



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

## **DEPARTMENT OF TRADE AND INDUSTRY**

### **WRITTEN COMMENTS ON THE DRAFT GOVERNMENT ADVERTISING AGENCY BILL**

### **THE SELECT COMMITTEE ON PETITIONS AND EXECUTIVE UNDERTAKINGS**

#### **Input on the Proposed Draft State and State Corporations Advertising Agency Bill**

#### **1. Background**

- 1.1 The Select Committee on Petitions and Executive Undertakings invited the Department of Trade and Industry (**the dti**) to make comments to the Draft State Corporations Advertising Agency Bill as well as attend the Petition Hearing. **the dti** received a copy of the draft State and State Corporations Advertising Agency Bill and has considered the content thereof. The Bill was submitted by the member of the public through a petition for consideration by the National Council of Provinces (NCOP). The analysis by **the dti** highlights some areas for further consideration addressed below.

1.2 The draft Bill seeks to establish the State and State Corporations' Advertising Agency, which will be in place to ensure that third parties are allowed to advertise on government issued communications amongst other platforms.

## 2. **Comments on the Bill**

2.1 **No clear link between the establishment of the agency and the generation of revenue:** Although the idea of sourcing revenue through advertisement in the proposed manner may be valid, it is unclear if there is a direct link between the revenue generation and the establishment of the proposed agency. The two do not seem harmonised in the Bill.

2.2 **Unclear Rationale of the Bill:** There is a need to thoroughly understand the rationale behind the initiation of this draft Bill. It is advisable for a clause to be inserted in the draft Bill dealing with the need for the agency. It should also be clear whether the intention and emphasis is to generate revenue by using government related platforms, the latter should be differentiated from the desire to establish an agency touted to oversee the revenue collection and subsequent expenditure in the manner proposed. The focus seems to be on establishing an agency and yet it is unclear as to whether a new agency will be necessary.

2.3 **Target group of the Bill:** The target group of the Bill is too wide. It is not clear which government employees and sphere of government it targets and similarly the utilities such as electricity, municipal accounts, telephones accounts; It mentions many institutions and it is not clear how the revenues will be generated; it is also not clear who the beneficiary of the revenue will be in terms of where the funds will go once collected, the list provided on section 3.5 of the Bill seem arbitrary and broad (e.g. Provide State Buildings, State Corporations' Buildings, Police Stations, State Websites, State Corporations' Websites, School Websites, Government Gazette, State Vehicles).

- 2.3.1 The functions of the agency may require to be concurrent amongst spheres of government which requires an intergovernmental approach and multiple institutional arrangements that far goes beyond the mere board structure. The legal framework of this proposed functions of the agency may not be practical given existing regulatory structures governed by various legislation.
- 2.4 **The Socio Economic Impact of the Bill:** The notion of generating revenue from advertisements by third parties on government platforms is supported, however a thorough Socio Economic Impact Assessment ought to inform the desirability and feasibility of the idea. It is unclear as to whether the use of government platforms in the manner proposed is currently regulated, if at all, to justify the proposed advertising demands. The magnitude of institutions affected do not reflect how practical the Bill is.
- 2.5 **Protection of public employees and consumers:** The proposal to use payslips and bills or statements of accounts to advertise third party products may impact vulnerable public employees and consumers by exposing them to third parties that may entice their consumer behaviour that may have negative consequences such as over-indebtedness due to overspending on the advertised products.
- 2.6 **Legal gaps in the Bill:** No reference to the current legal prescripts is done in this regard, which poses a challenge. The establishment of an agency in the manner proposed thus appears to be secondary, as the need for such has yet to be investigated.
- 2.7 **Structure and process of the Bill:** There should be a memo on the objects and a Socio Economic Impact Assessment Systems (SEIAS) as alluded to, to clearly outline the rationale for the proposed legislation and its suitability in addressing a specified challenge.

- 2.7.1 The draft Bill is concerning on numerous fronts, including, legislative authority and drafting irregularities, amongst other aspects. The draft Bill does not conform to applicable legislative drafting standards and conventions to the point that it is unclear if a qualified legal drafter or legal opinion was utilized in its composition.
- 2.8 **Reference to repealed legislation:** The Constitution of the Republic of South Africa, 1993 was repealed in its entirety by the Constitution of the Republic of South Africa, 1996, the former as such, may not be relied upon as it no longer exists. Although the provisions relied upon were reproduced and exist in the Constitution, 1996, it seems that that this salient aspect was not picked up by the drafters. Of primary importance is the repeal of the Constitution, 1993, sought to be relied upon, as may be seen in terms of schedule 7 of the Constitution, 1996.
- 2.9 **Member of the public introducing the Bill:** It is also unclear as to how a member of the public is legally able to propose a Bill to the NCOP in the manner put forward. A closer analysis of this aspect is warranted. Sections 60 to 72 of the Constitution, 1996 makes provision for the establishment and functions of the National Council of Provinces. A few of these provisions are worth highlighting:
- 2.9.1 Section 68 specifically talks to the legislative power of the NCOP in particular to consider, pass, amend, propose amendments to or reject any legislation before the Council, including, the power to initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in terms of section 76 (3) to the exclusion of money Bills.
- 2.9.2 Section 69 talks to the evidence or information before the NCOP and provides amongst others that the NCOP may summon any person to appear before it to give evidence, require any institution or person to report to it, compel, in terms of national legislation or the rules and orders, any person

or institution to comply with a summons referred to and empowers the NCOP to receive petitions, representations or submissions from any interested persons or institutions. Section 72 makes provision for the public's access to and involvement in NCOP.

- 2.9.3 It is unclear if reference to petitions in terms of section 69 (d) includes a request by a member of the public to suggest a legislation of their own or whether it is a petition in response to a legislative process already embarked upon by the NCOP. The latter seems to be the intended position.
- 2.9.4 The central involvement of a member of the public in the legislative processes of the NCOP, as appears from the proposed Bill, is of concern to **the dti**. The NCOP is a house of Parliament and is vested with national legislative powers.
- 2.9.5 Section 73 of the Constitution, 1996 is worth scrutiny at this juncture, as it prescribes the national legislative process. It is worth noting that only a member of the NCOP or a committee of the NCOP may introduce a Bill in the NCOP, in terms of section 73 (4). This provision alone ought to clarify that although the NCOP may receive petitions from members of the public as part of information brought before it, it is only a member or a committee of the NCOP who may introduce a Bill in the NCOP.
- 2.9.6 The legislative authority applicable should be clearly stipulated, and a conventional drafting approach adopted, considering that legislative authority originates from the Constitution, 1996.
- 2.10 **Drafting and structural gaps of the Bill:** As already highlighted this Bill is not in line with the conventional rules of legislative drafting.

- 2.10.1 The long title and the preamble ought to be revised and drafted in line with acceptable standards. The content of these are better suited for a memorandum on the objects of the Bill as opposed to a conventionally formulated and drafted long title and preamble.
- 2.10.2 It ought to be noted that the preamble does not just give account of the problem and proposed solution but is supposed to give an account of the applicable legal framework, the identified gaps within the legal framework or the malice to be cured and the proposed legal interventions with intends to improve on the status quo.
- 2.10.3 There are specific conventional rules applicable to legislative drafting, in particular the margins, the sequence of provisions and the wording alignment of any legislation.
- 2.10.4 This Bill is not drafted and quality assured to be in a manner that is suitable to allow for formal consultation or input to be sought on it, at this stage of its development.
- 2.10.5 The Bill is not yet at Act, although it is referred to as an Act of law.
- 2.11 **Advertising legal framework:** It is essential to determine the applicable legal framework for advertisement in the context of the Bill and ultimately whether third parties ought to be allowed to advertise their products and services to government employees or to advertise on government issued platforms and communication channels.
- 2.12 **Consumer Protection Act-Applicable legislation:** Advertising law is a broad area of law in general terms. Although the overarching legislation applicable is the Consumer Protection Act 68 of 2008 (CPA), specific rules apply depending on the type of product or service being advertised. Due to the fact that the proposed

agency will deal with adverts on services and products that will mostly be exposed to public servants, it is advised that the agency must insert a provision(s) on fundamental human rights that must be consonant with the general principles relating to the marketing of goods and services, as contained in the Consumer Protection Act 68 of 2008. The CPA primarily promotes the advertisement of products in a fair and reasonable manner and forces advertisers to ensure that no misrepresentation is made about the product or service. The salient provisions to be considered are contained at sections 29 to 33 of the CPA, amongst others, in this regard.

**2.13 Other applicable legislation:** In addition to the provisions highlighted above, it is worth keeping in mind that the actual content of an advertisement is regulated through a self-regulatory system as informed by the Code of Advertising Practice, and headed by the Advertising Standards Authority of South Africa. Having complied with the Code, further legislation will be applicable depending on the specific product or service being advertised. For instance, the Foodstuffs, Cosmetic and Disinfectants Act 54 of 1972 will apply to advertising of various food products, the Medicines and Related Substances Act 101 of 1965 and its applicable code of marketing practice will apply to the advertising of medicine and the National Credit Act 34 of 2005 will be applicable to the advertising of credit products or services, amongst other legislation. The development of the Bill should take into account other applicable legislation to avoid contradictions.

**2.14 Readiness of the Bill:** Considering the input made with regard to the deficiencies in the proposed draft Bill, a discussion of the applicable framework might be pre-emptive and misplaced.

2.14.1 The Bill is silent on which legislation or applicable prescripts require, for instance, that payslips or municipal bills be printed and dispersed in the manner that they are. Government Printing Works exist as a state entity responsible for issuing Gazette, amongst other printed material, on a regular

basis and yet no mention of their empowering legislation or applicable policies seem to have been investigated.

2.14.2 As such, it is quite difficult to substantively comment on this Bill in its current form as it is silent on salient aspects which ought to have already been investigated and addressed.

2.14.3 **the dti** will make input when the Bill is suitable to be published for wider public consultation. More work is still required on the Bill given its wide scope and lack of practical clarity from various perspectives highlighted above.

2.15 **The agency may not be the most effective vehicle of implementation:** Boards as implementation structures may not be the most effective vehicles. **the dti** in its experience and study has found Boards not to be effective. The proposed agency with a Board does not seem to be based on any study that forms a basis for its establishment. The concept seems untested and arbitrary.

### **3. Recommendations and Closing Remarks**

The Committee to note **the dti's** comments. The Department thanks the Committee for the opportunity to participate in this process and wishes for favourable deliberations.