

THE IMPACT OF PROPOSED LEGISLATION ON THE MULTIMODAL TRANSPORTATION SECTOR IN NIGERIA

Introduction

The growth of any nation's economy is tied implicitly to the level and efficiency of its public infrastructure, principal amongst which is transportation. It is therefore imperative for every progressive nation to have a functional and efficient transport system, which is available and accessible to all in spite of age, tribe, geographic location or financial capacity. In a bid to achieve this, many countries develop regulatory frameworks to intervene in the operation of the transport sector. This intervention is carried out by fixing or controlling tariffs, profits, regulating market entries or exits and ensuring the maintenance of fair and competitive practices across the transport sector.

Prior to now, the regulation of the Nigerian transport sector had been at sub-sectoral levels with multiple regulatory agencies controlling different constituents within the market. This is particularly pronounced in the marine transport sub-sector where different elements of operations within the sub-sector are regulated by the Nigerian Maritime Administration and Safety Agency, the Nigerian Ports Authority, the Nigerian Shippers Council, and the National Inland Waterways. In spite of this multiplicity of regulators, there is a visible absence of an economic regulator for the sector except for air transport, which is regulated by the Nigerian Civil Aviation Authority (NCAA).

The absence of an economic regulator has therefore encouraged anti-competitive behaviour such as exercise of dominant power leading to disproportionate tariffs. A case in point is the occasional rifts between shipping companies and terminal operators in the maritime transport sector. These practices have resulted in



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increased costs for users of transport services and the economy at large. Ultimately, would-be investors are discouraged from investing in the sector given the lack of a level playing field.

In line with the Economic Recovery and Growth Plan, which seeks to drive growth and investment across the economic value chain; the Nigerian Senate, on 15th March, 2018, passed the National Transport Commission Bill ("the Bill"). The Bill seeks to establish a framework for the economic regulation of Nigeria's multi-modal transport sector by one single regulator. The Bill is focused on influencing the economic behaviour of all operators within the sector, including government agencies and corporations.

This article highlights the key provisions of the Bill and proffers recommendations that may assist the Federal Government achieve a timely realisation of the objectives of the Bill.

Overview of the Bill

1. Objectives of the Bill

The objectives of the Bill include:

- i. establishing the National Transport Commission as an effective, impartial, and independent regulatory authority in the sector;
- ii. creating an efficient economic regulatory framework for the sector;
- iii. providing a mechanism for monitoring compliance of government agencies and transport operators in Nigeria;
- iv. protecting the rights and interests of service operators and users within Nigeria;
- v. promoting the implementation of the National Transport Policy; and
- vi. creating an enabling environment for private investments within the sector.

It is evident, from the objectives of the Bill, that its primary aim is to revamp the transport sector in its entirety by strengthening the regulator, protecting the rights of all stakeholders across the value chain and creating an economic environment, which would be attractive to and conducive for investors. Whilst such is the case, a greater portion of the Bill focuses on the establishment, functions, and powers of the National Transport Commission. It is therefore expected that the Commission, having been given the duty of realising the objectives of the Bill, will develop more robust regulations in this regard.

It is important to note that whilst the Bill applies across the sector, the regulation of air transport services is excluded from its purview. The Bill therefore only applies to land transport (road, rail and water transport). We surmise that the reason for this exclusion is the existence of the NCAA as the recognised regulator for the air transport sub-sector in Nigeria.

2. Highpoints of the Bill.

i. Establishment of the National Transport Commission

The Bill establishes the National Transport Commission (“the Commission”). The Commission will be

recognised as the sole economic regulator for the transport sector (excluding air transport); it has the principal duty of implementing the Bill – when it becomes law – and realising the objectives.

For the purpose of realising the objectives of the Bill, the Commission is expected to:

- a. create an efficient economic regulatory framework for the provision of transport services;
- b. promote competitive market conduct;
- c. ensure accessibility of transport facilities, channels, and routes;
- d. and monitor the performance of the regulated transport industry.

The Commission, having been authorized to make regulations and guidelines for the implementation of the Bill’s objectives, will be expected to immediately set out the modus for performing its functions.

The Bill further provides that the National Council on Privatisation will have the role of ensuring the formation of the institutional structures of the Commission after the Bill comes into force. It is unclear but suggestive that one may expect privatization of some Government-owned transport assets in the mid- to long-term horizon.

ii. Powers of the Commission

a. Regulation of Tariffs

The Bill empowers the Commission to regulate tariffs (including fees, dues, prices, charges, and rates) for prescribed goods and services supplied within the sector. (“Prescribed goods and services” is defined under Section 101 of the Bill as “goods and services, or access to transport services and facilities, made, produced, supplied or provided within the regulated sector, which goods and services are specified by the Empowering Instrument as being goods or services in respect of which the Commission has power to regulated tariffs.”)

All regulated transport service operators will be required to file their tariffs or range of tariffs with the Commission and are restricted from imposing any tariff or charges, which have not been approved by the Commission.

This is to ensure that all tariff rates fixed by transport service operators reflect the principles of fair and competitive trading having regard to the peculiar circumstances of the regulated transport sub-sector and that of the specific good or service. This is expected to result in the predictability of tariffs across the sector for the benefit of investors and users.

b. Registration of Transport Operators

Under the Bill, every transport operator is required to register with the Commission and obtain a Registration Certificate. The manner in which the application for registration is to be made will be specified by the Commission in its guidelines and regulations. The Commission will be required to either issue a Registration certificate or a written notice of refusal to the applicant within six weeks of submission of an application. The provision in respect of timeline is important as unnecessary delays in processing of applications would defeat the purpose of the Bill.

Upon registration, relevant details of the transport operators will be entered into a register to be maintained by the Commission. The existence of a single record of operators in the sector would provide the Commission with a bird's eye view of the sector, which would be an asset in the performance of its regulatory functions.

c. Oversight, Monitoring and Reporting

The Commission will monitor all matters relating to the performance and compliance of all transport service operators with the provisions of the Bill and other sector legislations. The Commission is expected to publish annual reports at the end of each financial year. The Report will provide an update on its operations and administration of the Bill; the quality of services in the sector; tariff rates and charges paid by port, inland waterways facilities, railway, and road transport users anti-competition practices, including cross-subsidies; the development of industry self-regulation;

any deficiencies in the scope of operation of the Bill and any other matters, which the Commission considers relevant.

The obligation to give annual report of its operations in itself serves as a check on the commission to ensure that it is consistently on the path of realizing its mandate. Further, the annual report will be an invaluable repository of information on the sector, which is especially useful to investors as well as the Government to assess progress made and sector deficiencies. It is also a veritable tool for economic planning and resource allocation.

d. Competition Regulations

The Commission is empowered to make and enforce guidelines and regulations to prohibit anti-competition behaviours in the sector. The Commission will also enforce other anti-competition laws relating to the sector.

Transport service providers will be prohibited from engaging in conducts aimed at fostering anti-competition in any aspect of the regulated transport industry such as entering into agreements or arrangements containing terms, which promote monopoly. It is expected that this will promote more private participation and inflow of private (local and foreign) capital into the sector. Further, users of transport services would be protected from abusive monopoly, price manipulation and poor services.

e. Dispute Resolution

The Commission is vested with the power to resolve disputes relating to matters falling within the purview of the Bill or any of its subsidiary legislation. The Commission may however only exercise this power if the parties to a dispute elect to refer the dispute to the Commission by written notice. Parties to a dispute will be required to attempt amicable settlement prior to requesting the Commission to intervene. This may be a better alternative to litigation and would afford disputants the advantage of having their disputes resolved by industry experts.

Upon concluding and giving its decision in respect of a dispute, the Commission will issue a certificate to the successful party for leave to proceed to the Court for enforcement. The decision of the Commission will have similar force as an arbitral award and shall be binding on the parties to the dispute.

Recommendations

Having examined the key provisions of the Bill, we note that for effective implementation, it is imperative that the Commission considers and implements the under-listed, which have been identified as critical to realising its mandate under the Bill.

i. Formulation of the Commission's Regulations

On account of the several gaps in the Bill, the Commission is empowered to make regulations and establish guidelines in respect of all matters relating to the objectives of the Bill. The successful implementation of the Bill will therefore depend on the timely formulation of applicable Regulations, Guidelines and Rules necessary for the implementation of the Bill.

One of the gaps identified is in respect of the Commission's power to regulate tariffs in respect of "*prescribed goods and services*". The Bill however fails to define what will constitute "prescribed goods and services"; this pre-supposes that the Commission will by regulations outline what will constitute such. Another example is the Commission's responsibility to maintain a register of "*all agreements required to be registered under the provisions of the Bill*". The Bill fails to outline the specific agreements requiring registration, or the effects of non-registration of such agreements.

It is therefore imperative that the Commission makes robust and comprehensive regulations, immediately upon inception, to address the gaps in the Bill to enable it to exercise its powers and perform its functions optimally.

ii. Timely Formation of the Institutional Structures of the Commission

Section 100 of the Bill states that, the National Privatization Council will have the responsibility of bringing into being the institutional structures of the Commission not later than three months after the Bill comes into force. We suggest that the timeline prescribed in the Bill be strictly adhered to as this will be necessary to ensure that the Commission commences operations without delay.

Maintaining the Independence and Transparency of the Commission

Two key principles for an effective regulatory institutional framework are independence and transparency. There is need for the Commission to be and remain independent from any form of influence from Government or interest groups. The Commission must not only be independent but must be seen to be independent in order to maintain public confidence in the objectivity and impartiality of its decisions and effective operation. Maintaining the objectivity, and impartiality of the Commission is fundamental to ensuring that all the operators and users within the sector are held to the same standards prescribed by the Bill and the Commission's regulations.

Conclusion

The creation of an effective economic regulatory framework for the transport sector is a key component of Nigeria's efforts to boost economic growth in the non-oil sectors of the economy. The effective administration and enforcement of the Bill, when assented, will create an enabling environment for increased inflow of private capital, prevent anti-competitive practices, introduce a stable economic regulatory framework, and establish a one-point source for measuring growth in the sector. The passage of the Bill is therefore a right step towards the attainment of real, tangible and sustainable progress within Nigeria's multi-modal transport sector.



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