

COMMENT - ECONOMIC REGULATION OF TRANSPORT BILL

Mr Ofentse Hlulani Mokwena

Lecturer, Transport Economist

The views, opinions and evidence expressed, or any other expression, in this presentation are of Mr Ofentse Hlulani Mokwena, and not those of the North-West University or any other entity. The presentation is based on his professional assessment of the policy, in terms of academic literature, and information available in the public domain.

About the Presenter

A focus on transport economics, planning and implementation across various modes, and points of discourse, Ofentse blogs, conducts empirical research and facilitates dialogue through teaching, podcasts and academic citizenship.

The comments today are in my personal capacity as a researcher in the field of transport. I do not represent any entity, or speak on behalf of any entity.



Broad Overview of the Bill

Basis of the Bill

- The Bill responds to a call to address the structural issues embedded in network industries as identified by National Treasury, as investigated by the National Planning Commission and as presented in the White Paper on Rail Transport Policy.
- It is largely motivated by the need to introduce structural reforms that (a) change the operational performance in order to enhance efficiency; and (b) change how the transport market is structured in order to introduce more private sector participation.
- These primary principles are aligned with Treasury, the NPC and the NDoT's strategic direction to enhance Private Sector Participation through the separation of infrastructure from operations and empowering SOEs in particular to lean into their potential as outlined in the DPE report for Accelerating the Development of SOE's in SA of 2000.
- As a result the Bill may be pursuing the economic regulation of **network industries** in transport, not necessarily of the entire transport market.

National Treasury (2019) 'Economic transformation, inclusive growth, and competitiveness:

Towards an Economic Strategy for South Africa'. Pretoria, South Africa. Specifically pages 24-26.

National Planning Commission (2020) 'Position Paper: The contribution of SOEs to Vision 2030: Case Studies of Eskom, Transnet and PRASA'. The Presidency, Pretoria, South Africa. Specifically pages 15, 17-18.

Issue

This alignment, in all the above-mentioned reports, makes no mention of the other transport modes, specifically the modes involved in the Competition Commission's Market Inquiry on Land-based Passenger Transport, specifically metered taxis, minibus taxis, and bus transport.

Whereas, further economic regulation will be necessary for the efficient allocation of **public transport subsidies** between passenger rail, minibus taxis, bus transport and potentially non-motorised transport sharing schemes.

Metered taxis (and ride-hailing)

1. have route, commission fee, pricing, cost structure and market access issues;

Minibus taxis (and other future forms of paratransit)

- have route, operating licence, securitisation, pricing, cost structure and market structure issues (compliance, law enforcement etc.); and

Bus transport (contracted and 'tendered')

- have subsidy, performance and compliance issues while contracts remain in a negotiated state.

Shared transport

- Transport sharing platforms, especially in NMT may have issues around pricing, economic regulation and equitable access.

A need for clarity

- Given that the Bill outlines its purpose around developing Small Medium Enterprises and achieve the objectives of equality as in Section 2(a) and (b), it should therefore clarify its application as only relevant for **parts of the transport sector** and not the **entire transport sector**—particularly the **network industries**.
- Alternatively, the Bill or NDoT may clarify that the Bill will **in future be progressively expanded to the economic regulation of passenger transport**.
- **A few strategic scenarios may be considered:**

Scenarios

Economic Regulation of Rail Transport

- Applicable only to network industries in order to “enable” the removal of structural issues associated with inhibitive access to rail infrastructure for passenger and rail transport.

Economic Regulation of Network Industries in Transport

- Is applicable to the entire basket of strategic assets in the transport sector, specifically maritime, aviation, guided transport and roads under the South African Road Agency Limited (SANRAL).

Economic Regulation of Transport

- Is inclusive of all transport modes, issues and industries which would then incorporate the planning authorities, provincial regulatory entities.
- This approach would require deeper analysis and investigation by the economic regulator, to avoid dependence on ‘commentary’, ensure relationships with entities to be regulated are built and to engage deeply with the policy issues.
- **It will also require the reinstatement of Chapter 2 Part A of the initial 2018 Bill, Section 5 in particular which covers the Provincial and Municipal Co-operation issues related to economic regulation.**

Assumptions

- Potential directions of the Bill:
 - **Economic regulation is only applicable to strategic assets and services within the ambit of national government;**
 - **The economic regulator will not interface with provincial regulatory entities, planning authorities, transport plans and underlying contracts and social contracts** (i.e. universal obligation issues embedded in subsidies allocated to bus transport, and potential subsidy discourses related to minibus taxis, and commission structures associated with ride-hailing); and
 - **The transport interchange, and intermodal infrastructure are assumed to be part of the network infrastructure** in general and may be owned, operated and maintained by public or private sector.
- As a result, the comments outlined here assume that (a) inputs are necessary for network industries, and (b) the Bill may seek to apply to passenger transport and free market freight transport currently and in future.

Remarks

Remarks

- *Here I propose that the policy focuses on regulating access to transport infrastructure which falls within the premised Application of the Act.* In this manner, the Bill becomes more inclusive of Secure Road Side Stations, Public Transport Routes, Taxi Ranks and Interchanges, in addition to airports and ports.
- The Bill seems disconnected from existing regulatory entities and activities seen through the Integrated Transport Plans, at District and Local Municipalities.
- Given the sheer dominance of the minibus taxi industry in the passenger transport market, and the dominance of the road freight industry in the freight transport market the Bill lacks inherent economic principles that incentivise implementation.

Recommendations

It is recommended that the Bill absorbs greater insight from a more South African outlook in terms of economic regulation—particularly given the dominance of minibus taxis, rising ride-hailing, microcargo, bike-sharing and other modes.

Some key regulatory instruments worth considering are:

1. The medallion approach to containing and managing the transport market, in addition to access pricing and price controls.
2. Following the White Paper on Transport Policy, incorporating the economic regulation of transport at a municipal level through devolving transport functions, and building transport components as part of the policy.
3. Reviewing the scenarios and sequencing the policy effort more appropriately with policy making practice.
4. While the Bill is essential, it is also challenged by the legitimacy and motivation for the Bill. The lack of a **Discussion Document**, and related White Papers for specific transport markets poses a challenge: *where does the regulation come from?*

It is very likely that the Bill may be timely for strategic industries, but potentially premature for the broader transport sector.

Comments Directed to the Bill

Definitions

Section	Current Statement	Comment	Recommendation
<i>Previous version of the Act</i>	Removal of definition of Municipal Transport Authority from the initial Bill (12 February 2018).	<p>The language is crucial here, the National Land Transport Act includes various authorities in the regulatory sphere:</p> <ul style="list-style-type: none"> - Provincial Regulatory Entity, and - Transport Planning Authorities in particular. 	<p>Insert the definition of a ‘planning authority’ (Section 14 of the Principal Act) and ‘contracting authority’ in the Bill, as per the National Land Transport Act. <u>Unless if the term “regulatory authority” can include, or includes the above mentioned.</u></p> <p>Clarity around the relationship between the Provincial Regulatory Entities, the Public Transport Regulator, and the Operating Licence Administration System (OLAS) and this Bill is necessary—as in the Impact Assessment the above-mentioned stakeholders were not consulted. Is it potentially because of the limited scope in applying the Bill to traditional entities in Western economic regulatory schemes?</p>
	Economic regulation is defined in three forms: price controls, access regulation, and service levels and service conditions.	<p>Based on the literature, “fixed-price” regulation and “cost plus” regulation are an important balancing act for an economic regulator. Both influence the structure of prices but come at a different cost of public funds.</p>	<p>The regulatory regime however only reflects ‘price controls’ as the primary instrument, not much is discussed about service levels and service conditions in terms of regulation (it is latent, hidden in other sections). It is recommended that similar sub-sections are formulated specifically for these two terms, as they are beta values for the effort exerted (cost) to produce the level of service ‘prescribed’ by the regulator. Definitions for “service levels” and “service conditions” must be added. These may also influence the prohibited acts indicated.</p>

Section	Current Statement	Comment	Recommendation
	<p>Transport sector is defined in terms of industries: shipping, aviation, rail and road transport.</p>	<p>Whereas, “shipping” is an activity that is part of the maritime environment. Whereas “rail” is an activity that is part of the guided-transport environment. The use of these terms would cover current and future technologies. Furthermore, the exclusion of pipeline transport is not consistent with the National Transport Master Plan of 2050 as one of the modes of transport.</p>	<p>It is recommended that:</p> <ul style="list-style-type: none"> - “Shipping” is substituted by “maritime”; - “Rail” is substituted by “guided transport”; and - Pipeline transport is included in the transport sector (although its regulatory framing is embedded in the National Energy Regulator of South Africa, this function may need to be jointly structured between the STER and NERSA).
	<p>Market is defined as any place where goods and services are exchanged at a fee.</p>	<p>This definition, while accurate, is too generic for the specific application of the Bill. Given, for instance that transportation can take place unimodally (one mode) and multimodally (multiple modes), then which market would ‘market power’ be classified under?</p>	<p>It is recommended that the term transport market is used to describe (a) various transport modes as a market within themselves; and (b) passenger or freight volumes and their product (passenger-seat kilometres, and ton-km) constitute the other dimension of how a market is defined.</p> <p>Lastly, infrastructure—specifically intermodal infrastructure may also be a market, where a single firm may not own more than 70% of the market. While this seems unlikely, a regulatory limit remains necessary.</p>

Purpose of the Act

Section	Current Statement	Comment	Recommendation
3(1)(b)	...promote the development of an integrated system of economic regulation of transport of passengers and goods, by air or through airports or ports , and by road or rail;	<p>Airports and ports are usually associated with aviation, and maritime transport respectively.</p> <p>For the purpose of public and freight transport, the term transport interchange is of relevance. A bus terminal, taxi rank, a park-and-ride, inland freight nodes or any other facility is usually an interchange within or between transport modes.</p>	Add transport interchange to: <i>...of passengers and goods, by air or through airports, ports or transport interchanges, and by road or rail;</i>
4(2)	The Minister, in consultation with the Regulator, by notice in the Gazette, may declare that this Act applies to any market , or any entity or facility, irrespective whether privately or state owned, within the transport sector...	Consider the definition of market outlined in the previous section.	Substitute market with: <i>...this Act applies to any transport market, or any entity...</i>
4(2)(a)	a single operator controls more than 70% of the market concerned; or	<p>Given the various approaches to analysing market control, or dominance, the 70% threshold may need to be scrutinised.</p> <p>Given the policy goal to encourage the shift from road to rail, the notion of a 'single operator' may also need to be scrutinised.</p>	<p>The determination of the 70% threshold needs to be outlined and justified, as various stakeholders may approach dominance from various angles, especially including route, fleet, coverage, patronage, revenue, cost and subsidy dimensions.</p> <p>The DoT may need to explore this 'single operator' notion more comprehensively given their embedded policy goals.</p>

Section	Current Statement	Comment	Recommendation
4(2)(b)	the preconditions for efficiency and cost-effectiveness do not exist in the market concerned.	<p>The primary concern here is that such ‘preconditions’ need to be determined through a specific framework that has been consulted upon, it may not be a product of a heuristic process.</p> <p>Furthermore, economic regulation literature outlines the importance of accounting for the impact of Universal Service Obligations (i.e. development goals, common carrier status, service guarantees). These may perpetuate a degree of cross-subsidisation, which the Impact Assessment argues is a key risk if “lost”.</p> <p>The inclusion of “service levels” and “service conditions” is crucial here, because efficiency and effectiveness is a bi-product of the effort exerted to produce service levels within specific conditions.</p>	<p>Guidelines for determining such preconditions are necessary in order to avoid rent-seeking or regulatory leakages.</p> <p>Consider the addition of Universal Service Obligations, and service levels and conditions such that:</p> <p>...the preconditions for efficiency, service obligation, service levels, service conditions and cost-effectiveness do not exist...</p>
4(3)	The extent of regulation introduced must be proportionate to the competition problems in the market.	In this instance, if there are entities with service obligations, then competition is only one element in the considerations.	<p>Add “service obligations” to:</p> <p>....must be proportionate to the competition problems and service obligations in the market.</p>
4(5)(b) and 4(10)(a)	<p>must publish, in the Gazette, a notice that such a determination is being considered, and invite public submissions in response to the notice;...</p> <p>(a) the timing, manner and form of notices and periods of public submissions contemplated in subsection (5)(b);</p>	A minimum time needs to be indicated here, for instance: at least 30 days, rather than providing such broad flexibility.	<p>Add “within at least 30 days of invitation” to</p> <p>...and invite public submission in response to the notice within at least 30 days of the invitation...</p> <p>Or include a subsection 4(5)(c):</p> <p>...Responses to the invitation must be submitted within at least 30 days of the notice...</p>

Price Regulation

Section	Current Statement	Comment	Recommendation
11(2)(b)	a limit on the total amount of revenue it may raise from the facilities and services offered by it;	<p>"revenue" as a term does not interact directly with gross value added.</p> <p>It also does not account for the positive or negative externalities emanating from the entity and its operations. Whether it is CO2, particle matter or ocean footprint; community development; economic activity or otherwise.</p>	My recommendation is that in terms of regulatory control, may it be explicitly stated that "revenue and externalities" be the terms for "revenue".
11(3)	Each regulated entity must submit a proposal to the Regulator, requesting approval of a price control for the facilities and services offered by that regulated entity.	This position is unclear. If the entities are expected to 'propose a price control for approval', and there is no independent observation to supplement this then the regulator may grow biased, or entities may withhold, understate or perform below par on the basis that they are "incentivised" to do so. This is a ratchet effect.	<p>It is a similar mechanism imposed by the National Energy Regulator of South Africa. Tariffs are proposed and the regulator determines the extent to which the proposed tariffs are appropriate.</p> <p>However, there is significant room to under perform in order to justify or pursue certain levels of support. Although this is in contravention with this Bill.</p>
11(4)(b)(iii)	the opportunity cost of capital including the average rate of return on other domestic or international facilities or services having similar or comparable risk;	Also include the opportunity costs of public funds. This has not been done in the SA context.	
11(10)(a)	a calculation of the impact of the proposed price control deviation on the entity's revenues, costs and profitability, as well as, any other relevant material financial management metrics;	It is also important to indicate include the related service level requirements embedded in this process of estimating the impacts.	<p>Add</p> <p>"...revenues, costs, profitability and service levels..."</p>
11(9)(b)	set service standards in respect of any activity that is subject to the price control;	These will need techniques, tools and approaches. These additional regulations will be essential for implementation.	

Section	Current Statement	Comment	Recommendation
11(2)(b)	a limit on the total amount of revenue it may raise from the facilities and services offered by it;	<p>"revenue" as a term does not interact directly with gross value added.</p> <p>It also does not account for the positive or negative externalities emanating from the entity and its operations. Whether it is CO2, particle matter or ocean footprint; community development; economic activity or otherwise.</p>	My recommendation is that in terms of regulatory control, may it be explicitly stated that "revenue and externalities" be the terms for "revenue".
11(3)	Each regulated entity must submit a proposal to the Regulator, requesting approval of a price control for the facilities and services offered by that regulated entity.	This position is unclear. If the entities are expected to 'propose a price control for approval', and the is no independent observation to supplement this then the regulator may grow bias, or entities may withhold, understate or perform below par on the basis that they are "incentivised" to do so. This is a ratchet effect.	<p>It is a similar mechanism imposed by the National Energy Regulator of South Africa. Tariffs are proposed and the regulator determines the extent to which the proposed tariffs are appropriate.</p> <p>However, there is significant room to under perform in order to justify or pursue certain levels of support. Although this is in contravention with this Bill.</p>
11(4)(b)(iii)	the opportunity cost of capital including the average rate of return on other domestic or international facilities or services having similar or comparable risk;	Also include the opportunity costs of public funds. This has not been done in the SA context.	
11(10)(a)	a calculation of the impact of the proposed price control deviation on the entity's revenues, costs and profitability, as well as, any other relevant material financial management metrics;	It is also important to indicate include the related service level requirements embedded in this process of estimating the impacts.	<p>Add</p> <p>...revenues, costs, profitability and service levels..."</p>
11(9)(b)	set service standards in respect of any activity that is subject to the price control;	These will need techniques, tools and approaches. These additional regulations will be essential for implementation	

The Economic Regulator

Section	Policy Statement	Comment	Change
38(c)	promote efficiency in transport facilities and services by facilitating competition, where possible, and implementing regulations;	<p>*A note on competition, compatibility and or complementarity—</p> <p>Is it more appropriate to argue that efficiency is a function of compatibility and complementarity. Systems are inefficient they are not compatible to operate internally or externally. Complementarity influences the quality of the transitions between and within modes or services—throughout the journey or value chain. If members in a system do not complement each other the system is unlikely to be efficient. Components of efficiency need to be determined. This is consistent with the White Paper on Transport Policy.</p>	<p>Add</p> <p>...facilitating complementarity, competition, where possible, and implementing regulations...</p>
38(h)	determine price controls for transport facilities and services in accordance with Part A of Chapter 3 and, for that purpose, may determine methods of price regulation as appropriate for the economic circumstances of regulated entities;	A request for "techniques/methods of price regulation".	Guidelines, Minimum Requirements or prescriptions need to be outlined in subsequent regulatory guidelines.

Thank you