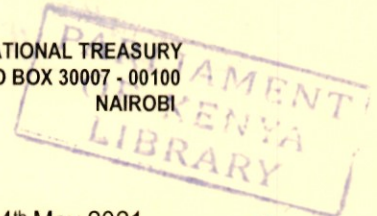




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Ref: TNT/PPPU/1/5 TY

Date: 4th May 2021

Mr. Michael Sialai
Clerk of the National Assembly,
The National Assembly,
Nairobi, Kenya

Dear *Sialai,*

REF: THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021

DLSP.
13/5/2021
How take this to accounts register. Taking receipts referred to committee
Legislation. 135-21.

We refer to the above subject.

We wish to advise the National Assembly that the National Treasury has prepared a statutory instrument titled 'The Public Finance Management (National Roads Toll Fund) Regulations, 2021'.

The statutory instrument has been prepared in strict compliance with the Statutory Instruments Act, 2013 and is designed to support the actualisation of critical development initiatives of Government, in particular the implementation of the national roads tolling programme.

Before we can publish the statutory instrument in the Kenya Gazette, we would be grateful for an opportunity to subject the said Regulations to pre-publication scrutiny by Parliament. The purpose of this letter is to therefore request your office to grant us the requested opportunity and to facilitate the same. We will make ourselves available for immediate engagement, once you respond in the affirmative.

We forward, for your records, the following:

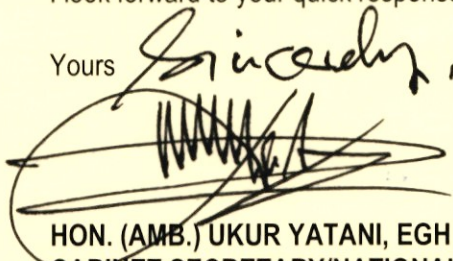
- a) The draft Public Finance Management (National Roads Toll Fund) Regulations, 2021;
- b) The Public Roads Toll Act and the relevant excerpts of amendments thereto, made through the Finance Act 2020. The amendments relate to the establishment and operation of the National Roads Toll Fund;
- c) An excerpt of Section 5A of the Statutory Instruments Act, 2013; and

for Prepub. Cetera Sunking

d) A Briefing Note on how the National Treasury complied with Section 5A of the Statutory Instruments Act, 2013 in preparing the Regulations.

I look forward to your quick response.

Yours



HON. (AMB.) UKUR YATANI, EGH
GABINET SECRETARY/NATIONAL TREASURY

Copy to: **Hon. Justice (Rtd) Paul Kihara Kariuki, EGH**
Attorney General
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P.O. Box 40112, 00100
NAIROBI

Mr. Kennedy Ogeto, CBS
Solicitor General
State Law Office and Department of Justice
Sheria House
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Mr. Christopher Kirigua, OGW
Director General
Public Private Partnerships
NAIROBI

a)



THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 08 JUN 2021
TREASURY
MAJORITY LEADER
BY: [Signature]
CLERK OF THE PARLIAMENT

LEGAL NOTICE NO.

THE PUBLIC FINANCE MANAGEMENT ACT
(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24(4) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021

Citation. 1. These Regulations may be cited as the Public Finance Management (National Roads Toll Fund) Regulations, 2021.

Interpretation. 2. In these Regulations, unless the context otherwise requires—

Cap. 407. “authorized toll collector” means a toll collector appointed as such under section 4 of the Public Roads Toll Act;

“budget framework” means the national government budget process under the Act;

“carrying capacity of the Fund” means the ability of the Fund to meet new funding obligations being imposed as a consequence to the admission of new toll projects into the Fund’s liability portfolio, relative to obligations already existing under the Fund;

“Committee” means the Oversight Committee established under regulation 8 of these Regulations;

No. 15 of 2013. “contracting authority” has the meaning assigned to it under section 2 of the Public Private Partnership Act, 2013;

“financial year” has the meaning assigned to it under Article 260 of the Constitution;

“Fund” means the National Roads Toll Fund established under regulation 5 of these Regulations;

“Fund Secretariat” means the Fund Secretariat established under regulation 16 of these Regulations;

“independent expert” means a person or organisation with

substantial experience in the development of traffic forecasts, toll revenue projections and road project agreements appointed to support the Officer Administering the Fund in the preparation of quarterly and annual inflow and outflow projections;

“inflows” means all payments into the Fund;

“Officer Administering the Fund” means the officer designated as such under regulation 12 of these Regulations,

“outflows” means payments out of the Fund to meet eligible expenditure under the Fund;

“Public Private Partnership Project Facilitation Fund” means the Fund established under section 68 of the Public Private Partnerships Act, 2013,

“PPP unit” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“private party” includes a service provider or a toll operator appointed as an authorised toll collector under a project agreement to perform services related to a toll road in Kenya,

“project agreement” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013,

“project company” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“project road” means a road declared as toll road under section 3(1) of the Public Roads Toll Act and for which a project agreement obligates service or other payments from the Fund;

“Projected Fund Ratio” as at a particular future date, means the ratio of 1.3 times of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date, calculated for twelve forward rolling months:

Provided that this ratio shall, at a minimum, be computed taking into account arrears, amounts invoiced but not settled and not yet classified as arrears, and other amounts that will become due over the forecast period,

“projected shortfall” means the Projected Fund Ratio which is less than 1.3 in any projection period,

“projected surplus” means existing Projected Fund Ratio exceeding 1.3 in any projection period and where actual cash balances, excluding projected future inflows, within the Fund are the basis for determining the Projected Fund Ratio,

“Public Service Commission” means the Public Service Commission established under Article 233(1) of the Constitution;

“road toll” means a user charge levied on road users in accordance with the Public Roads Toll Act;

“road users” means the categories of vehicular traffic subject to pay a prescribed toll;

“service payments” means payments due to and invoiced by a private party pursuant to a project agreement and in accordance with these Regulations;

“service provider” means a private party or project company that enters into a project agreement with a contracting authority to provide a project road, as detailed under a project agreement;

“Short-Term Liquid Instruments” means any marketable financial security having short-term maturity, readily convertible into cash, including fixed income instruments such as treasury bills, commercial paper and certificates of deposit as may from time to time be approved in accordance with these Regulations; and

“toll operator” means a private party appointed as an authorised toll collector under a project agreement by a contracting authority to establish, administer and operate a toll system.

Objects and purpose of Regulations.

3. The objects and purposes of these Regulations are—

- (a) to establish a centralized Fund into which all revenues collected pursuant to these Regulations shall be paid and administered;
- (b) to provide for the oversight and administration of the Fund;
- (c) to prescribe the processes by which money is paid into and out of the Fund;
- (d) to provide investors in and financiers of project roads, as well as the general public, necessary information on the status of the Fund to support investment decisions; and
- (e) to make provision for purposes connected with and incidental to the foregoing objects and purposes.

Imposition of tolls.

4. There shall be imposition of road tolls which shall be set in accordance with the Public Roads Toll Act.

Establishment of the Fund.

5. There is established a fund to be known as the National Roads Toll Fund, which shall be operated under the budgeting, accounting, reporting and auditing framework of the Act.

Sources of the Fund

6. The sources of the Fund shall consist of the following—
- (a) road tolls levied on road users for access to and use of project roads;
 - (b) fees or charges imposed on road users accessing project roads with overloaded axles levied in accordance with Part III of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, section 58 of the Traffic Act and Section 21 of the East African Community Vehicle Load Control Act, 2016,
 - (c) monies appropriated by Parliament or otherwise paid into the Fund by the Government for the purposes of the Fund,
 - (d) grants and donations made to the Fund,
 - (e) any earnings, accruals or income generated from moneys held within the Fund;
 - (f) proceeds from levies on roadside developments including road side stations which form part of the scope of works for project roads, as well as proceeds from any access fees and advertisements along the project roads levied in accordance with Part II of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013,
 - (g) penalties arising from any breaches by a private partner under an agreement entered into under section 4A of the Public Roads Toll Act,
 - (h) insurance proceeds payable to a contracting authority under a project agreement applied as reimbursement intended to make good a loss occasioned to and suffered by a contracting authority for an action of a service provider only where the loss suffered by the contracting authority have been met from the Fund, and
 - (i) money from any other source approved by the Cabinet Secretary

Payments out of the Fund

7. Payments out of the Fund shall comprise the following—
- (a) payments certified by a contracting authority as being due to a service provider or a toll operator under a project agreement and in accordance with these Regulations, excluding—
 - (i) compensation for political events;

- (ii) termination payments;
- (b) the approved annual operating budget of the Fund; and
- (c) any other eligible expenditure incurred in pursuant of the object and purpose for which the Fund is established.

Establishment of Oversight Committee.

8. (1) There is established a committee to be known as the Oversight Committee which shall consist of—

- (a) the Principal Secretary for the time being responsible for matters relating to finance, who shall be its chairperson;
- (b) the Principal Secretary for the time being responsible for matters relating to roads;
- (c) the Principal Secretary for the time being responsible for matters relating to planning and statistics;
- (d) Attorney-General or his representative;
- (e) three other persons being non-public officials drawn from technical, financial services, social services, life sciences, consumer rights and legal professions appointed by the Cabinet Secretary; and
- (f) the Officer Administering the Fund, who shall be Secretary to the Committee.

(2) The Committee may from time to time admit a representative of a contracting authority for the time being having a project road, a representative of the PPP Unit, the Accountant-General or any other public official it deems fit into its sittings and participate as an *ex officio* member.

Qualifications for appointment.

9. A person shall be qualified to be appointed under regulation 8(1)(e) as a member of the Committee if that person—

- (a) holds a degree in the relevant field from a university recognized in Kenya;
- (b) has proven fund management or other relevant professional experience;
- (c) has served in a position of senior management for a period of at least 6 years;
- (d) has not served in the same entity as an employee in the preceding 5 years;

- (e) meets the requirements of Chapter six of the Constitution; and
- (f) has no convictions resulting from integrity related matters or civil liabilities.

Functions of the
Committee.

10. (1) The Functions and powers of the Committee shall be to—

- (a) review and approve the annual work programme and budget of the Fund;
- (b) authorise allocations in accordance with approved budgets;
- (c) approve annual reports of the Fund before submission to the Cabinet Secretary and inform the Cabinet Secretary of the annual funding requirements of the Fund;
- (d) approve the opening of bank accounts of the Fund by the Officer Administering the Fund;
- (e) make recommendations to the Cabinet Secretary on the declaration and use of projected surpluses;
- (f) authorise withdrawals from the Fund of projected surpluses upon approval by the Cabinet Secretary in accordance with these Regulations and any guidelines it approves for this purpose;
- (g) approve the systems for the control and oversight of the operation of the Fund;
- (h) approve the recruitment and the terms and conditions of staff of the Fund;
- (i) appoint independent advisors to provide it with expert opinion on any matter falling within its mandate that is deemed to require such expertise, and require the Officer Administering the Fund to meet the costs, if any, attendant on such experts or advisors;
- (j) establish the Fund's investment policies with respect to surplus cash;
- (k) approve annual financial statement of accounts prepared by the Officer Administering the Fund;
- (l) oversee the performance of the Officer Administering the Fund;
- (m) oversee the performance of the Fund;

- (n) perform any other function necessary to promote the objects and purpose of the Fund and consistent with these Regulations.

(2) The Committee shall, in discharging its functions under these Regulations—

- (a) take such measures and make such recommendations to the Cabinet Secretary as it shall be necessary to guarantee, sustain and improve the governance framework for toll road programmes with the view to promoting the long-term financial integrity of the Fund with respect to the purposes for which it has been established;
- (b) meet regularly, and at least once a quarter, to consider the affairs, status and operation of the Fund;
- (c) adopt such procedures as shall be necessary to organize the conduct of its business including the methods by which meetings shall be convened and the frequency and quorum thereof, the keeping of records, co-option of persons with such skills as the Committee may require to better discharge its duties under these Regulations, the formation of any sub-committees as the business of the Committee may demand, and for such other matters as the Committee shall deem fit and necessary to support its operational and functional efficiency and effectiveness.

Vacation and filling of office.

11. (1) A vacancy shall arise under regulation 8(1)(e) where the member—

- (a) dies;
- (b) resigns from office, by notice in writing addressed to the Cabinet Secretary;
- (c) is adjudged bankrupt or otherwise declared to be insolvent;
- (d) abandons the business of the Fund or fails to attend three consecutive meetings of the Committee without a valid reason; or
- (e) is convicted of an offence involving dishonesty or fraud or moral turpitude and sentenced to imprisonment for a term exceeding six months.

(2) The Cabinet Secretary shall appoint the person to fill the vacancy in the Committee in accordance with regulation 8(1)(e).

(3) The Cabinet Secretary shall, within seven days of appointing a person under regulation 8(1)(e) notify such appointment by notice in the Gazette.

Officer
Administering
the Fund.

12. Pursuant to section 24(5) of the Act, the Cabinet Secretary shall designate a person, who shall be a public officer, to be the Officer Administering the Fund.

Functions of
Officer
Administering
the Fund.

13. (1) The Officer Administering the Fund shall control the administration of the Fund, for which purpose it shall cause to be established proper systems for the operation of the Fund—

(2) The systems to be established under sub-regulation (1) shall include the following—

- (a) financial management systems;
- (b) audit control systems;
- (c) documentation and records systems;
- (d) human resource management systems;
- (e) assets, stores and supplies; and
- (f) reporting systems.

(3) The Officer Administering the Fund shall have the following key functions—

- (a) the preparation of work programme and budget of the Fund, and for this purpose shall—
 - (i) make preparation of the Fund's annual budget and work plans, and submit the same to the Committee for approval;
 - (ii) address projected shortfalls in the Fund through the budget framework in accordance with the Act and these Regulations;
- (b) financial control over the administration of the Fund, which shall include the following—
 - (i) opening of a bank account and any sub-accounts of the Fund in a financial institution approved by the Cabinet Secretary;
 - (ii) making payments out of the Fund in accordance with these Regulations;

- (iii) causing to be kept proper books of account and all records of the Fund;
 - (iv) specifying all forms and prepare all funding documentation required under these Regulations;
- (c) reporting to the Committee on the operations and performance of the Fund, which shall include—
- (i) annual financial accounts and reports of the Fund in accordance with the Act;
 - (ii) quarterly reports, on a rolling 12-month basis, of the projected inflows and outflows of the Fund and of the Projected Fund Ratio, and for any projected shortfalls or projected surpluses and make recommendations to the Committee for their approval;
 - (iii) quarterly reports, on a rolling 12-month basis, on the projected inflows and outflows of the Fund and of the Projected Fund Ratio, as well as statements on how any projected shortfalls are intended to be addressed which reports shall be submitted to contracting authorities and service providers, within 45 business days of the end of each quarter, following approval by the Committee;
 - (iv) quarterly and annual non-financial reports on the performance of the Fund in accordance with Act;
 - (v) preparation, signature, and with the approval of the Committee, transmission to the Auditor-General in respect of each financial year a statement of account relating to the Fund in such form and within such timelines as the Public Sector Accounting Standards Board established under section 192 of the Act may from time to time specify in accordance with the Act, a copy of which statement of account shall be filed with the National Treasury:

Provided that—

- (aa) for the purpose of paragraphs (c)(i) and (c)(ii), the Officer Administering the Fund, in

making projections for the purpose of determining surpluses or addressing shortfalls, may take into account such macroeconomic forward-looking assumptions derived from recognised and reputable independent sources for macroeconomic forecasts, to the extent these are available, such assumptions to be used both to produce traffic and revenue forecasts as well as to forecast future service payments, and may, at its discretion, retain advisors for this purpose; and

- (bb) the Officer Administering the Fund may recommend to the Committee, and the Committee may issue, such guidelines on conditions to be met before surpluses are declared and or withdrawn, taking into account the liabilities of the Fund, as may be necessary for the better carrying out of the objects of this regulation
- (d) implement the Fund's investment policies with respect to declared surpluses as established by the Committee, which shall include—
 - (i) recommendations on the declaration of projected surpluses and their usage or application;
 - (ii) investment of surplus cash in approved Short-Term Liquid Instruments,
 - (iii) raising additional resources for the Fund;
- (e) human resource management within the Fund, which shall include—
 - (i) recommendations on the appointment of Fund Secretariat staff to the Committee;
 - (ii) appointment of required, suitably qualified, independent experts or advisors, to prepare or advise on the preparation of the traffic and toll revenue projections supporting the estimates of inflows, and the estimates of payments to be made under project

agreements supporting the estimates of outflows, and consult with the contracting authorities and service providers as necessary;

- (iii) meeting the costs of advisors appointed by the Committee;
- (iv) performing any other function that the Committee may, consistent with these Regulations, delegate and require to be undertaken.

(4) subject to the approval of the Committee, the Officer Administering the Fund may outsource some of its functions to agents or experts and advisors it may appoint for that purpose, which appointment shall be in writing, and time-bound.

(5) The act of outsourcing the performance of a function of the Officer Administering the Fund to an appointed agent, expert or advisor shall not divest the Officer Administering the Fund of the responsibility to ensure that the function is effectively and efficiently performed in the public interest or on behalf of public service as set out in these Regulations.

Addressing shortfalls in the Fund.

14. For the better implementation of the obligations under regulation 13(3)(c), (d) and (e), the Officer Administering the Fund shall—

- (a) provide an estimate of the Projected Fund Ratio for each quarter of the immediate subsequent 12-month period with the view to determining whether the Fund shall realize a Projected Shortfall or Projected Surplus for the forecast period.
- (b) upon the establishment of the Fund, and for as long as toll revenues lead to the realization of projected shortfalls in the Fund, where the Projected Fund Ratio does not equal or exceed 1.3, cause to be appropriated such budgetary allocations as shall be adequate to cover the projected shortfall.
- (c) make recommendations to the Committee on the carrying capacity of the Fund, and the Committee shall advise the Cabinet Secretary on the advisability and implications of admitting new project liabilities into the Fund.

Determining shortfalls in Fund.

15. (1) Projected shortfalls in the Fund shall be evidenced by—

- (a) contracted obligations under project agreements; and
- (b) quarterly estimates of inflows and outflows of the

Fund prepared by the Officer Administering the Fund.

(2) For purposes of sub-regulation (1), the Officer Administering the Fund shall prepare and submit to the Committee for approval a detailed formula for the determination of the quantum of projected shortfalls, as the basis for resolution of such projected shortfalls within the annual budget framework

Fund Secretariat

16. The Officer Administering the Fund shall appoint such staff, in consultation with the Committee, as shall be deemed necessary to constitute the Fund Secretariat for the purposes of the administration of the Fund.

Eligibility of disbursements out of Fund

17. Disbursements out of the Fund shall be bound by the following broad principles—

- (a) disbursements to service providers and toll operators shall be on the basis of contracted obligations of a contracting authority under a project agreement;
- (b) the contracted obligations shall be included in the approved annual budget of the Fund,
- (c) disbursements to service providers and toll operators shall be against proper documentation as detailed in regulation 18 ;
- (d) disbursement of projected surpluses shall be subject to formal approval of the Cabinet Secretary as detailed in these Regulations.

Payment procedure by the Officer Administering the Fund

18. (1) The Officer Administering the Fund shall satisfy himself or herself, with respect to every payment instruction received from a contracting authority—

- (a) that each payment instruction is made in writing and authenticated by the certificate of the contracting authority as to the payment amount, the nature of services rendered or the compensation due against which the payment instruction is submitted and the payment recipient;
- (b) that the payee's account is the same one indicated in the project agreement or where appropriate the payee's account pursuant to the provisions of the lender's direct agreement, unless an alternative payee has been communicated in writing to the Officer Administering the Fund by a contracting authority in accordance with a project agreement or a lenders' direct agreement entered into between the relevant contracting authority, service provider or the toll

operator and project's financiers, as the case may be, payments to which alternative payee shall amount to complete and final discharge of the Fund and the contracting authority to the service provider and all its financiers for that particular invoice;

- (c) that the payment processes of the Officer Administering the Fund, including the execution of the powers reserved for him or her under these Regulations shall be completed and payments made no later than the time stipulated for such payments under a project agreement.

(2) The Officer Administering the Fund shall specify forms and documents to be used by contracting authorities in submitting payment requests to the Fund, in accordance with the requirements of a project agreement.

(3) All payment requests to the Fund shall be submitted to the Fund not later than 28 days before the due date for such payment, without prejudice to any larger period to the extent such is provided for under a project agreement.

(4) Any application for payment under this regulation shall, without prejudice to any provision in these Regulations, be supported by such documents as may be required under a project agreement, including the following—

- (a) the name and address of the payee;
- (b) the bank account details of the payee;
- (c) an invoice from the contractor or other eligible contract party;
- (d) any certificate required from a contracting authority and any independent expert under the terms of a project agreement;
- (e) a certified payment voucher, with all material fields duly populated and vetted;
- (f) any other information as may be specified by the Officer Administering the Fund under sub-regulation (2) of this regulation.

Right to question
and withhold
payment
instruction.

19. The Officer Administering the Fund shall, where it establishes that the requirements in regulation 18 have not been met in any material particular, have the right to request for clarification and rectification from the contracting authority, and the power to withhold disbursements against invoices until such matters are resolved.

Opening of accounts, and equality of Fund liabilities

20. (1) The Officer Administering the Fund shall cause to be opened in the name of the Fund such bank accounts for the Fund in a bank or banks approved in accordance with section 28 of the Act, as may be necessary for the purposes for which the Fund is established

(2) All liabilities relating to contracted obligations of the Fund shall rank equally.

Fund not to be overdrawn

21. The Officer Administering the Fund shall ensure that no bank accounts of the Fund are overdrawn.

Procedure for prefunding the Fund

22. (1) Further to regulation 14 and upon the establishment of the Fund, and until toll revenues collected on annual basis attain such a scale that the Projected Fund Ratio is equal to or exceeds the projected shortfall, the Officer Administering the Fund shall cause to be appropriated such budgetary allocations as shall be adequate to meet the Fund's contracted obligations, and this shall be an ongoing duty until such a time as toll revenues attain the threshold equal to or larger than the Projected Fund Ratio

(2) The Officer Administering the Fund shall, for purposes of this regulation, observe the budget process for national government entities as prescribed in the Act.

Declaration and use of surplus Funds

23. (1) Where and pursuant to regulation 13(3) (c) and (d) there is a projected surplus, the Committee, on the advice of the Officer Administering the Fund, may recommend to the Cabinet Secretary the declaration of a surplus in the Fund.

(2) A projected surplus may only be declared—

(a) where the Fund Ratio exceeds 1/3 of the 12-month estimate of forward-looking obligations under the Fund; and

(b) where the Projected Fund Ratio is derived against actual cash balances held within the Fund, not projected inflows.

(3) Subject to sub-regulation (4) of this regulation, and regulation 13, projected surpluses may be paid out of the Fund into the National Exchequer Account, provided such withdrawal does not exceed the amount of the available projected surplus and does not lead to a projected shortfall

(4) Where surpluses are taken out of the Fund under the terms of these Regulations, they shall be applied towards support for road sector development priorities including restoration of any appropriations earlier made by Government by way of budgetary allocations into the Fund, the settlement, in full or in part, of any sovereign debt contracted towards development of road projects in

Kenya including any viability gap funding for road sector projects, management of contingent liabilities arising from Project agreements including subventions to the Public Private Partnership Project Facilitation Fund, the reduction of Government's annual road sector financing deficits or for any other eligible road sector project as may from time to time be determined by the Cabinet Secretary.

Moneys to be retained in Fund.

24. All receipts, savings and accruals of the Fund and the balance of the Fund at the close of each financial year, shall be retained for the purpose for which the Fund is established.

Administrative costs.

25. The Officer Administering the Fund shall ensure the administration costs of the Fund shall be a maximum of three (3%) percent of the approved budgets of the Fund.

Superintendence of Fund expenditure

26. The Officer Administering the Fund shall establish systems, protocols and procedures necessary to ensure that –

- (a) the Fund's expenditure is controlled and is monitored, on an annual basis, against the Fund's approved revenue and expenditure plan;
- (b) withdrawals from the Fund are only for the purposes of payment of approved expenditure in accordance with these Regulations;
- (c) the records of expenditure relating to the Fund are kept and maintained in accordance with the provisions of the Act and Regulations made thereunder.

Access to information.

27. In furtherance of its mandate under these Regulations, the Officer Administering the Fund shall have power –

- (a) to access any project related data that he or she may need from contracting authorities in furtherance of his or her functions with respect to invoice settlement;
- (b) to call for such additional information with respect to requests for payments out of the Fund as are necessary to satisfy the requirements of regulation 18;
- (c) to issue financial management guidelines upon approval of the Committee relating to the purposes and objects of these Regulations;
- (d) to publish at the start of each financial year, on its website, the following information –
 - (i) amount and source of money received into

the Fund as at the close of the previous financial year;

- (ii) clear credit balances of available funds for the current financial year;
- (iii) quantum of committed eligible expenditure for the current financial year;
- (iv) total number of projects and other eligible activities supported under the Fund for the current financial year;
- (v) such other information that Fund beneficiaries may reasonably request, and approved by the Committee, from time to time.

Government financial Regulations.

28. The existing government financial and procurement Regulations shall, to the extent they relate to the administration of public funds established under the Act, apply in the administration of the Fund.

Submission of annual performance reports.

29. The Officer Administering the Fund shall prepare and submit to the Committee and the Cabinet Secretary, within three months after the end of the financial year, an annual Fund performance report relating to the previous financial year, detailing the extent to which the Fund met its regulatory and development objectives in the period under review, and highlighting challenges, threats and opportunities for the enhanced effectiveness of the Fund in promoting the public interests secured under these Regulations.

Misconduct of public officers.

30. The provisions of the Act relating to offences by public officers, including financial misconduct, shall apply to these Regulations.

Review of performance of the Fund.

31. (1) The Cabinet Secretary shall at the elapse of ten years from the date of commencement of these Regulations cause a review to be conducted of the performance of the Fund in accordance with the requirements of the Act.

(2) The review shall determine whether the Fund has met the objectives for which it was established.

(3) The report on the review shall be submitted to the Cabinet for approval.

Winding Up.

32. (1) The Cabinet Secretary may, subject to the approval of the National Assembly, wind up the Fund where the Cabinet Secretary considers that the Fund has successfully completed the specific objectives for which it was created.

(2) Despite the provisions of sub-regulation (1), the Cabinet Secretary may wind up the Fund if-

- (a) the Fund no longer has obligations to eligible parties under these Regulations;
- (b) the Committee has made its recommendations supporting such termination, and which opinion shall have taken into account any views and representations of any project participant supported under or through the Fund; and
- (c) the Cabinet has considered and approved the recommendation of the Cabinet Secretary to wind up the Fund, and Cabinet grants approval for such winding up to be moved before the National Assembly.

(3) On the winding up of the Fund –

- (a) the Officer Administering the Fund shall call on the contracting authorities to request from the respective service providers or other project parties or their agents financial statements to confirm any valid outstanding obligations to service providers or other involved project parties and commitments for payment;
- (b) subject to paragraph (a), the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the national government;
- (c) the Cabinet Secretary shall pay any deficit in the Fund from the funds of the national government in the National Exchequer Account with the approval of the National Assembly;
- (d) assets other than cash of the Fund shall be transferred to the National Treasury;
- (e) the Fund Secretariat shall be disbanded.

(4) The Officer Administering the Fund shall prepare, and the Cabinet Secretary shall submit to Parliament and to the Auditor-General, a final statement of accounts for audit within nine months from the date of the decision to wind up the Fund.

Revocation of
L.N
No.307/1986.

33. The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 made under the Public Roads Toll Act are hereby revoked.

Made on the, 2021

UKUR YATANI
Cabinet Secretary
The National Treasury

b)



LAWS OF KENYA



PUBLIC ROADS TOLL ACT

CHAPTER 407

Revised Edition 2012 [1989]

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CHAPTER 407

PUBLIC ROADS TOLL ACT

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CHAPTER 407

PUBLIC ROADS TOLL ACT

[Date of assent: 12th July, 1984.]

[Date of commencement: 1st August, 1984.]

An Act of Parliament to provide for the collection of tolls on public roads; to establish a Public Roads Toll Fund; and for connected purposes

[L.N. 110/1984, L.N. 152/1984, Act No. 19 of 1984, L.N. 119/1985, L.N. 208/1986, Act No. 18 of 1986, L.N. 161/1987, L.N. 162/1987, L.N. 522/1988, L.N. 209/1989, L.N. 429/1989, L.N. 63/1990, L.N. 425/1990, L.N. 479/1991, L.N. 260/1992, L.N. 199/1994, L.N. 273/1994, L.N. 274/1994, L.N. 305/1995, Act No. 2/2007.]

1. Short title

This Act may be cited as the Public Roads Toll Act, 1984.

2. Interpretation

In this Act, unless the context otherwise requires—

“**commercial vehicle**” has the meaning assigned to it in the Traffic Act (Cap. 403);

“**heavy goods vehicle**” means a commercial vehicle whose tare weight exceeds seven thousand kilograms; and includes semi-trailers and draw bar trailers irrespective of their nominal weight;

“**light goods vehicle**” means a commercial vehicle whose tare weight does not exceed four thousand kilogrammes;

“**matatu**” means a public service vehicle having seating accommodation for not more than twenty-five passengers exclusive of the driver; but does not include a motor car;

“**medium goods vehicle**” means a commercial vehicle whose tare weight does not exceed seven thousand kilogrammes;

“**motor car**” and “**motor omnibus**” have the meanings respectively assigned to those terms in the Traffic Act (Cap. 403);

“**roads authority**” means any of the authorities established under the Kenya Roads Act, 2007 (No. 2 of 2007);

“**toll**” means the charges prescribed in the Second Schedule leviable pursuant to this Act;

“**toll collector**” means a toll collector appointed under section 4;

“**toll road**” means a public road or a portion thereof which has been declared a toll road under subsection 3(1);

“**toll station**” means a structure on a toll road where toll is payable under this Act or any electrical or mechanical device on a toll road for recording the liability to pay toll, or any combination of such structure or device;

“vehicle” includes a motor vehicle, a trailer and any other conveyance used on a road; but does not include a bicycle, motor cycle, and an animal or human powered wheeled cart or an agricultural tractor which is not towing a trailer, whether it is laden or not.

[Act No. 19 of 1984, Sch., Act No. 2 of 2007, Fifth Sch.]

3. Toll stations, etc.

(1) The Minister may declare any public road or a portion thereof, including any bridge or tunnel on a public road, as a toll road for purposes of this Act.

(2) The public roads set out in the First Schedule are declared to be toll roads for the purposes of this Act.

(2A) The Minister may by Order published in the *Gazette* amend the First Schedule.

(3) The Minister shall provide equipment, buildings or structures and installations including permanent or movable weighbridges necessary for the proper functioning of a toll station.

(4) Special areas may be designated as toll stations through which different types of vehicles shall pass and each toll station shall be conspicuously signposted in Kiswahili and English.

(5) Every vehicle approaching and proceeding through a toll station shall be stopped at the toll station and the toll in respect of that vehicle shall be paid to the toll collector or in such other manner as may be prescribed by the Minister.

(6) The prescribed abstract of this Act and the rules shall be conspicuously exhibited in Kiswahili and English at every toll station.

[Act No. 2 of 2007, Fifth Sch.]

4. Appointment of toll collectors

(1) The Minister shall appoint toll collectors who shall collect tolls at toll stations and perform such other duties as may be prescribed by the Minister for the purpose of this Act.

(2) Every toll station shall have a station manager appointed by the Minister.

4A. Agreements for road management

(1) The Minister, or a roads authority, may enter into an agreement with a suitably qualified person to plan, design, construct and manage a public road or any portion thereof which has been declared to be a toll road for the purposes of this Act.

(2) A person authorised under subsection (1) shall carry out the activity for which he is authorised subject to such terms and conditions as may be specified in the agreement.

(3) A proposed agreement for the purpose of this section shall be laid before the National Assembly for approval prior to signature.

(4) The tolling regime provided for in an agreement to be entered into by the Minister or a roads agency designated by the Minister, shall be laid before the National Assembly for approval prior to the Minister or roads Authority designated by the Minister signing such agreement.

(5) Any agreement entered into by the Minister or a roads agency pursuant to subsection (1) without the approval of the National Assembly shall be null and void.

[Act No. 2 of 2007, Fifth Sch.]

4B. Levying of tolls pursuant to agreement

(1) A person with whom the Minister or a roads agency enters into an agreement pursuant to section 4A shall be entitled to levy toll, and collect monies payable as toll on such toll road, or portion thereof, for his or her own account during the said period, and may for that purpose erect a toll station or toll stations and facilities in connection therewith, including permanent and movable weighbridges, on the toll road or portion of thereof.

(2) The person referred to in subsection (1) shall only be entitled to levy toll in accordance with the agreement with the Minister or the roads agency and the amount of such toll shall be subject to approval by the Minister.

(3) The Minister shall notify all tolls approved under subsection (2) in the *Gazette*.

(4) The person referred to in subsection (1) shall be entitled to appoint toll collectors and station managers in respect of the toll road in respect of which there is an agreement subject to the terms of such agreement.

(5) The person shall maintain a record of the payment of tolls and submit it to the Minister or road agency, as the case may be, in accordance with the terms of the agreement.

[Act No. 2 of 2007, Fifth Sch.]

5. Levying of tolls

(1) Tolls, other than those to be levied at Mtwapa Bridge and the New Nyali Bridge, shall be levied in accordance with the rates prescribed in Part I of the Second Schedule.

(2) Tolls for Mtwapa Bridge and the New Nyali Bridge shall be levied in accordance with the rates prescribed in Part II of the Second Schedule.

(3) The Minister may, by order published in the *Gazette*, amend the Second Schedule.

(4) *Deleted by Act No. 2 of 2007, Fifth Sch.*

[Act No. 2 of 2007, Fifth Sch.]

6. Receipts to be issued and records to be kept

(1) A receipt or ticket in the prescribed form shall be issued on the payment of a toll.

(2) A record of the payment of tolls shall be maintained at every toll station and the station manager shall make and submit or cause to be made and submitted to the Minister monthly returns of the payment in the prescribed form.

7. *Deleted by Act No. 2 of 2007, Fifth Sch.*

8. Offences and penalties

(1) Any person who—

- (a) drives a vehicle through a toll station except by the route designated for the passage of that vehicle; or
- (b) refuses to stop a vehicle at a toll station and to pay the toll; or
- (c) fraudulently or forcibly drives a vehicle through a toll station without paying the toll,

shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.

(2) In addition to the penalty under subsection (1) the court shall order the offender to pay the prescribed toll where the offence is one of failing to pay the toll.

9. Rules

The Minister may make rules generally for the better carrying into effect the provisions of this Act and may, by those rules, prescribe anything which under this Act may be prescribed.

10. Offences cognisable

Offences under this Act shall be cognisable to the police.

[Act No. 19 of 1984, Sch.]

11. Power to exempt

The Minister may, by notice in the *Gazette*, exempt any vehicle or any class or classes or description of vehicles from all or any of the provisions of this Act.

[Act No. 19 of 1984, Sch.]

FIRST SCHEDULE

[Section 3.]

[L.N. 119/1985, L.N. 208/1986, L.N. 162/1987, L.N. 522/1988, L.N. 209/1989, L.N. 63/1990, L.N. 132/1990, L.N. 425/1990, L.N. 199/1994, L.N. 273/1994.]

TRANSIT TOLL STATIONS

| <i>Location</i> | <i>Public Road</i> |
|---------------------|--------------------|
| 1. Busia (Kenya) | Road B1 |
| 2. Amagoro (Malaba) | Road A104 |
| 3. Isebania | Road A1 |
| 4. Namanga | Road A104 |
| 5. Lunga Lunga | Road A14 |
| 6. Taveta | Road A23 |
| 7. Lokichokio | Road A1 |

Public Roads Toll

FIRST SCHEDULE—continued

| Location | Public Road |
|----------------|-------------|
| 8. Liboi | Road A3 |
| 9. Mariakani | Road A109 |
| 10. Athi River | Road A104 |
| 11. Gilgil | Road A104 |
| 12. Moyale | Road A2 |
| 13. Mandera | Road B9 |
| 14. Lodwar | Road A1 |
| 15. Garissa | Road A3 |
| 16. Isiolo | Road A2 |

SECOND SCHEDULE

[Section 5.]

TOLLS

[L.N. 152/1984, L.N. 161/1987, L.N. 429/1989, L.N. 479/1991, L.N. 260/1992, L.N. 274/1994, L.N. 305/1995.]

PART I

| CATEGORY OF VEHICLE | RATE OF TOLL TO BE CHARGED FOR A SINGLE JOURNEY | |
|--|---|--|
| | TRANSIT TRAFFIC TO AND FROM* | |
| | Tanzania US\$/100 km. | Other P.T.A./COMESA Countries US\$/100 km. |
| Rigid chassis with up to 3 axles without a trailer .. | 8.00 | 6.00 |
| Heavy goods vehicles with more than 3 axles and all articulated vehicles | 16.00 | 10.00 |
| All buses | 8.00 | 5.00 |

- *1. Vehicles bearing Kenyan registration are for the time being exempted.
- 2. All articulated vehicles consisting of a combination of either Kenyan head with foreign registered trailer or Kenyan trailer with foreign registered head shall be deemed to be wholly foreign registered and the respective toll rates shall apply.

Public Roads Toll

[Subsidiary]

CHAPTER 407

PUBLIC ROADS TOLL ACT

SUBSIDIARY LEGISLATION

List of Subsidiary Legislation

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PUBLIC ROADS TOLL (PUBLIC ROADS TOLL FUND) RULES, 1986

[L.N. 307/1986.]

1. These Rules may be cited as the (Public Roads Toll Fund) Rules, 1986 and shall be deemed to have into operation on the 1st August, 1984.

2. In this Rules unless the context otherwise requires—

“**financial year**” means the period from 1st July in any year to the 30th June in the immediately succeeding year (both days inclusive);

“**fund**” means the Public Roads Toll Fund established under section 7(1) of the Public Roads Toll Act;

“**officer administering the Fund**” means the accounting officer responsible for the Vote of the Ministry for the time being responsible for roads or any other person appointed by him in writing to administer the Fund on his behalf.

3. The purpose and object of the Fund shall be to provide additional funds required for the operation of toll stations and for maintenance of roads.

4. (1) The initial capital of the Fund shall be K£10 appropriated by Parliament in the 1985/86 financial year.

(2) The surplus realized in any year from the operation of the Fund shall be added to the initial capital.

5. The expenditure on operation of toll stations and maintenance of roads shall be on the basis of, and be limited to, the annual budget (on receipts and expenditure) which shall be submitted to the Treasury for approval before the beginning of the financial year to which the budget relates.

6. The Government procurement procedure shall strictly be adhered to.

7. All moneys collected as tolls under the Public Roads Toll Act shall be paid into the Fund.

8. All receipts, savings and accruals of the Fund and the balance of the Fund at the close of each financial year, shall be retained for the purpose of which the Fund is established.

9. The officer administering the Fund shall—

- (a) supervise and control the administration of the Fund;
- (b) if he thinks fit, impose conditions as the use to be made of any expenditure authorized by him or on his behalf and such conditions may impose any reasonable prohibition, restriction or requirements concerning such use or expenditure;
- (c) cause to be kept all proper books of accounts and other books and records in relation to the Fund and to all the various activities and undertakings financed by the Fund;
- (d) transmit to the Controller and Auditor-General, in respect of each financial year and within four months after the end thereof a statement of account relating to the Fund, prepared and signed by him, specifying income to the Fund, and showing the expenditure incurred from the Fund, in such details and with such additional information as he may deem to be proper and sufficient for the purpose of examination and audit by the Controller and

Public Roads Toll

[Subsidiary]

Auditor-General in accordance with section 18(2) of the Exchequer and Audit Act (Cap 412) as the Treasury may from time to time direct, and every statement of account shall include details of the balance between the assets and liabilities of the Fund, and indicate the financial status of the Fund, as at the end of the financial year concerned

SPECIAL ISSUE

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REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2020

NAIROBI, 30th June, 2020

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- (ix) equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and National Police Service.

PART VII—TAX APPEALS TRIBUNAL

23. Section 13 of the Tax Appeals Tribunal Act, 2013, is amended in subsection (6) by inserting the words “or documents” immediately after the word “appeal”.

Amendment of section 13 of No. 40 of 2013.

PART VIII—MISCELLANEOUS

24. Section 2 of the Public Roads Toll Act is amended—

Amendment of section 2 of Cap. 407.

- (a) by deleting the definition of the term “toll collector” and substituting therefor the following new definition—

“toll collector” means a public toll collector appointed under section 4 and includes a private toll collector appointed under section 4B;

- (b) by inserting the following new definitions in proper alphabetical sequence—

“base toll rate” means the unit rate prescribed by the Minister under section 4A for the calculation of applicable tolls;

“Fund” means the National Roads Toll Fund established under section 6A;

“Minister” means the Cabinet Secretary for the time being responsible for matters relating to roads.

25. Section 3 of the Public Roads Toll Act is amended—

Amendment of section 3 of Cap. 407.

- (a) by inserting the following subsection immediately after subsection (1)—

(1A) Notwithstanding subsection (1), a private toll collector shall only levy toll and collect monies payable on a public toll road constructed

under an agreement entered into under section 4A.

- (b) by deleting subsection (2) and substituting therefor the following new subsection—

(2) The stations specified in the first column of the First Schedule are declared to be transit toll stations for the public roads respectively set out in the second column.

- (c) by deleting subsection (5) and substituting therefor the following new subsection—

(5) The toll in respect of every vehicle approaching and proceeding through a toll station shall be paid to the toll collector in such manner as may be prescribed by the Minister.

26. Section 4A of the Public Roads Toll Act is amended—

Amendment of section 4A of Cap. 407.

- (a) by deleting subsection (3);
 (b) by deleting subsection (4);
 (c) by deleting subsection (5).

27. Section 4B of the Public Roads Toll Act is amended—

Amendment of section 4B of Cap. 407.

- (a) by inserting the following proviso immediately after subsection (1)—

Provided that the agreement may prescribe alternative arrangements for the levying, collection and administration of tolls and management of toll infrastructure.

- (b) by inserting the following proviso immediately after subsection (2)—

Provided that the Minister may prescribe the base toll rate in the agreement and permit the person referred to in subsection (1) to adjust, vary or otherwise revise the toll in accordance with an adjustment mechanism provided in the agreement.

28. The Public Roads Toll Act is amended by inserting the following new section immediately after

Insertion of new section on Cap. 407.

2020

section 6—

Establishment of
Fund.

No.18 of 2012.

6A. (1) The Minister responsible for the National Treasury shall establish a Fund to be known as the National Roads Toll Fund under the Public Finance Management Act, 2012.

(2) All tolls, except transit tolls, collected by the persons appointed under section 4 shall be remitted to the Fund.

(3) The purpose of the Fund shall be to provide funds for the—

- (a) proper functioning of toll roads and toll stations; and
- (b) development, repair or maintenance of roads as the Minister may direct, taking into account regional balancing.

(4) The Fund shall be administered in accordance with section 24 of the Public Finance Management Act, 2012, and the regulations made thereunder.

29. Section 8 of the Public Roads Toll Act is amended by—

Amendment of
section 8 of
Cap. 407.

- (a) deleting the words “shall be guilty of an offence and liable to a fine not exceeding five thousand” appearing in subsection (1) and substituting therefor the words “commits an offence and shall upon conviction, be liable to a fine not exceeding fifty thousand.”;
- (b) inserting the following new subsection immediately after subsection (2)—
 - (3) Notwithstanding subsections (1) and (2), the person with whom the Minister enters into an agreement under section 4A may collect the unpaid tolls from defaulters as a civil debt

recoverable summarily.

30. Section 11 of the Capital Markets Act is amended in subsection (3) by inserting the following new paragraph immediately after paragraph (g)—

Amendment of section 11 of Cap. 485A.

(ga) license, approve and regulate private equity and venture capital companies that have access to public funds.

31. Section 18 of the Capital Markets Act is amended in subsection (1) by deleting the words “and paying beneficiaries from collected unclaimed dividends when they resurface”.

Amendment of section 18 of Cap. 485A.

32. Section 204A of the Insurance Act is amended in subsection (3) by inserting the expression “within thirty days” immediately after the word “may”.

Amendment of section 204A of Cap. 487

33. Section 5 of the Kenya Revenue Authority Act, 1995, is amended by inserting the following new subsection immediately after subsection (2)—

Amendment of section 5 of No. 2 of 1995.

(2A) The Authority may establish an institution to provide capacity building and training for the better carrying out of its functions.

34. Section 16 of the Kenya Revenue Authority Act, 1995, is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (b)—

Amendment of section 16 of No. 2 of 1995.

(ba) any commission received by the Authority for collecting any revenue on behalf of a county government or government agency:

Provided that such commission shall not exceed two per cent of the total revenue collected on behalf of the county government or government agency.

35. The Kenya Revenue Authority Act, 1995, is amended by inserting the following new section immediately after section 20—

Insertion of a new section 20A in No. 2 of 1995.

Limitation of actions.

20A. Legal action against the Authority shall not be instituted unless—

(a) it is commenced within three years



THE REPUBLIC OF KENYA

LAWS OF KENYA

STATUTORY INSTRUMENTS ACT

NO. 23 OF 2013

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NO. 23 OF 2013
STATUTORY INSTRUMENTS ACT
ARRANGEMENT OF SECTIONS
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PART VII – TRANSITION AND SAVING

27. Transition and saving.
28. Actions necessary after the effective date.

SCHEDULE — EXPLANATORY MEMORANDUM

4. Object of the Act

The object of this Act is to provide a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments by—

- (a) requiring regulation-making authorities to undertake appropriate consultation before making statutory instruments;
- (b) requiring high standards in the drafting of statutory instruments to promote their legal effectiveness, clarity and intelligibility to anticipated users;
- (c) improving public access to statutory instruments;
- (d) establishing improved mechanisms for parliamentary scrutiny of statutory instruments; and
- (e) establishing mechanisms to ensure that statutory instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.

**PART II – CONSULTATIONS BEFORE
MAKING STATUTORY INSTRUMENTS**

5. Consultation before making statutory instruments

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

- (a) have a direct, or a substantial indirect effect on business; or
- (b) restrict competition;

the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

(2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
- (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—

- (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
- (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

5A. Explanatory memorandum

(1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—

- (a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of the Constitution;

- (b) a brief statement of all the consultations undertaken before the statutory instrument was made;
- (c) a brief statement of the way the consultation was carried out;
- (d) an outline of the results of the consultation;
- (e) a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

[Act No. 4 of 2018, Sch.]

PART III – REGULATORY IMPACT STATEMENTS

6. Regulatory impact statements

If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.

7. Contents of regulatory impact statements

(1) A regulatory impact statement shall include the following information about the proposed statutory instrument in clear and precise language—

- (a) a statement of the objectives of the proposed legislation and the reasons for them;
- (b) a statement explaining the effect of the proposed legislation, including in the case of a proposed legislation which is to amend an existing statutory instrument the effect on the operation of the existing statutory instrument;
- (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
- (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;
- (e) the reasons why the other means are not appropriate;
- (f) any other matters specified by the guidelines;
- (g) a draft copy of the proposed statutory rule.

(2) The assessment of the costs and benefits shall include an assessment of the economic, environmental and social impact and the likely administration and compliance costs including resource allocation costs.

(3) The responsible Cabinet Secretary shall ensure that independent advice as to the adequacy of the regulatory impact statement and of the assessment included in the regulatory impact statement is obtained and considered in accordance with the guidelines.

(4) The responsible Cabinet Secretary shall before a statutory rule in respect of which a regulatory impact statement is required is made, give a certificate in writing specifying that—

d)

Briefing Note

Information demonstrating Compliance by the National Treasury with Section 5A of the Statutory Instruments Act, 2013

Background Information

On 30th June 2020, the amendments to the Public Roads Toll Act received force of law through the enactment of the Finance Act 2020. The main purpose of the amendments to the Public Roads Toll Act, was to empower persons who enter into agreements with the Cabinet Secretary responsible for roads to collect road tolls for the roads which are subject to such agreements.

The amendments to the Public Roads Toll Act also empowered the Cabinet Secretary for the National Treasury to establish the National Roads Toll Fund under the Public Finance Management Act 2012, for the deposit and administration of the tolls collected under the Act. These legal developments make it possible for Kenya to implement a national road tolling programme under the PPP framework.

The NRTF Regulations, therefore, seek to create administrative mechanisms for the implementation of the toll road projects under the public private partnerships framework and the enabling provisions of the Public Roads Toll Act, 1984. The National Roads Toll Fund Regulations simply create a Fund, and a governance and administrative framework for its operation. The National Toll Fund will however require prefunding, which will be done through the National Budget Framework.

Compliance with the Statutory Process

We have compiled a detailed account of the statutory steps undertaken in accordance with the following themes set out under Section 5A of the Statutory Instruments Act:

- (a) a statement on the proof and demonstration that sufficient public consultation was conducted;
- (b) a brief statement of all the consultations undertaken before the Regulations were made;
- (c) a brief statement of the way the consultation was carried out;
- (d) an outline of the results of the consultation; and
- (e) a brief explanation of any changes made to the legislation as a result of the consultation.

A. A statement on the proof and demonstration that sufficient public consultation was conducted;

The National Treasury confirms that it adhered to the requirements under the Statutory Instruments Act, 2013 (hereinafter 'the Act'), to satisfy the public participation requirements in regulatory instrument development and that the public consultation process was sufficient. The National Treasury further confirms that the documentation submitted herewith in demonstration of the adequacy of public consultation conducted for this process is comprehensive, accurate and a true representation of the public consultation process undertaken.

B. A brief statement of all the consultations undertaken before the Regulations were made;

1. On Friday 3rd April 2020, the Notice of preparation of a Regulatory Impact Statement was published in the Kenya Gazette (Gazette Notice Number 2797). This publication was made in compliance with section 8 (1) of the Statutory Instruments Act, 2013 which requires that a regulatory Impact Statement be notified in the Kenya Gazette and in a newspaper likely to be read by people particularly affected by the proposed statutory instrument.

2. On the same day, the draft NTF Regulations and the Regulatory Impact Statement were uploaded on the National Treasury and the PPP Unit websites, giving the public twenty-one (21) days until 24th April 2020, within which to submit their comments/memoranda on the draft regulations.
3. On Monday 6th, 14th and 20th April 2020, further notices inviting submission of memoranda by way of public participation by 24th April 2020, were published in the both the Nation and Standard Newspapers.
4. Additional specific emails were simultaneously sent to the Matatu Owners Association, Kenya Truck Owners Association, Kenya Transporters Association, Kenya Association of Manufacturers, Chamber of Commerce, Federation of Kenya Employers, Consumer Federation of Kenya, Katiba Institute, the Fourth Estate, the Transport Committees of the Senate and the National Assembly, the Council of Governors, the Governors of the Counties of Machakos, Kiambu, Nakuru, Uasin Gishu, Kitui, Nairobi and Mombasa, the Kenya Private Sector Alliance, the Law Society of Kenya, the Institute of Certified Public Accountants and the Institute of Certified Secretaries.
5. On Thursday 9th April 2020, hard copy letters were dispatched to the Chairpersons of the Transport Committees of the Senate and the National Assembly, the Council of Governors, the Governors of the Counties of Machakos, Kiambu, Nakuru, Uasin Gishu, Kitui, Nairobi and Mombasa, the Chairperson of and the Chief Executive Officer of the Council of Governors, the Directors General of Kenya National Highways Authority, Kenya Urban Roads Authority and Kenya Rural Roads Authority, the PPP Committee and Directors General and Heads of Department of the National Treasury .
6. The PPP Unit publicised the public participation process on twitter under the PPP Unit's official Twitter handle, which generated significant chatter (both positive and negative).

C. A brief statement of the way the consultation was carried out;

The PPP Office furnished email contacts through which members of the public could submit their comments. The PPP Office Twitter handle was available for submission of comments. Additionally, physical boxes for handwritten public comments were strategically positioned at the PPP offices at 6th Floor of Kenya Re Plaza.

In view of the public health threat of COVID-19, and the Presidential Directive on this matter made on 17th March, 2020, it was not possible to hold public hearings in various counties on the Regulations as earlier envisaged.

D. An outline of the results of the consultation; and

Written submissions were received from a wide cross section of interested institutions including the Rift Valley Connect (RVC), the World Bank, Consumers Federation of Kenya (COFEK), Members of the PPP Committee, the Institute of Certified Public Accountants of Kenya, KeNHA, County Governments, the Motorists Association, law firms and various individuals.

The Unit collated the comments and compiled a matrix categorising the responses into 6 thematic areas namely: Establishment of the Fund, Operationalisation of the Fund, Governance, Levying of Tolls, Tolling System and Infrastructure and a General comments section. The detailed matrix is attached for information.

On various dates in December 2020 and following the date of 8th December 2020, when the draft Regulations were submitted to the Office of the Attorney General, both the World Bank Group and the Vinci Highways Consortium, the entity awarded the tender to construct the Nairobi Mau Summit Toll road project, made appeals for a further review of the said draft Regulations, to address the concerns they raised.

The Directorate held direct meetings with both the Vinci Highways Consortium (VHC) and the World Bank Group on their concerns, all of which were discussed. A summary of the key issues that arose and how they were dispensed with is attached herewith.

Following incorporation of the amendments suggested by VHC and the World Bank and prior to submission of the finalized draft Regulations to the Office of the AG, on 11th February 2021, the Directorate sought for comments on the Regulations from the National Treasury. On 22nd February 2021, the Directorate received comments on the Regulations from the Office of the Principal Secretary and the Department of Macro and Fiscal Affairs. The comments were considered by the PPP Directorate and the required amendments duly incorporated into the Regulations. The matrix of their comments highlighting the adopted amendments is enclosed.

E. A brief explanation of any changes made to the legislation as a result of the consultation.

Summary of Amendments Made to the Public Finance Management Act National Roads Toll Fund) Regulations 2021, following review of stakeholder comments.

In addition, to refinements on drafting language from the legal draftspersons at the Office of the Attorney General, the following is a summary of the key amendments made to the Regulations:

1. Specificity on the powers pursuant to which the Regulations have been made. While mention of the establishment of the Roads Toll Fund is contained in the Public Roads Toll Act, Regulations for the management of public funds are made pursuant to Section 24(4) of the Public Finance Management Act, 2021
2. Definitions: The following additions have been incorporated:
 - a. Clarity that an “Authorized Toll Collector” includes a relevant Contracting Authority or a private party authorized by a Contracting Authority.
 - b. Recognition of the national government “budget framework” as the framework within which annual budget shortfalls will be catered for.
 - c. Introduction of the ‘carrying capacity of the Fund’ as a measure to ensure that new project liabilities are only admitted to the Fund following due diligence and advice from the Committee and recommendations to the Cabinet Secretary on the implications thereof.
 - d. “Financial year” is now defined to provide alignment of the reference with the meaning under the Constitution.
 - e. Specificity on the precise ratio that will apply to the phrase ‘Projected Fund Ratio’ and clarity of the applicable period has been provided. Accordingly, the ratio has been enhanced from the previous 1.05 to 1.3 times of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date, calculated for twelve forward rolling months.
 - f. Enhancement of the ratio that shall be considered as the “Projected Surplus” from 1.10 in any projection period to 1.3. Further clarity has been provided to the effect that this projection shall apply where cash balances, excluding projected inflows within the Fund are the basis for determining the Projected Fund Ratio.
 - g. Deletion of the terminology “termination payments’ as this is catered for in the respective Project Agreements.
3. The imposition of tolls pursuant to the Public Roads Toll Act has been expressly included as an important cross reference in the Public Finance Management Act, Regulations. (Regulation 4).
4. Repetitive language within the objects and purpose and the establishment of the Fund has been removed and greater clarity provided under each. (Regulations 3 and 5).
5. Sources of finances for the Fund have been enhanced to include proceeds from levies from roadside developments, fees for access and advertisements and penalties from breaches of tolling

arrangements by private partners. Where applicable, the statutory basis for the various sources of the funds has also been incorporated. (Regulation 6).

6. Membership of the Oversight committee has been expanded to include 3 members from the private sector appointed by the CS, the PS responsible for roads and the Officer Administering the Fund. The qualifications for the appointment of the private members have also been prescribed as well as provisions on vacation and filling of office for the private members specified. (Regulations 8, 9 and 11).
7. The functions of the Oversight Committee have been streamlined and mundane administrative and routine tasks expunged. (Regulation 10).
8. Alignment has been made to the requirements of the Public Finance Management Act, for the designation as opposed to the appointment of the Officer Administering the Fund. (Regulation 12).
9. The presentation of the functions of the Officer Administering the Fund (OAF) has been overhauled to set out the overall purpose of the Fund, clarify the systems for the proper operation of the Fund and itemize in more explanatory detail, the key functions of the OAF.(Regulation 13).
10. Bank statements, financial statements and statements of amounts held within the designated Fund accounts have been expunged from the evidence that is required to determine Projected Shortfalls. (Regulation 15).
11. Disbursements from the Fund have been expanded to include 'Toll Operators' in addition to 'Service Providers', based on contracted obligations to a Contracting Authority under a Project Agreement. (Regulation 17).
12. A more elaborate process for the 'Payment Procedure by the Officer Administering the Fund' has been included. This includes specifications of payment timelines and the format for submitting payment requests as well as a prescription of the appropriate supporting documentation to facilitate payment. (Regulation 18).
13. To reflect *pari passu* treatment of the Fund's liabilities, a provision has been included to clarify that all liabilities relating to contracted obligations of the Fund shall rank equally. (Regulation 20).
14. To facilitate the initial establishment of the Fund, a provision for the procedure for the pre-funding of the Fund, as a national budget appropriation, has been introduced. (Regulation 22).
15. An important proviso has been introduced for the determination of a projected surplus and to guard against any irregular utilization of anticipatory cash flows, to the effect that the declaration of a projected surplus can only be derived from a Projected Fund Ratio that has been calculated against actual cash balances within the Fund and not projected inflows. (Regulation 23).
16. In line with the Public Finance Management Regulations, express provision has been made within the Regulations to cap administrative costs at 3% of the approved budget of the Fund. (Regulation 25).

17. The provisions on 'Access to Information' have been expanded to require the OAF to publish on the Fund's website at the start of each financial year, specified financial information, including the Fund inflows and sources thereof; the credit balances of available funds for the current financial year; the quantum of committed eligible expenditure; the total number of projects and other activities supported by the fund for the current financial year; and such other information that Fund beneficiaries may reasonably request and approved by the Committee from time to time. (Regulation 27)
18. A new provision on "Submission of Annual Performance Reports" to the Committee by the OAF within 3 months of the end of the financial year has been incorporated, together with the salient themes of what this annual report should include. (Regulation 29).
19. The Winding Up provisions have been expanded to ensure that the winding up of the Fund by the Cabinet Secretary can only take place once all the Project Agreements have been terminated/expired; the Committee has made recommendations supporting such termination taking into account views and representations of project participants; and the Cabinet has considered and approved the recommendation of the Cabinet Secretary to wind up the Fund through the prescribed process that requires National Assembly approval. These conditions shall apply conjunctively. (Regulation 32)
20. The revocation of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986 made under the Public Roads Toll Act, has been provided for. (Regulation 33).

THE NATIONAL TREASURY
