

**REPUBLIC OF KENYA**



**THE NATIONAL TREASURY**

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**IN THE MATTER OF PUBLIC PARTICIPATION ON THE DRAFT**

**REGULATORY IMPACT STATEMENT ON THE DRAFT PUBLIC FINANCE  
MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020**

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**(1) The objectives of and reasons for the proposed National Toll Fund Regulations are mainly the following:**

- (a) To support the Government of Kenya's agenda to develop world class roads across the country in aid of development and promotion of productive sectors of the economy;
- (b) To promote protection of human life and property through reducing the numbers and severity of road accidents, while reducing the financial burden of borrowing to build such roads;
- (c) To establish a dedicated fund pool into which toll revenues will be paid to support the Government of Kenya's payment obligations under public private partnership contract arrangements;
- (d) To give project lenders and private parties under PPP arrangements confidence in the Government's commitment to meet its payment obligations adequately, timeously, consistently and for the entire duration of signed PPP contracts;
- (e) To give lenders and private parties visibility over the amount of funds actually available for debt service and operations and maintenance cost requirements of contracted projects;
- (f) To promote better market practices and promote better value for money price discovery outcomes in competitively procured PPP projects;
- (g) To promote fiscal responsibility through dedication and strict application of designated funds to designated public purposes;
- (h) To promote the quality and quantity of public services through linking performance to payments, and allowing for mechanisms for sanctioning non-performance while protecting the public interest and public resources from financial loss arising from service non-performance;
- (i) To give effect to the intentions of the Public Roads Toll Act, Cap 407 of the Laws of Kenya; and
- (j) To promote the Government's objective of promoting and securing public private partnerships in roads development in Kenya.

**(2) The effect of the proposed National Toll Fund Regulations include the following:**

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- (a) The regulations give regulatory effect to the approved National Tolling Policy, and are consistent with the principles of the Constitution, as well as the Public Roads Toll Act, Cap 407 of the Laws of Kenya, which require that the imposition of a charge related to access to a toll road system shall be first published in the Kenya Gazette;
- (b) The regulations establish a centralized and mandatory framework on the administration of toll revenues in Kenya;
- (c) The Regulations impose a charge for every person accessing a toll road network in Kenya, and the effect of the charge will be to control access to the tolled network, meaning that only those persons that pay the prescribed toll will have the unimpeded right to travel on and through the tolled road network;
- (d) The regulations enable the Government of Kenya to implement public private partnerships for roads development and modernisation quickly, and to high standard, with guaranteed high level performance of Kenya's critical roads over a long period of time, with minimal burden on the National Exchequer.

### **(3) Possible alternative and practicable means of achieving the foregoing objectives, including other regulatory as well as non-regulatory options:**

- (a) An alternative to financing new roads development is the use of the National Exchequer Account – implying the on-boarding of the full project cost on the national budget, or borrowing by Government to finance the construction of the roads, and such financing solutions being budgeted for in the normal manner: this simply means the creation of fiscal space, and the withdrawal of available public funds from other competing needs and uses, with concomitant burdens on the individual tax payer;
- (b) The National Toll Fund (to be established under the Public Roads Toll Act, Cap 407 of the Law of Kenya), could be remodelled for utilization in the development of new roads (currently, it is applied primarily to rehabilitation of existing roads) – but this would be faced with the challenge of statutory re-engineering, as well as the fundamental question on how such a Fund could be funded to attain the same objectives – with the answer typically being the tax payer shouldering the cost, at a general country level, regardless of whether such tax payer actually ever uses the improved road network;
- (c) Ultimately, the alternative options imply the full retention of the financing risk by Government, and the expansion of the tax exposure (increased tax burden) of the ordinary tax payer.

### **(4) Assessment of the costs and benefits of the proposed National Toll Fund Regulations and of any other practicable means of achieving**

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### **the same objectives;**

- (a) A direct cost that arises from this regulatory instrument is the imposition of an additional cost to travel, but only for vehicles falling under the approved classes under the National Tolling Policy, and which actually use the tolled road network;
- (b) Owing to the improved road infrastructure, however, every single user of the toll road network will experience the immense benefits of traveling efficiently through the network, without exposure to heavy traffic snarl-ups, and without the wear and tear common on less well-constructed and poorly maintained roads;
- (c) Vehicle running and operating costs will be significantly less, with the outcome that the cost of paying a toll will be compensated many times over from savings arising from dramatically reduced vehicle operating costs (being a function of the time spent on roads, the fuel wasted on travel delays, and excessive wear and tear stemming from poor and damaged road surfaces);
- (d) Travellers through the toll network will be assured of transit time, representing a substantial cost of time saving for both business travellers and commercial undertakings – as it can enable smaller operations to operate Just-in-Time systems, and save substantial money from costly stockpiling solutions they currently implement owing to uncertainty, currently, in travel time across the networks intended to be tolled;
- (e) The toll is not a tax of general application – it is a user fee, which represents a fair allocation of costs and benefits at the macroeconomic level of society: only such persons that actually use the service are obliged to pay for the service, in exchange for the wide package of benefits that come from that service. Those that do not are not exposed to the toll charge, which is a fair proposition. In addition, tolled roads will not be subject to maintenance, repairs and rehabilitation under the National Toll Fund – all of that cost will be bundled up in the PPP arrangement, and will be fully catered for under the tolling arrangement. There is therefore no double jeopardy even for the toll-payer, and the non-toll-payer is neither unduly exposed to toll nor the Roads Maintenance Levy Fund. On either side, there will be no double jeopardy, and no double taxation, and no unjust enrichment.
- (f) All the other alternatives to tolling are beset by various challenges and limitations, and none of the alternatives represent true viability and utility in helping the Government of Kenya to achieve its development agenda within the target timelines. These reasons are better outlined in section (5) below.

### **(5) The Reasons why the other means set out in section (3) are not appropriate:**

- (a) While the national budgeting platform is stable and mature, it is faced with significant constraints arising from numerous competing

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needs. To deliver world class infrastructure rapidly, massive resource deployment is necessary. It is not possible under present fiscal space constraints to dedicate the size of financial resources required at a minimum to roll out the road modernisation agenda. The budget, put simply, is inadequate. An alternative solution is required – and tolling represents that solution: it is credible, it is fair as it apportions costs appropriately, and it is grounded on a performance based contract which assures the highest levels of public service delivery in the form of modern well-built and well-maintained roads.

- (b) In addition to budgetary inadequacy, it is also the case that the budgeting framework, from a resource allocation perspective, is not always predictable. Supervening events, altering prerogatives, among others, may require resource re-allocation amongst Government priority programmes, which in itself may mean that funds initially earmarked for such projects as roads development, may subsequently be vired to alternative public uses.
- (c) Furthermore, every year, Government stipulates varying budget ceilings for various economic sectors, and this process is not precise since various actors are involved at the Executive and Legislative arms of Government. The idea of budget ceilings at the sectoral level therefore imports uncertainty which can be a significant constraint for investors whose decisions are hinged on long-term visibility of governance arrangements around a project.
- (d) Partnership projects are always grounded on trust – trust that one’s partner will keep their end of the bargain. In project finance-based investments, trust is motivated by visibility and predictability – and the budgeting process on multi-year, sometimes multi-decade financial obligations, may represent a certain level of uncertainty. Project lenders therefore require confidence contracted obligations will survive political cycles, will stand the test of time, and their rights will not only be recognized, but also protected.
- (e) Outside of the budgeting framework, other potential platforms for pursuing the toll road financing solutions, such as the National Toll Fund, are beset by structural rigidity principles built into such funds. The Roads Maintenance Levy Fund is a rigid tool: bound by rigid formulae on how moneys within the Fund are to be distributed amongst the qualifying stakeholders, who are named within the constitutive legal instrument. Furthermore, the Fund is open only to maintenance and rehabilitation works, not the development of new road infrastructure. This last bit is the singular impediment the utility of this Fund for the intended objectives of the Regulations.
- (f) None of the alternative options for financing the Government’s ambitious infrastructure modernisation agenda portends the kind of sustainability that tolls represent.
- (g) To implement the programme on a budget basis, it would be imperative to first identify and dedicate actual financing under the budget, prior to project implementation commencing. Under the rules of the Public Finance Management Act, 2012, it is unlawful to initiate a public tender process if one does not have financing within its

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approved budget estimates for the year in question. This means the pace of implementing the roads modernisation programme must be slowed down and pursued incrementally were it to be pursued under the budget framework. Under a tolling arrangement, the ambitious programme can be pursued simultaneously, and Government's overall exposure to all such projects would remain low, covering only that component of shortfall that is realized from time to time by the toll operator.

**(6) any other matters specified by the guidelines;**

Overall, the net impact of the proposed regulatory rule is positive on both the Kenyan economy and the individual road user. The benefits outweigh the costs, many times over.

**(7) a draft copy of the proposed statutory rule.**

A draft copy of the Public Finance Management (National Toll Fund) Regulations, 2020 can be downloaded from [www.pppunit.go.ke](http://www.pppunit.go.ke).