OUTA

ORGANISATION UNDOING TAX ABUSE

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OUTA Comment on the Economic Regulation of Transport Bill [B1 - 2020]

Submission to the Portfolio Committee on Transport

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Introduction

The purpose of this introductory submission to the Portfolio Committee on Transport is to ensure that issues of financial mismanagement, monopolization, withholding of information and poor governance that OUTA usually challenges when it comes to entities such as Transnet, PRASA, SANRAL and others will be ameliorated by this Bill. This comment is introductory and will be enhanced in a more robust submission to the Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure in the National Council of Provinces in due course.

The Department of Transport has indicated that it aims to 1) consolidate economic regulation of transport within a single framework and policy; 2) improve national transport planning to develop long-term plans for the transport sector, synchronize spatial planning and align infrastructure investment between all spheres of government; and 3) to establish the Transport Economic Regulator and Transport Economic Council. Infrastructure construction and maintenance has, in general, been neglected in targeted public expenditure. This needs to change. The combined effects of prolonged state capture and Covid-19 lockdown demand immediate re-prioritisation of funds.

The purpose of the 2020 Economic Regulation of Transport Bill is to promote economic growth and welfare in South Africa by promoting an effective, efficient, and productive transport sector and inform consequential amendments to various Acts within the transport industry. To that end, two parallel and independent but integrated regulatory agencies will be created to administrate. In the main, OUTA's comment deals with access to information, potential abuse, known governance challenges, the integrity of public-private partnerships, and practicalities around implementation of the Economic Regulation of Transport Bill. All sections should be read with the Bill as published. Questions, comments, and recommendations focused on provisions are set out below. Institutional rules and operations of the administrative agencies are emphasized in this submission.

At a glance, OUTA supports the Economic Regulation of Transport Bill in that it intends to eliminate potential market abuse of predominantly state-owned monopolies and excessive centralization of public expenditure decision-making processes that preclude appropriate access to information in the transport industry, which has enabled systemic corruption and strategic misuse of public resources.

OUTA supports the Bill's promotion of competition in the transport industry. Attracting investment from domestic and foreign private sectors is a crucial objective in the context of dwindling tax revenue, persistent maladministration, and unnecessary losses in state-owned entities. Whilst legislative innovation is welcomed, government will be held accountable when implementing it.

Memorandum on the Objects of the Bill

The Memorandum states that 'preconditions for efficiency and cost-effectiveness' do not exist in the transport sector. The meaning of such preconditions is unclear, but OUTA agrees that the institutional framework of transportation is dominated by large state-owned companies. Improved access to the transport sector is expected to result from technical, operational, and pricing efficiency. However, we are concerned that 'effective government oversight and economic regulation' is presented as a panacea for inefficiencies resulting from systemic non-compliance with existing legislation such as the Public Finance Management Act, 1999. Economic regulation is a suitable mechanism to balance and prevent possible abuse of power by state-owned entities in markets where demand is dispersed, especially where state-aid and subsidies may otherwise be necessary and where no other competitive suppliers exist. The strategic abuse of power and public resources will not be eliminated by private sector investment if such investment is subject to governmental discretion and control.

OUTA concurs that there is currently little economic regulation of non-competitive road concessions, and the state-controlled rail sector. Whilst the ports and aviation sectors have been subject to dedicated regulatory functions, the efficacy of these is limited. The consolidation of regulatory institutions in the transport sector should be executed with caution and extensive mechanisms that will ensure transparency, accountability and all those checks and balances that preclude abuse. Market price mechanisms should be preserved where competitive markets exist. A single, multi-modal regulator may be more efficient if governed lawfully and within the confines of public accountability and transparency, but one that is accountable only to senior government officials who only account to politicians may have unintended consequences.

For example, Ministerial discretion to bring any private or public entity, market, facility, or service into the scope of the prospective Act (if it falls under the conditions of Clause 4) demands objective and unambiguous prerequisites. Consultation only with the regulator, to the exclusion of those that would be affected in the industry (both suppliers and users), runs contrary to the *batho pele* principles and the scope of the values and principles contained in Section 195 of the Constitution. Highly discretionary control of market segments is obviously vulnerable to exploitation, especially in the case of public enterprises competing with private sector enterprises, without adequate safeguards of competitive neutrality and equal treatment. This is especially the case where the Government provides financial assistance (State Aid) to public entities which compete with private sector enterprises to whom no such State Aid is made available on equal terms and conditions.

Comment on Specific Provisions

Section 2(5): "regulated entities" - The Bill is intended to apply to certain state owned and private entities, particularly the SANRAL and concessionaire contracts concluded on or after the effective date of the law, but only to the extent that such a concession agreement expressly provides for the authorized person to be subject to this act.

Section 27 of the South African National Roads Agency Limited and National Roads Act No. 7 of 1998 (the SANRAL Act) already has a method for setting the maximum price that can be charged for the use of toll roads. Such a method is provided for in section 27(3) of the SANRAL Act and provides that the amount of toll fees that may be levied, any rebate thereon and any increase or reduction thereof is determined by the Minister of Transport on the recommendation of SANRAL, which is published in the Government Gazette. This illustrates the need for transitional arrangements of tariff mechanisms, prices and tariffs in the process of consolidating economic regulators into one economic regulator.

Section 3: The stated purpose of the Act is to promote competition and attract investment in the transport industry. In South Africa, large areas of the transport market experience little or no competition and the transport costs are unacceptably high, while sections of the transport market are highly inefficient, which impacts on achievement of economic growth objectives. OUTA intends to hold the Department of Transport (hereinafter referred to as the DoT) accountable to make sure that the Bill is implemented correctly, and accountable personnel should obey the aims and objectives of this Bill. The Bill's memorandum declares that the department aims to achieve "technically competent, independent and adequately resourced regulator, which is well placed to improve economic outcomes in the transport sector".

We recommend that suitable benchmarks of regulated prices be published in the annual reports of the regulator as well as any circumstances that influence regulated prices to such benchmarks.

Section 4(2): The Ministerial discretion, in consultation with the Regulator, to apply the Bill to any market, entity or facility in the public or private sectors is problematic:

1. As mentioned above, consultation only with the regulator, to the exclusion of those that would be affected in the industry (both suppliers and users), runs contrary to the *batho pele* principles and the scope of the values and principles contained in Section 195 of the Constitution.

2. ‘Preconditions for efficiency and cost-effectiveness’ (in section 4(2)b) are independent of the 70% market share requirement set in (in section 4(2)a). The meaning of these ‘preconditions’ should be articulated, qualified and made less ambiguous in the definitions or publicly (transparently) be interpreted by the regulator to ensure that this provision cannot be abused.

Section 11: The Bill proposes to empower the Transport Economic Regulator (the Regulator) as the functionary authorised to sign off on the prices imposed by regulated entities. The Regulator is established as an organ of state (in terms of the new law) within the public administration, but as an institution outside the public service, is independent and subject only to the Constitution and the law. The Regulator, when considering the pricing proposal of a regulated entity; (i) must consult with interested parties and the public and (ii) must determine whether the proposal is fair and reasonable. After considering all relevant circumstances, the conditions that may be imposed by the Regulator in response to a price adjustment include, amongst other things, the power to set service standards in respect of any activity that is subject to the price control. The Regulator may conduct an extraordinary review if it is satisfied that reasonably unforeseeable changes in economic demand, input costs, technology, the regulatory environment or other similar factors have affected the regulated entity sufficiently to constitute a threat to its economic sustainability.

Section 11(2): The ‘method for setting the price’, as included in the definition of price control should be included in the items (a) to (d) of section 11(2).

Section 11(4): Although this bill will regulate the transport industry, this section in particular may be useful for the taxi industry to cap increased prices as a result of an increased petrol price and to adjust prices as a result of a decrease in the fuel price, where the suppliers are organised in trade associations, coordinate their activities and consumers (buyers) are dispersed.

Section 11(5): The Bill states that “government must provide subsidy to the taxi industry”, this will allow the government and the public to determine appropriate tariffs for the transport.

Section 14(4): Currently the taxi industry is not paying any direct tax and the public and the government do not know how much the taxi industry is making. This will determine that their financials are audited, which promotes transparency and accountability.

Section 15: This section will allow consumers or taxi users to lodge complaints that can be investigated and resolved through the Regulator’s office. This will minimise the recklessness of this industry as currently consumers are mistreated, and their complaints are handled by the same taxi association which is causing the problems (player and referee scenario).

Section 20: The Regulator's role will be to enforce compliance within the transport industry where non-compliance will result in the matter being referred to the National Prosecuting Authority. OUTA fully supports the compliance section of the Bill as this will enforce accountability and responsibility which will be followed by prosecution if not abided. The Regulator should ensure that compliance is a key component of the 'business'.

Section 21: OUTA agrees with the section as the Regulator will oversee price controls, this will force the service providers to take care of their consumers. (4) The Bill imposes limits on the powers of the Regulator in terms of price reduction "not to exceed more than 10% of the entity's annual turnover". It is not clear why the reduction should be limited to 10% especially in cases where cost decreases or efficiency gains exceed 10% or in cases where medium term industry agreements for higher (fixed or capital) cost recoveries are followed by periods of lower regulated prices when cost recovery has been achieved (for example, the agreement between the airlines association (AASA) on passenger service charge for ACSA to fund ACSA's CAPEX for the 2010 World Cup event).

Section 22: The Bill allows the public to challenge the Regulator if it is not treating public transport providers and users fairly.

Section 28: OUTA appeals to the Minister, the Council to abide by this section as stated in the Bill to gain the trust of the public and to abide by the law. The Regulator may have the powers, but it does not mean the decision made cannot be changed by other parties involved.

Section 53(3): The 'method for setting the price' should also be disclosed as well as the items (a) to (f) of section 53(3).

Legal Opinion

In terms of Chapters 4,5 and 6 we found that proper regard to the Companies Act was given and duly incorporated in this Bill. This will allow for accountability of the executive in instances of corruption.

In terms of accountability, OUTA found that the Bill covers all avenues of enforceability, both civil and criminally. We also found that sanctions imposed are fair and agree with the fact that our Magistrates and High Courts have jurisdiction to apply their discretion. We recommend that the Regulator should be completely independent from the onset. The Bill now states that the DoT will assist in the implementation phase, however the implementation phase is not defined. This means that there is a risk that the DoT could open the door to corruption, as they have in the past.

We recommend that the Minister should define the initial implementation phase in the regulations and give a strict deadline on when the DoT should remove themselves and allow the designed bodies to operate independently.

Section 42 (2) of the Bill states that the Regulator may request any person requesting the Regulator to conduct any research in terms of this Act, to fund the cost of the research, and may decline to conduct such research, if the required funding is not provided.

It is our view that the aforementioned section diminishes the values and principles contained in Section 195 of the Constitution and does not promote the objectives of public awareness and increase knowledge of the economic nature and dynamics of the transport market. It would have been reasonable for the Regulator to decline such a request for research, if indeed the research requested did not fall within the ambit of the Regulator and not necessarily solely based on funding.

Section 44 of the Bill states that the Regulator "*may*" advise the Minister. We are of the opinion that the Regulator "*must*" advise the Minister on all matters, which means that the Minister should have oversight over all decisions taken by the Regulator. In turn, the Minister "*must*" report to Parliament in a manner that prioritizes complete transparency and public accountability.

Affected State-Owned Entities: PRASA, SANRAL and Transnet

Views of the stakeholders consulted during the development of the current Bill revealed that some issues have been workshopped but unresolved. Progress on this matter has not been provided by the Department of Transport. We await deliberations in Parliament to better understand the dynamic of interests at play.

The monetary exchange between these entities is free from public scrutiny, even though it is the public who finances these operations. Road users thus have no right to know what they are paying for other than generic cost categories like construction and maintenance. The rates of public compensation for concessionaire services are kept secret - making such contractual arrangements vulnerable to abuse.

OUTA requested that SANRAL provide it with records relevant to the concessionaire agreements in place between SANRAL and Bakwena, N3TC and TRAC, respectively. OUTA considers this information within the public interest and has accordingly resorted to litigation to obtain such information. It is unfortunate that our society has reached a point where access to information within the public interest may only be reasonably obtained by members of society willing to fork out thousands of Rands in legal fees.

OUTA is optimistic that the establishment of the Regulator will result in amplified transparency and accountability in the transport sector.

Access to Information & Regulators

The Bill states that the Regulator must promote public awareness and increase knowledge of the economic nature and dynamics of the transport market and when communicating with the public, as required by this section, the Regulator must employ effective means of disseminating information, including freely accessible internet publishing.

We are yet to see how regulators in the South African public sector promote public awareness and increase knowledge of the economic nature and dynamics of markets. Whether information will be freely accessible is not clear from the Bill in its current form. The Bill must provide clarity on consequences for instances where information that is in the public interest is withheld by entities, facilities, or services.

Conclusion

This Bill aims for an improved transportation sector with outcomes contributing to economic growth. Transport has been identified by the National Tourism Sector Strategy as an enabler for tourism growth. The tourism sector is therefore heavily dependent on an effective transport sector. The intended proposal's economic outcomes will have a positive impact on the tourism sector.

OUTA recommends that the Regulator should consist of personnel with relevant skills and that there should be experts from different sub sectors within the transport industry. Its leadership should not be politically appointed. This will assist the Regulator to make independent decisions that will lift the economy and circumvent instances biased decision making.

The transport sector has been wrought with large scale corruption and the abuse of capital-intensive public procurement. Locomotive procurement in both PRASA and Transnet are obvious examples of this issue. We look forward to deliberations on this Bill in Parliament and beseech the Portfolio Committee on Transport to process it with an affordable and reliable public transport industry in mind.

As indicated, OUTA will make a more substantive submission to the Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure in the National Council of Provinces in due course. The content of that submission will depend on 1) the content of other submissions made to the Portfolio Committee; and 2) the quality of deliberations and processing undertaken by the Portfolio Committee.