COMMENTARY ON DRAFT DISASTER MANAGEMENT FUND REGULATIONS, 2022

Introduction

The Draft Public Finance Management (Disaster Management Fund) Regulations, 2022 ("the Draft Regulations") and Regulatory Impact Assessment were published on February 18th, 2022, with a call for public comments and submissions thereto. These Draft Regulations are proposed under section 24 (4) of the Public Finance Management Act ("the Act") which empowers the Cabinet Secretary to establish a national government public fund with the approval of the National Assembly.

The Disaster Management Fund is intended to provide a centralized pool of funds accessible by both national and county governments that will provide financing mechanisms for timely, transparent and accountable disaster management in Kenya.

Kenya is vulnerable to both natural and man-made hazards, which include drought, floods, land-slides, urban and forest fires, armed conflicts, human and animal diseases, pests, earthquakes, infrastructure collapse, and road accidents, affecting an estimated 3 to 4 million people annually. The Regulations seek to establish the Disaster Management Fund ("the DMF") which shall be used to mobilize resources towards efficient and effective disaster management. While the Act makes provision for other emergency funds at both the national and county government level (examples include Contingences Fund established under Article 208 of the Constitution of Kenya, the COVID-19 Emergency Response Fund, 2020, the National Drought Emergency Fund, 2021, and various county level Emergency Funds established under Section 108 of the Act), these Draft Regulations are intended to centralise disaster management funds that would be available to levels of government in a consistent manner.

Key Definitions

The Regulations define a *"disaster"* as any progressive or sudden disruption of the functioning of a community, which causes widespread human, material, economic or environmental losses which exceed the ability of the affected community to cope using its own resources. *"Disaster Management"* is defined as the continuous and integrated multi-sectoral process of planning and implementation of measures geared towards disaster preparedness, response, mitigation and recovery which *"preparedness"* refers to all pre-disaster activities that are undertaken within the context of disaster risk management and are based on sound risk analysis.

Other definitions include *"response"* which refers to the provision of emergency services and public assistance during or immediately after a disaster in order to save lives, reduce health -impacts, ensure public safety and meet the basic subsistence needs of affected people. *"Recovery"* has been defined to mean the restoration and improvement of facilities, livelihoods and living conditions of disaster affected communities including efforts to reduce disaster risk factors while *"mitigation"* refers to the structural and non-structural measures undertaken to limit the adverse impact of natural hazards, environmental degradation and technological hazards.

While these definitions differ from those presented in the National Policy for Disaster Management in Kenya, they provide a broader context within which to interpret disaster management.

Institutional Framework

The DMF shall be managed by the Disaster Management Fund Board ("the Board") headed by a Chairperson as established under Regulation 10. The functions of the

Board are to, *inter alia*, provide oversight on the administration and management of the DMF, mobilize resources, and set a disaster response threshold for disbursement of funds. The Draft Regulations also establish a Secretariat led by Head to provide support to the Board and who shall report to the Administrator of the DMF.

The Draft Regulations provide that the DMF shall be administered by an Administrator, who shall be the accounting officer responsible for disaster management (the Principal Secretary) and shall also serve as the Secretary to the Board. The Administrator is required, amongst other things, to supervise and control the proper administration of the fund, prepare and sign and submit financial reports to the Board, prepare and submit reports to the Auditor General as well as prepare annual reports on the financial and non-financial performance of the DMF.

As the Disaster Risk Management portfolio has changed within different ministries over the years and noting that the Principal Secretary responsible for disaster management is a key member of the Board, it is very likely that there would be a conflict in the Administrator's reporting obligations to the same Board. It may therefore be more prudent to have the "head" of the Secretariat, and who is appointed competitively, serve as the Administrator to avoid multiple levels of administration and increased operational costs while ensuring continuity during transitions of the disaster management portfolio from one ministry to another or changes in the office of the principal secretary.

DMF is proposed to be capitalised with an initial Kes 3 Billion in FY 2022/2023which is Kes 7 Billion less than the cap in the Contingencies Fund established under the Constitution

Capitalisation of, and Apportionment of Monies from, the DMF

Regulation 5 highlights the use of the monies of the DMF to include facilitating disaster preparedness, mitigation, response and recovery. The DMF shall have an initial capital of Kes 3 Billion (approximately US$30 Million) to be appropriated by Parliament in the upcoming financial year 2022/2023. While this may seem a significant sum, it is important to note that the annual allocation under the Contingencies Fund is capped at Kes. 10 Billion (US$100 Million) and therefore the initial capitalization of the DMF falls significantly below this threshold.

Other sources of the DMF will include grants or donations, income generated from proceeds of the DMF, or any money received by the DMF from any other lawful source as approved by the Cabinet Secretary responsible for matters relating to finance. Humanitarian assistance to Kenya's disaster response has historically been from donor funding and humanitarian appeals which have consistently resulted in a significant funding gap year on year and Emergency Funds established by the County Governments are also restricted to a maximum of 2% of the previous year's total audited revenue and less than 50% of the counties have established these funds.

Regarding utilisation of the DMF funds, Regulation 8 requires that 17% be allocated to disaster mitigation and preparedness, 55% to disaster response and 25% to disaster recovery while administrative costs are capped at 3% of the approved budget as the administration cost of the DMF in compliance with the provisions of the Act. The Second Schedule enumerates levels of disaster response, and the Board is required, under Regulation 18, to prepare additional requirements for eligibility to access the DMF. The Board is also required to develop operational procedures for the disbursement and accountability of funds, but no timeline is provided within which these should be published following establishment of the Board.

The Medium Term Plan III (2018 – 2022) which comes to an end in June 2022, anticipates the implementation of an integrated Disaster Risk Management System focussing on preventing or reducing the risk of disasters, mitigating the severity of disasters, enhancing preparedness, rapid and effective response to disasters and post-disaster recovery and it is hoped that this will be in place timeously to ensure the efficacy of the management of the DMF.

Regulation 24 poses some conflicting timelines related to the approvals of requests for funding. On the one hand, the Administrator of the DMF shall on evaluation of a request for funding make recommendations to the Board for consideration and approval and the Head of the Secretariat is obliged to communicate the decision of the Board within 7 days of that decision. There is no timeline within which the Administrator is required to evaluate the request for funding. However, paragraph (5) of the same Regulation 24 requires that a request for funding shall be considered and communicated in writing within 24 hours of receipt of the application. It is likely that this was meant to refer to Regulation 22 which deals with a request for funding of activities on Disaster Response guided by a declaration of a disaster by the President or proof that the magnitude of the disaster has reached the threshold determined by the Board, and it is hoped that these timelines will be clarified in the final draft.

Regulation 37 imposes an imprisonment term of not less than five years or a fine not exceeding ten million shillings for any person found guilty of misappropriating any funds or assets from the DMF. It is interesting to note that the 5-year term in these Draft Regulations is recorded as a minimum while the 5-year term threshold in the Drought Emergency Fund Regulations, 2021 is set as a maximum.

Winding up of the DMF

The DMF may be wound up in accordance with Section 24 (9) of the Act provides that upon the winding up of a national public fund, the administrator of the DMF shall pay any amount remaining in the DMF into the National Exchequer Account, the Cabinet Secretary to pay any deficit from the DMF from the funds of the National government in the National Exchequer Account and also submit a final statement of accounts to Parliament. It is notable that there is no term designated for the DMF, in which case, Regulation 2017(1)(i) would be applicable which presumes that an initial approval for the establishment of a national public fund shall be for a maximum of 10 years beyond which the approval of the Cabinet Secretary for the National Treasury and Parliamentary should be sought.

Final Remarks

The Draft Regulations are a welcome effort at the centralization of disaster management in Kenya and it is hoped that the final version will be refined to ensure seamless, effective and efficient operation of the DMF in order to achieve the objective of providing a coordinated approach to disaster risk financing across both national and county government institutions. To this end, it will be important to understand what the impact of the Draft Regulations and proposed DMF will be on the National Climate Change Fund intended to be established under the Climate Change Act, 2016 and various county climate change funds which, as at 2020, had been developed or were under development in close to 15 counties.

The Draft Regulations also bring Kenya a few steps closer to compliance with its regional and international obligations under various instruments including the AU Regional Strategy for Disaster Risk Reduction, the EAC Treaty and EAC Disaster Risk Reduction Act, 2016 as well as the Sendai Framework for Disaster Risk Reduction 2015 - 2030, the Paris Agreement and the Bonn Challenge among others.

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