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The Petroleum Industry Governance Bill, **2017**

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In a much awaited development, after about a decade of political twists and turns, the Nigerian Senate has on 25 May, 2017, approved the Petroleum Industry Governance Bill (SB.237) (the “Governance Bill”).

Unlike its *forerunner*, the overly ambitious and much storied Petroleum Industry Bill (“PIB”), which adopted an all-encompassing approach to the reform of the operation and regulation of the Nigerian petroleum industry, the Governance Bill takes a more pragmatic and focused approach in tackling its subject matter. This modest approach became necessary after the Nigerian Government and various stakeholders in the petroleum industry came to realise the enormous difficulty and impracticality of seeking to undertake a wholesale overhaul of the entire industry and its numerous governing laws and regulations through the medium of one single law.

At its core, the much-pared down Governance Bill deals mainly with the governance and institutional framework for the petroleum industry, and seeks to establish bright lines between policymaking, regulation and commercial activities, and the authorities or bodies that are charged with those respective functions. It also seeks to engender value addition, transparency, accountability and a re-orientation towards optimal profit creation for national petroleum assets.

It remains for the Governance Bill to be considered and hopefully passed by the House of Representatives, which is the second chamber of Nigeria’s bicameral National Assembly, after which the bill will be transmitted to the President for his assent. If the President gives his assent, the bill will become law.

It is expected that the other subjects not within the remit of the Governance Bill such as the fiscal framework, the host communities funding and consenting regime for the transfer and assignment of interests in petroleum assets will be accorded the same priority that the Governance Bill was given.

In this first of a series of updates on the Governance Bill and its implications for the petroleum industry, we have provided a brief summary of the highlights of the bill, including the (i) clear intention of the bill to limit the role of the Minister of Petroleum Resources (“Minister”) essentially to that of a policy maker, (ii) the transfer of industry regulatory functions to a new independent petroleum regulatory commission; and (iii) the restructuring of the Nigerian National Petroleum Corporation (“NNPC”) with the aim of resolving its age-long funding challenges, lack of transparency and accountability, and steering it towards value creation and profitability.

Role of the Minister of Petroleum Resources

The Minister remains responsible for the supervision of operations and affairs of the Industry. He is authorized to determine, formulate, modify and monitor petroleum policies and after due consultation with the relevant stakeholders in the Industry and the general public, issue new petroleum policies. The Minister is authorized on behalf of the Federal Government to negotiate and execute international petroleum treaties and agreements with other countries and international organizations and do all such things incidental and necessary for the performance of the duties of his office. The Governance Bill also preserves the right of pre-emption of the Minister to all petroleum and petroleum products in the event of a state of national emergency.

However, unlike the position under the current Petroleum Act, P10, LFN 2004 which confers discretionary powers on the Minister to grant, renew extend or revoke petroleum exploration and production licences and leases, the Governance Bill gives the power to exercise those functions, in the Nigeria Petroleum Regulatory Commission (the “Petroleum Regulatory Commission” or the “Commission”). The Bill also transfers the power to grant licences in relation to refineries and such other downstream activities as the importation, sale, storage or distribution of petroleum products, and price control of petroleum products from the Minister to the Petroleum Regulatory Commission.

With regards to the issuance of regulations, the powers of the Minister under the current Petroleum Act, the Hydrocarbon Oil Refineries Act and the Oil Pipelines Act have been completely whittled down. Under the Governance Bill, those rule-making functions will be assumed by the Petroleum Regulatory Commission. In the same vein, the regulatory functions of the chief executive of the Petroleum Inspectorate set up pursuant to the NNPC Act shall be assumed by the Nigeria Petroleum Regulatory Commission. And all the resources, rights, liabilities, obligations and assets of the Department of Petroleum Resources, the Petroleum Inspectorate and the Petroleum Products Pricing Regulatory Agency will be transferred to the Petroleum Regulatory Commission.

The Nigeria Petroleum Regulatory Commission

It is laudable that the tenets undergirding the establishment of the Petroleum Regulatory Commission are the necessity of agency autonomy and independence from ministerial control. These are apparent in the clarity of the functions of the Commission as well as the composition of the Governing Board of the Commission (“Board”). The Minister has no seat on the Board, and the members of the Board will be appointed through a transparent process by the President subject to the approval of the Senate. In instances, where the Minister issues general policy directions to the Petroleum Regulatory Commission, the Commission shall only be obligated to implement such policies if they are not in conflict with the provisions of the enabling law.

The Commission’s functions will include enforcing compliance with all applicable laws and regulations, executing policies, issuing fair and balanced regulations, developing and publishing methodologies for tariffs and pricing relating to third party access to petroleum facilities, evaluation of national reserves, licensing for the upstream,

midstream and downstream regulated activities, modification and revocation of licences, allocation of petroleum production quotas in a non-discriminatory manner, promotion of competition and arresting situations of abuse of dominant power, establishing consumer protection measures, developing market rules for trading in wholesale gas supplies and developing open access rules for petroleum products and transportation infrastructure. The Governance Bill also gives the Commission full responsibility for environmental matters and enforcement of environmental policies, regulations and laws in the petroleum industry.

Establishment of Commercial Entities and the future of the Nigerian National Petroleum Corporation

In a bid to reposition Nigeria's upstream assets and its key asset-holding vehicles for self-sustainability and accountability, the Governance Bill provides for the creation of three new entities, namely the Ministry of Petroleum Incorporated ("MOPI"), the Nigeria Petroleum Assets Management Company ("NPAMC") and the National Petroleum Company ("NPC").

The MOPI which will be established as a corporation will be the sole investment vehicle of the Government and will hold the shares of the Government in the successor commercial entities like NPAMC and NPC.

NPAMC will be incorporated as a company limited by shares under the general company law. It will be capitalized from public funds with the expectation that it would fund its operations from its revenue after it becomes fully operational. The production sharing contract assets currently held by the NNPC will be transferred to it under a transfer order to be issued by the Minister. It will also assume specified liabilities, rights, obligations and employees of the NNPC.

Its mandate includes the management of the production sharing contract assets with a view to achieving maximum return on investment for the Federal Government. To further entrench the Governance Bill's commitment to accountability and transparency, NPAMC has an obligation to comply with the Codes of Corporate Governance issued by the Securities and Exchange Commission, and publish its annual reports and accounts on its website and public media. It is comforting to note that the Governance Bill preserves all existing causes of action and contractual relationships (including bonds, loans, financing agreements, joint operating agreements, production sharing contracts and all working arrangements) relating to the assets that will be transferred from the NNPC to NPAMC. All such relationships, etc shall be fully effective and enforceable against or in favour of NPAMC as though NPAMC was the original named party or against both NPAMC and NNPC depending on the terms of the transfer order. Furthermore, the Governance Bill expressly exempts the transfer of the assets from any stamp duties or capital gains tax that would otherwise have been chargeable as a result of the transfer.

Similar to NPAMC, the third entity, NPC will be set up as a company under general company law with a transitional equity divestment plan that ensures that the Government retains controlling interest in the company. At incorporation, its shares will be held by the Ministry of Finance, the Bureau of Public Enterprises and MOPI. Within five (5) years from the date of incorporation, NPC shall divest a certain

percentage of its shares to the public, and within ten (10) years of the date of incorporation, divest an additional number of its shares to the public. Certain assets, liabilities and obligations of NNPC will be transferred to NPC pursuant to a transfer order issued by the Minister and NPC's mandate will be the operation of such assets on a fully commercial basis.

In a bid to insulate NPC from the transactional bottlenecks that the NNPC continues to experience in the areas of commercial borrowing, incurring expenditure for its petroleum operations, public procurement of technical services and disposal of public assets, the Governance Bill expressly exempts NPC from complying with the provisions of the Fiscal Responsibility Act, 2007 and the Public Procurement Act, 2007. However, it will be liable to comply with the general rules of accountability applicable to companies under the Companies and Allied Matters Act and the Investment and Securities Act. To enable continuous creation of value and a clean break from existing liabilities, the board of directors of NPC is empowered (with the approval of its shareholders) to utilize any appropriate mechanism including asset and interest sale to offset any liabilities, meet future obligations and implement strategic objectives.

Another feature of the Bill that aims to resolve a funding challenge that has historically plagued the NNPC is a provision entitling NPC to, notwithstanding the provisions of any law to the contrary, retain the revenue from its operations to defray its expenses including its cash call obligations and its payment obligations to its lenders. The extent of the efficacy of this provision is open to possible debate in the light of the judicial decisions on the constitutional requirement for all revenue of the Nigerian Federation to first be paid into a central public account known as the Federation Account.

As with NPAMC, the Governance Bill also preserves all existing causes of action and contractual relationships (including bonds, loans, financing agreements, joint operating agreements, production sharing contracts and all working arrangements) relating to the assets that will be transferred from NNPC to NPC. All such contractual arrangements shall be fully effective and enforceable against or in favour of NPC as though NPC was the original named party or against both NPC and NNPC depending on the terms of the transfer order. Again as with NPAMC, the transfer of all such assets from NNPC to NPC is exempt from any stamp duties or capital gains tax that would otherwise have been chargeable as a result of the transfer.

To ensure that NPAMC and NPC are not financially encumbered with the liabilities of NNPC, the Governance Bill proposes the incorporation of a liability management company to which certain liabilities of the NNPC will be transferred for resolution purposes. Upon the conclusion of the settlement of such liabilities, the liability management company shall be wound up.

Miscellany

If it is ultimately enacted into law following passage by the House of Representatives and assent by the President, the Governance Bill shall prevail over any existing law including the provisions of the Petroleum Act, the Oil Pipelines Act, Hydrocarbon Oil Refineries Act and the Companies and Allied Matters Act to the extent of any inconsistencies between the Bill and any of those laws. The Governance Bill will also repeal the Petroleum Products Pricing Regulatory Agency (Establishment) Act, the Petroleum Equalisation Fund (Management Board) Act, Cap P11, LFN 2004, the Nigerian National Petroleum Corporation Act Cap P43, LFN 2004, Nigerian National Petroleum Corporation (Projects) Act, Cap N124, LFN 2004, and the Nigerian National Petroleum Corporation Amendment Act, Cap N123, LFN 2004. All validly existing licences, leases and permits, certificates or authorisations issued by the Department of Petroleum Resources or under any of the above laws shall continue to have effect for the remainder of the period of their validity.

Conclusion

Without a doubt, the passage of the Governance Bill by the Senate following its third and final reading on 25 May, 2017 (*more than a decade after its forerunner, the Petroleum Industry Bill was introduced*) is commendable.

Whilst there are still a number of uncertainties on (i) the approach that the House of Representatives will take in its review and consideration of the Governance Bill; (ii) the scope and content of the harmonized Governance Bill that will be passed by the House of Representatives, and (iii) whether or when the President will give its assent to the Bill, the Governance Bill in its current state serves as a springboard for the much awaited dispensation of non-discriminatory allocation of acreages and curbing of abuse of dominant power.

Historically, petroleum ministers have been known, in the exercise of their discretionary powers, to make certain allocations without significant consideration being given to the capabilities of the potential awardees to successfully exploit such resources. Consequently, a considerable number of prolific fields particularly gas bearing assets remain unexploited long after being awarded.

Also, with the introduction of a single and independent petroleum regulator, operators within the sector and potential investors will no longer have to contend with similar requirements from multiple agencies. A single petroleum regulatory agency will assist greatly to streamline the regulatory process, introduce clarity and reduce the several layers of bureaucracy in a sector that is already notorious for unnecessary regulatory processes and hurdles.

An endemic problem in the management and operation of the nation's petroleum assets has been the absence of transparency. If the proposal to restructure the NNPC for transparency, accountability and value addition scales the outstanding regulatory and executive hurdles, the nation's asset-holding vehicles will, for the first time in Nigeria's history, become positioned to compete globally and attract funding for resource exploitation.

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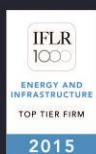
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