

Proposed amendment to Special Economic Zones Bill to enable licensee to conclude pre-incorporation agreements

1. A pre-incorporation agreement is a contract, in writing, entered into in the name of or on behalf of a company that is still to be formed (section 21 of the Companies Act, 2008).
2. Pre-incorporation agreements are usually used to enable an individual to take up a business opportunity in the name of a company (e.g. to purchase or lease property) even though the company has not yet been incorporated and therefore cannot sign the agreement. □
3. Generally, once the company is incorporated the board of the company may completely, partially or conditionally ratify or reject any pre-incorporation contract made or done in its name or on its behalf.
4. The Special Economic Zones Bill creates 4 distinct structures namely: the licensee, Special Economic Zone entity with its Board, Special economic Zone operator and businesses located in a Special Economic Zone.
5. Each structure has its own roles and functions and the Bill provides a framework to ensure that the structures perform their functions and fulfill the objects of the SEZ Bill. Each structure is required to be appropriately skilled to perform the functions provided for in the Bill.
6. In terms of the framework created in the SEZ Bill, the Special Economic Zone entity acting through its Board, appoints an operator and approves business to be located in the Special Economic Zone.
7. The Special Economic Zone entity acting through its Board must for example, follow a prescribed procurement process in order to appoint an operator and must ensure that businesses meet stipulated criteria before authorising them to locate in the Special Economic Zone.
8. It has been proposed that the licensee be empowered to enter into pre-incorporation agreements so that the licensee can appoint an operator or approve a business to locate in the Special Economic Zone, in circumstances where there is a delay in establishing the Special Economic Zone entity.
9. The consequences of enabling the licensee to perform these functions is that it may circumvent the framework created in the Bill. In terms of the this framework it is the Special Economic Zone entity acting through its Board that is empowered to appoint the operator and approve the business and which is accountable to ensure that stipulated processes are complied with when performing these functions.
10. The dti is of the view that this amendment may result in a blurring of the functions and responsibilities of the licensee on the one hand and the Special Economic Zone entity and its Board on the other. The amendment will also have the unintended consequence of creating a loophole in terms of which the licensee can act as Special Economic Zone entity and Board, without the being subject to associated accountability mechanisms in the Bill.

11. Furthermore, the dti is of the view that the implementation protocols and intergovernmental co-operation will be the more appropriate mechanism to deal with delays that may arise in establishing the SEZ entity.
12. The dti therefore proposes that the Special Economic Zones Bill is not amended to provide for the licensee to enter into pre-incorporation agreements.