

Midstream

Downstream

Transfer of Licenses, Rights and Interests in the Nigerian Midstream and Downstream Sectors: Questions, Answers and Observations.

On September 1, 2020, the Department of Petroleum Resources (“DPR”) issued the *Guidelines and Procedures for Obtaining DPR Approval for Transfer of Licences, Rights or Interests in the Downstream Sector of the Nigerian Oil and Gas Industry (“Guidelines and Procedures”)*. These Guidelines and Procedures flashed a beam of light over commercial transactions or projects that have the potential to alter the ownership or control of the *Licence to Operate (“LTO”)* midstream or downstream assets.

Prior to the issuance of the Guidelines and Procedures, *excepting interests in pipelines*, transactions or projects involving the transfer of licences, interests, and rights in the midstream and downstream sectors of the Nigerian oil and gas industry were not subjected to such level of scrutiny by the DPR.

In this write-up, we have, through our *Questions (Q)*, *Answers (A)* and *Observations (O)* highlighted the salient points to note in relation to the transfer of midstream and downstream assets in the Nigerian oil and gas industry.

Q: What is the scope of the Guidelines and Procedures?

A: The Guidelines and Procedures establish the processes for obtaining the approval of the DPR in respect of transactions, consummated in the midstream and downstream sectors (“**Sector**”) of the Nigerian oil and gas industry (“**Industry**”), which effectively alter the ownership of the LTO or changes the control of the LTO. In the Sector, the LTO is typically granted after mechanical completion of the asset and satisfactory inspection by the DPR. The LTO authorizes the licensee to operate the asset. For the purposes of the Guidelines and Procedures, Downstream Facilities are defined in a non-exhaustive manner to include depots, filling stations, lube blending plants, liquefied petroleum gas refilling plants, tank farms, gas processing plants, petrochemical plants, refineries, pipelines (“**Asset**”).

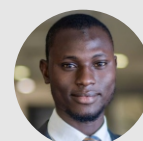
O: Although, the long title of the Guidelines and Procedures specifically refers to the downstream sector of the industry, our observation is that the definition of the “**Downstream Sector**” in the Guidelines and Procedures is quite encompassing as it seeks to capture all activities from the “**flow stations to the retail outlets**”. Practically and arguably, this definition covers the midstream value chain, and this probably explains why “**Downstream Facilities**” are defined to include gas processing plants and petrochemical plants. We have also noted the inclusion of “**pipelines**” in the definition of Assets. This inclusion potentially creates confusion and overlap because the Oil Pipelines Act¹- the principal legislation that regulates the construction, maintenance and operation of pipelines requires the prior written approval of the Minister of Petroleum Resources (the “**Minister**”) for the assignment, sublease, mortgage of the pipeline operating licence or any right or interest therein. The DPR acknowledged the authority of the Minister of Petroleum Resources in its 2014 Guidelines and

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Procedures for Obtaining Minister's Consent to Assignment of Oil and Gas Assets or Interest under the Petroleum Act and the Oil Pipelines Act (the “**Consent Guidelines**”). The Consent Guidelines set out the process for procuring the consent of the Minister in respect of the transfer or assignment of an oil or gas pipeline licence. It is therefore not clear what the intention of the DPR is, in relation to the inclusion of pipelines in the scope of Assets covered by the Guidelines and Procedures, especially as the process in the Guidelines and Procedures does not explicitly culminate in the grant of any approval by the Minister, a key requirement under the Oil Pipelines Act. It could well be the case that the DPR sought to differentiate pipelines conveying petroleum products in spite of the definition of pipelines under the Oil Pipelines Act.

Q: Did the DPR indicate the type of commercial transactions that will fall within the purview of the Guidelines and Procedures?

A: The Guidelines and Procedures provide that any **transaction** such as a **merger, acquisition, take-over, lease transaction, share divestment, mortgage, lien, assignment**, or any other similar transaction that leads to the emergence of a new licensee; or alters the beneficiary of the rights and interests in the LTO or the control of the LTO will be subject to the DPR's approval. As such, such transaction will be regarded as a “**Transfer of the LTO**”.

Q: Based on the foregoing, secured financing transactions involving the enforcement, and perhaps the creation, of security interests over relevant Assets may now be subject to the DPR's scrutiny. In our view, the appropriate time to seek the DPR's approval will depend on the nature of the security in question. For instance, a legal mortgage alters ownership at creation (albeit for a limited period barring the occurrence of a default under the underlying transaction) and may thus require the approval of the DPR at the point of creation whilst a floating charge may not require the approval of the DPR until the enforcement of the security since it has no significant impact on ownership or control at the time of creation.

Q: Are there any materiality thresholds or will every takeover, acquisition or merger or lease or share divestment consummated in the Sector constitute a Transfer of the LTO?

A: Acquisition, Takeover and Merger have specific meanings attributed to them in the Guidelines and Procedures.

An Acquisition is a corporate transaction that involves the purchase of all or a substantial part of the interest, shares, or facility of another such that the acquiree becomes a subsidiary or division of the acquiring company.

A Takeover is a transaction involving the shares of a publicly listed company by an individual or a company and the acquisition of control over the management of the target company. Whilst a merger is defined as the fusion of two or more companies into a new legal entity. A Lease is defined to mean a transaction involving the transfer of title or rights in real property or an asset to another company for a term of years.

A Lease is defined to mean a transaction involving the transfer of title or rights in real property or an Eligible Facility to another company for a term of years.

Q: It appears that any transactional construct that fits into the definitions provided above i.e., Merger, Acquisition, Takeover or Lease will automatically constitute a Transfer of the LTO, thus, subject to the approval of the DPR. For the other transaction types that were mentioned but not defined like assignment, the critical determinant will be whether the transaction results in a change in the incidents of ownership or control of the LTO.

Q: Is the holder of a Licence to Establish an Asset or the Approval to Construct an Asset required to seek DPR's approval for a transfer of such Licence or Approval?

A: The DPR approval will not be required.

Q: The Guidelines and Procedures focus on LTOs only. To provide context, the licences and approvals for the development and operation of Assets within the Sector are typically issued in sequential stages with the first being the Licence to Establish (“**LTE**”) the Asset followed by the Approval to Construct (“**ATC**”) the Asset. The LTO is granted after the terms and conditions of the LTE and ATC have been met. The LTO authorizes the holder to carry out the relevant operations for which the Asset is constructed.

Q: What is the process for procuring the approval of the DPR?

A: The Approval process is in three stages:

The first stage entails a prior notification by the licensee to the DPR of the intention to engage in a transaction that will result in the transfer of its LTO and the procurement of a certificate of no-objection to proceed. To obtain the certificate of no-objection, the licensee must rationalize the technical and economic value that will be derived from such transfer.

Upon the completion of the transaction, the licensee proceeds to apply for the DPR's approval to transfer the LTO. The DPR's decision to grant the approval will be determined by the outcome of its due diligence on the transaction, the technical competence, experience and financial capability of the transferee.

The licensee completes the process by paying the applicable statutory fees (application, processing and approval fees) and submitting the relevant documents.

If the outcome of the due diligence exercise is satisfactory, the DPR will cancel the existing LTO and re-issue it in the name of the transferee.

Q: Interestingly, after the prior notification is given by the licensee, the licensee is at liberty to proceed with the consummation of the transaction and is not required to apply for the approval of the DPR until the transaction is concluded. Whilst this offers some level of flexibility to the transacting parties in closing the deal, the likelihood of the deal unravelling becomes heightened since the DPR may object to the choice of the transferee if the due diligence is not satisfactory. Transacting parties are therefore advised to bear this in mind in the structuring of the deal, and selection of the transferee.

Q: Are there statutory fees to be paid for the approval?

A: The Guidelines and Procedures prescribe three categories of statutory fees to be paid by the licensee ("Applicant") and the fees are determined by the type of Asset in question. The fees are summarized below:

Facility	Application Fee	Processing Fee	Approval Fee
Petrol Station/LPG Refining Plant	N20, 000	N20, 000	N200, 000
Depots	N150, 000	N500, 000	N1, 000,000
Lube Oil Blending Plants/Waste	N250, 000	N250, 000	N3, 000, 000
Modular Refinery/Plant (between 1,000 bpd and 30,000 bpd)	US\$ 1, 000	N500, 000	N2, 500, 000
Modular Refinery/Plant (30,000 bpd and above)	US\$100, 000		

Conventional Refinery/Plants	US\$100, 000	N500, 000	N50, 000
Pipeline/Pipeline Network	US\$50, 000	US\$10, 000	US\$50, 000
Gas Processing Plants	N250, 000	N250, 000	N3, 000, 000

The approval fee otherwise referred to as the transaction fee is the higher of 5% of the transaction purse or the fee set out above.

Q: Although the applicable fees are stipulated in the Guidelines and Procedures, it is not clear the point at which the application fee and the processing fee are required to be paid. Also, the fees (especially the reference to 5% of the transaction purse) will increase the cost of transactions in the Sector, especially as a number of affected downstream transactions involve the acquisition of, or long lease of the land hosting the Asset which by their nature already attract ad valorem rates for the consent of the relevant State Governor, registration fees and stamp taxes.

Q: What are the consequences of non-compliance?

A: The Guidelines and Procedures do not proffer any consequence for non-compliance. As such, the principal act, (the "**Petroleum Act**") and the relevant regulations pursuant to which the Guidelines and Procedures were issued become relevant in this regard.

Conclusion

Overall, the Guidelines and Procedures create a new set of compliance obligations for operators and owners in the midstream and downstream petroleum sector as the DPR's final nod is now required for any transaction that alters the incidents of ownership in an LTO or changes the control of an LTO.

These Guidelines and Procedures introduce yet another layer of regulatory hurdle for transacting parties and may elicit transactional anxiety particularly because the Guidelines and Procedures are silent on the duration within which a no-objection certification and the final approval for the Transfer of the LTO will be issued. Nonetheless, the Guidelines and Procedures cannot be ignored as the provisions clearly reveal the DPR's intention to replicate the level of scrutiny that is currently administered in relation to the transfer and assignment of Nigerian oil and gas upstream assets.