



Comments on the Draft Regulations of the Internet Censorship Amendment Act

A report compiled for AfriForum
in cooperation with Ernst J. van Zyl

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1. Introduction and background

AfriForum is a registered not-for-profit company with a membership of more than 250 000 individuals. This submission is made pursuant to the objectives of AfriForum, which include – but are not limited to – the following:

- The promotion and preservation of civil, minority, human and constitutional rights;
- The safeguarding of good governance and governmental transparency;
- The establishing of self-reliant and self-respecting communities;
- The attainment of settlements in furtherance of peaceful coexistence and tolerance between communities; and
- The establishing and promotion of mutual recognition and respect between communities.

On 3 July 2020 the Minister of Communications and Digital Technologies (“the Minister”) published the Draft Films and Publications Amendment Regulations 2020 (“the Draft Regulations”) for public comment, in terms of section 31 (1)(c), (d) and (e) of the Films and Publications Act 65 of 1996 (“the Act”), as amended by the Films and Publications Amendment Act 11 of 2019 (“the Amendment Act”).

AfriForum wants to submit its written comments on the Draft Regulations. In broad terms, as far as its legal concerns in respect of the Draft Regulations are concerned, AfriForum’s written comments will focus on the following:

- Preliminary comments about vague provisions in the Draft Regulations; and
- Comments that relate to the constitutionality of the Draft Regulations.

2. Practical and analytical arguments against the Draft Regulations

One of the vital elements of a healthy democracy is the free flow of information. Freedom of speech, as protected by Section 16 of the South African Constitution, facilitates this to a large degree. The Draft Regulations – in fact, the Amendment Act in its entirety – pose a threat to this free flow of information and to freedom of speech, because it aims to regulate speech and information to a significant degree.

The Amendment Act read together with the Draft Regulations makes the Film and Publications Board (FPB) the arbiter of what is and what is not to be considered protected speech. The FPB is a government entity that reports to the Minister of Communications.¹ This means that these Regulations, read together with the Amendment Act, will give the government more control over speech and information. This is a dangerous prospect when one considers the plethora of cases (past and present) of governments abusing legislation that regulates speech to promote their own agenda and tighten their grip on power.

The Amendment Act and Draft Regulations not only give the FPB jurisdiction over films, but over any kind of content posted online, including photos and text. South Africans have increasingly been adopting the internet as a communication and social medium,^{2,3} and an increasing number of citizens have embraced social media platforms to – among others – share ideas, to comment on the news, to analyse the news and political developments, to publish video essays, to criticise the government and other authoritative bodies, and to

¹ Ellipsis. 2020. *The Film & Publications Board and online content regulation*. Available at <https://www.ellipsis.co.za/the-film-publications-board-and-online-content-regulation/>. Accessed on 13 August 2020.

² De Villiers, J. 2019. *South African internet users spend much more time online than Americans and Europeans*. Business Insider South Africa, 5 February. Available at <https://www.businessinsider.co.za/south-africa-one-of-the-worlds-top-internet-users-hootsuite-report-2019-2>. Accessed on 13 August 2020.

³ Statistics South Africa. 2019. *General Household Survey 2018*. Pretoria: Stats SA, p. 57–58. Available at <http://www.statssa.gov.za/publications/P0318/P03182018.pdf>. Accessed on 13 August 2020.

participate in democracy in new ways. An increasing portion of this communication employs a video or film format.⁴

Section 24A of the Act outlines that non-compliance in terms of registration⁵ would make criminals out of people who are simply posting online video content, even when they do not profit from it. Additionally, they would be subject to fines of up to R150 000 and possible imprisonment – simply for posting videos, photos or even text online.

The addition of a fee for the registration process further carries the risk of discouraging many without the means to pay this fee from participating in online discourse or posting film or video content.

Dominic Cull, a specialist in telecommunications law at Ellipsis, describes this legislation as “not only embarrassing, but ... an indictment on the Parliamentary process” as well as a complete regulatory over-reach.⁶

In 2020 approximately 22 million South Africans uses online social media sites.⁷ This number is rapidly increasing annually. Almost all the content posted on social media by these users would fall under the Draft Regulations in terms of the Amendment Act, as outlined in Section 24.1. When considering this vast number, it becomes clear that the enforcement of these proposed regulations will be completely impractical. The question then arises: How would the FPB select cases to pursue from a group of 22 million? This leaves the door open for specific targeting of individuals or organisations. Constitutional rights violations and abuse of this legislation aside, there is no feasible way that the FPB will be able to apply these regulations consistently and across the board. In the case of selective application of this legislation, its legitimacy would arguably soon come under increased scrutiny from the public and civil society.

The South African economy is increasingly adopting internet-based technologies and platforms, and the COVID-19 lockdown only accelerated the digital and online revolution in South Africa. The Draft Regulations and the Amendment Act, with its accompanying fees, has the potential to substantially stifle this economic transition to internet-based services and careers, especially for impoverished South Africans who wish to utilise these new technologies and platforms to pursue internet-based careers and businesses.

AfriForum believes that no government body should be made the judge on a nuanced and complex matter such as determining what falls within the parameters of acceptable and permissible speech. Freedom of speech and freedom of expression are integral rights in any democracy and serve as strong checks and balances for power. When these freedoms are increasingly diluted and regulated by the government, it creates fertile ground for abuses of power and authority.

⁴ Mjo, O. 2018. Inside the business of SA's professional YouTubers. *TimesLIVE*. 25 December. Available at <https://www.timeslive.co.za/sunday-times/lifestyle/2018-12-25-inside-the-business-of-sas-professional-youtubers/>. Accessed on 13 August 2020.

⁵ Clement, J. 2020. *Number of social network users in South Africa from 2017 to 2025*. Graph published by Statista. Available at <https://www.statista.com/statistics/972776/number-of-social-network-users-in-south-africa/#:~:text=In%202019%2C%20there%20were%20approximately,26.81%20million%20users%20in%202025>. Accessed on 13 August 2020.

⁶ Vermeulen, J. 2020. *Serious concern over South Africa's Internet censorship bill*. MyBroadband. 5 August. Available at <https://mybroadband.co.za/news/internet/362712-serious-concern-over-south-africas-internet-censorship-bill.html>. Accessed on 12 August 2020.

⁷ Clement, J. 2020. *Number of social network users in South Africa from 2017 to 2025*. Graph published by Statista. Available at <https://www.statista.com/statistics/972776/number-of-social-network-users-in-south-africa/#:~:text=In%202019%2C%20there%20were%20approximately,26.81%20million%20users%20in%202025>. Accessed on 13 August 2020.

3. Legal analysis

3.1 Preliminary comments on the Draft Regulations

In terms of South African common law, laws must be written in a clear and accessible manner, as held by the Constitutional Court in the case of *Affordable Medicines Trust v Minister of Health*:⁸

The doctrine of vagueness, ... requires that laws must be written in a clear and accessible manner. What is required is a reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.

When the above is applied to the Draft Regulations, the following is noted (own emphasis):

1. Notwithstanding the fact that a commercial online distributor is defined as "... a distributor in relation to films, games and publications which are distributed for commercial purposes using the internet",⁹ the Draft Regulations do not define the term "commercial purposes".
2. While the Draft Regulations define the term "non-commercial online distributor" as "... any person who distributes content using the internet, or enables content to be distributed by a user of online services, for personal or private purposes",¹⁰ the Draft Regulations fail to define the term "personal or private purposes". This uncertainty creates particular concern in light of the fact that the Amendment Act defines a distributor as "... a person who conducts the business of distributing films, games or publications and includes a commercial online distributor."¹¹ The vagueness about what constitutes a commercial distributor and a non-commercial distributor creates uncertainty about the applicability of among others regulation 2.1 of the Draft Regulations, which provides that "[a]n application for registration as a distributor or exhibitor of films or games in terms of section 18 (1)(a) of the Act shall be made on the relevant Form provided by the FPB or submitted through an electronic system accessible on its website ..." In light of the fundamental importance of the difference between a commercial online distributor and a non-commercial online distributor (insofar as the Amendment Act and the Draft Regulations are concerned), these terms should be defined in more detail. In addition, it should be clarified, expressly, whether a non-commercial online distributor qualifies as a distributor for purposes of the Amendment Act and the Draft Regulations. This is particularly important in light of section 24A(1) of the Amendment Act, which provides that (own emphasis):

Any person who knowingly distributes or exhibits in public a film or game without first having been registered with the Board as a distributor or exhibitor of films or games shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding [six] eight months or to both a fine and such imprisonment.

3. Even though the Draft Regulations contain a definition of hate speech, the term is not used in the Draft Regulations. In light of the fact that the Amendment Act criminalises the publication of hate speech,¹² it is to be clarified if and to what extent the Draft Regulations aim to apply to the publication of hate speech (if at all).

⁸ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at par 108. These principles were recently referred to with approval in the case of *Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* (21424/2020) [2020] ZAGPPHC 237 (19 June 2020) at par. 16.

⁹ Regulation 1(i) of the Draft Regulations.

¹⁰ Regulation 1(w) of the Draft Regulations.

¹¹ Section 1(e) of the Amendment Act.

¹² Section 18H (read with section 24G) of the Amendment Act.

4. In various provisions of the Draft Regulations, reference is made to a prescribed fee.¹³ While the Draft Regulations contain a definition of prescribed fee,¹⁴ the Draft Regulations, as a whole, do not indicate the probable amount/s of the different prescribed fees. To properly comment on the Draft Regulations, the proposed amounts of the prescribed fees must be indicated and/or clarified.

AfriForum therefore submits that the provisions of the Draft Regulations must be clarified, specifically regarding the concepts and terms discussed above.

3.2 Comments as to the constitutionality of the Draft Regulations

In terms of section 2 of the Constitution, the Constitution "... is the supreme law of the Republic; law or conduct inconsistent with it is invalid."

Chapter 2 of the Constitution, which comprises the Bill of Rights, entrenches various fundamental rights, including:

1. Section 10 (human dignity), which stipulates that everyone has inherent dignity and the right to have their dignity respected and protected;
2. Section 14 (privacy), which stipulates that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed;
3. Section 16 (freedom of expression), which stipulates that everyone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity and academic freedom and freedom of scientific research; and
4. Section 18 (freedom of association), which stipulates that everyone has the right to freedom of association.

Rights contained in the Bill of Rights may only be limited in terms of section 36 of the Constitution, which provides as follows:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Draft Regulations (read with the Amendment Act), infringes on the above rights (particularly the right to freedom of expression), among others in the following ways:

1. Regulation 2.3.3 of the Draft Regulations, which provides that the FPB may, when issuing a registration certificate, impose any conditions it considers necessary for the better achievement of the objects and purposes of the Act;
2. Regulation 3 (read with regulation 2.3.1) of the Draft Regulations, which requires an annual re-registration as a distributor;
3. Regulation 6 of the Draft Regulations, which requires compulsory examination and classification prior to publications that are contemplated in section 16(2) of the Act;
4. Regulation 16.1 of the Draft Regulations, which requires that any person whom the FPB issued with a registration certificate as a distributor of a publication, film or game, and who wishes to distribute online any publication, film or game, must, unless that

¹³ See for example regulations 2.4.1, 2.4.2 and 3.1 of the Draft Regulations.

¹⁴ Regulation 1(z) of the Draft Regulations merely provide as follows: "... means the applicable fee prescribed by regulation by the Minister from time to time, under section 31 (1)(a) of the Act."

- publication, film or game has already been classified by the FPB, submit such publication, film or game for classification;
5. Regulation 20.1 of the Draft Regulations, which provides that for the duration of a permit, the FPB is entitled to have access to, and the classification decisions of, the publications, films or games of a commercial online distributor, in order to assess whether the classification decision by the commercial online distributor complies with the Act and the Draft Regulations; and
 6. Regulation 24.1 of the Draft Regulations, which requires that any person in respect of publications, films or games (including educational or cultural materials endorsed by learning institutions, films on skills demonstrations or instructions, as well as music, sports, physical exercise, design and spiritual events) is not automatically exempt from classification, but must apply to be exempted.

It is submitted that these violations are not justifiable in terms of section 36 of the Constitution in that:

1. The nature and extent of the above limitations are excessive;
2. There is hardly any relation between these limitations and the purpose of the limitations; and
3. There are less restrictive means to achieve the purpose of the above limitations.

In this regard, the following views of the Constitutional Court (expressed in the case of *Islamic Unity Convention v Independent Broadcasting Authority and Others*)¹⁵ are of particular relevance (own emphasis):

In fulfilling this regulatory function, the broadcasting authority is bound to respect the provisions of the Bill of Rights while the legislation may limit the protected rights only as permitted by the Constitution. In the context of broadcasting, freedom of expression will have special relevance. It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas. It is also in the public interest that reasonable limitations be applied, provided that they are consistent with the Constitution.

4. Conclusion

In its current form, the Draft Regulations are:

1. **Vague** in the sense that the Draft Regulations do not define fundamental concepts in the Draft Regulations;
2. **Unenforceable**, in the sense that, considering the number of South African internet users into account, it would be impossible to apply this legislation consistently across the board;
3. **Prone to abuse**, in the sense that the regulations open the door for abuse in regard to the government's power to control speech and the flow of information; and
4. **Unconstitutional**, in the sense that the Draft Regulations unjustifiably violate rights entrenched in the Bill of Rights (including the right to freedom of expression and the right to freedom of association).

AfriForum's rights in this regard (including the right to supplement these comments in future) are and remain reserved.

¹⁵ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at par 36.