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Commentaries on the Nigerian Local Content Development and Enforcement Commission Bill 2020

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In December 2019, the National Assembly proposed a bill to repeal the subsisting Nigerian Oil and Gas Industry Content Development Act (NOGICDA), 2010, and replace it with the Nigerian Local Content Development and Enforcement Commission Bill ("the Bill"), 2020. The Bill seeks to "establish the Nigerian Local Content Development Commission and provide for comprehensive framework, structures, programmes, and schemes for the institutionalization and strengthening of Nigerian local content in all sectors of the Nigerian economy for self-sufficiency, job creation, international competitiveness of Nigerian domestic businesses and economic diversification and for matters connected therewith."

In furtherance of our commitment to thought leadership on key industry issues, we have provided below, a summary of the key provisions of the Bill and our commentaries thereon.

1. Expansion of the scope of Nigerian Content (NC) to other sectors

The Bill, in its current form, seeks to extend the NC philosophy to operations and transactions in all areas of the Nigerian economy, particularly, in the petroleum, solid minerals mining, construction, power, information and communications technology (ICT), manufacturing and health sectors. This extension may not be unconnected to the relative success of the NOGICDA in the oil and gas sector, leading to the emergence of Nigerian companies playing significant roles in all key segments of the industry.

2. Key provisions of the Bill

- ***The regulator, its functions and its powers***

The proposed new regulator in the Bill will be called the *"Nigerian Local Content Development and Enforcement Commission"* (NLCDEC or the Commission). The NLCDEC's mandate is similar to that of the Nigerian Content Development and Monitoring Board (NCDMB) as articulated in the NOGICDA.

The Commission will have seven (7) Nigerian Local Content (NLC) Directorates – for Oil and Gas, ICT, Solid Minerals and Metallurgy, Construction, Power, Manufacturing and Health - and each directorate will be headed by an Executive Commissioner[1]. Each Directorate will be responsible for, amongst others, overseeing, coordinating, monitoring, administering and enforcing the implementation of the provisions of the Bill in their respective sectors.

In addition to the functions of the NCDMB detailed in section 70 of the NOGICDA, which have now been substantially replicated as the functions of the Commission, the Commission will also promote mutually beneficial Public Private Partnerships (PPPs), and establish Centers for Acquisition of Technology for the promotion of technology utilization and strengthening of technology management capabilities and capacities.

- ***Prioritization of Nigerian Local Content (NLC) Development Plan (NLCDP)***

All bids by NLC Entities (NLCEs) would include a long-term NLCDP (including an NLC on Employment and Skill Development Plan) that shows, amongst others, the expected quantity and quality of goods and services required for project execution and the estimated quantum of Nigerian produced goods and services that meet the required industry standards out of the total required for the project. The Plan is to be submitted to the relevant Directorate as well as the Awarding Authority[2].

The Plan is to be acknowledged by the Directorate, and a Certificate of Authorisation (CoA) issued, where the Plan complies with the provisions of the Bill. Where no communication is received within the set timeline, the applicant can assume approval and commence project execution.

NLCEs will be required to set aside five percent (5%) of their net profits for Research and Development (R&D) activities, and domicile the funds with the Central Bank of Nigeria (CBN). Fifty percent (50%) will be allocated to R&D programmes in Nigerian tertiary or research institutions, and fifty percent (50%) allocated to R&D within the NLCE's facilities in Nigeria. This amount will be tax-deductible.

[1]The Commissioner will be appointed by the President subject to the approval of the Senate

[2]Defined in the Bill as" the Authority which is to grant the license, permit, lease, approval or the interest for the undertaking of the activity".

- ***Transfer of technology for NC Development and Succession Plan***

  Non-Nigerian Local Content Entities (NNLCEs) will prepare and submit an implementation plan for the transfer of technology, together with the NLCDP (including the use of licensing agreements). Each Directorate, upon consultation with the Board of the Commission and other relevant agencies, will submit recommendations to the President for the setting up of criteria for obtaining fiscal and other incentives. The incentives will be enjoyed by entities that facilitate the transfer of technology and expertise to Nigerians or indigenous Nigerian companies, and indigenous Nigerian companies and Nigerians who establish factories and production infrastructure in Nigeria for goods that are largely imported.

  Furthermore, a succession plan for positions held by expatriates is to be submitted to the relevant Directorate and the Nigeria Immigration Service (NIS) within six (6) months from commencement of operations. The plan will provide for a Nigerian understudy of expatriate's role, for a period to be determined on a case-by-case basis by the Directorate.

- ***Issuance of Work Permits and Expatriate Quotas (EQs)***

  The Federal Ministry of Interior may, for the purpose of knowledge sharing, create a special immigration classification to encourage expatriates, especially from African countries, who have skills that are not available in Nigeria to reside and work in Nigeria upon obtaining a work permit. Issuance and renewal of work permits will be dependent on a certification from the relevant Directorate that no ascertainable Nigerian possesses such skills.

- ***Insurance, Legal and Financial Plan (ILFP)***

  Together with the NLCDP, NLCEs would be required to submit ILFPs, the contents of which are like those required under the current NOGICDA.

  Section 42 of the Bill proposes that no insurance risk in Nigeria shall be placed offshore without the written approval of the relevant Directorate and the Minister responsible for matters concerning insurance in Nigeria, both of whom shall ensure that Nigerian local capacity has been fully exhausted, before granting such approval. This is different from the subsisting provision in the NOGICDA where only the written approval of the National Insurance Commission is required for insurance risks to be placed offshore.

- ***Nigerian Content in government agencies***

  All arms and agencies of the Federal Government will be required to:

  ✓ develop NLCDPs indicating the minimum NLC requirement for materials, services and labor required to execute any major project, provided that the Plan is consistent with subsisting minimum NLC subsequently prescribed by the NLCDEC. The Plan would serve as the threshold for evaluation of NLC bids;

  ✓ in acquiring goods and services, maintain a fair, transparent and liberalized bidding process that gives indigenous Nigerian contractors and companies possible preferential positions where the goods and services meet the standards set by the Standard Organisation of Nigeria or other regulatory body. This preference is also to be stated in bid request documents;

  ✓ where foreign companies bid, request proof of existence of a joint venture agreement between them and indigenous Nigerian companies; and

  ✓ not disqualify an indigenous Nigerian company or firm solely on the basis of its not being the lowest financial bidder, provided that the tendered value does not exceed the lowest bid price by 15% margin of preference for international competitive bidding for goods, and 7.5% for competitive bidding with respect to works.

- ***Nigerian subcontractors***

  Contracts for public works granted to non-indigenous Nigerian companies or citizens will include a requirement to subcontract at least forty percent (40%)[3] of the contracted works to an indigenous Nigerian company or citizen, while the former will still maintain responsibility for performance under the contract.

- ***Local refining of crude oil and utilization of gas***

  The Directorate of NLC on Oil and Gas will establish plans and programmes to train Nigerians to be highly skilled in constructing, repairing, maintaining, and operating modular refineries and modular gas processing plants. The Bill also spells out other mandates of the Directorate relating to artisanal refineries, particularly, the integration of their operations into the existing formal refineries, evaluating applications from artisanal petroleum refiners[4] who voluntarily apply to formalize their refining activities and submit them to the relevant government agency for processing and approval.

[3] This rate may be altered on a case by case basis by each Directorate.

[4] Defined as "any person who uses locally sourced technological device to refine crude oil into various petroleum products"

- ***Formalisation of artisanal miners[5] of solid minerals***

  The Directorate of Solid Minerals and Metallurgy will, amongst other responsibilities, establish plans and programs to train artisanal and small-scale miners to be highly skilled in constructing, repairing, maintaining and operating solid minerals processing plants capable of refining and processing standardized solid minerals. The Bill also spells out other mandates of the Directorate regarding the establishment of extension services (in conjunction with the Ministry of Mines and Steel Development), for artisanal and small-scale miners registered with cooperative societies recognized by the Ministry. All previous operating Nigerian artisanal miners will be excluded from prosecution.

- ***Establishment and management of Funds for the Directorates***

  Seven (7) Funds will be established as follows:

  (i) Nigerian Oil and Gas Content Development (Special) Fund,

  (ii) Nigerian ICT Content Development (Special) Fund,

  (iii) Nigerian Power Content Development (Special) Fund,

  (iv) Nigerian Solid Minerals and Metallurgical Content Development (Special) Fund,

  (v) Nigerian Construction Content Development (Special) Fund,

  (vi) Nigerian Manufacturing Content Development (Special) Fund, and

  (vii) Nigerian Health Content Development (Special) Fund.

  Each Fund will be exclusively administered by the relevant Directorate, with 20% of the amounts collected used for the running of each Directorate and 80% for executing plans and programs aimed at increasing NLC in the relevant sectors.

  The Bill also seeks to impose an overarching 1% NLC Development surcharge on every electronic transaction[6] in Nigeria, to be split 30% each between the following *"critical sectors of the Nigerian economy"* - Nigerian ICT Content Development (Special) Fund, Nigerian Power Content Development (Special) Fund, and the Nigerian Solid Minerals and Metallurgical Content Development (Special) Fund[7]. This will be payable directly to the CBN and disbursed monthly. Contributions to the Funds are tax-deductible.

  Specific levies payable to each of the Funds listed above under the Bill are as follows:

  - Oil and gas (upstream and downstream), Construction, Manufacturing and Health sectors

    (i) two percent (2%) surcharge on the monetary value of all contracts awarded in the sectors.

  - Natural Gas Development Fund (gas sub-sector):

    (i) two percent (2%) surcharge on monetary value of every ton of gas imported into Nigeria by any company; and

    (ii) two percent (2%) surcharge on the monetary value of every ton of gas sold by the Nigerian Liquefied Natural Gas Company or any other company engaged in the local production of gas.

  - ICT, Power and Solid Minerals sectors

  (i) two percent (2%) surcharge on the monetary value of all contracts awarded in the sectors; and

  (ii) 30% of every sum accruing from all surcharges on electronic transactions in Nigeria.

- ***Liberalised loans on solid minerals and purchase of vessels***

  The CBN, Bank of Industry (BOI) or any other financial institution wholly or partly owned by the Federal Government will, subject to fund availability, be required to make loans available on liberal terms for indigenous Nigerian companies seeking to purchase equipment to exploit Nigerian solid mineral resources or to purchase, repair and/or maintain vessels[8].

  To qualify for the solid minerals loan, the indigenous Nigerian company should hold a mineral title with unexpired duration of at least four (4)years and be able to *"demonstrate that the monetary value of the solid minerals relating to the title is not less than four times the value of the loan sought for."*

  For the vessel loan, the applicant would need to be registered with the Nigerian Petroleum Exchange (NIPEX) and the Department of Petroleum Resources (DPR), must have been doing business in the oil and gas industry for at least fifteen (15) years preceding the date of the loan application, and must have deposited a contributory deposit of 30% of the total value of the vessel to be purchased with the CBN.

  Where the Directorates of NLC on Solid Minerals and Metallurgical Content and Oil and Gas stand as guarantor, the applicant will not be required to furnish any security or collateral to be granted the loan, subject to fulfilling certain conditions.

[5]Defined as "a subsistence miner who is not officially employed by a licensed mining company, but works independently, mining minerals using their own resources, usually by hand or other locally fabricated tools or equipment."

[6] Defined as "the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over computer-mediated networks wherein the goods and services are ordered over those networks, but the payment and the ultimate delivery of the good or service may be conducted on or off-line."

[7]The Bill is silent on what the balance of 10% will be allocated to.

[8]The Bill seems to suggest that priority will be given to indigenous Nigerian companies seeking loans to purchase vessels for shipping business especially for the transportation of petroleum and petroleum products within Nigeria.

- ***NLC Development Credit Guarantee Scheme***

  This will be established by the CBN to guarantee

  - investment/ loans by foreign investors who invest in or grant foreign loans to indigenous Nigerian companies for the construction, use and operation of modular refineries in-country using wholly or partially locally sourced materials;
  - payment to original equipment manufacturers who sell equipment to qualified indigenous Nigerian companies on credit, for the exploitation of mineral and petroleum resources, or for use in the Nigerian health sector, or for manufacturing goods that will substitute imported goods in all sectors of the economy;
  - payment for any vessel for shipping activities especially for the transportation of petroleum, petroleum products and other goods within and outside Nigeria.

  The rate of interest will not exceed 5%, and the loan will not attract any management/ processing fees but will require security/collateral. On the tenor, the CBN will issue guidelines after consultation with relevant bodies.

  Indigenous Nigerian companies seeking guaranteed loans relating to the above, will be required to apply to the financial institution where their accounts are domiciled, for a *"Guaranteed Local Content Development Loan."* The lending financial institutions will be required to establish Local Content Finance Departments at their head offices and submit monthly returns on guaranteed loan activities granted by them. Failure to submit the returns will attract a penalty of N500,000 for each day of failure for a maximum of 30 days, and N1,000,000 for each day the failure persists.

- ***Transportation of Nigerian oil and gas***

  No foreign company will be competent to bid for, be awarded, or be involved in any contract relating to transportation of oil and gas within, from and to Nigeria without first obtaining a Letter of Confirmation from the Directorate of NLC on Oil and Gas stating that the vessel and/ or company is in partnership with an indigenous Nigerian company involved in coastal trade. All shipments of Nigerian oil and gas for export will be based on Cost, Insurance and Freight except where impracticable.

- ***Setting up NC monitoring units in Ministries, Extra-ministerial Departments, Agencies and Others (MEA)***

  The Commission will set up an NLC Development Unit (NLCDU) in each MEA. The Unit will, amongst others, *"be responsible for overseeing, coordinating, monitoring, administering and enforcing the implementation of the provisions of the Bill and ensuring measurable and continuous growth in Nigerian Local Content in relation to the activities of the MEA"* under which it operates. To ensure independence, the Unit will only be subject to the direction/ control of the Commission.

- ***Penal and administrative sanctions***

  Several offences are listed in the Bill, some of which include carrying out shoddy work, selling/ transferring/ assigning contracts/ licenses/ leases/ interest obtained based on being an indigenous Nigerian company/ Nigerian citizen to a foreigner or foreign company without authorization from the designated Department, etc. The penalties include fines of between N20m to N60m, and imprisonment terms of five (5) to ten (10) years.

  For breaching provisions for which no penalty is provided, the general penalty is a fine not exceeding N20m, or imprisonment of up to 3 years or both, while the administrative penalty is N30m (or less), and N120m for repeated infringement in respect of the same offence. The fines are payable within seven (7) working days of imposition and attract interest at the prevailing bank rate from the date of imposition. Also, entities that have been assessed to the fines shall cease carrying on the contracted activity until payment is made.

- ***Miscellaneous provisions***

  The Board, upon consultation with relevant key industry stakeholders, government and regulatory agencies, chambers of commerce, and relevant professional associations, will issue Regulations for carrying out the purpose of the Bill. The Regulations are to be issued within 180 days from the date of commencement of the Bill.

  The Bill takes precedence over all existing laws relating to NC and its provisions prevail in the event of an inconsistency.

3. Our commentaries

The extension of the NLC philosophy to other sectors of the economy is a welcome development. No doubt, these sectors are achieving scale and Nigerians and Nigerian companies are being empowered to be part of the success story.

Our general observations regarding some of the provisions of the Bill are as follows:

1. The proposed 2% surcharge on all contracts awarded in the seven sectors covered in the Bill, and the additional 1% NLC development surcharge on every electronic transaction in Nigeria may conflict with the government's representation (during the public engagement on the proposed Finance Bill 2020, by the Fiscal Policy Reform Committee of the Federal Ministry of Finance, Budget and National Planning in November 2020) that it would not impose any additional *"**tax**"* or introduce any additional *"**relief**"* in 2021. If the proposal in the Bill sails through, it may cast doubts on the sincerity of Nigeria's government policy pronouncements and deepen the existing trust deficit.

   The proposal will also thwart the government's efforts at making Nigeria a manufacturing hub, leveraging the African Continental Free Trade Area Agreement (AfCFTA). A 2% surcharge, for example, on all contracts in the manufacturing sector will escalate the price of inputs of Nigerian-made goods and make them uncompetitive in the region.

2. Imposing a 1% NLC development surcharge on every electronic transaction in Nigeria is inconsistent with the spirit behind the government's cashless economy drive, as citizens may gravitate towards cash transactions to avoid the charge. Furthermore, it is also not clear who will be responsible for deducting and remitting the surcharge, as the Bill is silent on this.

3. With specific reference to the oil and gas sector, the 2% surcharge appears rather steep - a whopping 100% increase compared to the 1% levy in the subsisting NOGICDA. Furthermore, introducing it at a time when the industry and operators are still reeling under the impact of the Covid-19 pandemic and the plummeted crude oil prices may appear insensitive.

4. Under the Bill, seven (7) Directorates will be set up for all the sectors for which the government plans to pursue the Nigerian local content agenda. While this may appear plausible given the diverse nature of the sectors and the need for specialization/development of special skills, it may unwittingly lead to proliferation of regulatory bodies and agencies at a time that the country is aiming to streamline and harmonize MEAs and reduce the cost of governance. Instead of creating different agencies and boards to superintend the seven (7) sectors, we propose that a single Board be retained, with different departments for each sector. This way, specialization can still be achieved while they draw resources from the centre.

5. The Bill defines NLCE as an operator or any entity carrying out or seeking to carry out any regulated activity in any sector of the Nigerian economy covered by the Bill. On the other hand, it defines an *"indigenous Nigerian company"* as one incorporated in Nigeria, having its principal place of business in Nigeria, with a minimum of 90% equity stakes held by Nigerians, not having its assets controlled by foreign nationals or companies. Where the Bill is passed into law in its current form, companies interested in qualifying as Nigerian or indigenous companies would need to review their shareholding and management structures to bring themselves into compliance with this definition. A transitional period of at least two years should be given to allow the existing companies reorganize their operations to align with the requirements of the Bill.

The Bill if passed into law, will be a major game changer as sectors other than the Oil and Gas industry will now be required to comply with Nigerian local content requirements. We will continue to follow the developments in the NC space and provide a detailed newsletter once the Bill is passed into law.

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