equity participation in the licence.[26]

Sentech proposed the deletion of section 1(1) (a) of Schedule 2 of the IBA Act "since the instances where control is deemed to be exercised or as to what is meant by control are set out in sections 1(1) (b) through to 1(1) (e) of Schedule 2". They also proposed that "associate" be defined as holding company or subsidiary as contemplated in section 1 of the Companies Act, 61 of 1973.[27]
The NAB also submitted that the reference to "financial interest" makes the entire definition tautologous because the definition of financial interest in the IBA Act itself refers to an interest that may not have voting rights attached to it, but which gives a person or entity a financial interest directly via shares or indirectly via an agreement giving it the power to have control of the licensee or effective say over the affairs of the licensee. "Thus one has deemed control if one has an agreement giving one *de facto* control and the definition of financial interest makes no reference to financial matters at all, clearly an absurdity, and the percentages referred to in the section make no sense: they are set at exceeding 25% for equity interests but at 25% for other financial interests". The NAB suggested that the percentage set be rationally connected to the *de facto* operation of company law. "In this regard, the NAB notes that in terms of the Companies Act, shareholders require a 75% majority to approve special resolutions for matters such as the sale of the business or any material asset, liquidating the company, and increasing the authorised share capital of the company. Thus, negative control of a company is generally accepted as being 25% plus 1".

The NAB also proposed that the definition of "financial interest" be deleted from the IBA Act and that section 3 of Schedule 2 to the IBA Act be amended to read as follows:

> *"Notwithstanding the provisions of any law or of the common law, a person shall be deemed to be in control of a company if such person has equity shareholding in such company exceeding 25%". 28*

Sentech submitted that financial interest as currently defined overlaps with the definition of control provided for in section 1 of Schedule 2. "Its application to section 3 of Schedule 2 is confusing since by virtue of section 3, other financial interests in a company exceeding 25% of its net assets give rise to a presumption of control.

[22] The NAB's submission at page 33.
[23] The NCRF and Classic FM's submissions to ICASA on the Discussion Paper at pages 7 and 5 respectively.
[24] The NCRF's submission at page 7.
[25] Johnnic's submission to ICASA on the Discussion Paper ("Johnnic's submission") at page 34.
[26] Makana's submission at page 33.
[27] Sentech's submission at page 8.
[28] The NAB's submission at page 35.

Financial control should be defined as any direct or indirect financial interests, whether by way of agreement or otherwise".[29]

Sentech also proposed that the words "or interest either in voting shares or paid-up capital" in section 48(1) (b) should be deleted, and that the words "financial control" in section 50(2) (a) should be amended to "financial interest".[30]

The NAB suggested deleting the reference to "financial interests" from the definition of "deemed control" as set out in paragraph 3 of schedule 2 as there is insufficient clarity with respect to the nature of the "financial interest" which would lead to a party having "deemed control".[31]

3. Limitations on Foreign Control of Broadcasting Services

Section 48 of the IBA Act limits the extent to which foreign persons may exercise control over, or have interests in, commercial broadcasting services. Section 48(1) provides that one or more foreign persons shall not, whether directly or indirectly-

(a) exercise control over a commercial broadcasting licensee; or

(b) have financial interest or interest either in voting shares or paid-up capital in a private broadcasting licensee exceeding twenty percent.

Section 48(2) provides that not more than twenty percent of the directors of a commercial broadcasting licensee may be foreign persons.

The White Paper on Broadcasting Policy, 1998 ("the White Paper"), stipulates that private broadcasters are expected to fulfil significant public policy goals.[32] Although the White Paper does not elaborate, these public policy goals encompass both the objective of promoting South African content and the objective of ensuring access of historically disadvantaged persons to the broadcasting sector.. The former is closely aligned to the general themes of diversity and plurality, and focuses on ensuring the cultural relevance of media voices to the local market. Against these priorities, the White Paper weighs the need for foreign investment to enable commercial broadcasters to fulfil the policy goals. It states that "the Government is keen to increase investment opportunities in the South African broadcasting system so that South Africa can play its rightful role in global markets. The increase in investment opportunities will flow from both the investments of South African companies and foreign companies that partner South African companies in new undertakings".[33]

The Discussion Paper raised the question whether there is any justification, in the context of globalisation, to continue to restrict foreign control of South African broadcasting licensees, and whether the abolition of the present restrictions would encourage investment and stimulate growth in the South African broadcasting industry. The Discussion Paper further enquired whether the restrictions on foreign control of South African broadcasting licensees should be adjusted and whether the Authority should be empowered to grant exemptions, in appropriate circumstances, from the limitations on foreign control as set out in section 48.

The NAB and Primedia Broadcasting (Pty) Ltd ("Primedia") submitted that the current restrictions are too limiting and that the resultant lack of direct foreign investment into the South African broadcasting industry has

[29] Sentech's submission at page 9.
[30] Ibid.
[31] The NAB's submission at page 35.
[32] The White Paper on Broadcasting Policy, published by the Department of Communications, May 1998, at page 19.
[33] Ibid.

meant that the growth of the industry has been inhibited and as a result, South Africa is playing an unnecessarily minor role in the global markets. They argued that the restrictions are not appropriate for large-scale international satellite broadcasters with an international broadcasting footprint. The NAB argued that if South Africa insists on a 20% restriction, these broadcasters would flock in ever-increasing numbers to friendlier regulatory environments in Africa, and South Africa will lose its position as the international gateway to Africa.[34]

The NAB and Primedia also submitted that listed companies have a difficult time in identifying whether their shareholders are local or foreign as many shares are held by nominee companies. "It is extremely difficult for them, or indeed for the JSE Securities Exchange South Africa ("the JSE"), to regulate the trading of shares. Consequently, they maintained, the threshold should be raised to avoid listed companies inadvertently falling foul of the restrictions.[35]

The NAB also argued that having too low a foreign ownership threshold undermines black economic empowerment. According to the NAB, people from historically disadvantaged groups usually lack access to capital, whether equity or debt. If they cannot obtain such capital from foreign funders, they will have to access capital from traditional sources. The NAB submitted that these are usually white and advantaged and, that the restriction on foreign ownership actually serves to further enrich traditionally white companies.

The NAB and Primedia proposed that a single foreign person be allowed to hold, whether directly or indirectly, not more than 25% equity ownership of a South African unlisted public or private company holding a commercial broadcasting licence and which broadcasts within South Africa only. "The NAB submits that 25% equity ownership is an important cut-off point in terms of South African company law and ought to apply in the broadcasting sphere. With only 25%, a person cannot veto local shareholders' attempts to run the company and cannot restrain such local shareholders from passing special resolutions affecting major company operations".

The NAB and Primedia also proposed that two or more foreign persons be allowed to hold, between them, whether directly or indirectly, not more than 35% equity ownership of a South African unlisted public or private company holding a commercial broadcasting licence and which broadcasts within South Africa. They argued that it should be provided that this upper limit may increase to 45% if at least one of the foreign shareholders holding at least 10% of the broadcasting licensee is an African Union investor, that is, where the ultimate shareholders or controllers of such foreign shareholder are from countries within the African Union.[36] The NAB submitted that having an increased upper limit for more than one foreign investor to 35% meant that to veto local shareholders requires the agreement of two or more foreign investors. The NAB submitted that this was sufficient to ensure that a single foreign entity did not exercise control over a South African broadcaster. The NAB further suggested that having a 45% ownership limit to encourage the participation of African Union investors would give content to South Africa's commitment to the New Economic Partnership for Africa's Development ("NEPAD").[37]

The NAB further proposed that a single foreign person be allowed to hold, whether directly or indirectly, not more than 34.9% equity ownership of a South African listed public company holding a commercial broadcasting licence and which broadcasts within South Africa only. "This is in line with the JSE rules requiring a person who acquires 35% of the shares in a listed company to make an offer to purchase the shares held by

[34] Primedia's and the NAB's submissions to ICASA on the Discussion Paper at pages 5 and 9 respectively.
[35] Ibid.
[36] Primedia's submission at page 7.
[37] Ibid.

all other minority shareholders. Thus 35% is a critical 'trigger' for listed companies in terms of the Securities Regulation Panel Code and trying to regulate foreign shareholding below that number is difficult in terms of existing JSE practices".

The NAB also submitted that a provision for exemptions on 'good cause' shown, similar to that contained in sections 49 and 50 of the IBA Act, ought to be inserted in section 48 of the IBA Act. "Examples of what might constitute 'good cause' for such an exemption ought to be provided in the legislation itself to give guidance to ICASA and broadcasters alike and to lead to more certainty and flexibility for the good of the industry as a whole. Examples of 'good cause' could include the following: to promote and facilitate black economic empowerment; to promote foreign direct investment and job creation in the broadcasting industry; undertakings by foreign persons to sell shares back to South African persons within a specific period; and undertakings by foreign persons to transfer expertise to South Africans".[38]

Sentech submitted that the 20% threshold in section 48(2) should be raised to 49% and that this should be done in conjunction with set guidelines and the rigorous regulation and enforcement thereof. "The majority of board of directors should be reserved for South Africans and editorial content must be retained by South Africans. There should be tighter regulatory control of South African content and the maintenance of broadcasting standards and the monitoring of compliance with these requirements".[39]

M-Net submitted that a review of the 20% limitation on the foreign control of commercial broadcasting services in South Africa would be appropriate. "The Authority may also want to consider adopting the current system adopted by Member States of the EU in respect of EU nationals. This would allow African (non-South African) investors to invest in broadcasting services in South Africa".[40]

Makana submitted that the 20% limitation on the foreign control of commercial broadcasting services should be raised to 40%. Makana argued further that "this level of shareholding will allow a foreign player to influence the underlying operations, without the need of complex agreements. They will be encouraged to mobilise the transfer of skills at a fair return rather than an exorbitant one. Over the next 10 to 15 years, this clause could be relaxed further as developments in distribution technology take place and the middle class market in South Africa strengthens. Careful considerations should be made to agreements that are entered into between the various parties to ensure that provision is made for the local partners to be operationally involved; mechanisms are in place to facilitate skills transfer; the fees to be paid to the foreign player are market related and reasonable; the promises of performance made by the foreign players are incorporated into the business plan and licence conditions; the agreements are for a finite period of time with clear deliverables; the conditions for renewal are clear and supported by all parties; and the agreements do not conflict with any provisions of the IBA Act.[41]

Classic FM submitted that that the 20% limitation on the foreign control of commercial broadcasting services could be raised to 40% but that overall control would not be in the best interests of South African radio. "Foreign owners will tend to concentrate on maximising profits by choosing mass popular formats that will seldom take into account South African cultural issues or adding value to their targeted communities".[42]

[38] The NAB's submission at page 46.
[39] Sentech's submission at page 11.
[40] M-Net's submission to ICASA on the Discussion Paper ("M-Net's submission") at page 58.
[41] Makana's submission at pages 30 and 31.
[42] Classic FM's submission at page 6.

4. Limitations on Ownership and Control of Broadcasting Services

One of the primary objectives of the IBA Act is to ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa.[43] Against this background, section 49 of the IBA Act sets out limitations on the extent of the control that any person may have over a multiplicity of commercial broadcasting services. This section deals with limitations in respect of the control of commercial television broadcasting licences, commercial FM sound broadcasting licences, and commercial AM sound broadcasting licences.

In essence, section 49 provides that no person may be in a position, directly or indirectly, to exercise control over more than one commercial television broadcasting licence or more than two commercial FM sound broadcasting licences or more than two commercial AM sound broadcasting licences. Where a person is in a position to control two commercial FM or AM sound broadcasting licences, such licences must not relate to the same licence area or to substantially overlapping licence areas.

The Discussion Paper questioned whether the existing ownership restrictions should be reviewed and if the abolition of the restrictions set out in section 49 would have an adverse impact on the plurality of news, views and information available in the South African broadcasting industry. The Discussion Paper sought guidance on how to strike a balance between the apparently conflicting interests of encouraging investment in the broadcasting industry and maintaining the plurality of news, views and information.

The NAB submitted that it is important for ownership rules to be technology neutral to ensure that technologies are not made use of simply to avoid regulatory structures. "This will result in fairer regulations for the industry as a whole. Technological advances, such as the use of satellite technology for broadcasting and the advent of digital broadcasting, are undoubtedly going to transform the industry as we know it. The broadcasting regulatory environment must not only encourage new technologies but also must guard against hamstringing existing broadcasting operators through unnecessary over-regulation. Digital broadcasting will be introduced within 10 years. A totally different ownership and control regime will apply to digital broadcasting, given that scarce frequency spectrum ceases to be a problem with the use of digital technology as both the AM and FM spectrum will increase in value. Indeed the Discussion Paper on Digital Broadcasting issued recently by the Digital Broadcasting Advisory Body has already posed questions on this issue and ICASA needs to ensure that in conducting its ownership review, it is aware of the future challenges and possible scenarios. The NAB suggests that ICASA recognise that a digital broadcasting environment will require an entirely new regulatory regime in respect of ownership and control. This regime ought to be regulated by prohibiting one broadcaster from reaching more than a certain percentage of national audience reach and not by insisting on numeric limitations on the numbers of services a single broadcaster may provide".[44]

The NAB also submitted that the current limitations are too restrictive and impede black economic empowerment in the commercial broadcasting industry in that empowerment investors cannot expand and grow through ownership of additional interests in commercial broadcasting licences. "Consequently, these empowerment media companies are unable to become mega-players in the South African market because their respective market caps are just too small. The restrictions are also not appropriate for the creation and development of internationally competitive broadcasting companies that could play a meaningful role in the global broadcasting market. The restrictions impede the development of commercial broadcasting companies

[43] Section 2(i) of the IBA Act and section 2(m) of the Broadcasting Act.
[44] The NAB's submission at page 7.

that have a sufficiently large local asset base to enable them successfully to compete in the international broadcasting arena".[45]

The NAB proposed that the limit on the number of existing commercial stations that can be controlled by one person be increased to three, provided that the broadcast coverage areas do not substantially overlap (that is by 50% or more). "Such a change would allow for the growth of existing media companies without stifling the potential for new entrants into the industry. However, this assumes that the number of such stations remains at eleven. If, following a thorough market analysis of the viability of existing broadcasting services, ICASA were to licence additional commercial FM sound broadcasting licences (other than by way of secondary town licences), it may well be appropriate to increase the maximum number to four or even five".[46]

The NAB submitted that the introduction of digital technology renders AM significantly more valuable than it currently is. "Consequently, the NAB submits that ICASA would want to avoid a situation where broadcasters were involved in terrestrial AM broadcasting simply to ensure that they are guaranteed access to AM frequencies in the digital era. The NAB submits the limit on the number of AM sound broadcasting stations that can be controlled by one person be increased to three, provided that the licence areas do not substantially overlap (that is by 50% or more)".[47]

The NCRF submitted that the Authority should not allow the multiplicity of ownership of commercial radio stations. "The Authority should investigate the possibilities of the opportunity of community-commercial partnership before it can consider the multiplicity of ownership".[48]

Y-FM and Kagiso Media ("Kagiso") submitted that the limit on the number of regional FM licences that can be owned or controlled by one person should be increased to three, for existing licences.[49] Y-FM proposed that the Authority issue national commercial radio licences at a later stage, then one person should be able to control or own more than one such licence. One person should be able to control a minimum of four regional FM and four regional AM licences or 20% of the total number of such licences, whichever is the greater.[50]

Kagiso submitted that one person be allowed to control two regional FM and two regional AM licences where the licence areas overlap, provided that such control does not result in a share of total radio listenership within the said area of greater than 50%. Kagiso also proposed that no one person should be allowed to own more than one national licence and that if more regional licences are issued, there should be a minimum of four regional FM and four regional AM licences per person.[51]

M-Net submitted that in the jurisdictions they analysed, either horizontal limitations are not imposed at all, or they apply to free-to-air commercial television broadcasting services, which are seen as the primary provider (other than the public broadcasting services) of news and current affairs programming. "The limitations do not apply to pay broadcasters since the reach of these services is generally limited, and more importantly, these services are not regarded as important providers of news and current affairs programming. Countries reviewing their limitations on horizontal control of commercial television services are looking to other means to address concerns about economic concentration and diversity. They view Competition Law as the appropriate instrument to address concerns about economic concentration and diversity. As regards concerns about

[45] The NAB's submission at page 13.
[46] The NAB's submission at page 15.
[47] The NAB's submission at page 16.
[48] The NCRF's submission at page 8.
[49] Y-FM's submission and Kagiso Media's submission to ICASA on the Discussion Paper at pages 6 and 14 respectively
[50] Y-FM's submission to ICASA at page 6.
[51] Kagiso Media's submission at page 14.

plurality and diversity of programming, governments are looking to market forces, content regulation directed at achieving the policy objectives of diversity of programming, public service obligations and local content, particularly in relation to news and current affairs programming".[52]

M-Net recommended that if horizontal limitations are to remain in the IBA Act, then the Act ought to make it clear that they apply only to commercial free-to-air television broadcasting services and that they do not apply to subscription television broadcasting services, whose audience reach is limited and do not provide news and current affairs programming. "Depending on ICASA's recommendation to Parliament concerning section 49 of the IBA Act, consideration may be given to the wording of section 2(i) of the IBA Act and section 2(m) of the Broadcasting Act, so as to ensure consistency".[53]

Primedia proposed that the existing provisions of section 49(1)(a) of the IBA Act should remain as they are with the proviso that they be amended to refer to a single national commercial free-to-air television licence. They also proposed that section 49 should be amended to take into account the imminent licensing of regional commercial television. "Ownership and control rules that would apply to regional commercial television should provide that no person shall, directly or indirectly, own or control more than two regional commercial television licences and that same cannot have overlapping coverage areas". Primedia also proposed that sections 49(1)(b), 49(1)(c), 49(2)(b), 49(2)(c), 49(4)(b), and 49(4)(c) of the IBA Act should be deleted.

NAIL and Midi TV argued that the SABC has an unfair advantage over other broadcasting licensees in that it is permitted to operate a plurality of commercial radio stations, and in that some of its stations broadcast nationally whereas other commercial sound broadcasting services have geographically restricted footprints.[54]

Primedia submitted that it is anticipated that with the restructuring of the SABC, eight of the FM sound broadcasting services including two with national coverage will be restructured into commercial FM sound broadcasting services. "All SABC sound broadcasting services, except Channel Africa and X-K FM, carry advertising. No private commercial entity is allowed to operate a national commercial sound broadcasting service".[55]

Primedia argued that the SABC currently operates two subscription satellite television broadcasting services and four terrestrial free-to-air television broadcasting services, three of which have national coverage. "It is anticipated that with the restructuring of the SABC, two of these terrestrial television broadcasting services, namely SABC 3 and Bop TV, which has a limited coverage, will be restructured into the public commercial broadcasting service division. All SABC television broadcasting services carry advertising. No private commercial entity has been granted a terrestrial commercial regional television broadcasting licence and no private commercial entity is allowed to operate more than one terrestrial commercial television broadcasting licence".[56]

Primedia and NAIL argued that the SABC currently holds a very dominant position in the market in terms of audience share. They, therefore, proposed that the ultimate goal in the reform and transformation of the South African broadcasting system must be the privatisation of the SABC's commercial broadcasting services such that the SABC becomes a 'pure' public broadcasting service. Primedia submitted that "not only would this create a healthier public broadcasting service, but this will result in a stronger and more vibrant broadcasting

[52] M-Net's submission at pages 25 and 27.
[53] M-Net's submission to ICASA at pages 58 and 59.
[54] NAIL's submision and Midi TV's submission at pages 5 and 10 respectively.
[55] Primedia's submission at page 24.
[56] Ibid.

and entertainment industry, which would stimulate the local production sector, create more jobs, and quality local programming content for South Africa and internationally".[57]

Primedia proposed that in respect of commercial sound broadcasting services operated by the SABC the two national commercial sound broadcasting services should be sold (as national stations), and all interested parties, should be invited to apply; or the two national sound broadcasting services should be split into regions and sold as regional stations; and all other commercial regional sound broadcasting services should also be sold; and the provisions of sections 49(3) and (5) should be amended in order to make provision for the overlap of a national and a regional/ metropolitan commercial sound broadcasting service. "In respect of commercial terrestrial television broadcasting services one of the three national free-to-air television broadcasting services should be sold and all interested parties should be invited to apply; or Bop TV should be sold as a regional commercial terrestrial television broadcasting service and all interested parties should be invited to apply for such licence; and the provisions of section 49 (1) should be amended to reflect these developments".[58]

Responding to the above argument, the SABC submitted that section 28 of the IBA Act makes provision for the holding of inquiries and that it states that the Gazette must indicate the subject matter of the inquiry. The SABC,submitted therefore that its structure and funding model was not listed as a subject matter of the inquiry and not dealt with substantively in the Discussion Paper. "Any amendment that may need to be made to the way the SABC conducts its broadcasting services is a matter that should follow a process different to and separate from the current inquiry. Stakeholders cannot, therefore, expect ICASA, during this inquiry to reach any findings on the privatisation of the SABC services; the restriction or abolition of advertising on SABC stations and channels; the restriction on the SABC from offering commercial services; the limitation of the number of services which the SABC operates; and whether the SABC enjoys an unfair competitive advantage".[59]

The SABC argued further that sections 48, 49 and 50 are not applicable to the SABC's public commercial services. They submitted that legislation makes distinction between the SABC's public commercial services and "purely" commercial services and that the policy and regulatory structures that apply to "purely" commercial services apply to the SABC's commercial services only to the extent contemplated in section 11(a) of the Broadcasting Act.[60]

5. Limitations on Cross-Media Control of Broadcasting Services

Concentration of media power refers to the phenomenon whereby a few media players, through joint co-operation deals, mergers, acquisitions and cross-acquisitions and any other arrangements, establish for themselves powerful cross-holdings with financial or other interests straddling media types. Generally, the media types involved in media concentration are radio, television and print. This also includes vertical integration..[61]

In 1995, the Authority's predecessor, the Independent Broadcasting Authority ("the IBA"), stated that whilst on the face of it there may appear to be a plurality of services and therefore choice, in essence many of the media services may owe their existence and accountability to one media controller. "Different voices are

[57] Primedia's subimission at pages 24 and 25.
[58] Primedia's subimission at page 26.
[59] The SABC's oral submission to ICASA on the Discussion Paper 18 February 2003.
[60] Section 11(a) of the Broadcasting Act states that "the commercial services provided by the SABC must be subject to the same policy and regulatory structures as outlined in this Act for commercial broadcasting services".
[61] The IBA Triple Inquiry Report, 1995, at page 70.

therefore not necessarily equal to different operators and different opinions. One person uses a number of services to communicate with the viewer or listener. Whilst there appears to be choice, there can be no question of pluralism or diversity".[62]

The Discussion Paper asked if there was a direct or necessary correlation between diversity of ownership of broadcasting services and a diversity of opinion or voice. The Discussion Paper also asked if socio-political and economic conditions and circumstances in the broadcasting industry have changed since the publication of the Triple Inquiry Report that would necessitate a the review. The Discussion Paper further asked whether the abolition of the restrictions on cross-media control would encourage investment and stimulate growth in the South African broadcasting industry.

The NAB submitted that the current wording of section 50(2)(b) of the IBA Act is unworkable and does not in fact reflect the intention of the regulator set out in paragraph 15.1.7 of the Triple Inquiry Report, 1995. "The provisions of section 50(2)(c) refer to substantially overlapping areas in respect of newspaper circulation areas and broadcasting coverage areas. This needs to be better defined for a number of reasons: the percentage of overlap should be relevant only in respect of the broadcasting coverage area; it is difficult to determine a 'circulation area' of a newspaper as the distribution points thereof are often limited to a particular city or town in a region; it is difficult to determine how to measure 'total circulations' of newspapers in a particular area. The NAB suggests that this be done based on the total newspapers available in a week, thus taking into account daily and weekly papers, including so-called 'free sheets'".[63]

The NAB and Primedia proposed that sections 50(2)(c) and 50(2)(d) of the IBA Act be deleted. The NAB proposed that 50(2)(b) of the IBA Act be amended to read as follows:

"No person who controls a commercial sound broadcasting licence may control a newspaper with an average weekly ABC circulation of at least 25% of the total weekly newspaper circulation in the relevant broadcast coverage area. Where the relevant broadcast coverage area is concentrated in a single city, the newspaper circulation figures shall be calculated relative to that city. However, where the broadcast coverage area covers a number of cities or towns, the newspaper circulation figures shall be calculated relative to the three largest cities or towns within the relevant broadcast coverage area".[64]

Primedia proposed that section 50(2)(a) of the IBA Act should be amended to refer to control and not financial control. They also proposed that section 50(2)(b) should still include a reference to commercial television and should read as follows:

> *"No person who controls a commercial free-to-air television broadcasting licence or a commercial sound broadcasting licence may control a newspaper with an average weekly circulation of at least 25% of the total weekly newspaper circulation in the relevant broadcast area. Where the relevant broadcast coverage area is controlled in a single city, the newspaper circulation figures shall be calculated relative to that city. However, where the broadcast coverage area covers a number of cities or towns, the newspaper circulation figures shall be calculated relative to the three largest cities or towns within the relevant broadcast coverage area".*[65]

[62] Ibid.
[63] Primedia's submission and the NAB's submission at pages 13 and 17 to 18 respectively.
[64] The NAB's submission at page 18.
[65] Primedia's submission and the NAB's submission at pages 13 and 17 to 18 respectively.

The NAB also suggested that section 50(3) of the IBA Act be amended to give examples of "good cause" for an exemption. "The NAB submits that this will give some guidance to both ICASA and to the industry and provide certainty and flexibility. The NAB respectfully suggests that the following are examples of 'good cause': the promotion and facilitation of black economic empowerment and ensuring the survival of failing newspaper and/or broadcasting licensees. This is important to promote the overall reason for such restrictions, namely ensuring access to a diversity of views. Access to various views albeit from a similar ownership source, the NAB respectfully submits, is better than not having access to any views at all".[66]

Classic FM and Marcus Wendell Jacobs submitted that there is no correlation between diversity of ownership of broadcasting services and diversity of opinion.[67] Classic FM argued that cross-media restrictions should be relaxed and that market forces would ensure that commercial stations would not be successful if they did not satisfy the needs of the given target market.[68]

M-Net submitted that internationally, apart from addressing competition concerns, cross-media limitations have been introduced to ensure a multiplicity of voices which inform the public, influence opinion and engender political debate. Proponents of these limitations have sought diversity, particularly in relation to news and current affairs/information programming. "The UK government put it succinctly when it stated that the purpose of cross-media limitations is the belief that editorial independence will be compromised if the same company owned both kinds of mainstream media for news and political expression."[69]

M-Net further submitted that in the jurisdictions they analysed cross-media limitations are not imposed at all, or they apply primarily to commercial free-to-air television broadcasting services. They also argued that the regulation of broadcasting services by virtue of the IBA Act and the Broadcasting Act, as well as regulations made in terms of these Acts, and licence conditions, limit the right to freedom of expression in relation to broadcasting services. "Section 50(2) of the IBA Act purports to apply to all commercial TV broadcasting services regardless of the nature and extent of their public mandate; the nature and extent of the broadcasting service's audience; whether or not the broadcasting service provides news and current affairs programming; and whether they are national, provincial, regional or local".[70]

M-Net argued that on the basis of their analysis of section 50(2) and of the approach to cross-media limitations on control of commercial television broadcasting services in other jurisdictions, there is no proportionality between the harm done by the infringement and the objectives section 50(2) is meant to advance. "The limitation is wide and it is neither appropriately tailored nor narrowly focused. Other means, such as those employed in other jurisdictions, which we have outlined, could be employed in South Africa to address competition and diversity concerns, which means will either not restrict the right to freedom of expression at all, or will be less restrictive. If less restrictive alternative means exist to achieve the purpose of the limitation, then these less restrictive means must be preferred".[71]

M-Net concluded that the Constitutional Court is likely to find that section 50 (2) of the IBA Act, in its current form, is neither reasonable nor justifiable; alternatively, that the application of section 50(2) to subscription television broadcasting services would be neither reasonable nor justifiable.[72]

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[66] The NAB's submission at pages 18 and 19.
[67] Classic FM's submission and Marcus Wendel Jacobs' submission at pages 7 and 19 respectively.
[68] Classic FM's submission at page 7.
[69] M-Net's submission at page 36.
[70] M-Net's submission to ICASA at pages 43 and 44.
[71] M-Net's submission at page 44.
[72] Ibid.

M-Net proposed that section 50 of the IBA Act be removed. "In the alternative, if cross-media limitations are to remain in the IBA Act, then the Act ought to make it clear that as regards television, they apply only to the universally accessible commercial free-to-air television broadcasting services, and that they do not apply to subscription television broadcasting services, whose audience reach is limited and which do not provide news and current affairs programming. Depending on the Authority's recommendation to parliament concerning section 50 of the IBA Act, consideration may need to be given to the wording of section 2(j) of the IBA Act, so as to ensure consistency".[73]

Johnnic submitted that the current limitation placed on an entity deemed to control a newspaper from owning a radio licence should be removed as it is stifling the primary objectives of the IBA Act. "Section 50 should be repealed in its entirety. Any competition issues regarding cross-media controls and monitoring mergers and acquisitions are consistent with the Competition Act, with concurrent jurisdiction between the Authority and the Competition Commission".[74]

Kagiso submitted that the relaxation of the limitations on cross-media ownership would encourage growth and investment in the South African broadcasting sector by creating a larger pool of media owners able to invest in the broader industry. "Relaxation would create the possibility for black owned companies to increase and diversify the assets under their management thereby laying the basis for the emergence of black owned companies".[75]

NAIL submitted that the control of multiplicity of commercial services and cross-media control do not in themselves lead to a conflict or a compromise of the objects of the IBA Act and the general principles of the industry. "NAIL has not had any conflict of interests with regard to its control of multiplicity of commercial services and cross media interests. Rather, NAIL has sought to ensure that it is operationally focused and is seeking to grow organically by adding value to all its media interests. In addition, the programming and target audience of some of NAIL's assets remain particularly diverse, notwithstanding the fact that two of the stations forming part of NAIL's media assets are in a similar broadcast region. Furthermore, the current radio stations controlled by NAIL have over time succeeded in achieving greater diversity in the ethnic make-up of the audiences".[76]

The SABC submitted that cross-media ownership rules should be retained since the principle behind the rules is sound. They, however, argued that the current wording of section 50(2)(b) of the IBA Act uses the term "readership" instead of "circulation". "It is difficult to define the circulation area of a newspaper and it is difficult to determine how to measure total circulations".[77]

6. Exemption from the Requirements of Sections 49 and 50 of the IBA Act

In terms of sections 49(6)(a) and 50(3) of the IBA Act, the Authority has discretionary power to exempt any person, on good cause shown, from the requirement of having to adhere to the limitations contemplated in sections 49 and 50. However, in doing so, the Authority may not depart from the objects and principles set out in section 2. In other words, the restrictions imposed by section 49 and 50 are not absolute and, in appropriate cases, the Authority may permit non-compliance with these restrictions.

[73] M-Net's submission at page 45.
[74] Johnnic's submission at page 30.
[75] Kagiso Media's submission at page 15.
[76] NAIL's submission at pages 11 and 12.
[77] The SABC's submission to ICASA on the Discussion Paper ("the SABC's submission") at page 22.

When considering whether or not an applicant should be exempted from the limitations set out in sections 49 and 50 of the IBA Act, the Authority must determine whether such applicant has shown good cause why it should be exempted; and determine whether, if granted, the exemption would not amount to a departure from the objects and principles set out in section 2 of the IBA Act. It is, therefore, an absolute requirement that the Authority may not grant exemption from the abovementioned restrictions if, to do so, would be inconsistent with any of the objects or principles set out in section 2 of the IBA Act. Consequently, in order to qualify for exemption, the applicant would have to satisfy the Authority that its proposed control structure (which is in contravention of section 49 or 50, but in respect of which exemption from those provisions is sought) is not inconsistent with the objects or principles set out in section 2. In addition, the applicant would have to satisfy the Authority that good reasons exist for granting the requested exemption.

The Authority is not required by the IBA Act or the Broadcasting Act to incorporate a licensee's shareholding structure in its licence terms and conditions. However, in the context of the Authority's duty to, *inter alia*, encourage ownership and control of broadcasting services by persons from historically disadvantaged groups, and in view of the fact that the Authority, when making a decision to award a licence to a particular licensee, makes such decision on the basis, *inter alia*, of such licensee's shareholding structure, it has been considered appropriate that the shareholding structure be entrenched in the licence. Accordingly, a licensee is frequently not able to amend its shareholding structure without first having obtained the Authority's approval, in terms of section 52 of the IBA Act, for an amendment to its licence conditions. If a licensee wishes to amend its shareholding structure such that the result of the amendment, if granted, would be in conflict with section 49 or 50, such amendment application must be considered simultaneously with an application for an exemption in terms of either section 49(6) or 50(3).

The Discussion Paper asked whether it would be useful for the Authority to publish guidelines regarding the interpretation and application of sections 49(6) and 50(3) of the IBA Act, particularly regarding the meaning of the "good cause" requirement. The Discussion Paper also sought guidance on how such guidelines should be formulated and on what would constitute "good cause".

The NAB submitted that it is necessary for ICASA to have the discretion granted in terms of sections 49 and 50 in order to introduce flexibility in the regulatory regime of the broadcasting industry. "Further, ICASA ought to have the flexibility to grant exemptions from the restrictions in section 48 as well. To date, ICASA's unwillingness to exercise its exemption discretion has resulted in inflexibility and unpredictability of the regulation of commercial broadcasting services as experienced by the industry as a whole. The NAB submits that this was not the intention of the legislature when it specifically granted the regulator such discretion".[78]

Primedia submitted that the Authority should exercise its discretion to grant exemptions on "good cause" shown as provided for in section 49(6) of the IBA Act. "Should ICASA exercise its discretion, Primedia Broadcasting submits that it will give the broadcasting industry as a whole the ability to expand and grow. It will further encourage new potential investors to invest in the broadcasting industry due to the increased tradability of broadcasting assets".[79]

Primedia also submitted that section 49(6)(a) of the IBA Act, must be amended to prescribe that:

[78] The NAB's submission at pages 43 and 44.
[79] Primedia's submission at pages 11 and 12.

"*the Authority shall make regulations setting out grounds which may constitute 'good cause' in respect of the exemption provision".*

Primedia submitted that these regulations will serve as guidelines to broadcasters and will result in more certainty and flexibility in the broadcasting industry.[80]

The NAB submitted that examples of what might constitute "good cause" for an exemption from the restrictions to be contained in sections 48, 49 and 50 ought to be provided in the legislation itself to give guidance to the Authority and broadcasters alike, and to lead to more certainty and flexibility for the good of the industry as a whole. The NAB proposed the following as examples of 'good cause': the promotion and facilitation of black economic empowerment; ensuring the survival of failing newspaper and/or broadcasting licensees; and ensuring the survival of commercial broadcasters, particularly of so-called "Greenfields" licences, which, as a result of external market forces and through no fault of their own management, are in danger of failing. "This is important to promote the overall reason for such restrictions, namely, ensuring access to a diversity of views. Access to various views albeit from a similar ownership source is better than not having access to any views at all".[81] The NAB proposal was supported by Primedia.[82]

NAIL also submitted that the Authority has discretion to grant entities an exemption to the ownership and control limitations in sections 49 and 50 of the IBA Act. "The Authority may exercise this discretion in accordance with the requirements of administrative law (including the recent Promotion of Administrative Justice Act, 2000) as well as the Constitution of the Republic of South Africa, 1996. Section 22 of the Constitution entrenches the right to freedom of trade, occupation and profession, which may only be limited in a rational manner in furtherance of a legitimate state objective. The rationale for restricting one's freedom of economic activity is therefore important in assessing whether a particular limitation is justified in law. Thus in assessing whether an exemption should be granted under section 49(6), the Authority should be cognisant of the fact that a refusal of an exemption can arguably amount to an infringement of the freedom of economic activity and must therefore be justified".[83]

NAIL went further to say that a balance should be struck between competing interests. "The practice at this stage has been the rigid application and insistence of compliance with circumstances that existed at the time that the original licences were granted. This rigid practice means that subsequent changes in the general South Africa and broadcasting landscape cannot be adequately accommodated. In this regard the drafters of the IBA Act sought to introduce flexibility in the application of the ownership and control limitations by providing for an exemption to such limitations for good cause shown".[84]

Kagiso submitted that where good cause is shown the Authority may seek to relax the limitations imposed by section 49. "Examples of good cause are advancement of Black Economic Empowerment; ensuring the survival of Greenfields licences; allowing a South African company to develop sufficient scale to become globally competitive; and ensuring the survival of a failing newspaper and /or broadcasting licensee".[85]

[80] Ibid.
[81] The NAB's submission at page 44.

[82] Primedia's submission at page 12.
[83] NAIL's submission at paragraph 3.4.1.
[84] NAIL's submission at paragraph 3.4.3.
[85] Kagiso Media's submission pages 14 and 15.

Classic FM submitted that the Authority should publish guidelines regarding the interpretations of sections 49 and 50 of the IBA Act.[86]

7. Empowerment

One of the primary objectives of the IBA Act and the Broadcasting Act is to encourage ownership and control of broadcasting services by persons from historically disadvantaged groups[87]. In the light of the number of current commercial sound broadcasting licences that are owned or controlled by previously disadvantaged groups, some progress has been made towards the achievement of these objects. The Authority has, by having regard to these objects in performing its regulatory function, facilitated the entry of a number of empowerment companies into the broadcasting industry.

In order to promote these objects, the Authority's practice has been to specify, in broadcasting licensees' licence conditions, the names of its shareholders and their respective percentage shareholdings. The purpose of this practice is to ensure that control over a licensee does not change and that the percentage of shares held by historically disadvantaged persons in the licensee's issued share capital is not reduced without the Authority's prior approval having been obtained. It has been suggested by some stakeholders that this is not an effective method of ensuring the continued participation of previously disadvantaged groups, especially in the light of the ongoing funding requirements of licensees, and the desirability of any investor, whether previously disadvantaged or otherwise, being able to trade these investments.

Another concern that has been raised, particularly during the course of applications under section 52 of the IBA Act for the amendment of broadcasting licensees' licence terms and conditions relating to empowerment shareholding requirements, relates to the absence of a definition or common understanding of the terms "empowerment" and "historically disadvantaged groups".

7.1 Limitation on Ownership and Control of Telecommunication Services

On 16 January 2003 the Minister approved the regulations drafted by the Authority in respect of "the Limitation of Ownership and Control of Telecommunication Services" in terms of section 52 of the Telecommunications Act.[88] In these regulations, the Authority defined "historically disadvantaged persons" as follows:

"historically disadvantaged persons" means in the case of-

> *(a) natural persons, who before the Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993) came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion;*
>
> *(b) an association, a majority of whose members are natural persons referred to in regulation (a) above;*
>
> *(c) a juristic person other than an association, and natural persons referred to in regulations (a) and (b) above own and control more than twenty-five percent of such juristic person's issued share capital*

[86] Classic FM's submission at page 8.
[87] Section 2(f) of the IBA Act, and section 2(c) of the Broadcasting Act.
[88] Notice No. 105, Government Gazette 24288, 16 January 2003.

(directly or indirectly) or members' interests and are able to control a majority of the juristic person's votes;

(d) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b) or (c) above own and control more than twenty-five percent of such juristic person's or association's issued share capital or member's interest and are able to control a majority of its votes;

(e) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b), (c) or (d) above possess the power to direct or cause the direction of the management and policies thereof whether through the direct or indirect ownership of issued share capital, by contract or otherwise.

Although interested parties did not have the opportunity to comment on this Regulation in the context of this inquiry, the Authority would obviously be required to take into account its own regulations when finalising this Position Paper.

The term "historically disadvantaged individuals ("HDIs")" has also been given the following definitions by the legislature (albeit in different statutory contexts):

7.2 The National Empowerment Fund Act, No. 105 of 1998

Section 1 of the National Empowerment Fund Act defines HDIs as:

"(T)hose persons or categories of persons, who prior to the new democratic dispensation marked by the adoption and coming into force of the Constitution of the Republic of South Africa Act, Act 108 of 1996, were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned and controlled by such persons". [89]

7.3 The World Heritage Convention Act, No. 49 of 1999

Section 1 of the World Heritage Convention Act defines HDIs as:

"Persons or categories of persons that were unfairly discriminated against on the basis of past legislation, policies, prejudice and stereotypes".

7.4 The Competition Act, No. 89 of 1998

"*A person is a historically disadvantaged person if that person –*

(a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;
(b) is an association, a majority of whose members are individuals referred to in paragraph (a);

[89] Section 1 of the National Empowerment Fund Act, No. 105 of 1998.

(c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes; or

(d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes." [90]

7.5 The Employment Equity Act, No. 55 of 1998

The Employment Equity Act[91] seeks to promote equal employment opportunities for persons from "designated groups". The term "designated groups" is defined as "black people, women and people with disabilities."[92] In turn, the term "black people" is defined as a generic term which means Africans, Coloureds and Indians. The term "people with disabilities" is defined as "people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment."

7.6 Submissions on Definition of Historically Disadvantaged Individuals or Persons

The Discussion Paper asked if the term "historically disadvantaged person" should be defined in the IBA Act, the Broadcasting Act and/or in broadcasting licensees' licence terms and conditions, how the term should be defined, and how such definition would be related to the definition of control. The Discussion Paper also asked if the industry agreed with the Black Economic Empowerment Commission's 2002 proposed definitions of "black economic empowerment, black company, black empowered company, black influenced company and engendered company", and if these definitions can be applied usefully in the broadcasting industry.

The NAB submitted that HDIs should be defined as Black people, women and people with disabilities and that Black people should be defined as Africans, Indians and Coloureds. "Categories of empowerment companies ought to be defined by levels of equity ownership and control to facilitate speedy regulatory processes, especially in regard to changes in shareholding of broadcasting licensees. Indirect shareholder changes in a broadcasting licensee which do not result in a diminution of the empowerment status of a licensee or a shareholder therein, ought to take place in accordance with an ICASA notification procedure rather than a full amendment procedure in terms of section 52 of the IBA Act".[93]

The NAB and YFM proposed that the following table, containing suggested empowerment company categories, ought to be adopted by the Authority:[94]

[90] See section 3(2) of the Competition Act, No. 89 of 1998.
[91] Act No. 55 of 1998.
[92] Section 1 of the Employment Equity Act, 1998.
[93] The NAB's submission at page 20.
[94] The NAB's submission and YFM's submission at pages 21 and 8 respectively.

Listed Companies	Unlisted Public or Private Companies
"Black Company" • At least 50.1% voting rights in Black hands; and • At least 10% equity ownership in Black hands	"Black Company" • At least 50.1% equity ownership and voting rights in Black hands
"Black Empowered Company" • At least 25.1% voting rights in Black hands; and • At least 5% equity ownership in Black hands	"Black Empowered Company" • 25.1% equity ownership and voting rights in Black hands
"Gender Empowered Company" • At least 25.1% voting rights in women's hands; and • at least 5% equity ownership in women's hands	"Gender Empowered Company" • 25.1% equity ownership and voting rights in women's hands

Primedia supported the NAB's definition of HDIs, and suggested that the following should be looked at when evaluating empowerment:

- pure equity ownership;
- extent of real risk equity investment by historically disadvantaged groups as opposed to funding by financial institutions;
- level of financing benefit derived by historically disadvantaged groups;
- extent of voting control exercised by historically disadvantaged groups;
- constitution of the Board of Directors;
- number of representatives from historically disadvantaged groups performing key management roles;
- success in development of executives from historically disadvantaged groups;
- corporate social responsibility; and
- transformation policies, such as procurement, recruitment and training.[95]

Midi TV submitted that a black empowerment company should be defined as a company in which black people hold equity of at least 25% plus one. "Other factors may apply in determining the extent of black empowerment in a company – e.g., a company may be controlled by black persons but the equity holding may be less than 25%. The Authority would have to have regard to issues concerning control as well as economic interest before determining whether a company is black empowered. The threshold for determining the extent of black empowerment should take account of the size of the company concerned". They also proposed that the term "historically disadvantaged persons" should refer to black South Africans and women, and that `Black' should be defined as Africans, Coloureds, and Indians.[96]

Makana proposed that the Authority should spell out the following in relation to the definition:

[95] Primedia's submission at pages 17, 18 and 19.
[96] Midi TV's submission at page 9.

- required percentage of involvement by local, regional and national disadvantaged representations in order to qualify;
- the necessity for broad-based participation as opposed to individual participation;
- the encouragement of involvement of Small Medium Micro Enterprises ("SMMEs") and Black Economic Empowerment groups;
- the vision and strategy of the BEE groups relating to the media; and
- the level of skills and expertise expected from BEE groups and their level of operational involvement.[97]

M-Net submitted that a separate inquiry ought to be devoted to empowerment and the development of an Empowerment Charter for the South African broadcasting industry. "The Broad-Based Socio-Economic Empowerment Charter for the SA Mining Industry defines an historically disadvantaged person as any person, category of persons or a community disadvantaged by unfair discrimination before the Constitution came into operation. The Broad-Based Socio-Economic Empowerment Charter for the SA Mining Industry defines empowerment as a social or economic strategy, plan, principle, approach or act aimed at redressing the results of past or present discrimination of historically disadvantaged persons in the industry; and seeking to transform the industry in relation to historically disadvantaged persons, through their ownership and participation in existing or future business operations, their participation in or control of the management of such operations, the development of their management, scientific or engineering skills and their involvement in procurement chains. The Authority should adopt a similar approach to that taken in the Mining Charter".98

8. Additional Commercial Sound Licences

8.1 Secondary Towns

The Authority has, since 1997, heard from stakeholders that they would be interested in the possibility of the Authority issuing commercial sound broadcasting licences in secondary towns. Secondary town licences are licences in respect of commercial sound broadcasting licensees situated outside of the primary markets, namely Gauteng, Durban and Cape Town. The idea of secondary town licences was first proposed in the Authority's Position Paper on Private Sound Broadcasting, 1996.

The Discussion Paper proposed 23 secondary towns as possible secondary town commercial sound broadcasting licence sites. The Discussion Paper solicited stakeholders' views on the proposed secondary towns, and whether there were other approaches to identifying potential secondary town licence areas which the Authority should consider. The Discussion Paper asked if there was scope for the issuing of secondary town licences.

The NAB submitted that the limit on the number of secondary town licences that can be owned or controlled by one person be three, provided that the licence areas do not substantially overlap (that is by 50% or more).[99]

NAIL submitted that the Authority should distinguish between revenue based on South African content and revenue based on adspend. "Revenue, LSM and population of secondary towns may not be able to justify a revenue model based on South African content and it would be difficult to sustain as a commercial enterprise.

[97] Makana's submission at page 32.
[98] M-Net's submission at pages 48, 49 and 50.

[99] The NAB's submission at page 15.

The Authority should allow stakeholders in existing licensees to acquire a stake in secondary licensees and fund them. Allow secondary licensees to source the programming format from the primary licensees in which the relevant stakeholders have interests. Secondary licensees may then be required to carry specific local programming as their South African content, including news, local traffic and weather, while the rest of the programming is sourced from its primary affiliate. Initial start-up costs can be more easily borne by an existing licensee or stakeholder that simply exports its successful radio brand and radio product as well as its proven technical expertise and skill to the secondary licensee".[100]

Primedia proposed that secondary towns should be defined in terms of a particular region or a particular market. "Identify secondary markets by analysing a number of demographic factors".[101]

Kagiso submitted that to issue secondary licences as standalone licences would prove to be economically unviable. "In certain of the indicated secondary towns local markets are unlikely to be able to support stations. If the new licensee is able to share certain costs (such as news gathering, administrative costs, technical services and sales) with an existing radio broadcaster and is able to syndicate for instance the morning and afternoon drive shows, the break-even level should be reduced substantially".[102]
The NCRF proposed that Gauteng, Kwazulu-Natal and Western Cape provinces should have no new regional sound broadcasting services. "The Authority should investigate the stability and sustainability of the radio broadcasting sector, and that investigation should assist the Authority to apply its discretion with granting secondary broadcasting licences to various towns".[103]

Makana submitted that secondary town licences should not be awarded in areas where their coverage will overlap with that of Greenfield licences unless the formats are vastly different.[104] African Media Entertainment Limited ("AME") proposed that new licences be issued not only in secondary towns but in principal towns (Pretoria and Pietermaritzburg) as well.[105]

Nhlalala Communications Limited ("Nhlalala") proposed that the Authority should issue one licence for Limpopo province. "Issuing two licences for a province like Limpopo with a low economy will not make sense to investors. There is no town in Limpopo which has more than two million people concentrated at any point in time. Polokwane (Pietersburg) as a capital of Limpopo is a right location. The footprint of the station should include Makhado (Louis Trichardt), Musina (Messina), Tzaneen, Phalaborwa, Thohoyandou, Arconhoek, Giyani and other key towns".[106]

The SABC submitted that any consideration of the potential impact of new licences must also have regard to the negative impact on the SABC revenue. "Certain of the SABC public broadcasting stations would be impacted negatively by commercial licences in some secondary towns". The SABC cautioned against allowing existing commercial stations to extend their stations through the secondary town licences.[107]

8.2 Primary Markets

[100] NAIL's submission at page 6.
[101] Primedia's submission at page 20.
[102] Kagiso's submission at page 10.
[103] The NCRF's submission at pages 6 and 7.
[104] Makana's submission at page 24.
[105] AME's submission to ICASA on the Discussion Paper ("AME's submission") at page 6.
[106] Nhlalala Communications Limited's submission to ICASA on the Discussion Paper at page 1.
[107] The SABC's submission at page 24.

AME submitted that new commercial licences should be introduced in Cape Town, Durban/Pietermaritzburg and Johannesburg/Pretoria and their immediate urban surroundings. "AME is of the view that such new licences should be non-prescriptive as to format, and should allow for a level playing field of competition both within secondary and principal towns".[108]

8.3 National Commercial Radio

The Discussion Paper asked if the Authority should consider the issuance of national commercial sound broadcasting licences. Kagiso Media submitted that it supported the issuance of national commercial radio licences provided they were issued to commercial sound broadcasters as part of leveling the competitive environment between commercial broadcasters and the SABC's commercial services. "We believe that in issuing such licences the Authority should consider the existing broadcasting landscape and the extent to which such a license or licensees would add to the variety of formats currently available and impact on the audiences currently available to commercial broadcasters".[109]

Primedia submitted that the SABC currently holds a very dominant position in the market in terms of audience share. Primedia, therefore, proposed that the ultimate goal in the reform and transformation of the South African broadcasting system must be the privatisation of the SABC's commercial broadcasting services such that the SABC becomes a 'pure' public broadcasting service. "Not only would this create a healthier public broadcasting service, but this will result in a stronger and more vibrant broadcasting and entertainment industry, which would stimulate the local production sector, create more jobs, and quality local programming content for South Africa and internationally".[110]

Primedia also proposed that two national commercial sound broadcasting services operated by the SABC should be sold either as national stations whereby all interested parties would be invited to apply or be split into regions and sold as regional stations; that the SABC's other commercial regional sound broadcasting services should also be sold; and that the provisions of sections 49(3) and (5) should be amended in order to make provision for the overlap of a national and a regional/ metropolitan commercial sound broadcasting service.[111]

Primedia also proposed the sale of one of the three SABC's national free-to-air television broadcasting services should be sold and all interested parties should be invited to apply; or the sale of Bop TV as a regional commercial terrestrial television broadcasting service and that the provisions of section 49 (1) be amended to reflect these developments.[112]

The SABC disputed the Authority's jurisdiction to make recommendations regarding the SABC in the context of an inquiry on the ownership of commercial media. The SABC lamented the fact that the Discussion Paper did not make any reference to the Authority's original rationale for not granting national commercial radio licences. "As the Triple Inquiry Report makes clear, this decision was based on frequency considerations and also on the need to protect income streams for the SABC so that it could fund its public mandate".[113]

[108] AME's submission at page 6.
[109] Kagiso Media's at page 9.
[110] Primedia's submission at page 24.
[111] Primedia's submission at page 26.
[112] Ibid.
[113] SABC's submission at page 23.

9. Practical and Procedural Considerations

It is believed by many media owners that the prevailing regulatory regime is an impediment to the continued attractiveness of investment in the media sectors. One of the problems that has been raised is the uncertainty surrounding time-frames for regulatory decision-making on licence amendments and ownership changes.

There was also a request by interested parties that the Authority should be able to provide non-binding advisory opinions on proposed transactions involving commercial broadcasting licensees.

It was also pointed out that no statutory procedure exists for the approval of the change in control of a licence that does not amount to a licence amendment or transfer as contemplated in sections 52 and 74 of the IBA Act.

The Authority was requested to bring greater certainty and predictability to practical and procedural issues, particularly when issues of ownership and black economic empowerment were at stake.

PART C: FINDINGS

10. Regulated Consolidation in an Analogue Environment

The legislative provisions under review in this inquiry deal with ownership and control of commercial broadcasting licences in an analogue environment. The Authority believes that a digital broadcasting environment will require a new regulatory regime with respect to ownership and control.

To a certain extent, this may be addressed by section 31(3) of the Broadcasting Act which requires that:

> (3) Pursuant to an inquiry in terms of section 28 of the IBA Act, the Authority must issue recommendations as to whether sections 49 and 50 of the IBA Act are applicable to broadcasting services carrying more than one channel and the extent and terms upon which such sections must apply.

Section 31(4) also states that:

> (4) Sections 49 and 50 of the IBA Act must not apply to such broadcasting services until the Authority has issued such a recommendation and that recommendation has been submitted to the Minister for tabling in the National Assembly, and has been adopted by the National Assembly.

However, the Authority does not agree with the view that the advent of digital broadcasting is reason enough to dispense with ownership limitations on analogue commercial broadcasters. In the current South African broadcasting environment, digital sound and television broadcasters reach a very small percentage of the total radio and television audiences. In fact, analogue sound and television broadcasters are still the major purveyors of information, entertainment and education.

Therefore, in the short-to-medium term, factors such as share of audience and scarcity of spectrum will still inform the Authority's policy with regard to the limitations on the ownership and control of commercial broadcasting services.

The Authority's policy, as reflected in this Position Paper and proposed amendments to the law, is based on the notion that a measure of regulated consolidation should be allowed if new commercial licence applications are invited at the same time. In other words, consolidation should be allowed in the context of the licensing of additional commercial sound broadcasting services.

For the Authority, `regulated consolidation' means consolidation that is permitted within the confines of the regulatory dispensation. This policy is therefore strongly underpinned by the policy goals of diversity of ownership as well as investment in the broadcasting industry.

The Authority's policy requires that the limitations on ownership be relaxed but not dispensed with and that new commercial licences be issued in an orderly and phased manner.

The Authority believes that the retention of albeit, relaxed structural limitations are important to ensure diversity of ownership in the South African broadcasting industry. During the course of this inquiry, M-Net submitted that section 49(1) [1] of the IBA Act constitutes an unreasonable and unjustifiable violation of the Constitutional right to freedom of expression. [2] M-Net stated that this argument is supported by the Constitutional Court's judgment in *Islamic Unity Convention v Independent Broadcasting Authority.* [3]

The Authority disagrees with M-Net's view in this regard. While it is not necessary in this Position Paper to traverse all the legal points pertaining to the matter under inquiry, some issues do need clarification.

The importance of the right to freedom of expression is beyond challenge. The right to protection of the means of expression has to be understood in the context of the Constitution. Section 192 of the Constitution provides for the establishment of an independent authority to regulate broadcasting in the public interest. The need for regulation is therefore recognized by the Constitution. The Authority was set up pursuant to section 192 and mandated to implement the provisions of the IBA Act, including the ownership limitations on broadcast media, in regulating broadcasting in the public interest. The important question is whether the limits placed on the right to freedom of expression by the ownership limitations in the IBA Act go beyond the Constitutionally permissible limits of regulation in their attempt to regulate broadcasting for the common good and in the public interest. In the Authority's view, they do not.

The limitations on ownership have contemplated by the IBA Act have been imposed in accordance with a law of general application for the purpose of achieving the general democratic values on which our society is based and to meet the legitimate needs of our society.

Section 2 of the IBA Act sets out the primary objectives of the Act, amongst others as being: -

[1] Section 49(1) provides as follows: "No person shall – (a) directly or indirectly exercise control over more than one commercial television broadcasting licence; or (b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than one commercial television broadcasting licence; or (c) be in a position to exercise control over a commercial television broadcasting licence and be a director of any company which is in a position to exercise control over any other commercial television broadcasting licence."
[2] See paras 87-100 of M-Net's submission.
[3] 2002 (4) SA 294 (CC).

- "to provide for the regulation of broadcasting activities in the Republic in the public interest through the Independent Broadcasting Authority established by section 3, and for that purpose to-
- promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information;…
- ensure that broadcasting services, viewed collectively, develop and protect a national and regional identity, culture and character;…
- encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
- promote the empowerment and advancement of women in the broadcasting services;
- ensure that broadcasting services are not controlled by foreign persons;
- impose limitations on cross-media control of commercial broadcasting services;
- ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- ensure fair competition between broadcasting licensees …"

There is clearly a rational connection between the ownership restrictions in the IBA Act and the achievement of these objectives. Furthermore, it cannot be argued that the ownership limitations have grave and irreparable consequences for the right to freedom of expression.

The Authority is required by the IBA Act to promote investment in the South African broadcasting industry. The Authority believes that through regulated consolidation and the granting of additional commercial sound broadcasting licences, there will be a marked increase in investment opportunities in the broadcasting industry.

The Authority's new percentage-based limitation, as set out below, will allow for consolidation as well as the promotion of diversity of opinion.

Furthermore, the Authority shares the government's view, stated in the White Paper on Broadcasting Policy, that the 20% ceiling on foreign ownership of broadcasting licensees should be raised in order to facilitate an increase in foreign investment.

Notwithstanding the advantages of consolidation for the commercial sector, the Authority has to protect the public interest and more particularly diversity of ownership, culture and opinion.

11. Increasing Coverage Areas of Greenfields licences

The Authority has decided to ensure that, where possible, the Greenfields stations may apply for similar or the same coverage areas as the privatised six former SABC stations.

The Authority has decided that Greenfields stations who have indicated their wish to increase their coverage areas, should be afforded the opportunity to apply for such licence amendments, subject to frequency availability. The Authority will consider applications by Greenfields licensees to amend their coverage areas in terms of section 52 of the IBA Act.

In deciding whether or not it will be possible to consider and grant applications for increased coverage areas by Greenfield licensees, the Authority will also have to take into account its plans to licence additional commercial sound broadcasters in the primary and secondary markets. The Authority has to balance the policy objective of increasing coverage areas of existing broadcasters with the objective of creating new opportunities for commercial broadcasting in South Africa.

12. Additional Commercial Sound Broadcasting Licences

Regulated consolidation can only take place in the context of licensing additional commercial sound broadcasting services. Therefore the Authority has decided to set out its plan for licensing additional commercial sound broadcasting services in secondary and primary markets. For the purposes of this inquiry and for the regulation of the commercial sound broadcasting sector going forward, the Authority regards the primary markets as the geographical markets of Gauteng and the metropolitan areas of and around Cape Town and Durban. In accordance with submissions received in this inquiry the Authority has decided to refer to secondary markets as opposed to secondary towns. In this regard, secondary markets are geographical markets and include those mainly metropolitan areas outside the primary markets.

12.1 Secondary Markets

After taking into account, *inter alia*, the need to protect the integrity and viability of the public broadcaster, the promotion of investment in the broadcasting sector, as well as the 2003 Terrestrial Broadcast Frequency Plan, the Authority has decided to licence commercial sound broadcasters in four provinces. During 2004/05 financial year the Authority will therefore invite interested parties to apply for commercial sound broadcasting licences in each of the following provinces:

12.1 .1 Limpopo Province

The Licensee should cover the following towns: Mokopane, Polokwane, Makhado, Musina, Thohoyandou, Tzaneen, Phalaborwa, Giyani and Arconhoek.

12.1 .2 Mpumalanga Province

The Licensee should cover the following towns: Nelspruit, Witbank, Middleburg, Standerton, Lydenburg, Ermelo, Bethal, Piet Retief, and Lydenburg.

12.1.3 Northern Cape Province

The Licensee should cover the following towns: Kimberley, Upington, De Aar, Colesburg, Calvinia and Springbok.

12.1.4 North West Province

The Licensee will cover the following towns: Mafikeng, Potchefstroom, Rustenburg, Klerksdorp, Litchenburg, Zeerust, Taung and Ventersdorp.

12.2 Licensing Process for Secondary Markets

The Authority shall, in terms of section 41(1) and (2) of the IBA Act, publish a notice in the Government Gazette inviting applications for the four licences contemplated. This notice will set out:

(a) the licence category, the frequency available, and, where applicable, the licence area and technical parameters, relevant to the broadcasting licence in respect of which application may be made;
(b) the person with whom and the period within which such an application has to be lodged; and
(c) the application fee payable, which shall be as prescribed.

In terms of section 41(3) of the IBA Act, every application must include particulars-

(a) of his or her proposals in relation to the nature and licence area of the service; and
(b) which, having due regard to the provisions of section 46, may be reasonably necessary in order to enable the Authority to properly consider the application,

Applicants for the provision of commercial sound broadcasting service in the above mentioned provinces will be required to conduct economic feasibility studies and prove to the Authority that they would be able to operate viable commercial stations in these areas. The Authority intends to grant further licences in the secondary markets of Eastern Cape and Free State and may invite applications for a further two licences in these markets during the 2005-6 financial year.

12.3 Primary Markets

Taking into account the Terrestrial Broadcast Frequency Plan, during the 2005-6 financial year the Authority will invite interested parties to apply for new commercial licences in Gauteng,

Kwazulu-Natal and Western Cape. The Authority is committed to granting at least three new commercial licences in primary markets, in addition to the re-licensing of Capital Radio and the former Punt Geselsradio frequencies.

By March 2006, nine years will have passed since the licensing of Greenfields stations under the IBA Act – certainly a long enough period for these stations to be financially sustainable going forward. The Authority has also taken into account that there is still a strong demand for commercial sound licences in the primary markets. Therefore it is important to ensure that the momentum of further investment in the industry is not lost.

During 2005-6 financial year the Authority will, in terms of sections 41(1) and (2) of the IBA Act, publish a notice in the Government Gazette inviting applications for at least three new commercial licences in the primary markets.

12.4 National Commercial Licences

The Authority has upheld its 1996 policy decision and has decided not to invite applications for a national commercial sound broadcasting licence. Due to frequency limitations, a new national radio network would be difficult to establish.

Within the current frequency plan, the Authority believes it can continue to create more opportunities for investment and diversity through the licensing of metropolitan/regional stations than through the licensing of a national commercial station.

The Authority has decided not to make a finding on the SABC's national radio licences and frequencies. The regulator does not want to pre-empt the forthcoming amendment applications by the SABC in terms of section 22 of the Broadcasting Act.

13. Empowerment

As was evidenced by this inquiry, the Authority was presented with various proposals with regard to the definitions of historically disadvantaged persons and black economic empowerment. In order to promote consistency across the broadcasting and telecommunications sectors, the Authority has decided to adopt the same approach to defining historically disadvantaged persons in the context of the ownership and control of broadcasting services as that set out in the regulations in respect of "the Limitation of Ownership and Control of Telecommunication Services" in terms section 52 of the Telecommunications Act. This definition incorporates most of the elements of the proposals placed before the Authority.

For the purposes of analysing ownership and empowerment issues with respect to broadcasting services, 'historically disadvantaged persons' are therefore defined as follows:

"historically disadvantaged persons" means in the case of-

(a) natural persons, who before the Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993) came into operation, were disadvantaged by unfair discrimination on the basis of race , gender, disability, sexual orientation or religion;

(b) an association, a majority of whose members are natural persons referred to in regulation (a) above;

(c) a juristic person other than an association, and natural persons referred to in regulations (a) and (b) above own and control more than twenty-five percent of such juristic person's issued share capital (directly or indirectly) or members' interests and are able to control a majority of the juristic person's votes;

(d) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b) or (c) above own and control more than twenty-five percent of such juristic person's or association's issued share capital or member's interest and are able to control a majority of its votes;

(e) *a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b), (c) or (d) above possess the power to direct or cause the direction of the management and policies thereof whether through the direct or indirect ownership of issued share capital, by contract or otherwise."*

The Authority will also be guided by any Code of Practice issued pursuant to section 9 of the Broad-Based Black Economic Empowerment Bill.[4]

14. Amendments to the IBA Act

14.1 Two Options for Amending the IBA Act

[4] At the time of completing this Position Paper, the Bill had not yet been promulgated.

The Authority has proposed two options for amending sections 48, 49 and 50 and Schedule 2. In Option One the Authority proposes the deletion of these sections and their replacement by provisions that would enable the Authority to prescribe regulations on the same subject matter. The legislation could set out the factors the Authority should take into account when prescribing such regulations.

Option Two involves the amendment of the relevant sections and the retention of the ownership limits in the statutes. In Part D, the Authority has prepared a set of draft amendments for public comment. After receiving and taking into account further written representations, the proposed amendments will be submitted to the Minister for tabling in Parliament. Should Option One be preferred, then the proposed amendments set out under Option Two could form the basis of draft regulations.

14.2 Definitions of Control, Deemed Control and Financial Interest

After taking into account all the representations, the Authority has proposed a number of consequential amendments regarding definitions of `control', `deemed control', `financial interest' and `securities'. These amendments clear up areas of legislative uncertainty which have emerged over the last nine years.

14.3 Limitations on Foreign Control of Broadcasting Services

Government stated in the White Paper on Broadcasting Policy, 1998, that commercial broadcasters should be expected to fulfil significant public policy goals. "To ensure that the broadcasting system meets the needs of South Africa, it is imperative that effective ownership and control of broadcasting system remain in the hands of South African citizens. However, in order to meet their obligations private broadcasters need access to adequate amount of capital. An appropriate balance must be met between these priorities".[5]

In the White Paper government also stated that it was keen to increase investment opportunities in the South African broadcasting system so that South Africa could play its rightful role in global markets. "The level of ownership of private radio and television stations permitted for a foreigner is currently 20%. The Government is of the view that this ceiling should be raised in order to facilitate an increase in investments".

The Authority has decided to give effect to government and the broadcasting industry's view that the percentage-based limitation on foreign ownership should be increased without necessarily allowing foreigners to control broadcasting services. A provision allowing for an application for exemption on good cause has also been proposed.

[5] The White Paper on Broadcasting Policy, 1998, at page 40.

The proposed amendments to section 48 have been set out in detail in Part D.

14.4 Limitations on Ownership and Control of Broadcasting Services

It is the Authority's view is that consolidation of broadcasting interests and the control of multiplicity of commercial services do not automatically mean an end to plurality and diversity of voices.

There are currently 13 commercial sound broadcasting licences and section 49 limits control by any person to a total of four licences. While the Authority's proposed changes to the legislation (see Part D) would allow companies to control more licences, the Authority also plans to licence at least 7 new commercial sound broadcasters over the next two years. At least 4 of these licences will be granted in secondary markets, and at least 3 will be granted in primary markets. This should, by March 2006, increase the current number of commercial radio licensees from 13 to 23, taking into account the sale and licensing of Capital Radio in the short-term, as well as the re-licensing of the MW frequencies forfeited by Punt Gesels Radio.

In order to move towards a more technology neutral environment and because of the disparity between the amount of AM and FM licences that have been issued, the Authority has decided to dispense with the legislative distinction between FM and AM broadcasters. It is therefore proposed that the legislation should refer only `to the control of licensed commercial sound broadcasting services' and not distinguish between AM and FM, for the purposes of ensuring diversity of ownership.

The Authority has also decided to recommend that legislation dispense with a finite numerical limit on the number of commercial licences. A structural, percentage-based limitation is favoured.

The Authority has decided that no person may control more than 35% of the number of commercial sound broadcasting services that are licensed to broadcast. In other words, if the law was amended today, a person would be able to control five commercial sound broadcasting services. For example, in an environment where 23 commercial sound broadcasting services are licensed no person would be able to control more than eight licences.

The advantage of this system is that it retains a measure of proportionality whilst capping the ownership of commercial sound broadcasting licences. Therefore, there will be no need to constantly amend the law should more commercial sound broadcasting licences be issued or withdrawn.

The Authority is also convinced that regulated consolidation will have benefits for the South African broadcasting industry. Some of the benefits of consolidation include:

- significant cost savings for broadcasting companies, through the pooling of resources and the rationalisation of cost centers;
- the development of corporate expertise in and commitment to the broadcasting sector as a whole, through the experience of holding a number of different broadcasting licences; and
- the development of large broadcasting companies that are able to compete internationally by producing export broadcasting products of a high standard;

14.5 Limitations on Cross-Media Control of Broadcasting Services

The Authority believes that while it is important to retain limitations on cross-media control of commercial broadcasting services, these limitations need to be clarified.

The Authority has agreed to clarify section 50 by proposing amendments in this regard. The confusion between readership and circulation is removed and the relevant limit raised to 25%.

The amendments to section 50 have been set out in Part D.

14.6 Exemption from the Requirements of Sections 48, 49 and 50

Sections 49(6)(a) of the IBA Act states that on application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in section 49 of the IBA Act.[6] Section 50(3) of the IBA Act states that the Authority may on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt the publisher of a newspaper or, where such publisher is a company, the person in control of such company, from adherence to any of the limitations determined in terms of section 50.[7] The Authority has also proposed a similar exemption provision for section 48.

In addition to section 2 of the IBA Act, the Authority will be guided by, inter alia, the following factors when exercising its discretion to grant exemptions from the requirements of sections 48, 49 and 50 of the IBA Act, namely:

- the promotion of the ownership and control of broadcasting services by historically disadvantaged persons;
- ensuring the survival of a failing newspaper; and
- ensuring the survival of a failing commercial broadcasting licensee.

15. Practical and Procedural Considerations

[6] Section 49(6)(a) of the IBA Act.
[7] Section 50(3) of the IBA Act.

15.1 The Authority's Approval for the Change in Control of a Licensee

The Authority proposes in Part D that section 52A be inserted in the IBA Act to deal with the approval of a change in the control of a licensee that does not amount to an amendment or transfer of a licence.

Furthermore, it has come to the Authority's attention that commercial sound broadcasting licensees have different provisions in their licences regarding the changes in shareholding, empowerment, control and amendment of licences.

The recent amendment to the broadcasting licence of Midi TV best encapsulates the approach favoured by the Authority with regard to changes in shareholding, empowerment, control and amendment of the licence. As soon as reasonably practical after the publication of this Position Paper, the Authority will enter into discussions with commercial sound broadcasting licensees with a view to agreeing on how to standardise all licences with respect to changes in shareholding, empowerment, control and the amendment of the licence.

15.2 Non-binding Discussions

The Authority will continue its policy of entering into non-binding discussions, on an informal and 'without prejudice' basis, with potential parties to a transaction, so that parties can gauge whether or not there are impediments to their proposed transaction from a regulatory point of view.

15.3 Regulations on Time-Frames for Decisions on Licence Applications, Renewals, Amendments, Transfers and other Applications requiring the Authority's Approval

The Authority is guided by the Promotion of Administrative Justice Act with regard to time-frames and procedural fairness. Should this Act not provide the necessary certainty requested by stakeholders, the Authority may consider publishing draft regulations on time-frames for decisions on licence applications, renewals, amendments, transfers and other applications requiring the Authority's approval.

PART D: PROPOSALS TO AMEND THE PROVISIONS OF THE INDEPENDENT BROADCASTING AUTHORITY ACT (No. 153 of 1993)[8]

The Independent Communications Authority of South Africa ("the Authority"), in terms of section 13(1)(k) read with sections 49(7) and 50(4) of the Independent Broadcasting Authority Act ("the IBA Act") (Act No.153 of 1993) intends to propose to the Minister of Communications ("the Minister") that sections 48, 49, 50, and paragraphs 1 and 3 of Schedule 2 to the IBA Act be amended.

On the same day as the publication of this Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences, the Authority shall publish for written comment proposed amendments to the IBA Act, set out hereunder. Although the Authority is not required by the statute to publish these proposed amendments for comment, the Authority has decided to allow the public and stakeholders the opportunity to help shape legislative proposals to the Minister and Parliament.

The Authority has proposed two sets of legislative amendments for public comment under the headings `Option One' and `Option Two'.

The Authority is seeking comment on the two options and on the substantive amendments themselves. Further proposals on the proposed amendments are also welcome. The Authority will only consider proposals on the amendments as set out in Part D of the Position Paper. No representations on the policy as set out in Part C shall be considered.

OPTION ONE: PRESCRIBING REGULATIONS THAT LIMIT FOREIGN OWNERSHIP, COMMERCIAL SOUND AND TELEVISION BROADCASTING OWNERSHIP AND CROSS-MEDIA OWNERSHIP, AND THAT DEFINE CONTROL

The Authority proposes the deletion of sections 48, 49 and 50 and Schedule 1 to the IBA Act and their replacement by provisions that would enable the Authority to prescribe regulations on the same subject matter. The legislation could set out the factors the Authority should take into account when prescribing such regulations.

Section 48: Limitations on Foreign Control of Commercial Broadcasting Services

The Authority proposes that section 48 of the IBA Act be deleted and be substituted with the following new section:

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[8] **GENERAL EXPLANATORY NOTE[ ]** Words in bold type in square brackets indicate deletions of existing words..____ Underlined words indicate insertions

48. Taking into account the objects of the Act as set out in section 2, the Authority shall prescribe the limitations on the control of broadcasting services by foreign persons.

Section 49: Limitations on Control of Commercial Broadcasting Services

The Authority proposes that subsections (1), (2), (3), (4) and (5) of section 49 be deleted and be substituted with the following:

49. Taking into account the objects of the Act as set out in section 2, the Authority shall prescribe limitations on the control of commercial television and sound broadcasting services, including:

(a) definitions of control and historically disadvantaged persons;

(b) instances of control of commercial broadcasting licensees, newspapers and other companies;

(c) limitations with respect to overlapping broadcasting licence areas;

(d) any other matter relevant or ancillary to the promotion of diversity of ownership in the broadcasting industry.

Section 50: Limitations on Cross-Medial Control of Commercial Broadcasting Services

The Authority proposes that section 50 of the IBA Act be deleted and be substituted with the following new section:

50. Taking into account the objects as set out in section of the Act, the Authority shall prescribe limitations on cross-media control of commercial broadcasting services.

Insertion of Section 52A

The Authority proposes that section 52A be inserted in the IBA Act to deal with the approval for the change in control of a licensee that does not amount to an amendment or transfer of a licence. The Authority proposes that section 52A should read as follows:

"The Authority may prescribe regulations on the procedure to be followed by a licensee who is required to seek approval for the change in control of a licence and such approval does not involve an amendment or a transfer of a licence".

Deletion of Schedule 2 to the IBA Act

The Authority proposes that Schedule 2 to the IBA Act be deleted.

OPTION TWO: AMENDING SCHEDULE 2 AND SECTIONS 48, 49 AND 50 OF THE IBA ACT AND RETAINING THE SUBSTANTIVE PROVISIONS IN THE IBA ACT

Option Two involves the amendment of the relevant sections and the retention of these ownership limits in the IBA Act. Should Option One be preferred, then the proposed amendments set out under option two would form the basis of regulations.

Section 48: Limitations on Foreign Control of Commercial Broadcasting Services

1. The Authority proposes that section 48(1)(b) of the IBA Act be amended to read as follows:
   (1) One foreign person shall not, whether directly or indirectly –
      (b) have **[financial interest or interest in either]** securities [**in voting shares or paid-up capital]** in a South African unlisted public or private company holding a **[private]** commercial broadcasting **[licensee]** licence equal to or exceeding **[twenty]** twenty-five percent.
2. The Authority proposes that section 48A(1) be inserted to read as follows:
   *(*1) One or more foreign persons shall not, whether directly or indirectly –
      (a) have securities in a South African unlisted public or private company holding a commercial broadcasting licence equal to or exceeding thirty-five percent.

3. The Authority proposes that section 48A(2) be inserted to read as follows:
   (2) One foreign person shall not, whether directly or indirectly –
      (a) have securities in a South African listed public company holding a commercial broadcasting licence equal to or exceeding thirty-five percent.

4. The Authority proposes that subsections 4(a) and 4(b) be added to section 48 of the IBA Act. Section 48(4)(a) should read as follows:
   On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections.

5. The Authority proposes that section 48(4)(b) should read as follows:
   An exemption in terms of paragraph (a) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

Section 49: Limitations on Control of Commercial Broadcasting Services

6. The Authority proposes that subsections (1), (2), (3), (4) and (5) of section 49 be deleted and substituted with the following:

(1) No person shall be in a position to directly or indirectly exercise control over more than one commercial television broadcasting licence;

(2) No person shall be in a position to exercise control over more than thirty five percent of the number of licensed commercial sound broadcasting services except:

(a) when the calculation of the percentage does not result in an integer and that when the number of licences is rounded to the closest integer, that integer is higher than the percentage limit; and/or
(b) when a person exceeds the percentage limit only because one or more other licensees have had their licences suspended or revoked by the Authority, in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).

(3) No person shall be in a position to exercise control over more than two commercial sound broadcasting licences which have the same licence areas or substantially overlapping areas.

Section 50: Limitations on Cross-Media Control of Commercial Broadcasting Services

10. The Authority proposes that section 50(2)(a) be amended to read as follows:
"No person who controls a newspaper may acquire or retain **[a financial]** control in both a **[radio]** commercial sound and **[TV]** a commercial television broadcasting licence".

11. The Authority proposes that section 50(2)(b) be amended to read as follows:
"No person who is in a position to control a newspaper may be in a position to control a **[radio]** sound or a television broadcasting licence in an area where the newspaper has an average weekly ABC circulation of **[20%]** 25% of the total newspaper **[readership]** circulation in the area if the licence area of the **[radio]** sound or television broadcasting licence overlaps substantially with the said circulation area of the newspaper

12. The Authority proposes that section 50(2)(bA) be inserted as follows:

Where the relevant broadcast coverage area is controlled in a single city, the newspaper circulation figures shall be calculated relative to that city.

13. The Authority proposes that section 50(2)(bB) be inserted as follows:
Where the broadcast coverage area covers a number of cities or towns, the newspaper circulation figures shall be calculated relative to the three largest cities or towns within the relevant broadcast coverage area.

14. The Authority proposes that section 50(2)(bC) be inserted as follows:

Where the broadcast coverage area is national, the national newspaper circulation figures shall be used.

15. The Authority proposes that section 50(2)(d) be deleted.

Insertion of Section 52A

16. The Authority proposes that section 52A be inserted in the IBA Act to deal with the approval for the change in control of a licensee that does not amount to an amendment or transfer of a licence. The Authority proposes that section 52A should read as follows:

"The Authority may prescribe regulations on the procedure to be followed by a licensee who is required to seek approval for the change in control of a licence and such approval does not involve the amendment or a transfer of a licence".

Schedule 2 of the IBA Act

17. The Authority proposes that paragraph 3 of Schedule 2 to the IBA Act be amended to read as follows:

> "Without derogating from the provisions of any law or from the common law, and in the absence of proof to the contrary, a person shall be regarded as being in control of, or being in a position to exercise control over, a company if he or she has equity shareholding in the company exceeding twenty-five percent or has other securities **[**financial interests therein equal to at least**]** exceeding twenty five percent of its nett assets, irrespective of whether such holding or holdings confers de facto control.

18. The Authority proposes that paragraph 3(a) be inserted into Schedule 2 to the IBA Act as follows:

`Security' means any share in the capital of a company and includes stock and debentures convertible into shares and any rights or interests in a company or in respect of any such shares, stock or debentures and includes any financial instrument as defined in the Financial Markets Control Act, 1989 (Act No. 55 of 1989)

17. The Authority proposes that the definition of **'financial interest'** in section 1 of the IBA Act be deleted.