



## CONTENTS

|   |           |
|---|-----------|
| INTRODUCTION .....  | 3         |
| <b>A. CONSTITUTIONAL RIGHTS AND ACCESS TO CREDIBLE NEWS.....</b>  | <b>4</b>  |
| The need to consider the provision of universal access to credible news as an issue of<br>fundamental rights, and not just of commercial competition.....       | 4         |
| <b>B. COMPETITION BETWEEN FOREIGN NEWS MEDIA AND SOUTH AFRICAN NEWS MEDIA<br/>    ORGANISATIONS .....</b>   | <b>8</b>  |
| <b>C. TRENDS IN NEWS MEDIA AND REVENUE GENERATION FOR NEWS MEDIA .....</b>  | <b>8</b>  |
| The pivotal role of South Africa’s news industry and the importance of news distribution in<br>the country .....  | 8         |
| The state and current landscape of South Africa’s news industry, including changes and<br>developments in the digital distribution of news in South Africa..... | 9         |
| <b>D. CONSUMER CHOICE AND THE PARTICIPATION OF SMEs AND HDPs IN THE ONLINE<br/>    DISTRIBUTION OF NEWS .....</b>   | <b>13</b> |
| The role and importance of community news media.....  | 13        |
| How to get digital platforms to better support the sector, including in audio feeds and in local<br>languages .....   | 15        |
| <b>E. THE IMPACT OF MIS- AND DISINFORMATION .....</b>   | <b>17</b> |
| The value of investigative journalism .....   | 17        |
| How digital platforms could prioritise credible news as a bulwark against mis- and<br>disinformation .....  | 18        |
| <b>F. ADDITIONAL MATTERS .....</b>  | <b>23</b> |
| The need for transparency in data and advertising .....   | 23        |
| Generative AI as a complicating element of compensation for media organisations<br>(historically and going forward) .....                                       | 25        |
| CONCLUSION .....  | 28        |
| LIST OF AUTHORITIES .....   | 31        |

## INTRODUCTION

1. The South African National Editors' Forum (**SANEF**), the Press Council of South Africa (**Press Council**), the Association of Independent Publishers (**AIP**), and the Forum of Community Journalists (**FCJ**) (collectively "**the presenting parties**") welcome the opportunity to present oral submissions to the Competition Commission's Media and Digital Platforms Market Inquiry (**MDPMI**).<sup>1</sup>
2. As detailed in the invitation letter to SANEF from the Competition Commission (**Commission**) dated 24 February 2024, the presenting parties' oral presentation is structured as follows:
  - 2.1. Constitutional rights and access to credible news;
  - 2.2. Competition between foreign news media and South African news media organisations;
  - 2.3. Trends in news media and revenue generation for news media;
  - 2.4. Consumer choice and the participation of SMEs and HDPs in the online distribution of news media; and
  - 2.5. The impact of mis- and disinformation.
3. In addition, the presenting parties address:
  - 3.1. The need for transparency in data and advertising; and
  - 3.2. Generative artificial intelligence (**AI**) as a complicating element of compensation for media organisations (historically and going forward).<sup>2</sup>
4. Each topic is addressed in turn, and, where relevant, a reference is provided to previous submissions made by SANEF and others on:

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<sup>1</sup> These submissions were prepared following a workshop held by the submitting parties on 29 February 2024.

<sup>2</sup> SANEF Registration Form for Oral Submissions dated 16 February 2024.

- 4.1. The Draft Terms of Reference (**ToRs**) dated 20 April 2023 (**SANEF Submission on the Draft ToRs**);
- 4.2. The Statement of Issues (**SoI**) dated 11 November 2023 (**SANEF Submission on the SoI**); and
- 4.3. The Further Statement of Issues (**FSOI**) dated 22 January 2024 (**SANEF Submission on the FSOI**).

#### **A. CONSTITUTIONAL RIGHTS AND ACCESS TO CREDIBLE NEWS**

##### **The need to consider the provision of universal access to credible news as an issue of fundamental rights, and not just of commercial competition**

5. The Constitutional Court of South Africa (**Constitutional Court**) has consistently affirmed the “constitutional importance of media in our democratic society”,<sup>3</sup> in recognition of how the media plays a vital role in informing citizens of salient public information and in investigating and holding power to account.
6. Additionally, the Constitutional Court has found that “[t]he Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.”<sup>4</sup>
7. In the Final ToRs for the MDPMI, the Commission provides that:
  - 7.1. “Consistent with section 43B of the Act, the MDPMI will focus on whether there are any market features in digital platforms that distribute news media content which impede, distort, or restrict competition or undermine the purposes of the Act, and which have material implications for the news media sector in South Africa”;<sup>5</sup>

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<sup>3</sup> *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC) (*amaBhungane*) at para 115.

<sup>4</sup> *Id.*

<sup>5</sup> Final ToRs at para 3.1.

- 7.2. “The MDPMI broadly focuses on . . . (iii) the implications of the dependency on digital platforms by news media organisations on consumers, on the sustainability of news the news media sector, and the provision of credible news content as a public good to consumers”;<sup>6</sup>
8. In the FSoI, and following reference to the *Mediclinic*<sup>7</sup> judgment of the Constitutional Court, the Commission notes that “[t]here is therefore no question that the interpretation of the Act, including the Market Inquiry provisions, must promote the Constitutional Rights”.<sup>8</sup> (Own emphasis.)
9. The presenting parties support this position for the following reasons:
- 9.1. Section 1(2) of the Act provides that it must be interpreted “(a) in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2; and (b) in compliance with the international law obligations of the Republic.”<sup>9</sup> (Own emphasis.)
- 9.2. Section 2 of the Act provides, among others, that “[t]he purpose of this Act is to promote and maintain competition in the Republic in order . . . (c) to promote employment and advance the social and economic welfare of South Africans . . . [and] (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.”<sup>10</sup> (Own emphasis.)
- 9.3. Section 43B(1)(a) of the Act provides that the Commission may conduct a market inquiry: (i) “if it has reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market; or (ii) to achieve the purposes of this Act.” (Own emphasis.)
- 9.4. In addition, section 1(3) of the Act provides that “[a]ny person interpreting or applying *this Act* may consider appropriate foreign and international law.” This largely accords with section 39(1) of the Constitution which provides that “[w]hen

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<sup>6</sup> *Id* at para 3.3.

<sup>7</sup> *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35; 2022 (4) SA 323 (CC); 2022 (5) BCLR 532 (CC) (***Mediclinic***).

<sup>8</sup> FSoI at para 7.

<sup>9</sup> SANEF Submission on the SoI at para 28.

<sup>10</sup> SANEF Submission on the FSoI at para 31.

interpreting the Bill of Rights, a court, *tribunal, or forum* (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; (b) *must* consider international law; and (c) may consider foreign law. In terms of international law, both “binding” and “non-binding” sources of international law should be considered.<sup>11</sup> (Own emphasis.)

- 9.5. Lastly, the Constitutional Court in *Mediclinic* makes it clear that both “the Tribunal and Competition Appeal Court” are: (1) “under a section 7(2)<sup>12</sup> obligation to promote, protect, respect and fulfil rights in the Bill of Rights;” and (2) “have the added responsibility to do so imposed on them by the Preamble to the Act and its purpose.”<sup>13</sup> These obligations logically extend to the Competition Commission and its approach to the present Inquiry.<sup>14</sup>
10. In acknowledging this constitutional obligation imposed on the Commission, the presenting parties further note that this Inquiry implicates, at least, seven constitutional rights, which include:
- 10.1. The right to freedom of expression, including freedom of the press and other media, as it pertains to public interest media and an effective and quality news media eco-system in South Africa;<sup>15</sup>
- 10.2. The right of access to information, as it pertains to the impact of social media platforms on the economic viability and prominence of credible news as an essential component of a democratic society and effective participation in economic life;<sup>16</sup>
- 10.3. The right to language and cultural participation, as it pertains to media diversity and plurality;<sup>17</sup>

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<sup>11</sup> SANEF Submission on the SoI at para 29.

<sup>12</sup> Section 7(2) of the Constitution provides that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

<sup>13</sup> *Mediclinic* above n 7 at para 10.

<sup>14</sup> SANEF Submission on the FSoI at para 34.

<sup>15</sup> *Id* at para 38.1.

<sup>16</sup> *Id* at para 38.2.

<sup>17</sup> *Id* at para 38.3.

- 10.4. The right to equality, as it pertains to the ability for people to discover and access credible information across various divides such as language, gender class, and region;<sup>18</sup>
- 10.5. The right to human dignity, as it pertains to, among others, algorithmic content recommendations which undermine individual agency and choice;<sup>19</sup>
- 10.6. The rights of the child and the right to education, as it pertains to the impacts of mis- and disinformation on children and their ability to access credible information as a component of both formal and informal basic and further education;<sup>20</sup> and
- 10.7. The right to privacy, as it pertains to the obligation on digital platforms to protect personal data which is not a legitimate reason to avoid providing access to anonymised or other data, such as to journalists and advocacy groups, when there is a public interest, and the access is proportionate and necessary in a determined context.<sup>21</sup>
11. As a result, the Commission is enjoined to promote the Constitution, and the applicable rights in the Bill of Rights, in every aspect of this Inquiry. This includes through ensuring that the foundational constitutional values of “openness”, “responsiveness”, “equality”, and “human dignity” infuse the Inquiry process, evidence-gathering, and findings.
12. In line with all human rights, the right to a remedy applies when rights are violated or otherwise interfered with. Regarding the rights cited above, remedial actions should apply. The Commission is therefore enjoined to ensure that a rights-based lens is applied to both its procedures and substantive determinations.<sup>22</sup>
13. Importantly, in determining adverse effects and remedial action, the Commission should ensure that implicated rights are considered alongside any adverse effects on competition, and that any remedial action, to the greatest extent possible, remedies any actual or potential rights violations.<sup>23</sup>

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<sup>18</sup> *Id* at para 38.4.

<sup>19</sup> *Id* at para 38.5.

<sup>20</sup> *Id* at para 38.6.

<sup>21</sup> *Id* at para 38.7.

<sup>22</sup> *Id* at para 39.

<sup>23</sup> *Id.*

14. Simply, the provision of access to credible news as a public good must be considered as a constitutional issue, not only as a matter of commercial competition.

**B. COMPETITION BETWEEN FOREIGN NEWS MEDIA AND SOUTH AFRICAN NEWS MEDIA ORGANISATIONS**

15. Competition between foreign and South African news media is not something that the submitting parties have addressed in their previous submissions to this Inquiry. It is also not evident to the presenting parties how the provision of and access to international news is seen as an issue that may unfairly compete with national and local news. However, with leave of the Commission and in further discussion during the oral presentations, the submitting parties may be in a position to prepare further written submissions on this question for submission to the Commission.

**C. TRENDS IN NEWS MEDIA AND REVENUE GENERATION FOR NEWS MEDIA**

**The pivotal role of South Africa's news industry and the importance of news distribution in the country**

16. As detailed in the SANEF Submission on the Draft ToRs,<sup>24</sup> "informing the citizenry is a key role of news media organisations which, in turn, is crucial to equip citizens with necessary information and tools to exercise and vindicate their rights."<sup>25</sup> Additionally, it cannot be gainsaid that an effective and quality information eco-system, enabled by the news media, is in the best interest of all of society, including the private and public sectors.<sup>26</sup>
17. As a result, there is a crucial nexus to be emphasised between journalism as a public good alongside the need for public interest content to serve social needs, and the sustainability of the news media.<sup>27</sup> Public interest journalism in South Africa has, in recent years, further demonstrated its immense contributions in fostering openness, transparency, and fair play by holding the government and the private sector accountable.<sup>28</sup> High-quality, credible, and

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<sup>24</sup> SANEF Submission on the Draft ToRs at para 25.

<sup>25</sup> *Id.*

<sup>26</sup> SANEF Submission on the SoI at para 30.

<sup>27</sup> SANEF Submission on the Draft ToRs at para 25.

<sup>28</sup> Herman Wasserman, 'The state of South African media: a space to contest democracy,' *Publizistik* (2020) (accessible [here](#)).



accessible news is a public good, and it directly serves the public interest in democracy and sustainable development.<sup>29</sup>

18. The media is a “public sentinel”.<sup>30</sup>
19. This Inquiry is directly seized with the impacts that platforms have on an effective and quality news media eco-system in South Africa, and the need to ensure that high-quality, accessible news — that serves the public interest — is protected, sustained, and enabled. This constitutional imperative, as detailed above, is at the heart of this Inquiry.

### **The state and current landscape of South Africa’s news industry, including changes and developments in the digital distribution of news in South Africa**

20. As a point of departure, in a country as diverse as South Africa — in language, politics, culture, and identities — that faces continuing and persistent inequities in the divides of race, class, and gender, media diversity (in turn predicated on a pluralism of viable media enterprises and outlets) is a crucial component of media freedom.<sup>31</sup>
21. A diverse media that represents different people and voices helps guarantee that a plurality of national and local news, and viewpoints and interests, are represented in the public domain, including those that may not be aired through media outlets that serve elite interests and focus largely upon the key urban centres.<sup>32</sup>
22. These sentiments are echoed in commitments made in the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa, which the Commission is bound to consider in terms of section 1(3) of the Competition Act 89 of 1998 (**Act**), and which provides that:<sup>33</sup>

“States shall take positive measures to promote a diverse and pluralistic media, which shall facilitate the promotion of free flow of information and ideas, access to media and

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<sup>29</sup> UNESCO, ‘Journalism as a public good,’ (2021) (accessible [here](#)).

<sup>30</sup> *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (**Print Media**) at para 54.

<sup>31</sup> SANEF Submission on the Draft ToRs at para 29.

<sup>32</sup> Jane Duncan and Julie Reid, ‘Toward a measurement tool for the monitoring of media diversity and pluralism in South Africa: A public-centred approach,’ *Communication: South African Journal for Communication Theory and Research* (2013) (accessible [here](#)).

<sup>33</sup> Principle 17 of the African Commission on Human and People’s Rights, ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa’, October 2019 (accessible [here](#)).

other means of communication, access to non-discriminatory and non-stereotyped information, access to the media by poor and rural communities, the promotion of transparency and diversity in media ownership, the promotion of local African languages, content and voices, and the promotion of the use of local languages in public affairs.”

23. Despite this clear imperative, media diversity in South Africa has not yet reached these ideals.
24. The Independent Panel Report on the Inquiry into Media Ethics and Credibility, chaired by Judge (retired) Kathleen Satchwell (**Satchwell Inquiry**) found that “[o]ligopoly and lack of diversity persist, narrowing the public space for access to information and debate in a socio-political and economic landscape where English and Afrikaans dominate all platforms, paywalls encroach, data is expensive, and online access limited.”<sup>34</sup> The Australian experience has also demonstrated that there is a tendency — unless concerted action is taken to the contrary — for media bargaining code-type models to predominantly benefit large and dominant news publishers at the expense of others.<sup>35</sup>
25. For present purposes, it must also be noted that systems in which news publishers could be rewarded or benefitted by platforms in proportion to their existing online traffic have the potential to perpetuate existing inequalities within the news media sector, and to continue to inhibit a successful transition to digital for small, local, and community media organisations. Additional checks and balances may need to be put in place to ensure that such smaller publishers are able to benefit from any proposed initiatives, which may also include an independently-operated fund for public interest media.<sup>36</sup>
26. Resultantly, fair compensation for news in the public interest that helps feed traffic and value on the platforms should be based on the value that platforms derive from this content, and small, local, and community media organisations should be enabled to participate and benefit from these systems.

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<sup>34</sup> Kathleen Satchwell et al, ‘Independent Panel Report: Inquiry into Media Ethics and Credibility’, (2021, updated in April 2021) (accessible [here](#)) (Satchwell Inquiry) at para ES12.

<sup>35</sup> For example, the Chair of the ACCC was quoted as saying that under the Australian Code, news outlets benefit in proportion to their existing contribution to journalism, in other words, in proportion to the number of journalists they employ. Anya Schiffrin, ‘Five competition ministers discuss regulating Big Tech’, (2021) (accessible [here](#)). See also section 5.3 of SANEF’s report on competition in the digital economy (accessible [here](#)).

<sup>36</sup> SANEF Submission on the Draft ToRs at para 34.

27. While some platforms are distancing themselves from news, it remains the case that users of these services both need and engage with such content, such as through repurposing or discussing topics originating from the hard work of news media workers. As one observer has noted, platforms can run, but not hide from news. This is especially during election periods, and the significance is that news continues to fuel the value proposition and generation of the platform gatekeepers.
28. In this regard, the presenting parties reiterate the recommendation made in paragraph 45 of the SANEF Submission on the SoI that the Commission undertake research based on the methodology proposed in the US media compensation research,<sup>37</sup> or another methodology suitable in the South African context, to determine fair compensation from digital platforms to news media organisations.
29. In terms of the current landscape, the following is notable:
- 29.1. The Satchwell Inquiry found that “[n]ews media is under pressure from changes in audience consumption of news wrought by the digital age. As already discussed, traditional publishers of newspapers who produce most of the news driving the political agenda have been hardest hit.”<sup>38</sup> (Own emphasis.) It is evident that even the limited extent of media diversity is being threatened by newsroom cutbacks in the mainstream media.
- 29.2. “Time-honoured print news production practices have been disrupted by the need to produce news in new ways for new audiences online. Broadcasting will face new challenges with the transition to digital broadcasting.”<sup>39</sup> (Own emphasis.) For all levels of media, the question of funding the production of news is increasingly acute.
- 29.3. “Despite these challenges, there has unquestionably been an irreversible move away from the traditional view that only centralised information from established and ‘official’ media sources can be relied upon. With the advent of a situation where, at least potentially, ‘everyone is a publisher’, there has been an explosion in the amount of information available; in the sources of such information, and in its

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<sup>37</sup> Dr Anya Schiffrin et al, ‘Paying for News: What Google and Meta Owe US Publishers’ (29 October 2023) (US media compensation research) (accessible here).

<sup>38</sup> Satchwell Inquiry above n 34 at para 6.145.

<sup>39</sup> *Id.*

type and nature. One has only to think of the many citizen journalists recording events in the Black, working class townships of South Africa, which would never before have seen the light of day, let alone received an audience response.”<sup>40</sup> (Own emphasis.) On the other hand, “citizen journalism” (often more commentary and opinion, than the surfacing of new facts through news reports) is not a substitute for comprehensive and professional supply through news enterprises whether national or local in their scope.

30. Resultantly, for the media to survive, some or other form of digital transformation is necessary, including attention to the wider digital value chain within the communications ecosystem:<sup>41</sup>
  - 30.1. The current limited levels of media development and diversity are being threatened within the wider political economy of the information environment, while the prospects of sorely needed new entrants — especially at the local-level — are rendered nearly impossible. Currently, news media is disadvantaged by the platform algorithms that deprioritise news in favour of other content, with adverse social impact for audiences who need news to enable their constitutional rights and to participate in our democracy and economy. The current structuring of search, whether on social media platforms, or through dedicated services, also works to the disadvantage of the discoverability and visibility of news.
  - 30.2. News media is also not able to compete with the opaque and dominant ad-tech exchanges operated by the major platforms that perform as both gatekeepers and as destinations for the placement of automated advertising (as is addressed more fully below).
  - 30.3. These obstacles, if unaddressed, place insurmountable hurdles to current and future news media enterprises even when advancing in digital transformation. The current scenario is one where the general public receives very limited relevant news in their media consumption diets, and only a minority who can pay for online subscriptions are informed. The right to access information is harmed by the current configuration of the communications ecosystem.

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<sup>40</sup> *Id* at para 6.153.

<sup>41</sup> SANEF Submission on the SoI at para 77.

31. In addition, a notable future trend is that audiences will expand in online spaces as we move closer towards universal access, and the online world, including platforms, will increasingly become the predominant source of content, often at the expense of information vis-a-vis false or fictional content and entertainment offerings.<sup>42</sup> There is need for action such that the digital platforms begin to better recognise community media publishers, as universal access expands in rural areas and in vernacular languages. This is where the online information ecosystem, as presented by the platforms, is of relatively low quality and lacking in diverse news at national, city, and rural area levels.<sup>43</sup> Any potential solutions in this regard must consider how community media may be capacitated and supported to operate online to ensure a plurality of news.
32. As such, it is imperative that the MDPMI acknowledges in its findings the importance of the country enabling investment in existing media and in developing and growing a more inclusive media. Specifically, the MDPMI should meaningfully support the existing diversity of the South African news media sector, including commercial media, the public broadcaster and the array of small, local, and community media organisations, as well as enhance the prospects for new entrants into the market. In addition, its recommendations should aim to support and advance diversity in the sector, which in turn will enrich the platform landscape's offerings to the public. This is critical to achieving the purpose of sections 2(c) and (e) of the Act.<sup>44</sup>

#### **D. CONSUMER CHOICE AND THE PARTICIPATION OF SMEs AND HDPs IN THE ONLINE DISTRIBUTION OF NEWS**

##### **The role and importance of community news media**

33. As detailed earlier in this submission, media diversity is a crucial component of media freedom and media development,<sup>45</sup> and community media, alongside the public broadcaster, is central to fostering media diversity and plurality. However, the transition to digital media has posed significant challenges for community media.<sup>46</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> SANEF Submission on the Draft ToRs at para 33.

<sup>45</sup> *Id.* at para 29.

<sup>46</sup> SANEF Submission on the SoI at para 78.

34. One notable challenge is the employment of first-time journalists who often “cut their teeth” in community media settings. Due to the limited online presence of community media organisations, many young journalists are not given exposure to online spaces to hone their skills and often find themselves competing for stories with Facebook pages or community WhatsApp groups, or having their content copied and duplicated for sharing through these platforms without credit.<sup>47</sup>
35. Some estimates by community media organisations are that the potential income from digital advertising is no more than 7-8% of turnover, leading to a lack of incentive to invest in the necessary infrastructure to develop a digital presence.<sup>48</sup>
36. In addition, the following is notable:
  - 36.1. While digital news content distribution has enabled more people to access greater quantities of content, new services in local languages have been limited, and arguably actively disadvantaged by the development of digital distribution mechanisms that appear to have inherent language biases in the algorithms used and the language and contextual skills of their staff of both algorithm developers and content moderators.<sup>49</sup>
  - 36.2. Different digital platforms have different distribution affordances. Meta’s platforms have evolved to limit news flow as much as possible. TikTok’s model is based on prioritising entertainment, which may often have a very low informational quotient. WhatsApp with encrypted messaging has introduced channels, akin to public dissemination, but lacks promotion of news publisher options to users, and also lacks monetisation options for news publishers. At the same time, user meta-data does go into Meta’s data profiling of individuals for ad sales elsewhere online.<sup>50</sup> The combined picture is that news publishers have to swim upstream in terms of distributing their journalism via digital gatekeepers and receive no direct compensation for the costs of producing this content.

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<sup>47</sup> *Id.*

<sup>48</sup> Franz Kruger, ‘Greening Africa’s new deserts: The search for sustainable local media in sub-Saharan Africa’ (2023) (accessible [here](#)) at 27.

<sup>49</sup> SANEF Submission on the SoI at para 108.

<sup>50</sup> *Id.* at para 109.

36.3. Consumer choice in this context is not a fixed commodity, whereby consumers inherently wish to consume or avoid news content. Instead, consumer choice is informed by, and shaped by, the range of options in content presented to them. Currently, these offerings are bounded in ways that inherently disadvantage news content, and particularly community media news content.<sup>51</sup>

### **How to get digital platforms to better support the sector, including in audio feeds and in local languages**

37. News content in local and vernacular languages has the potential to provide greater value to platforms and their users, and this should also be prioritised as a matter of the public good.<sup>52</sup>
38. However, few community media publishers in South Africa have active websites that can be indexed by search engines and news aggregators or linked to on social media. A large proportion of these publishers publish in local and vernacular languages. Many of these publishers state that the potential revenue they could generate from online advertising — and the non-viability of other online revenue models such as paywalls or subscriptions — have deterred them from investing their limited resources in a digital transition.<sup>53</sup>
39. The result is that online platforms continue to experience a dearth of credible information in these languages, particularly information relating to newsworthy events and current affairs on a local scale. By way of a simple example and as detailed in the SANEF Submission on the FSoI, a Google search in Setswana for the mayoral candidate in the Moses Kotane Municipality in the North-West province of South Africa, where a majority of residents speak Setswana, yields a mere three results, none of which refers to any past or future mayoral candidate in the region.<sup>54</sup>
40. For continued growth in a world in which it is already dominant in the search market, it is presumed that Google Search — and other digital platforms — will optimally need to rely on further market penetration among previously untapped audiences. This includes speakers of non-dominant languages and those in rural areas that are not already connected. Local and community news content is vital to maintaining traditional standards

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<sup>51</sup> *Id* at para 110.

<sup>52</sup> SANEF Submission on the FSoI at para 104.

<sup>53</sup> *Id* at para 105.

<sup>54</sup> See [here](#). See, also, *id* at para 106.

of credibility and reliability in the information eco-system as this expansion proceeds. The value of news content to Google and others is, therefore, not only what is already on the platform, but what will and should be in the future.<sup>55</sup>

41. Both the real and hypothetical value of community news content to platforms can be better gauged by interrogating the following questions, which the Commission may seek guidance from the platforms on:
  - 41.1. What proportion of Google searches end successfully — in terms of finding the information one seeks — for rural dwellers and non-English speakers in South Africa as for urban dwellers and English speakers?
  - 41.2. What proportion of people in rural areas and non-English speakers in South Africa would use Google to answer a question if internet access were not an issue, as opposed to other forms of investigation such as asking a friend or relative? How does this compare to urban residents and English speakers?
  - 41.3. What proportion of news content on Google South Africa’s search results is in each of the official South African languages? How does this compare to the proportion of total speakers in the country of each of these languages?
  - 41.4. How do rates of mis- and disinformation on social media platforms compare across the different South African languages?
  - 41.5. In providing young people with an informational service on which they are increasingly reliant, what are digital platforms’ responsibilities in terms of providing accurate, credible, and relevant information in order to mitigate violations of the rights to access information, freedom of expression, and dignity through the agency of users to choose and vet the information they consume?

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<sup>55</sup> *Id* at para 106.



## E. THE IMPACT OF MIS- AND DISINFORMATION

### The value of investigative journalism

42. The value of investigative journalism cannot be gainsaid. As detailed above, it is uncontroversial that public interest journalism in South Africa has, in recent years, demonstrated its immense contributions to transparency (both economically and politically) and to holding the government and the private sector accountable.<sup>56</sup> Investigative journalists are responsible for this and to them, we all owe a great debt.
43. The inherent value of investigative journalism lies in the tireless efforts to enable the free flow of information to the public. This has been captured by our Courts as follows:
- 43.1. “In considering the comprehensive quality of the right [to freedom of expression], one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public’s right to a healthy, unimpeded media.”<sup>57</sup> (Own emphasis.)
- 43.2. “The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty, and graft wherever it may occur and to expose the perpetrators.”<sup>58</sup> (Own emphasis.)
- 43.3. “It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press . . . The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.”<sup>59</sup>

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<sup>56</sup> Herman Wasserman above n 28.

<sup>57</sup> *Print Media* above n 30 at para 54.

<sup>58</sup> *Government of the Republic of South Africa v ‘Sunday Times’ Newspaper and Another* 1995 (2) SA 221 (T) at 227I.

<sup>59</sup> *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA) at para 6.

44. The value of investigative journalism can therefore not be understated; it is central to our constitutional dispensation, and any threat to it — including from digital platforms — should be effectively and comprehensively remedied.

### **How digital platforms could prioritise credible news as a bulwark against mis- and disinformation**

45. Despite the inherent value in public interest news, the news media sector faces multifaceted challenges from mis- and disinformation,<sup>60</sup> as well as from political interference, both of which undermine its ability to inform the public and, conversely, the trust that the public has for news publishers and institutions more broadly.<sup>61</sup> This crisis of distrust needs to be considered by the Commission.<sup>62</sup>
46. Principle 38 of the UNESCO Guidelines for the Governance of Digital Platforms provides that:

“Media outlets, fact-checking organizations, and the professionals within these institutions are important stakeholders and have a role in promoting the enjoyment of freedom of expression, access to information, and other human rights, while performing their watchdog function. Therefore, it is necessary to involve the media and its professionals in the regulatory process, recognising their role as active participants in positively contributing to the digital information ecosystem. A constructive relationship between digital platforms and credible news sources will enhance the role of digital platforms in providing information in the public interest.”<sup>63</sup> (Own emphasis.)

47. This crisis of trust in the media is intimately connected to the operations and the business model of the technology platforms. Research has found that online misinformation is linked to lower trust in mainstream media across party lines,<sup>64</sup> and the role of technology platforms in enabling the creation and spread of misinformation at an unprecedented scale is well documented. This mistrust in the news media feeds, in turn, the inability of the media

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<sup>60</sup> Ceylan and others, ‘Sharing of misinformation is habitual, not just lazy or biased,’ 2023 PNAS 120(4) (accessible [here](#)).

<sup>61</sup> UNESCO, ‘Finding the funds for journalism to thrive,’ (2022) (accessible [here](#)).

<sup>62</sup> SANEF Submission on the SoI at para 54.

<sup>63</sup> UNESCO, ‘Guidelines for the Governance of Digital Platforms: Safeguarding freedom of expression and access to information through a multistakeholder approach’ (2023) (accessible [here](#)).

<sup>64</sup> Ognyanova et al, ‘Misinformation in action: Fake news exposure is linked to lower trust in media, higher trust in government when your side is in power,’ Misinformation Review (2020) (accessible [here](#)).

to monetise their content such as subscriptions (for that sector of the public that can afford to pay).<sup>65</sup>

48. Notably, the design of digital platforms — the choice to maximise engagement as a means of generating ad revenue, the homogenisation of content as if it were all of equivalent value, plus the premium on immediacy in online spaces, and the opacity around revenue-sharing — is responsible for both the crisis of media sustainability and the crisis of mis- and disinformation.<sup>66</sup>
49. The result of the engagement-based business model is that social media either downgrades the visibility of posts with external links (as with X) and/or loads them within the platform's own ecosystem (Facebook). The longer the user spends within the ecosystem, the more data is extracted, and the more ads can be shown, with the unfortunate effect that news media receives less indirect and direct traffic.<sup>67</sup>
50. The externalities of the platforms' business models have a detrimental effect on the rights of South Africans in the communications ecosystem, and the costs thereof are not carried by the companies. Meanwhile, research commissioned by UNESCO observes how disinformation comes at a hard cost to economies and societies. “For example, in the UK it has been estimated that the annual social cost of online harm (i.e. the combination of direct costs to victims and society, and indirect costs of worsened mental health and lost productivity) may be at least £13 billion per annum. A component of this is how misinformation relating to COVID-19 and mask-wearing could have weakened the UK economy by £3.6 billion during 2020 through increased caseloads and hospitalisations”.<sup>68</sup>
51. Increasingly, even search engines (such as Google and Bing) deprioritise providing external links (except when in adverts on their services). Digital platforms have the sole discretion to determine what and how their algorithms promote or demote content and provide little transparency to outside users to understand or audit the consequences for the overall quality of the information eco-system.<sup>69</sup>

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<sup>65</sup> SANEF Submission on the SoI at para 55.

<sup>66</sup> *Id* at para 77.

<sup>67</sup> *Id.*

<sup>68</sup> Research ICT Africa, ‘Digital Platform Governance and the Challenges for Trust and Safety’ (accessible [here.](#))

<sup>69</sup> *Id.*

52. Additionally, in relation to children, the UN's General Comment No.25 on children's rights in relation to the digital environment<sup>70</sup> (General Comment No. 25) notes that:

States parties should ensure that digital literacy is taught in schools, as part of basic education curricula, from the preschool level and throughout all school years, and that such pedagogies are assessed on the basis of their results. Curricula should include the knowledge and skills to safely handle a wide range of digital tools and resources, including those relating to content, creation, collaboration, participation, socialisation and civic engagement. Curricula should also include critical understanding, guidance on how to find trusted sources of information and to identify misinformation and other forms of biased or false content, including on sexual and reproductive health issues, human rights, including the rights of the child in the digital environment, and available forms of support and remedy. They should promote awareness among children of the possible adverse consequences of exposure to risks relating to content, contact, conduct and contract, including cyberaggression, trafficking, sexual exploitation and abuse and other forms of violence, as well as coping strategies to reduce harm and strategies to protect their personal data and those of others and to build children's social and emotional skills and resilience.<sup>71</sup> (Own emphasis.)

53. Who should pay for such efforts is a moot question, although it is clear that news media providing journalism that is editorially-processed according to journalistic standards, and which is of clear provenance, is currently an unsubsidised antidote. It is also clear that though platforms pay for fact-checking, and have also supported journalism training, this is not a substitute for the challenge facing news media to cover the costs of their newsgathering. While best practice approaches to managing mis- and disinformation falls outside of the scope of the MDPMI, the impact that mis- and disinformation has on credible media eco-systems, and the role that digital platforms have played in exacerbating the crisis of distrust should be further considered by the Commission as it pertains to its determinations relating to section 2(c) of the Act.<sup>72</sup>

54. Additionally, the fundamental importance of self-regulatory bodies such as the Press Council of South Africa (Press Council) and the Broadcasting Complaints Commission of

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<sup>70</sup> United Nations Committee on the Rights of the Child, 'General Comment No. 25 (2001) on children's rights in relation to the digital environment (accessible [here](#)).

<sup>71</sup> *Id* at para 104. See also paras 54 and 96.

<sup>72</sup> SANEF Submission on the SoI at para 57

South Africa (BCCSA) to ensure a credible news ecosystem, and the importance of media and information literacy,<sup>73</sup> needs to be recognised.<sup>74</sup>

55. Credible news (i.e. subscribing to an independent self-regulatory body with an ethical code and an easy-to-use complaints mechanism) should be prioritised by platforms. It is a counter to mis- and disinformation, which is insufficiently prevented by the platforms and which content is also sometimes “gamed” to exploit the amplification and virality features built into platform algorithms.
56. In terms of the fight against mis- and disinformation, platforms spend a small amount of money, typically through discretionary philanthropic and similar programmes, paying for fact-checking services through an approved list of fact-checking organisations. However, these fact-checking services inherently lack scale and the ability to keep up with the speed and scale of mis- and disinformation spread through online platforms. However, platforms do not invest in structurally prioritising high-quality investigative journalism on their platforms, nor in sharing revenues from such content, thus leaving the producers of this content without a viable revenue model and largely dependent on discretionary and risky philanthropic funding.<sup>75</sup>
57. Resultantly, the Commission may consider:
  - 57.1. How digital platforms can alter their financial incentive structures in relation to content provided by credible media organisations that are party to industry quality-control and redress mechanisms as discussed above. Platforms currently compete in an information environment without substantively carrying the costs that news media carry, and they do adequately “clean up” harms perpetrated by and through their services. This action by the Commission could include the development of regulatory measures that propose revenue models that favour content from credible sources, and commensurate compensation, to help offset non-credible and potentially harmful content.<sup>76</sup>

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<sup>73</sup> See paras 74-84 of the UNESCO Guidelines above n 63.

<sup>74</sup> SANEF Submission on the SoI at para 57.

<sup>75</sup> *Id* at para 111. See, also, SANEF Submission on the FSoI from paras 41-57.

<sup>76</sup> SANEF Submission on the FSoI from para 56.

- 57.2. Recommending that digital platforms make greater investments into both fact-checking and content moderation by both humans and AI systems (being cautious not to entrench further biases) and into efforts to identify and counter-influence operations.<sup>77</sup> At the same time, a safer online environment is one consideration, but does not per se address the value to the economy and society of having quality verified news as a sustainable and recognised ingredient of the content package. Market failures impacting the sustainable (and future potential) production and circulation of journalism, is not redressed by fact-checking.
- 57.3. Recommending that platforms invest in hiring more content moderators with appropriate linguistic and cultural contextual skills. On this basis, platforms would be required to significantly increase these human resources ahead of major events that are prone to mis- and disinformation, including but not limited to elections, and humanitarian and environmental crises. This includes partnerships with media, including community media, as well as creating transparent (and frequently evaluated) escalation paths for news organisations, civil society, and government agencies to flag problematic content, and not least misogynistic and other attacks on journalists and human rights defenders.<sup>78</sup> As above, this does not however compensate for the disadvantages facing news publishers and therefore to their contribution to the economy and society.
- 57.4. Recommending that platforms provide greater transparency around decisions to label fact-checked content, as well as around the rationales underpinning the amplification of certain content.<sup>79</sup> Such transparency, however, should be just part of a bigger picture which would help level the playing field by reducing the information and data asymmetry between big platforms and South African news providers.
- 57.5. Recommending that platforms disclose their investment levels in these areas and provide concrete plans for improvement based on periodic transparent risk assessments and appropriate mitigation measures, and granular reporting not

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<sup>77</sup> *Id* at para 57.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

the impact of this in their transparency accounting.<sup>80</sup> In these ways, platforms would be compelled to better cover some of the real costs needed to ensure that all actors in the information ecosystem should be obliged to carry – and certainly these kinds of expenses are part of the burden on news publishers in ensuring verification and public interest standards in their own content contributions.

## F. ADDITIONAL MATTERS

### The need for transparency in data and advertising

58. In terms of the relationship between news media organisations and platforms, competition is inhibited by the lack of data access. Publishers receive little data about the performance of their content on digital platforms and even less about how algorithmic changes affect this.<sup>81</sup>
59. In relation to AdTech and direct placement on publishers’ websites, there is no transparency about what advertisers pay in relation to what the publishers receive — it is notoriously opaque. And while services like Google Analytics give both Google and publishers data on audience visits to a given news website, there is no insight to publishers about how this is used within AdTech to supply — or not supply — adverts.<sup>82</sup>
60. News media organisations are highly dependent on large AdTech intermediaries for sourcing digital advertising. This is, in part, because of the difficulties faced by other AdTech players in entering this semi-monopolised area, which is highly technology-and-data intensive and which creates a first-starter advantage in the collection of vast quantities of user data.<sup>83</sup>
61. The large operators have accumulated significant private data holdings, and leverage these to continue to expand them by monitoring in real-time how advertisements perform on different platforms and for different users. Importantly, AdTech enables programmatic advertising in which provenance and placement are relatively content-agnostic. This means

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<sup>80</sup> *Id.*

<sup>81</sup> SANEF Submission on the SoI at para 85

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at para 98.

that advertising often ends up funding fake news sites or normalises (and even financially benefits) content characterised by hate and disinformation.<sup>84</sup>

62. In addition, SANEF's Submission on the SoI highlighted the conflict of interest between social media platforms receiving advertising placements as well as owning the AdTech marketplace which determines placements. Legal cases brought in the United States against Google have pointed to problematic practices in how automated bidding operates in favour of the company's own ad tech services. Given the opacity of AdTech, it is difficult at scale to know what the share of advertising rands accrue at each layer in the stack, and whether that which accrues to media publishers can be assessed as equitable or not.<sup>85</sup>

63. Specifically:

63.1. Details of revenue sharing agreements — particularly on what proportion of the total revenue media organisations are receiving — are typically not disclosed. Without this information, it is hard for a media organisation to know whether the revenue split is fair (that is, proportionate to the value that digital platforms derive from the content).<sup>86</sup>

63.2. Algorithmic changes made by both digital platforms and AdTech intermediaries can change how content is ordered, and what kinds of content are displayed most prominently. This can impact media organisations' content distribution and advertising strategies. Without access to this information, they are unable to optimise their content for revenue generation.<sup>87</sup>

63.3. While digital platforms may provide general analytics data (for example, on the number of impressions on a given post), they do not provide information specific to news content, such as how this content has performed relative to other news content, or how news content engagement metrics compare to other types of content on the platform. This lack of specific data limits media organisations' ability to understand the true impact and reach of their journalistic output,

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<sup>84</sup> See UNESCO, 'Platform Problems and Regulatory Solutions: Findings from a comprehensive review of existing studies and investigations' (2023) (accessible [here](#)).

<sup>85</sup> SANEF Submission on the SoI at para 99.

<sup>86</sup> SANEF Submission on the FSoI at para 118.

<sup>87</sup> *Id.*



hindering their ability to refine content strategies and negotiate fairer terms with platforms based on the value their content adds.<sup>88</sup>

63.4. The AdTech supply chain encompasses numerous intermediaries, such as ad exchanges, networks, and agencies, operating between advertisers and publishers. This multi-layered structure often lacks clear visibility, making it difficult for media organisations to track exactly where their content is being displayed and in what contexts it appears.<sup>89</sup>

64. Resultantly, the Commission should consider and seek to address and remedy the issue of opacity in AdTech and the role of AdTech in enabling mis- and disinformation. Specifically, the Commission should direct digital platforms to either provide access to data on the details of revenue-sharing agreements, algorithmic changes and content visibility, news content engagement data, and AdTech supply chains, or to explain on what grounds this data cannot be provided.<sup>90</sup>

### **Generative AI as a complicating element of compensation for media organisations (historically and going forward)**

65. AI technology — in the form of machine learning algorithms — which is wholly unregulated in South Africa, already undergirds digital information ecosystems, primarily in the form of sorting algorithms that order how content is seen. Generative AI takes this further by developing and deploying AI not only to define the structures through which information flows, but also to participate in creating and sharing content.<sup>91</sup> That this content may be manufactured for falsity or for fraudulent impersonation of authentic actors, is not an issue currently addressed by the Large Language Models (**LLMs**) in generative AI. It is, however, thanks to media exposures, done at some financial cost, that the public — to the extent they can access news — is alerted to financial scams, cyber-misogyny and political disinformation based upon generative AI.

66. The evolving use of generative AI within the algorithms of search, social media, and news aggregators for surfacing and ranking of content, is impacting the visibility and findability

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id* at para 120.

<sup>91</sup> SANEF Submission on the SoI at para 100.

of news content particularly in search. This is because search engines are incorporating services which provide generated “answers” instead of links to copyrighted news material. These give no attribution, let alone links, to news media content although the latter may have been “scraped” to inform the results. The same applies to stand-alone services like ChatGPT.

67. Although news media content is amongst the most verified content that feeds generative AI models, the intellectual property issues around this are still in process. Nevertheless, that some AI companies have struck deals with some news publishers in the US and Europe, is a recognition that there is value at stake. What becomes important therefore is the precedents and parallels in compensation news providers for their value add to companies active in the content production (generative AI) business, and those companies active in content distribution (using recommender AI systems). As the latter, i.e. the social media and search companies, perceive the possibility to make money in the content production business, they are raising their investments in generative AI services. Under the current trajectory, they look set to benefit — without systemic pay back — from the value of news in both businesses.
68. Significantly, because generative AI is not a “truth” engine but rather a prediction service based upon unreliable as well as reliable sources, it can (and often does – even without user “bad” intent) generate results that are unaccountable and *do not* constitute verified or credible news. However, the illusion is presented, especially when the interface is anthropomorphised, of being trustworthy.<sup>92</sup>
69. In terms of social media, generative AI radically reduces the costs of content production. The upscaling of volume that this enables will overshadow non-automated content, such as journalistic artefacts based upon research and analysis and unearthing of entirely new information, as well as resource and time-intensive fact-checking processes. Meanwhile, generated AI content can plausibly resemble the news format, and even be used to fake news brands (as has already occurred with The Guardian newspaper in the UK).<sup>93</sup>
70. In addition, the cheap customisation afforded by generative AI, in the production of digital content, also enables an intensification of personalised targeting of content. This enables

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<sup>92</sup> *Id* at para 101.

<sup>93</sup> See The Guardian (Chris Moran), ‘ChatGPT is making up fake Guardian articles. Here’s how we’re responding’ (6 April 2023) (accessible [here](#)).

exploitation of the affordances of social media in terms of algorithmic micro-targeting, which intensifies threats to human agency and choice in information diets and exposure to a plurality of news.

71. A final point to make is that as generative AI feeds synthetic content into the wider ecosystem, so too does this become an input into new outputs from further applications of generative AI. The consequence is a well-recognised decline in the quality of outputs. Put simply, AI output trained on earlier AI output lacks the benefit of infusions of "new blood" — especially such as that from national and local news media, as a factor within the larger data sets being used for training. The value extraction from news providers becomes increasingly diluted, while the continuation of a parasitic extractive modality puts at jeopardy the continued production of this kind of content. Synergies are sacrificed, and the biggest loser is the South African public.
72. At present, the lack of transparency over the principles underlying the operation of generative AI raises questions about how they are likely to generate, share, or prioritise news content, as well as support the costs of its production and offset information pollution from their service. Further, there are questions about the extent to which they will avoid algorithmic bias and ensure greater diversity and representation of information for the wider segments of the marketplace (including news-poor minority language communities)<sup>94</sup>
73. What the Commission may wish to take into account is the "double whammy" emerging. On the one hand, there is an escalation in the production of content of highly variable quality. On the other hand, this content is produced to enter into the distribution ecosystem which already falls short of producing information as a public good. The fusion of the two applications of AI — in content production and distribution — is a powerful force that is unfolding, and one that in several respects is implicating the same giant companies in information contamination and a failure to credit and compensate news producers.
74. At the current stage, debates about the generative AI business and news are not resolved internationally, but it is now well established that problems in the gatekeeping distribution business call out for attention — as in the (related) AdTech sector. In other words, while the question of the value of news to content production, distribution, and monetisation is a complex one, the Commission does not need to wait before it tackles the different and

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<sup>94</sup> SANEF Submission on the SoI at para 107.

changing components of the puzzle. In particular, the AI-fueled production of content is still dependent on the (AI-driven) distribution channels in order to reach audiences. It is these channels, the social media and the search companies, which continue to occupy the most strategic space when it comes to the viability and competitiveness of news media in the wider communications ecosystem.

## CONCLUSION

75. In summary:

- 75.1. The Commission is enjoined to promote the Constitution, and the applicable rights in the Bill of Rights, in every aspect of this Inquiry. This includes through ensuring that the foundational constitutional values of “openness”, “responsiveness”, “equality”, and “human dignity” infuse the Inquiry process, evidence-gathering, findings, and remedial actions, as well as ensuring that a rights-based lens is applied to both its procedures and substantive determinations.
- 75.2. The provision of access to credible news as a public good must be considered as a constitutional issue, not only as a matter of commercial competition.
- 75.3. This Inquiry is directly seized with the impacts that platforms have on an effective and quality news media eco-system in South Africa, and the need to ensure that high-quality, credible, and accessible news — that serves the public interest — is protected, sustained, and enabled. This constitutional imperative is at the heart of this Inquiry.
- 75.4. In a country as diverse as South Africa — in language, politics, culture, and identities — that faces continuing and persistent inequities in the divides of race, class, and gender, media diversity is a crucial component of media freedom.
- 75.5. Fair compensation for news in the public interest used on platforms should be based on the value that platforms derive from this content, and small, local, and community media organisations should be enabled to participate and benefit from these systems.

- 75.6. Local and community news content is vital to maintaining traditional standards of credibility and reliability in the information eco-system. The value of news content to Google and other platforms is not only what is already on the platform, but what will and should be in the future.
- 75.7. It is imperative that the MDPMI acknowledges in its findings the importance of an inclusive media and meaningfully acknowledges the existing diversity of the South African news media sector, including the public broadcaster and the array of small, local, and community media organisations. In addition, its recommendations should aim to support and advance diversity in the sector. This is critical to achieving the purpose of sections 2(c) and (e) of the Act.
- 75.8. The value of investigative journalism cannot be gainsaid. It is uncontroversial that public interest journalism in South Africa has, in recent years, demonstrated its immense contributions to holding the government and the private sector accountable.
- 75.9. Despite the inherent value in public interest news, the news media sector faces multifaceted challenges from mis- and disinformation, as well as from political interference, both of which undermine its ability to inform the public and, conversely, the trust that the public has for news publishers. This crisis of distrust needs to be considered by the Commission.
- 75.10. Credible news (i.e. subscribing to an independent self-regulatory body and an ethical code) should be prioritised by platforms. It is an antidote to mis- and disinformation.
- 75.11. Transparency of algorithms and sharing of data and algorithms related to news content and related advertising on platforms (and in future for generative AI businesses) should be promoted, as well as access to data that publishers can use to promote and monetise their content and enter informed negotiations with corporate social media and search interlocutors. Without this, the information asymmetry is such that properly functioning markets in the communications space (including advertising) will remain distant for South Africans. And the prospects for the survival of existing diversity levels, and for deepening these through media development, will be firmly in the negative.

76. The presenting parties remain available for any further engagements with the Commission.

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**1 MARCH 2024**

**JOHANNESBURG, SOUTH AFRICA**

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