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GUIDELINES AND PROCEDURES FOR OBTAINING MINISTER'S CONSENT TO THE ASSIGNMENT OF INTEREST IN OIL AND GAS ASSETS

In the wake of increasing acquisition, divestment and financing activities within the upstream segment of the Nigerian Oil and Gas industry, the Department of Petroleum Resources ("**DPR**") on November 17, 2014 circulated Guidelines and Procedures for Obtaining Minister's Consent to the Assignment of Interests in Oil and Gas Assets (the "**Guidelines**") to, among others, establish the procedure for obtaining the consent of the Minister of Petroleum Resources (the "**Minister**") to any assignment of any right, power or interest in an Oil Prospecting Licence ("**OPL**"), Oil Mining Lease ("**OML**"), Marginal Field ("**MF**") or Oil and Gas Pipeline Licence ("**OGPL**") in accordance with the Petroleum Act Cap P10 Laws of the Federation of Nigeria ("**LFN**") 2004 ("**PA**") and the Oil Pipelines Act Cap O7 LFN 2004 ("**OPA**"). This memo takes a critical look at the Guidelines, examining the lacunae which existed prior to the issuance of the Guidelines and commenting on the requirements and procedures contained in the Guidelines including, in particular, changes to the existing regime

The Legal Setting

Currently, pursuant to provisions of both the PA and the OPA, ministerial consent is required for certain categories of transactions involving oil and gas assets such as interests in OPLs, OMLs, MFs and OGPLs. Specifically, paragraph 14 of the First Schedule to the PA provides that:

> *"Without the prior consent of the Minister, the holder of an oil prospecting licence or an oil mining lease shall not assign his licence or lease, or any right, power or interest therein or thereunder."*

Similarly, section 17 (5)(d) of the OPA, lists conditions to be deemed included as part of the terms of every oil pipeline licence, as including:

> *"not to assign, sublet, mortgage or otherwise part with the licence or any right or Interest thereunder without the previous consent in writing of the Minister."*

Notwithstanding the foregoing, neither the PA nor the OPA provides any definitions or further clarifications as to what would constitute "*interest in or under*" an OPL, OML or OGPL. In practice there have generally been two broad interpretations accorded to the provisions, a restrictive view and a broader view.

On the one hand, the restrictive approach has been to view the provisions of both the OPA and the PA as only requiring ministerial consent for a **legal** assignment/transfer of the relevant licence or lease. The implication of this being that ministerial consent would only be required for asset transactions and would not ordinarily be required in circumstances where there was a transfer of shares in a company which owned a relevant licence or lease. Similarly, ministerial consent would not normally be required in relation to transactions not involving a transfer of the legal interest in the licence or lease such as the creation of a trust

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or other contractual interest which gave rise to a right *in personam*[1] as opposed to a right *in rem.*[2] In relation to financing transactions, the implication of this restrictive approach was that ministerial consent would be required for mortgage and security assignment transactions which involved the transfer of the legal interest in the licence or lease but not in respect of share charges, fixed charges and debentures which did not involve any transfer of the legal interest.

On the other hand, the broader view was to adopt the mischief rule of interpretation and view the provisions as requiring ministerial consent not just for transactions involving the legal transfer of the licence or lease but for any kind of transactions (including share transfers) which resulted in a transfer of control of the licence or lease from one company (or group of companies) to another.

In mid-2012, the Federal High Court ("**FHC**") in the case of ***Moni Pulo Limited v. Brass Exploration Unlimited & 7 Ors*** (the "**Moni Pulo Case**")[3] gave judicial support to the expansive interpretation of the relevant provision of the PA. In the Moni Pulo Case the FHC, relying on provisions of the Petroleum (Drilling and Production) Regulations ("**PDPR**")[4], held that ministerial consent is required for the "takeover" of an OML, stating that the word "takeover" as used in the relevant provision of the PDPR

> *"clearly refers to a situation where another person or company gains control of the affairs of a company, either by the acquisition of the controlling shares or other interest in the company; the incidence of which is to make the company being taken over a subsidiary of the company that is taking over."*

The Moni Pulo Case effectively resolved the question of whether or not ministerial consent was required for share transfer transactions but did not address other aspects of the broader interpretation of the provisions of the OPA and the PA.

The Guidelines

Issued against the background described above, the Guidelines seek to, among others, establish the procedure for obtaining the consent of the Minister to assignments of any right, power or interest in an OPL, OML, MF, or OGPL. The Guidelines consist of six (6) paragraphs including provisions which prescribe the scope of the Guidelines, clarify what constitutes an assignment, and detail the procedure and some conditions for securing the consent of the Minister. Salient points of the Guidelines are detailed hereunder together with our commentary thereon:

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[1] Attaching to the person
[2] Attaching to the property
[3] (2012) 6 CLRN pg 153-235
[4] Paragraph 4 (b) of the Petroleum (Drilling and Production) Regulations provides that "*Application for the assignment or **takeover** of an oil prospecting licence or oil mining lease (or of an interest in the same) shall be made to the Minister in writing and accompanied by the prescribed fees at the discretion of the Minister; and the applicant shall furnish in respect of the assignment, or **takeover**, all such information as is required to be furnished in the case of an applicant for a new licence or lease."*

- Definition of "***interest in a licence or lease***" – Paragraph 2.0 of the Guidelines includes the following definition for interest in a licence or lease – "*any arrangement such as PSC, PSA, farm-in or farm-out agreement, sale, purchase, mortgage or* ***other business arrangements*** *by which a right, privilege, power, benefit, gain or advantage in a licence, or lease is* ***transferred to or conferred either directly or indirectly on a third party.***"

  Commentary: As noted above, prior to the Guidelines there was no subsisting definition for "*interest in a licence or lease*" which is referenced in both the provisions of the OPA and the PA. The introduction of definition would thus appear to be geared towards further clarifying the categories of transactions in respect of which ministerial consent will be required. Based on the definition it would appear that, in addition to transfers of licences or leases, themselves, and transfers of shares in companies holding licences or leases, ministerial consent would also be required in respect of the transfer of certain contractual rights, privileges, benefits or interests (such as those in/under a production sharing contract or a production sharing agreement) where the counterparty to the agreement does not ordinarily have any direct interest in the licence or lease, provided that what is being transferred constitutes a right, privilege, power, benefit, gain or advantage **in a licence or lease**. Currently the assignment of such contracts is generally not viewed as requiring ministerial consent except in circumstances where the counterparty to the contract is the Nigerian National Petroleum Corporation ("**NNPC**").

  Notwithstanding the foregoing it is however pertinent to note that the definition does create some fresh uncertainty as to the circumstances in which ministerial consent will be required. The use of the term "*conferred*" (see above) would appear to suggest a deliberate extension beyond mere transfers to circumstances of either actual or constructive trusts, where interests are vested and do not necessarily result from transfers.

- Definition of Assignment – Paragraph 3.1 of the Guidelines defines an assignment as involving "*the transfer of a licence, lease or a marginal field or an interest, power or right therein by any company with equity, participating, contractual or working interest in the said OPL, OML or marginal field in Nigeria, through merger, acquisition, take-over, divestment or any such transaction that may alter the ownership, equity, rights or interest of the assigning company in question not minding the nature of the upstream arrangement that the assigning company may be involved in, including but not limited to Joint Venture (JV), Production Sharing Contract (PSC), service contract, sole risk or marginal field operation*". In addition to the definition, the paragraph of the Guideline further lists certain types of transactions as instances of assignments. These are:

  (i) exchange or transfer of shares;

  (ii) private or public listing of a part or the whole of the shares of the relevant company;

(iii) merger of the relevant company with one or more companies to form another company;

(iv) acquisition wherein the acquiring company directly or indirectly takes over the or acquires the whole of the rights or interests in a licence or lease or marginal field and associated assets, including acquisition of interest by an entity in a parent company whose affiliate has interests in a licence or lease;

(v) assignment to a company in a group of which the assignor is a member and is to be for the purpose of re-organisation in order to achieve greater efficiency and to acquire resources for more effective petroleum operations; and

(vi) assignment brought about by devolution of ownership of shares or interest in ownership of shares by way of operation of law and testamentary device.

Commentary: As with the definition of interest in licence or lease, the definition of "*Assignment*" also appears geared towards further clarifying the circumstances in which ministerial consent is required for a transaction. The definition appears to tow the line of the decision in the Moni Pulo Case but extends this further by identifying other transactions such as a public offer of securities which, strictly speaking result in a change of control, but were not previously thought to be clearly within the purview of the provisions of the PA or the OPA. Also, the definition effectively settles a previously existing debate as to whether only direct share acquisitions required ministerial consent by expressly confirming that acquisitions of parent companies of licencee or lessees would also qualify as assignments for ministerial consent purposes.

It is noteworthy that in relation to share transactions, paragraph 3.1 of the Guidelines does not prescribe a threshold of shares but merely refers to "*any part*" of the shares of the relevant company. Ordinarily this would give rise to some further confusion especially in relation to publicly listed companies as it would suggest that the transfer of even a single share of a company which owns a licence or lease would require ministerial consent. This suggestion would represent a clear deviation from the Moni Pulo case which specifically set the threshold at "*controlling shares*". Whether or not the "*any part*" of the Guidelines will take precedence over the "*controlling shares*" of the Moni Pulo case is dependent on the status of both the Moni Pulo Case and the Guidelines under Nigerian law. In this regard several views exist. On the one hand it is arguable that guidelines are by their nature incidental and supplemental to the provisions of statutes and regulations and cannot alter and or vary terms of such statutes or regulations whereas case law by its nature is meant to provide appropriate interpretations for statutes and regulations and can thus (by providing a new interpretation) extend the application of a statute. By this argument, case law will be superior to guidelines within Nigerian law such that the Guidelines will need to be read in conjunction with the Moni Pulo Case thus implying a threshold of "*controlling shares*" for ministerial consent. On the other hand, it is also arguable that the Guidelines, having been issued pursuant to the provisions of the PA derive their validity and status from the provisions of the PA. This view will imply that guidelines issued following

the pronouncement in the Moni Pulo case could operate like a new statute or an amendment to the PA to effectively amend or vary the court's interpretation of the PA. The purport of this latter view is that the Guidelines have effectively abrogated the threshold for ministerial consent in respect of share transactions. This latter argument is however likely to lead to absurd consequences particularly in relation to publicly listed companies within interests in OPLs, OMLs or OGPLs by requiring ministerial consent in respect of every single transfer of shares of such companies. It is not likely that this was the intention of the DPR or that the Guidelines will generally be enforced in this manner.

- Procedure for an Assignment - Paragraph 4 of the Guidelines provides the first detailed and specific conditions and procedures for assignment transactions. This is summarized hereunder as including the following steps:

  (a) Notification to DPR by the holders of participating interests in an OPL, OML, MF or OGPL, prior to the commencement of the assignment transaction (including the publication of any adverts or press releases in relation to the assignment), of their intention to divest of their relevant participating interests, including the following details –

    (i) reason(s) for the divestment;

    (ii) plans for ensuring first consideration of Nigerian indigenous companies in the divestment;

    (iii) the method for conducting the assignment (where the assignment is sought to be undertaken as open or restrictive tendering process, this fact is also required to be made known to the DPR); and

    (iv) the possible technical and economic value the assignment would bring to the operation of the licence or lease;

  (b) Upon completion of technical evaluation of the candidates shortlisted thereon, the assignor must submit the list of same to the DPR for preliminary due diligence to ensure that such company is acceptable to the Government of the Federal Republic of Nigeria. The cost of same will be borne by the assignor.

  (c) In relation to joint venture arrangements involving the NNPC, the application for ministerial consent is required to be accompanied by a letter of waiver of right of pre-emption by the non-assigning parties in the joint venture. Similarly in relation to production sharing contracts with the NNPC, the consent application is required to be accompanied by a consent letter from the NNPC and, where pre-emption rights are included in the production sharing contracts, waivers from other contractor parties will also be required.

(d) Paragraph 4.14 of the Guidelines requires that first consideration be given to Nigerian indigenous companies in any assignment transactions.

Commentary: Previously, in relation to OPLs and OMLs, the PDRP merely provided for compliance with the requirements for a fresh application for a licence or lease. On the other hand, no widely circulated, reliable and authoritative details were provided as to the process to be complied with in relation to the assignment of OGPLs. The Guidelines are thus a very welcome development in this regard as they provide significant clarity as to the DPR's expectations. It is noteworthy that many of the procedural requirements prescribed were already previously being enforced in relation to assignment transactions. For instance, the DPR would typically not consider an assignment application without pre-emption rights waiver and counterparty consent letters. However, the requirement for a notification prior to the commencement of the transaction process is new and is likely to impact transaction timings and confidentiality. The exact point of transaction commencement is not defined in the Guidelines thus it is difficult to discern the exact point at which DPR expects the assignors to approach it. Based on our experience in acquisition transactions generally and also in dealings with other regulatory authorities in Nigeria such as the Securities and Exchange Commission, we would typically recommend an initial formal approach of the DPR from the point at which the board of the assignor resolves to proceed with a transaction. This is on the basis that it is arguable prior to this point that any activities geared towards a prospective transaction are merely speculative and exploratory and it is unlikely that DPR's expectation is to be engaged in respect of every speculative or exploratory transaction conceived or proposed by personnel of an OPL, OML or OGPL holder. Also, the requirement for an initial technical clearance of potential assignees would appear somewhat burdensome. However, the DPR has always considered the technical competence of prospective assignees and it is not infeasible that dealing with this early on could potentially reduce the timing for processing the consent at the end of the transaction.

Aside from the foregoing, a new requirement which is of some concern is the requirement for first consideration to be given to Nigerian indigenous companies. In relation to this point, the Guidelines appear to be based on what is in our view, an incorrect interpretation of section 3 of the Nigerian Oil and Gas Industry Content Development Act No. 2 of 2010 ("**NCA**"). Paragraph 4.14 of the Guidelines appears to suggest that the NCA requires first consideration to be given to Nigerian companies in any assignment in Nigeria. However, section 3 of the NCA actually only requires first consideration of Nigerian independent operators ***"in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contracts are to be awarded in the Nigerian oil and gas industry***." There is thus no requirement for assignments to, in the first instance, be given to Nigerian companies in the assignment of oil and gas assets. This requirement would thus appear not to be based on any legal provisions and, in practice could be challenged by applicants. Also, the Guidelines do not clarify what would "*first consideration*" hence there remains a significant lack of clarity in this regard.

- Conditions for Ministerial Consent – Paragraph 4 of the Guidelines also includes several conditions which could jeopardize a consent application. These are summarized hereunder as follows:

  (a) the assignor is precluded from imposing on the assignee, crude sale/purchase agreements as a condition for the consummation of the transaction and any conditions that will serve as an impediment to the takeover and or operation of the asset in a businesslike manner;

  (b) the assignor shall not impose Domestic Gas Supply Obligation volumes on the assignee without DPR's authorization;

  (c) where the relevant interest is in respect of a "*sole risk asset*", not more than forty percent (40%) of the overall interest in the asset can be assigned to a foreign entity;

  (d) where the relevant interest is in respect of a marginal field, the total interest assignable to a foreign entity is pegged at forty nine (49%) of the total overall interest in the asset; and

  (e) all proceeds from the interest being transferred must, from the date of execution of the relevant sale and purchase agreement up to the receipt of ministerial consent, be paid into and held in an escrow account to be opened by the assignor.

  Commentary: As with the new procedural requirements detailed in the guidelines, most of the conditions above, though not previously documented, are generally applied by the DPR in relation to assignment transactions. However, the restriction in relation to crude sale contracts, and the requirement for the entirety of consideration to be paid into escrow pending the issuance of the consent are both new and generally conflict with the current practice in relation to transactions. Also, the threshold of forty nine percent (49%) in relation to foreign ownership of marginal fields is a welcome development as it provides further clarity as to the applicable threshold of foreign ownership of marginal fields in Nigeria.

- Application for Ministerial Consent – In addition to the prescriptions in relation to procedure and the conditions for the grant of ministerial consent, paragraph 5 of the Guidelines also prescribes documentation to be submitted in relation to the actual consent application. This documentation is as follows:

  (i) three (3) copies of any deeds of assignment,

  (ii) copies of existing joint operating agreement (where applicable);

  (iii) Farm- in Agreement between the assignor and the assignee;

(iv) catalogue of the applicant (assignor)'s exploration and production activities carried out in respect of the OML or marginal field area up to the date of the application for consent;

(v) technical and financial track records of the proposed assignee in exploration and production operations (at least three years);

(vi) the proposed assignee's incorporation documents;

(vii) technical service agreements (if any);

(viii) the sale and purchase agreement executed in respect of the assignment; (where the assignment is by private or public listing the approvals, documents and rules governing the listing should be attached and where the assignment is a merger or acquisition of a public or privately quoted company the approvals, documents or rules governing the mergers or acquisitions in the relevant approving jurisdictions should also be submitted);

(ix) (where the assignment is as a result of operation of law) details of the court judgment or details of the legal administration of the estate , will or deed of gift; and

(x) a bank draft for N500,000 (Five Hundred Thousand Naira) being the application fee for consent to the assignment.

Commentary: Previously there were no clear, comprehensive and generally publicized guidelines as to the documentation required to be submitted with an application for consent. Paragraph 5 of the Guidelines is therefore a very welcome development as it should serve to ensure that sufficient details are provided with applications and should thus shorten the timeframe for securing the consent.

- Consent Fees – finally, paragraph 6 of the Guidelines stipulates the applicable consent fee/premium as being a range between 1% and 5% of the value of the transaction.

Commentary: While still far from ideal, the documentation of an actual range for the consent fee affords significantly more clarity to parties as to the likely consent costs and should go a great way to aiding planning for transactions. We expect that this will be particularly useful in relation to financings and that lenders will likely compute costs with the higher end of the range. Nonetheless the range of possible fees remains rather wide and no guidance is given as to circumstances in which either the lower or the higher end of the range will be applicable. It would have been preferable for the DPR to have provided some further guidance in this regard.

General Commentary

Aside from all of the issues discussed above, we have highlighted hereunder a few concerns in relation to the Guidelines.

(i) Use of Defined Terms – Paragraph 2 of the Guidelines contains five (5) defined terms however, most of these terms, particularly "*Assets*" do not appear to actually be used in the body of the Guidelines. This occasions some level of uncertainty as to the applicability of the defined terms in certain circumstances.

(ii) Commencement - The Guidelines does not contain any specific commencement or transition provisions but expressly indicate that they were made on August 11, 2014.[5] **In the circumstances, our expectation is the DPR will likely treat the Guidelines as applicable to any assignment transactions in respect of which ministerial consent had not been received as at August 11, 2014, notwithstanding that such transaction may have commenced much earlier than the date of the Guidelines.** However, as there is no specific indication that the Guideline is to have any form of retrospective effect, we would not expect that DPR would require the reversal of any actions which may already have occurred prior to the commencement of the Guidelines. For instance, although the Guidelines require that DPR be notified prior to the commencement of a transaction, where a transaction had commenced prior to the issuance of the Guidelines, we do not envisage that DPR would require the recommencement of the transaction following the issuance of the Guidelines.

Conclusion

As can be clearly deciphered from the foregoing discussions, the issuance of the Guidelines represents a watershed in the consummation of acquisition and divestment transactions in the Nigerian Oil and Gas Industry. It is hoped that as the industry matures further and more transactions are consummated, DPR will work to fix lapses in the current regime and provide further clarity on the process and requirements for obtaining ministerial consent for assignments.

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[5] Although our understanding is that the Guidelines were not circulated until November 2014 and had not previously been cited by the DPR in engagements with oil and gas companies in respect of assignment transactions.

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