



**PETROLEUM INDUSTRY
GOVERNANCE BILL 2017:**

**A CALL FOR
CAUTIOUS OPTIMISM**

INTRODUCTION

The Petroleum Industry Bill has been stuck at the Nigerian Parliament for the past decade. However, in an attempt to break the jinx of non-passage by successive Governments over the years, the Nigerian Senate in what can be described as an attempt to make history passed a bill which provides the framework for regulatory reforms in the Nigerian petroleum industry (the "Industry"). On Thursday 25th May 2017, the Nigerian Senate, the upper legislative house of the Nigerian Parliament passed the Petroleum Industry Governance Bill (the "Bill"). The Bill, which seeks to provide for the governance and institutional framework for the Industry is one of 3 bills to be passed in Government's efforts to reform the Industry. The other two bills are the Petroleum Industry Fiscal Reform Bill and the Petroleum Host Community Fund Bill which are at the time of writing this brief, yet to be presented to the National Assembly by the Executive Arm of Government.

The passage of the Bill by the Senate has generated a lot of excitement as Industry participants (operators and advisors) are quite optimistic with regards to the potential of the Bill on the Industry. Notwithstanding the excitement, it is necessary to consider the provisions of the Bill with a view to establishing the potential impact of the Bill on the Industry and any legal hurdles that may arise before enactment and post – enactment.

Minister for Petroleum Resources

The role of the Minister of Petroleum Resources ("Minister") has been considerably limited to policy formulation and coordination of the Industry. The Bill strips the Minister of the discretion to award and revoke exploration and production licenses. Under the Bill, the grant, amendment, renewal, extension or revocation of exploration and production licenses and leases can only be done by the Minister upon recommendation of the Nigeria Petroleum Regulatory Commission ("NPRC"). A pertinent question that comes to mind is the extent of control the Minister will have over the

NPRC. As drafted, the Minister shall not exercise any form of control over the NPRC under the Bill. Appointment of members of the board of NPRC (“NPRC Board”) shall be by the President of the Federal Republic of Nigeria (“President”) subject to confirmation of the Nigerian Senate. Also, the Minister is not included as a statutory member of the NPRC Board. This ensures that the Minister has no form of influence either directly or indirectly over the NPRC.

That said, a useful provision that may have been inserted in the Bill is to expressly provide that the Minister shall not be a member of the NPRC Board. The Bill as currently drafted does not prevent the Minister from being a Member of the NPRC Board as such, there is the possibility of the lacuna being exploited by a mischievous President.

With regards to grant and award of licenses, the Bill does not amend the existing provisions of the Oil Prospecting Licenses (Conversion to Oil Mining Leases, etc) Regulations, 2004, with respect to prescription by the Minister of the relevant amount payable as signature bonus upon conversion of an OPL to an OML. Therefore, the ability to determine signature bonus upon conversion from OPL to an OML still falls largely within the discretion of the Minister. However, it is noteworthy that in exercising its discretion, the Minister is obliged to take into consideration the following:

- a. the current market value of the area to be covered by the OMLs;
- b. the level of operational activity and expenditure so far carried out by the licence holder before the application; and
- c. the competitiveness of signature bonus paid on the OPL.

Nigeria Petroleum Regulatory Commission

The NPRC is a creation of the Bill to replace the Petroleum Inspectorate, the Department of Petroleum Resources (“DPR”) and the Petroleum Products Pricing Regulatory Agency (“PPRA”). Upon enactment, the NPRC will regulate the upstream and downstream sectors of the Industry.

The general powers of the NPRC under the Bill include: monitoring and enforcement of compliance with terms and conditions of all leases, license and permits; development and publication of tariffs and pricing methodology relating to third party access to petroleum facilities; advise the Minister on fiscal and other issues pertaining to the Industry.

Specifically, as it relates to the upstream sector, the functions of the NPRC includes issuance of licenses or permits in connection with seismic, drilling, design and construction of facilities for upstream operations. Also, the NPRC will be saddled with the responsibility of conducting bid rounds or other processes for the award of petroleum exploration and production licenses and leases.

The Bill also mandates the NPRC to liaise with Federal Inland Revenue Service on cost deductions. This provision in our view has been inserted against the backdrop of the various crude entitlement dispute between the NNPC and the major international oil companies (“IOCs”) especially as regards cost recovery. This provision is to ensure that agencies of Government have a common position when engaging the IOCs with regards to cost recovery process and crude entitlements under the Production Sharing Contracts.

With regards to the downstream sector, the functions of the NPRC includes: establishment of the methodology for determining appropriate tariffs for gas processing, gas transportation/transmission and transportation of crude oil and bulk storage of oil and gas; arrest situation of abuse of dominant power and restrictive business practices; monitoring and enforcement of the actual application of petroleum product pricing formulae or framework for petroleum products.

The NPRC is also empowered to make new regulations that will apply in the Industry, however those regulations shall be made only after the conduct of a public hearing in a specified manner on the subject matter of the proposed regulation. In exceptional circumstances, the NPRC may make regulations prior to the public hearing where it deems necessary so to do. Such regulations made without prior public hearing shall not last more than 6 months unless it is subsequently confirmed after a public hearing.

The Commercial Entities

The Bill directs and empowers the Minister to, within 3 months of its commencement to take steps to incorporate entities that may be called the Nigerian Petroleum Assets Management Company ("NPAMC") and the National Petroleum Company ("NPC") in accordance with the Companies and Allied Matters Act. The entities shall be vested with certain assets and liabilities of the Nigerian National Petroleum Corporation ("NNPC"). The Minister may also incorporate other entities to assume and manage other liabilities of the NNPC.

The Nigeria Petroleum Assets Management Company

NPAMC will be charged with the responsibility of managing NNPC's oil and gas investments in assets, in those instances where the Government will not be required or obliged to provide upfront funding in such investments. The NNPC shall within 3 months of the incorporation of NPAMC, upon the order of the Minister for Petroleum Resources, transfer its employees, assets, liabilities, rights and obligations of the NNPC to NPAMC. The initial shareholding of NPAMC shall be in the ratio of 99% to 1% with the Ministry of Finance holding 99% of its shares, while the Bureau for Public Enterprise ("BPE") shall hold the rest 1% on behalf of the Federal Government of Nigeria ("FGN").

NPAMC is entitled to charge the FGN for the management of the oil and gas assets in such fees as may be determined from the percentage of revenue generated by NPAMC for the FGN. The ability of NPAMC to charge the FGN fees on percentage of revenue generated by NPAMC will most likely raise constitutional issues with respect to remittances to the Federation Account. It may be argued that based on current constitutional provisions, any revenue which accrues to the Federal Republic of Nigeria ought to be paid into the Federation Account. Therefore, the revenue generated by NPAMC should be remitted to the Federation Account without any form of deductions or set-off. Based on this argument, any fees payable to NPAMC should be made through the consolidated revenue fund after full remittance to the Federation Account must have been done.

That said, the Bill provides that remittance to the Federation Account shall not apply to fees earned by NPAMC in connection with the management of assets. This provision of the Bill has the potential of being a subject of controversy from a constitutional perspective as it may be interpreted to be inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, as altered and amended (“Nigerian Constitution”). Our comments on this issue are discussed below under the header: The Nigerian Constitution and Defraying the Expenses of FGN Agencies.

The National Petroleum Company

NPC shall be an integrated oil and gas company operating as a fully commercial entity across the value chain. In what can be described as “seed capital” the initial funds required for NPC’s take-off shall be as appropriated by the National Assembly. It is expected that such funds shall not be less than the five-year average of the amounts appropriated by the National Assembly for the funding of the NNPC’s share of its cash calls in respect to all its joint venture (“JV”) operations.

NPC is entitled to retain its revenue from its operations and shall be entitled to defray from such revenue, all its expenses including its cash call obligations in respect of its JV assets and its petroleum operations and its obligations to lenders and financiers. Again, this provision of the Bill may raise the live issues of remittances of all amounts due to the FGN to the Federation Account. Our comments on this issue are discussed under the next header.

The initial shareholders of the NPC shall be the Ministry of Finance and the BPE on behalf of the FGN. However, the Bill provides that the FGN shall, within 6 years of its incorporation of the NPC, divest not less than 30% of the shares in the NPC to the public in a transparent manner. Within 3 months of the incorporation of the NPC the FGN shall order the NNPC to transfer employees, assets, liabilities, rights and obligations of the NNPC to the NPC.

The Bill is however unclear as to the particular employees, assets, liabilities, rights and obligations of the NNPC that will be transferred to the NPC as it has already been provided under its section 40 that the employees, assets, liabilities, rights and obligations of the NNPC will be transferred to the NPAMC. In this regard, the PGIB is unclear and uncertain.

The NPC are also exempted from the application of the Fiscal Responsibility Act 2007 and the Public Procurement Act 2007. The exemption of the NPC from the Public Procurement Act is quite an interesting provision as the need to comply with the Public Procurement Act has always been a challenge for the NNPC as the public procurement process often delays commercial arrangements which the NNPC intends to engage in. In our view, the exemption of the NPC from the Public Procurement Act may not be unconnected with the proposed divestment of the NPC where private persons will also be shareholders of the NPC and to subject a company which is partly-owned by private individuals to the Public Procurement Process may not be in line with commercial realities.

The Nigerian Constitution and Defraying Expenses of FGN Agencies

The NNPC Act contains a provision which allows the NNPC to maintain a fund of monies received by the NNPC in the course of its operations or in relation to the exercise by the NNPC of any of its functions. The NNPC is allowed to defray all its expenses from the fund. There are arguments that this provision of the NNPC Act is in contravention of section 162(1) of the Nigerian Constitution which provides that "the Federation shall maintain a special account into which shall be paid all revenues collected by the Government of the Federation".

In the case of ***Attorney-General of the Federation v. Attorney-General of Abia State & Ors (2002) 6 NWLR (Pt. 764) 542*** the Supreme Court pronounced that the practice and policy of deducting monies from the Federation Account to fund NNPC JV contracts and priority projects (among other heads of expense) was unconstitutional.

It is pertinent to note that the decision here prohibited deductions being made from the Federation Account rather than the defrayment of expenses by an agency/agent of the FGN from its gross revenue before the remittance of the net revenue into the Federation Account. Therefore, there is an argument that the provision of the NNPC Act is not in contravention of the Nigerian Constitution and by extension that the proposed provisions of the Bill on NPAMC and NPC expenses is not unconstitutional. We however do not believe that the issues are that simple and clear.

Current Hurdles for the Bill

The following are some of the challenges which the Bill faces before enactment:

1. **Non-passage by the House of Representatives:** Nigeria operates a bicameral legislative system wherein for a law to be enacted, both the Senate and the House of Representatives ought to pass a bill before it becomes law. Unfortunately, the House of Representatives is yet to consider the Bill; therefore, the Bill cannot become law until passed by the House of Representatives.
2. **A different Bill to be considered by the House of Representatives:** We understand that the House of Representatives intends to consider another version of the Bill which will include Host Community provisions and provisions regarding fiscal issues. This, in our view creates more confusion as the current Bill passed before the Senate may not be considered talk less of being passed by the House of Representatives.
3. **Executive Co-operation/Presidential Assent:** The Bill was sponsored by members of the Senate with little co-operation from the Executive Arm. This, has the potential of stalling the enactment process through presidential assent as the President may withhold his assent in the unlikely event the Executive Arm is not satisfied with the provisions of the Bill.

4. Post-enactment implementation: Assuming, the Bill is enacted, the restructuring process especially of the NNPC needs to be carefully thought through and implemented to avoid any gaps and inefficiencies. Also, the process of transfer of legacy staff of the NNPC to both the NPAMC and NPC should be well thought out as the provisions of the Bill are uncertain in this regard. We understand the NNPC is currently undertaking reforms in order to position itself for the post-enactment phase.

CONCLUSION

While the passage of the Bill by the Senate can be regarded as a major step for the legal reforms in the Industry with regards to the otherwise “jinxed” Petroleum Industry Bill, the road to reforms may be farther than near based on the challenges highlighted in this brief.

About AO2 Law

AO2 Law is a world-class law firm established to help clients achieve success through practical and innovative legal solutions. We think proactively thereby efficiently managing present and future business challenges. Through practical and innovative legal solutions we help our clients thrive in their business; delivering dependable services across our practices and in all matters we undertake. Led by a set of perspicacious Partners, AO2 Law is structured to deliver exceptional solutions to local and multinational organisations across various sectors in the global economy. We are instituted to consistently deliver result-oriented, best in class services to our clients. Our partners and associates are members of top ranking professional bodies bringing to bear experience and wealth of knowledge to the benefits of clients. We go beyond the call of duty. Our commitment to our clients is beyond just delivery of legal services; our clients' overall sustainability is our focus. With insights into the very core of how things really work, we deliver for you, the correct solutions that guarantees your place in the future you see.



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Chinedu (MCI Arb- United Kingdom) is the firm's Managing Partner/Head of the Litigation, Arbitration & ADR practice group. A seasoned litigator and arbitrator with over twelve (12) years cognate experience. He specializes in commercial litigation and has litigated on extensive range of issues, including that pertaining, but not limited to corporate recovery, receiverships and insolvency, company and partnership disputes, oil and gas, environmental matters, maritime, real estate, intellectual property, telecommunications, finance and banking contracts, commercial law transactions, family law and general litigation both at trial and appellate levels.

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