Mr Ofentse Hlulani Mokwena
Ofentse.mokwena@nwu.ac.za
Lecturer, Transport Economics
Dpt of Transport Economics and Logistics Management,
North-West University
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Ms Valerie Carelse
vcarelse@parliament.gov.za
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RE: COMMENT - ECONOMIC REGULATION OF TRANSPORT BILL

The Economic Regulation of Transport Bill (Bill hereafter) intends to enhance a competitive transport economy with an 'integrated system of economic regulation'[1] across all transport services and infrastructure.

The Bill also aims to facilitate the transition toward international best practice in the context of the performance, governance and effectiveness of transport facilities and services[2] through 'building institutions for markets'[3]—they are premised upon building "consistent economic regulation of transport facilities and services"[4]. These arrangements are expecting to improve management of facilities and services, promote investment, and resolve conflict.

At the core, is to pursue the development of small medium enterprises, and provide **equitable**[5] opportunity which advances access to and operation of transport facilities and services.

The broad scope of application, but confined to a 'single operator' controlling more than 70%, or the provision of the service not cost effective[6], but this is subject to market power dynamics and or the facility or service is deemed essential[7].

With these considerations in mind, I submit that there are some critical concerns with regard to the scope of application in the Bill:

1. The policy aims to introduce a consistent economic regulatory environment across various transport services and infrastructure, yet only 'access to rail infrastructure' is deemed a suitable point of discourse. *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. As a result of exclusive and capital-intensive nature of the railway industry, I would argue that the policy leans too much toward one transport mode's

[1] Section 3(1)(b)
[2] Section 3(1)(c)
[3] World Bank (2002) 'Building Institutions for Markets'.
[4] Section 3(1)(d)
[5] The term equal opportunity is applied in the Bill, this may be an inaccurate term given the nature of the Bill.
[6] 4(2)(a)-(b)
[7] 4(4)((a)-(b)

infrastructure rather than following international best practice—which covers a broad array of principles.

2. 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.
    a. 4(i)-(ii) require determination through an opinion from the Competition Commission, whereas, municipalities conduct transport planning activities which reveal route and market level competitive practices—especially in the public transport arena. If the policy is directed at small medium enterprises in the transport market, then how will it reflect the local area level competitive practices of dominant associations (public transport) and truckers (freight transport)?
    b. 11(8) argues that the Regulator must consider "each price control proposal on its merits in terms of subsection (4)", whereas sub-section (4) seems opaque with regard to unique transport economic issues and current policy practices in South Africa. The Bill purports that the Regulator will take a national posture, and have functional bodies spread through provinces in order to manage the sheer volume of market changes.
    c. 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:
        i. The medallion approach to containing and managing the transport market, in addition to access pricing and price controls.
        ii. 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.

While there are many other concerns, more technical issues with the Bill, I am of the view that the comments submitted are succinct and sufficient in order to create a more equitable and consistent economic regulatory market.

Best Regards,
Ofentse Hlulani Mokwena

Basis

The Bill responds to a call to address the structural issues embedded in network industries as identified by National Treasury[8], as investigated by the National Planning Commission[9] 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.

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: metered taxis, minibus taxis, and bus transport. As we know, each of these industries have unique challenges:

1. Metered taxis (and ride-hailing) have route, commission fee, pricing, cost structure and market access issues;
2. Minibus taxis (and other future forms of paratransit) have route, operating lisence, securitisation, pricing, cost structure and market structure issues (compliance, law enforcement etc.); and
3. Bus transport (contracted and 'tendered') have subsidy, performance and compliance issues while contracts remain in a negotiated state.

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.

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.**

Scenarios

The potential scenarios for the Bill may include:

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[8] National Treasury (2019) 'Economic transformation, inclusive growth, and competitiveness: Towards an Economic Strategy for South Africa'. Pretoria, South Africa. Specifically pages 24-26.

[9] 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.

1. 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. This would lean the Bill toward the **Economic Regulation of Rail Transport Bill** or better yet, “Guided Transport” in future.
2. 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). Then it may be best termed the **Economic Regulation of Network Industries in Transport** to avoid confusion with the pressing economic regulatory issues in the non-network land passenger transport markets.
3. Is inclusive of all transport modes, issues and industries which would then incorporate the planning authorities, provincial regulatory entities and the likes within the **Economic Regulation of Transport**. 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.

However, given the application of the Bill, where market power is concerned, then Scenario 3 is much more likely largely due to the premise of market power (there are some questions about how the 70% threshold was determined, and clarity on this issue is necessary).

Challenge
However, without the finalisation of the White Paper on National Transport Policy (to my knowledge) the certainty around the devolution of transport functions (especially rail transport), establishment of transport components, and the economic regulation of ride-hailing, paratransit (i.e. minibus taxis and tuk-tuk etc.), and road freight [10] prove to create an opaque environment for transport policy making in particular.

All transport infrastructure and services are part of a Provincial Land Transport Framework, and subsequent Integrated Transport Plans.

However, the Bill appears to assume two primary directions:
1. Economic regulation is only applicable to strategic assets and services within the ambit of national government;
2. 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
3. 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.

[10] See the Road Freight Strategy and Draft Implementation Plan, with the information platform from the NDOT.

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.

Definitions

Section	Current Statement	Comment	Recommendation
Definitions	Removal of definition of **Municipal Transport Authority** from the initial Bill (12 February 2018).	The language is crucial here, the National Land Transport Act includes various authorities in the regulatory sphere: - Provincial Regulatory Entity, and - Transport Planning Authorities in particular.	**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> 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?**
	Economic regulation is defined in three forms: price controls, access regulation, and service levels and service conditions.	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.	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 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.
	Transport sector is defined in terms of industries: shipping, aviation, rail and road transport.	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. Including technology as part of the transport sector should reflect both the digital and human labour required.	It is recommended that: - "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). - Add "related technology and human labour" to the sector definition.
	Market is defined as any place where goods and services are exchanged at a fee.	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	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.

		market would 'market power' be classified under?	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.
	"tariff" means any charge, fee, toll or other amount that may be imposed by a regulated entity for the use of, or access to, any transport service or facility;	Should we not add the value of contacts[11] now that they are not only smaller in the form block-chain; but also can be associated with (a) behavioural incentives and (b) some tradable value. The value of contracts for instance in the context of CTAs is the commission these companies charge *subscribers* for using the platform. Operators are in a contract trap, while users are in a convenience trap—both are asymmetric. Adding the value of a contract enables the treatment of **platforms** as contractors, **short-term subscription providers[12]**, to tangible services.	**"tariff"** means any charge, fee, toll**, contract** or other amount that may be imposed by a regulated entity for the use of, or access to, any transport service or facility;

[11] Section 2(3) of this Bill recognizes electronic contracts and their role in enabling transactions. The subsequent contracts embedded on digital platforms are going to be crucial across an array of digital currencies (not necessarily crypto).

[12] In the labour economy, these are floodgates for supply and demand issues in the shared-economy applications; but also in small doses, platforms require labour reforms potentially built into algorithms. This will require correct pricing, quality and potentially fewer operator per transport zone.

Purpose of the Act

Section	Current Statement	Comment	Recommendation
3(1)(a)	…promote the development of a competitive, efficient and viable South African **transport industry** contributing to economic growth and development;	Primary definition of the **"transport sector"** is presented. A sector is a large part of the economy; hence all modes are there. An industry is a specific cluster of entities, such as aviation.	Substitute "transport industry" with **transport sector.**
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;	Airports and ports are usually associated with aviation, and maritime transport respectively. 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.	Add **transport interchange** to: *…of passengers and goods, by air or through airports, ports or transport interchanges, and by road or rail;*
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: *…this Act applies to any **transport market**, or any entity…*
4(2)(a)	a single operator controls more than 70% of the market concerned; or	Given the various approaches to analysing market control, or dominance, the 70% threshold may need to be scrutinised. Given the policy goal to encourage the shift from road to rail, the notion of a 'single operator' may also need to be scrutinised.	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. The DoT may need to explore this 'single operator' notion more comprehensively given their embedded policy goals.
4(2)(b)	the preconditions for efficiency and cost-effectiveness do not exist in the market concerned.	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. Furthermore, economic regulation literature outlines the importance of accounting for the impact of Universal	**Guidelines for determining such preconditions are necessary** in order to avoid rent-seeking or regulatory leakages. **Consider the addition of Universal Service Obligations, and service levels and conditions[13] such that:** *…the preconditions for efficiency, **service obligation, service levels, service conditions** and cost-effectiveness do not exist…*

[13] This is with specific reference to minibus taxi, ride-hailing, metered taxi and transport sharing solutions (i.e. bike sharing).

		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". 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.	
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.	**Add "service obligations"** to: *….must be proportionate to the competition problems and **service obligations** in the market.*
4(5)(b) and 4(10)(a)	must publish, in the Gazette, a notice that such a determination is being considered, and invite public submissions in response to the notice;…. (a) the timing, manner and form of notices and periods of public submissions contemplated in subsection (5)(b);	A minimum time needs to be indicated here, for instance: at least 30 days, rather than providing such broad flexibility.	**Add "within at least 30 days of invitation" to** *…and invite public submission in response to the notice within at least 30 days of the invitation…* Or include a subsection 4(5)(c): *…Responses to the invitation must be submitted within at least 30 days of the notice…*

Price Regulation

Section	Current Statement	Comment	Recommendation
11(2)(a)	a schedule of tariffs, charges, fees, tolls or other amounts that may be imposed by the regulated entity for the use of, or access to, any transport service, or facility offered by that regulated entity;	Not all costs are "amounted", yes a price can be attached to their value,-- generalised cost (GC) is a much more appropriate term because it can also account for the short-and-long run costs/benefits.	*a schedule of tariffs, charges, fees, tolls, amounts or other impedances or incentives affecting generalised costs that may be imposed.."*
11(2)(b)	a limit on the total amount of revenue it may raise from the facilities and services offered by it;	"revenue" as a term does not interact directly with gross value added. 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.	*My recommendation is that in terms of regulatory control, may it be explicitly stated that "revenue and externalities" be the terms for "revenue".*
10(2)	The price control for a regulated entity may comprise—	But is not limited to.	*The price control for a regulated entity may comprise [**but not limited to]**—*
11(2)(b)	a limit on the total amount of revenue it may raise from the facilities and services offered by it;	Not all costs are "amounted", yes a price can be attached to their value,-- generalised cost (GC) may be an appropriate term to add because it can also account for the short-and-long run costs/benefits.	*a schedule of tariffs, charges, fees, tolls, amounts or other impedances or incentives affecting generalised costs that may be imposed.."*
11(2)(b)	a limit on the total amount of revenue it may raise from the facilities and services offered by it;	"revenue" as a term does not interact directly with gross value added. 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.	*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	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	*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.*

	approval of a price control for the facilities and services offered by that regulated entity.	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.	*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.*
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.	*Add* *…revenues, costs, profitability **and service levels**…"*
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.*	