



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 the Guidelines and Procedures for Obtaining Minister’s Consent to the Assignment of Interests in Oil and Gas Assets (the “Guidelines”) for the purposes of establishing 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”) as required under 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, highlighting the requirements and procedures of the Guidelines including in particular, changes to the existing regime, and analyzing the validity of the provisions of the Guidelines.

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, 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 the relevant licence or lease. Similarly, ministerial consent would usually not be required in relation to transactions which do not involve a transfer of the legal interest in the licence or lease such as the creation of



a trust 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 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. Salient points of the Guidelines are detailed hereunder together with our commentary thereon:

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 this 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 legal transfers of the licence or lease and transfers of majority shares in companies with interests in a licence or lease, ministerial consent would also be required in respect of certain contractual interests such as in/under a PSC or a PSA where the counterparty to the agreement does not have any interest in the 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, this 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 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 licence or lease holders 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. However, we hold the opinion that the Guidelines should be read in conjunction with subsisting law and the Moni Pulo Case which clearly indicate that the relevant threshold for the trigger of obtaining ministerial consent is “*controlling shares*”.

- 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 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 but we would typically interpret this as being the point at which the board of the assignor resolves to proceed with a transaction. Also, though the requirement for an initial technical clearance of potential assignees would appear somewhat burdensome it should be noted that , the DPR has always considered the technical competence of prospective assignees as a key requirement for approving any proposed assignment 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 however, a new requirement which is of some concern is the requirement for first consideration of 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 of 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 in the first instance to, be to Nigerian companies. This requirement would thus appear not to be based on any legal provisions and, in practice could be challenged by applicants. Notwithstanding the foregoing it is pertinent to note that the Minister’s powers to approve an assignment are discretionary and the conditions on which a denial could be based are broad enough to cover for instance, a refusal to give first consideration to Nigerian companies if this meant that the proposed assignee was therefore not acceptable to the Federal Government. The Guidelines however do not clarify what would be seen as “*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 represents a shift from a previous practice of restricting foreign ownership of interests in marginal fields to forty percent (40%).

- 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 specific guidelines as to the documentation required to be submitted with an application for consent.⁵ 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.

Validity of the Guidelines

Following the issuance of the Guidelines, there has been a great deal of debate amongst legal practitioners as to the legal competence of the DPR to issue guidelines of this nature and as to the validity of the Guidelines.

More common arguments focus on the points that the DPR does not have any express powers to issue guidelines in either the PA or the OPA and that although the Minister does have (under section 9 of the PA and section 33 of the OPA) wide powers to issue regulations, Section 12 of the PA specifically provides that – “*The Minister may by writing under his hand delegate to another person any power conferred on him by or under this Act **except the power to make orders and regulations.***” Some arguments also go further to insist that the Guidelines go beyond the provisions of the PA such that even if indeed the DPR was authorized to issue guidelines in relation to the issue of ministerial consent, these should not be able to extend the scope of paragraph 14 of the First Schedule to the PA or section 17 (5)(d) of the OPA.

On the other hand, arguments in favour of the validity of the Guidelines focus on the point that a combined reading of the provisions of section 10 (2) of the Interpretation Act Cap I23 LFN 2004 (“**IA**”) and sections 3 and 4 of the Ministers’ Statutory Powers and Duties (Miscellaneous Provisions) Act Cap M14 LFN 2004 (“**MSPDA**”) empower DPR to issue the Guidelines. Section 10 (2) of the IA provides that a statute, which confers a power to do any act will be interpreted as also conferring such other powers as are reasonably necessary to enable the exercise of the power or as are incidental to such exercise. Section 3 of the MSPDA empowers the Minister to delegate any executive powers vested in her pursuant to any statute whilst section 4 of the MSPDA provides that the exercise of such power by the supervising authority within

⁵ Paragraph 4 of the PDPR merely referenced the documentation for fresh applications for a licence or lease which does not generally take into consideration acquisition specific documentation.



a department of government which the Minister has charge over will be sufficient evidence that the requisite consent of the minister was obtained for the exercise of such power by the relevant authority. The purport of the foregoing is that the Minister's power to consent to an assignment will be interpreted as including powers to issue guidelines which clarify the circumstances in which consent is required and also prescribe requirements to be fulfilled for the issuance of such consent (on the basis that such guidelines are reasonably necessary or incidental to the exercise of the power to grant consent). Further, the issuance of such guidelines by the DPR is sufficient evidence of the delegation by the Minister of her power to issue the said guidelines. Based on this argument the Guidelines will be valid to the extent that it is reasonably necessary or incidental to the grant of ministerial consent.

A further argument in favour of the validity of the Guidelines relies on the statement of the court in the case of *Bamgboye v. University of Ilorin*⁶ to the effect that ***“where functions entrusted to a minister of state are performed by an official employed in the minister's department, there is in law no delegation because constitutionally the act or decision of the official is that of the minister.”*** The implication of this statement is that sections 9 of the PA and 33 of the OPA (although not referenced by the DPR) can be relied on as further basis for the validity of the Guidelines.

Further to all of the foregoing, we are of the considered view that the Guidelines are valid and thus enforceable by the DPR. Notwithstanding this view it is pertinent to clarify that the fact that the Guidelines are valid and enforceable does not mean that the Guidelines take precedence over the substantive provisions of the PA or the OPA. Furthermore, the DPR cannot by the issuance of the Guidelines, usurp the powers of the Nigerian judiciary to interpret provisions of the relevant laws. Thus, in relation to issues such as definitions of *“interest in a licence or lease”* or *“assignment”* the definitions in the Guidelines remain subject to any interpretation which may be accorded to the concepts as used in the relevant laws by the courts. Furthermore, the DPR is entitled to revise its interpretation of the relevant concepts and can thus either subsequently expand or limit the definitions of the concepts.

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.

⁶ [1991] 8 NWLR pt. 207 p. 30.



- (ii) Commencement - The Guidelines does not contain any specific commencement or transition provisions but expressly indicate that they were issued on August 11, 2014.⁷ **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.

Banwo & Ighodalo is available to advise on applicability of these regulations to ongoing and proposed transactions, as well as structuring and compliance issues in relation to the Guidelines.

Banwo & Ighodalo

Banwo & Ighodalo (“**B&I**”) is a full service commercial law firm known for providing innovative, competent, cost-effective and well-timed solutions. It’s Energy and Natural Resource Practice Group is frequently ranked as one of the leading Energy Practices in Nigeria and the Firm has advised, and continues to provide legal advisory support, on many complex oil, gas, power and mining projects, amongst others, which span the energy supply value chain. B&I’s Energy Practice frequently advises on a wide range of oil & gas acquisition transactions. The Practice has three (3) partners and six (6) other fee earners.

⁷ 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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