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The Consent Regime for Mergers, Acquisitions and Divestments in Nigeria's Midstream and Downstream Petroleum Sector: What is New?

Introduction

Prior to the enactment of the Petroleum industry Act, 2021 ("**PIA**"), the transfer of licences, rights or interests in Nigeria's midstream and downstream petroleum sector was, **arguably,** subject to **the Guidelines and Procedures for Obtaining DPR Approval for Transfer of Licence, Rights or Interests in the Downstream Sector of the Nigerian Oil and Gas Industry, 2020** (the "**2020 Guidelines**"). The scope of application of the 2020 Guidelines remained controversial, as it was not, for instance, clear if the assignment of interests in an oil pipeline licence fitted neatly into the scope covered by the 2020 Guidelines. Another of such controversies was the threshold required to trigger the regulator's consent. There was a school of thought that argued that the 2020 Guidelines applied where the transferee sought to acquire more than fifty percent (50%) of the interests of the transferor. These controversies prolonged the closing of transactions, and in certain instances, the application of the 2020 Guidelines were de-prioritised.

In recognition of the importance of having an unambiguous and comprehensive regulatory framework that encourages compliance, the Nigerian Midstream and Downstream Petroleum Regulatory Authority (the "**Authority**"), in exercise of the powers conferred upon it by sections 33 and 117 of the PIA, issued the **Assignment or Transfer of Licence and Permit Regulations, 2023** (the "**Regulations**").

The key highlight of the Regulations is that it uses the phrase "**assignment of a licence or permit**" as a **proxy** to cover mergers, acquisitions, divestments, re-organisations and devolution of ownership of interests occurring in Nigeria's midstream and downstream petroleum sector, and subjects these transaction types to the approval of the Authority. The Regulations also set out the eligibility criteria, such as the technical, financial and managerial capabilities of the proposed transferee, for procuring the Authority's approval.

(1) Transaction types that qualify as an "assignment or transfer of licence or permit"

In construing section 117(1) of the PIA, *the principal legislation on the assignment or transfer of licence or permit*, the Regulations introduce a broad and inexhaustive definition of "assignment" or "transfer". Essentially, any type of transaction entailing an assignment or transfer of direct or indirect interest or change in the ownership or control of **a company that holds a permit or licence to operate in the midstream or downstream petroleum sector** will require the prior written consent of the Authority. This means that the Regulations have far reaching implications and will go as far as affecting the transfer of shares at the ultimate beneficiary or holding company's level.

The transaction types include:

- A merger of two or more companies.
- Acquisition of a company or asset[1].
- Internal re-organisation.
- Transfer of a licence or permit to a new company (for e.g., a special purpose vehicle).
- Devolution of ownership of shares by operation of law or testamentary device.
- Transfer or exchange of shares – i.e, the acquisition of part or all the shares of a company holding a licence or permit.
- Private placement or public listing.

(2) Notification of Intention to Assign by the Transferor

As a first step in the consenting process, the proposed transferor is required to notify the Authority of its "intention" to undertake an assignment or transfer. Although, the Regulations do not provide any guidance on what constitutes a "transferor's intention", or the documentary evidence required to substantiate this, it is not unreasonable to argue that this obligation will be triggered once the transferor comes to a reasoned decision substantiated by a board resolution, shareholder resolution or management decision. Also, "intention" may be deemed to exist once the proposed transferor has conclusively determined the matters required to be contained in the "**Notification of Intention**", such as the reason for the assignment, the method (for example, selective tendering, negotiated transfer or an open bid process) and the possible technical and economic value of the assignment.

(3) Application for the Consent of the Authority by the Transferee

Under the Regulations, it is the responsibility of a prospective transferee to apply for the consent of the Authority. Upon the receipt of the Authority's response to the Notification of Intention, or the expiration of twenty-one (21) working days where no response is received from the Authority, the **prospective transferee** may **apply** for the Authority's consent to the assignment and **pay** the prescribed consent fees. In support of its application, the prospective transferee is required to submit a copy of the title documents, which must be certified by a court of competent jurisdiction. Title documents include the deed of assignment,

[1] Acquisition means a corporate transaction where one company purchases all or a substantial interest, portion, shares or facility of another company, such that the acquired company becomes a subsidiary or division of the acquiring company. Substantial interest in this context is where the acquirer purchases

purchase agreement, deed of lease, certificate of occupancy purchase agreement and any other document evidencing ownership.

It appears that the Regulations have given statutory flavour to the common market practice (as we typically see in acquisitions and divestments in the Nigerian petroleum sector) where the transferee bears the financial burden to pay any consent fees / premium. Therefore, a prospective transferee will have to assess this additional burden as part of its completion risk profile.

(4) Due Diligence

The Authority is obligated to conduct due diligence on the proposed transferee in accordance with guidelines to be issued by the Authority. Interestingly, the Regulations do not provide a timeline within which the due diligence must be conducted and / or completed. However, based on regulation 7(1) of the Regulations, we expect the due diligence to be conducted well within the ninety (90) day period from the date the application for consent was received by the Authority.

(5) Deemed Approval

The Regulations affirm the greater level of certainty introduced in the PIA via the deemed approval provisions. The Regulations impose an obligation on the Authority to communicate its decision on the transferor's Notification of Intention within twenty-one (21) working days from the date of receipt of the notification. Where no response is received, the approval of the Authority is deemed to be granted and the transferor may proceed to the next stage of the transaction. In addition, the Regulations vest the right of publication of the approval in the transferor, and this becomes a useful tool, in the hands of the transferee, for conclusively establishing the existence of an approval, particularly where a deemed approval is obtained.

Similarly, following the application for consent by the transferee, the Authority is required to communicate its consent or refusal of the application within ninety (90) days from the date of receipt of the application. Where no response is received, the consent of the Authority is deemed to be granted.

The introduction of the deemed approval construct in the oil and gas mergers and acquisitions ("**M&A**") space is a welcome addition, which is expected to mitigate completion delay risks, improve deal efficiency and reduce costs associated with prolonged transactions. Also, minimizing completion delay will incentivise regulatory compliance, which is critical in the M&A process.

above fifty percent (50%) interest in the acquired company. Assignment by acquisition also includes the direct or indirect take over or acquisition of the entire rights or interest in a licence or permit, and associated assets, including the acquisition of interests in a parent company whose affiliate has interests in a licence or permit in Nigeria.

Instructively, to ensure fairness to the transacting parties, a party who has been refused consent is afforded the opportunity to be informed of the reason for the refusal of consent and is entitled to make further representations to aid its case.

(6) Change of Name

Licence and permit holders are now required to notify the Authority prior to a change of name arising from a corporate restructuring or rebranding. Where the Authority has no objection to the change of name, the licence or permit holder is required to:

- apply to the Authority for a new licence to be issued in the new name of the company;
- return the licence(s) or permit(s) that bear the previous name. Such licences and permits will be cancelled; and
- pay the prescribed fees. Although no fees for this purpose were prescribed in the Regulations.

It is not an unusual feature of high-stake M&A transactions for the acquirer to change the name of the target / acquired company and undertake a rebranding exercise shortly after completion. In such instance, the acquirer has the added obligation of seeking a no-objection of the Authority and paying the requisite fees.

In addition, for the purpose of any due diligence exercise, it is no longer sufficient that a change of name is filed at the Corporate Affairs Commission. It is now imperative that the licensee who is the subject of the due diligence exercise, must notify the Authority, replace the old licences and permits, and pay the prescribed fees. This is an important point and should be flagged by the respective due diligence advisory team.

(7) Fees

The applicable consent processing fee for each asset type shall be the fees specified in the schedule of fees, or 5% of the value of the transaction, whichever is higher. By so doing, the Regulations set a minimum reference value for determining the consent processing fee, which guarantees the certainty of Government's revenue and ensures that same is unaffected by any adverse impact.

(8) Contraventions and Penalties

A person who contravenes the Regulations is liable to penalties which range from US$(c.)2,600 to US$100,000 per licence or permit. In addition, the affected licence or permit may be suspended, cancelled or revoked by the Authority.

Although, from the language of the Regulations, it is not clear what the effect will be where the defaulting party has multiple licences or permits. For instance, where there are multiple gas processing facilities or gas pipelines that are connected and implicated in a single transaction, will each licence or permit

be revoked, and how will this affect the licences or permits that are not subject to the contravention? We expect the Authority to clarify this point presently.

Conclusion

Considering that the policy aspirations of the newly sworn-in administration include revenue generation and asset optimisation, the Regulations are a welcome development, as they provide a well-structured framework for regulating acquisitions, mergers and divestments in Nigeria's midstream and downstream petroleum sector. While there may be some grey areas, the Regulations offer the vital assurance needed to minimize or eliminate delays in the regulatory closing of M&A transactions, incentivising compliance and streamlined processes.