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Newsletter

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AN OVERVIEW OF THE RECENT PRESIDENTIAL DIRECTIVES AND THE EXECUTIVE ORDER RELATING TO THE OIL AND GAS INDUSTRY

INTRODUCTION

On 28 February 2024 the President of the Federal Republic of Nigeria and Minister of Petroleum Resources, Bola Ahmed Tinubu ("President") in a bid to reform and attract investment in the Nigerian oil and gas sector ("sector") issued one executive order ("order") and two presidential directives ("directives") (altogether, "executive orders"). The executive orders are as follows:

- Oil and Gas Companies (Tax incentives, Exemption, Remission, Etc.) Order, 2024
- Presidential Directive on Local Content Compliance Requirements, 2024
- Presidential Directive on Reduction of Petroleum Sector Contracting Costs and Timelines, 2024

In this newsletter, we have reviewed the provisions of the executive orders and provided further guidance on the potential impact of the executive orders.

OIL AND GAS COMPANIES (TAX INCENTIVES, EXEMPTION, REMISSION, ETC.) ORDER

Introduction of fiscal incentives for non-associated gas ("NAG") greenfield developments

By this order, any investment in NAG greenfield developments that are onshore and in shallow waters, which achieves first commercial gas production on or before 1 January 2029 shall be entitled to gas tax credit where the hydrocarbon liquids ("HCL") content -

(a) does not exceed 30 barrels per million standard cubic feet ("SCF"), a gas tax credit at the rate of US$1.00 per thousand cubic feet or 30% of the fiscal gas price, whichever is lower; and

(b) exceeds 30 barrels per million SCF but does not exceed 100 barrels per million SCF, a gas tax credit at the rate of US$0.50 per thousand cubic feet of 30% of the fiscal gas price, whichever is lower.

Meanwhile, any other greenfield NAG project which achieves first commercial production after 1 January 2029 and with HCL content that does not exceed 100 barrels per million SCF shall be eligible for gas tax allowance at the rate of US$0.50 per thousand SCF or 30% of the fiscal gas price, whichever is lower.

This gas tax credit shall apply for a maximum of 10 years, after which it shall become a gas tax allowance claimable at the respective rates set out in (a) and (b) above. Also, the gas tax credit accruable in any year for a company shall not exceed the companies income tax ("CIT") payable for that year by the company and shall not be combined with the Associated Gas Framework Agreement incentives for the same greenfield NAG project. Also, in the event of a gas tax credit surplus in a particular year, the company has the right to carry the surplus forward to subsequent years but not exceeding 3 years.

By granting tax credit to gas producers that attain commercial production of NAG on or before 1 January 2029 and gas tax allowance to producers that attain commercial production of NAG after 1 January 2029, the order aims to encourage accelerated development and production of NAG by investors. This is because while the gas tax credit shall apply as a direct deduction from the CIT payable by a qualifying company (and therefore a more generous incentive), the gas tax allowance is claimable against the company's assessable profit prior to arriving at its taxable profit.

No incentive by way of gas tax credit or tax gas allowance is provided to NAG producers with HCL content above 100 barrels per million SCF.

The midstream capital and gas utilisation investment allowance

By the order, any gas company that undertakes a new, or as of the date of the order is undertaking an ongoing, project in the midstream oil and gas industry, shall be granted a gas utilisation investment allowance ("investment allowance") on qualifying expenditure on plant and equipment incurred by the company, which shall be utilised to reduce the company's assessable profits in the qualifying year. The rate of the investment allowance shall be 25% of the actual expenditure incurred on such plant and equipment. Notably, the investment allowance shall be granted as an allowable deduction from the assessable profits of the eligible company from the year of purchase of the relevant plant and equipment and shall not be taken into account in ascertaining the residue of qualifying expenditure incurred on such plant and equipment. A company shall only be granted the investment allowance upon the expiration of the tax-free period granted under section 39(1) of the Companies Income Tax Act ("CITA"). However, the order does not specify whether a company that has claimed accelerated capital allowances as provided under section 39(1) of the CITA shall be entitled to this additional investment allowance.

Further, the value of any asset on which capital allowance is claimable by a company under CITA shall not be restricted or reduced by the investment allowance available to be claimed by a company under the order.

Also, the applicable capital allowance under CITA shall continue to apply to the company without prejudice to any other allowable deductions, allowances and incentives available to the company under CITA or any other legislation.

But the investment allowance shall not apply on any qualifying expenditure incurred on plant and equipment within a period of 5 years from the date on which the expenditure was incurred where –

(a) the company sells or transfers the plant and equipment otherwise than to a person acquiring the plant and equipment for the same or related business and purpose as the seller, or for scrap;
(b) the company appropriates the plant and equipment for a purpose other than for gas utilisation; or
(c) the incurring of the expenditure for the plant and equipment occurs in a manner otherwise than as a bona fide business transaction or if the same is an artificial or fictitious transaction.

And in the event of a sale, plant or equipment for which the investment allowance has been claimed shall not be eligible for the same allowance by the acquiring entity or any subsequent purchaser.

The incentives for deep water oil and gas projects

The order enables the Minister of Finance to introduce fiscal incentives to ensure that investment in deep water oil and gas projects achieve a competitive internal rate of return. However, when the fiscal incentives are introduced, the Ministry of Finance Incorporated ("MOFI") and the Ministry of Petroleum Incorporated ("MOPI") are required to take steps to ensure that Nigerian National Petroleum Company Limited ("NNPCL") considers and implements commercial enablers for new brownfield and greenfield investments in deep water projects.

PRESIDENTIAL DIRECTIVE ON LOCAL CONTENT COMPLIANCE REQUIREMENTS

This directive was issued under the powers conferred on the President who doubles as the Minister of Petroleum Resources ("Minister") by the Nigerian Oil and Gas Industry Content Development Act, 2010 ("Local Content Act"). By this directive, the Nigerian Content Development and Monitoring Board ("NCDMB") which is established by the Local Content Act is mandated to –

(a) take into account the practical challenges of Nigeria's insufficient capacity for certain services; and
(b) act in a manner that does not hinder investments or competitiveness of petroleum projects in Nigeria.

The NCDMB is therefore required to reject any Nigerian Content Plan ("NCP") that contains intermediary entities that lack the requisite capacity and approve only NCPs which contain contractors that –
(a) meet the legal definition of Nigerian Content, and
(b) demonstrate genuine, substantial, and tangible capacity to independently execute projects within Nigeria.

It is therefore a violation of the local content requirement for NCDMB to approve any NCP, which contains an entity that acts solely as an intermediary with no demonstrated capacity to execute the relevant project or activity. NCDMB is therefore required to develop guidelines for assessing and verifying the capacity of companies which seek to execute contracts for specified activities under the Local Content Act in consultation with stakeholders.

PRESIDENTIAL DIRECTIVE ON REDUCTION OF PETROLEUM SECTOR CONTRACTING COSTS AND TIMELINES

This directive aims to promote transparency and efficiency in the oil and gas sector by shortening the procedure for obtaining approval for contracts from relevant government agencies and entities in the sector in line with global best practices, with a view to encouraging investment in the sector to reposition Nigeria as the preferred investment destination in the oil and gas sector in Africa. The directive is therefore targeted at the MOFI and MOPI (which are shareholders of the NNPCL), NNPC Upstream Investment Management Services ("NUIMS"), and the NCDMB.

The directive is expected to take effect immediately, but the MOFI, MOPI, and NCDMB are expected to work out the modalities for its implementation and comply with the directives within 30 days.

Removal of requirement for NNPCL approval for contracts below US$10,000,000

In any case in which the provisions of any production sharing contract ("PSC") or joint operating agreement ("JOA") provides a financial value threshold for the prior consent of NNPCL for the awards of contracts and procurements, MOFI and MOPI are directed to take steps to procure NNPCL to amend any such provision in a PSC or JOA in force to raise the approval threshold to an amount of not less than US$10,000,000 or the Naira equivalent determined at the NAFEX FMDQ exchange rate or any other platform determined by the Central Bank of Nigeria. Furthermore, MOFI and MOPI are required to ensure that the threshold is reviewed and adjusted annually in accordance with the rate of consumer inflation disclosed by the National Bureau of Statistics.

NNPCL and NUIMS

The NNPCL and its investment arm NUIMS, in collaboration with the NCDMB and stakeholders, are required to simplify the process for approval of contracts and adopt a single level of approval at each contract stage, i.e., prequalification, technical, commercial, and final approval. All approvals or consents for each contract stage are to be issued within 15 days from the date of submission of the application by the relevant party to the PSC or JOA. NNPCL and

NUIMS are expected to communicate their decision to the applicant within 15 days of the application, failing which the approval shall be deemed granted. Also, where the applicant's submission is deemed insufficient or inadequate, NNPCL and NUIMS shall request additional information "during the initial review period"; and the applicant is required to provide the additional information or clarification within 7 days. Upon the provision of the additional or outstanding information, NNPCL and NUIMS shall respond to the applicant within 7 days, failing which the approval shall be deemed granted. Although the phrase "during the initial review period" suggests that the right to call for additional information or clarification cannot be exercised interminably but must be exercised within 15 days of the application, the directive however does not stipulate the deadline within the 15-day period when NNPCL and NUIMS may make the request. This therefore means that the request for additional information may be validly made on the 14th day of the application, and thus potentially extend the approval period by 14 days. To avoid the unnecessary delay that may be occasioned by this loophole, we suggest that NNPCL and NUIMS should be required to call for additional information not later than 5 days of the date of the application, failing which the decision on the application must be made within 15 days of the application. It is also expected that NNPCL and NUIMS shall immediately publish a list of all documents or class of documents and information required to accompany an application in each case, so that any request foradditional information may be objectively tested against that list.

NCDMB

NCDMB has 10 days to review any NCP submitted to it pursuant to the Local Content Act, failing which the NCP shall be deemed approved. However, where the applicant's submission is deemed insufficient, NCDMB shall request for additional information and the applicant is required to furnish such additional information within 7 days following which the NCDMB shall respond within 7 days, failing which the approval will be deemed granted. As in the case of approvals by the NNPCL and NUIMS, the NCDMB should be required to call for additional information not later than 5 days of the date of the application, failing which the approval must be granted within 15 days of the application.

NCDMB is also required to direct an application for expatriate quota to the relevant MDA within 10 working days provided that all supporting documents are in place.

Duration of third-party contracts

The directive extends the duration of third-party contracts awarded pursuant to a PSC or JOA from 3 years to 5 years with the option of renewal for an additional 2 years after the expiration of the initial 5 years.

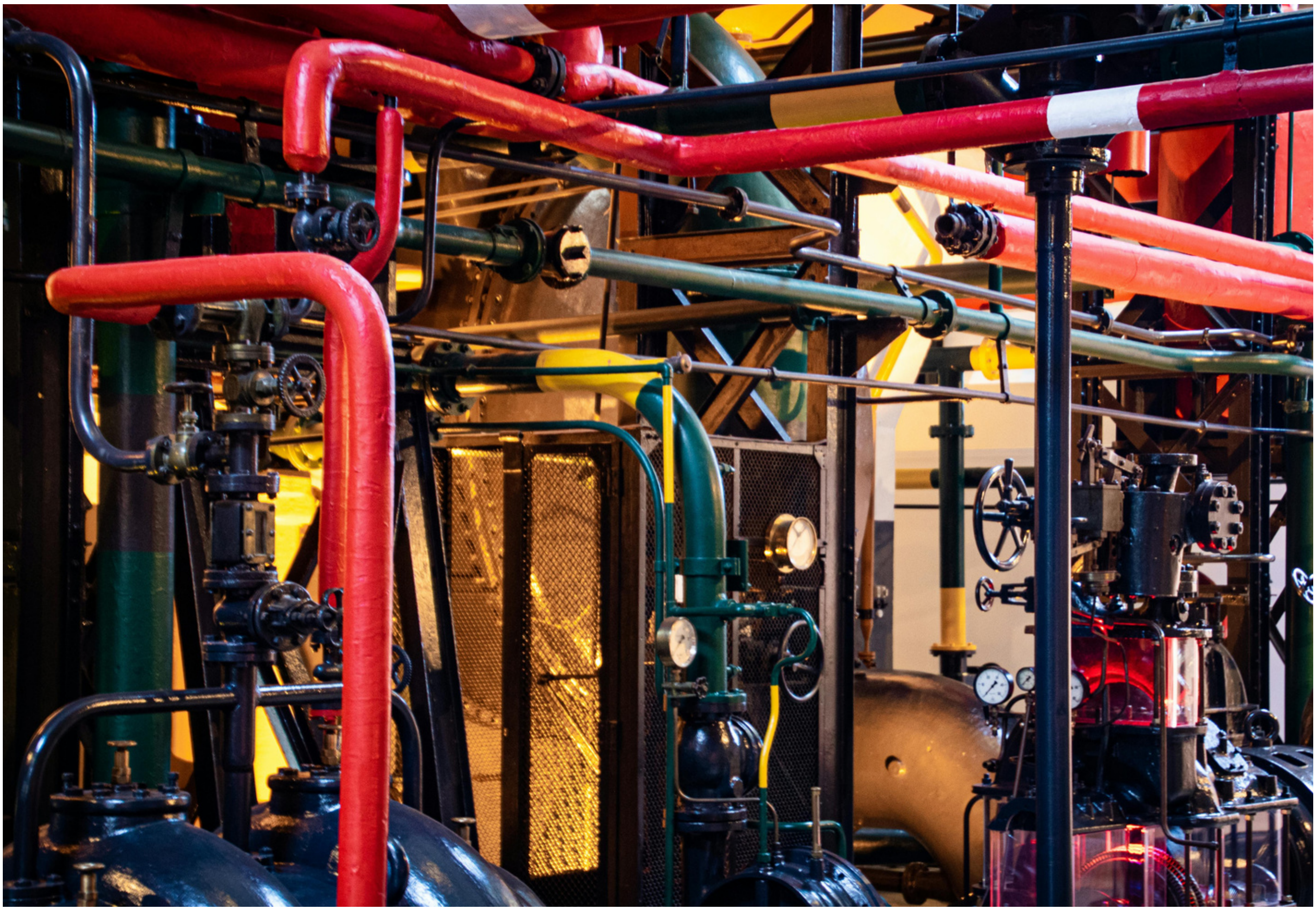
CONCLUSION

The making of the executive orders points to the realisation by the President that stakeholders in the oil and gas sector have become disenchanted and disillusioned by the corruption, opacity, and bureaucratic bottlenecks, and inexplicable and inexcusable very long delays, which characterise activities in the sector, especially in respect of approvals and consents required to properly conduct business in the sector.

However, the objective of the executive orders, namely the acceleration and expansion of activities and investments in the oil and gas sector in Nigeria, will not be achieved until the directives contained in the executive orders are fully implemented. Similar executive orders, which were aimed at improving the ease of doing business in Nigeria, were issued by former President Muhammadu Buhari; but they had no real impact on the ease of doing business in Nigeria. Also, not much has been heard about the Business Facilitation (Miscellaneous Provisions) Act, 2022, which codified some of the business facilitation standards or reforms contained in the executive orders that were issued by the former president. The government should therefore take very active and visible steps to ensure that the executive orders are indeed executed as ordered by Mr. President. And it may be helpful to apply severe sanctions against individual public servants who violate these directives. It may also be useful to codify the executive orders in a piece of legislation, with a clear provision that enables its provisions to override the provisions of existing legislation affected thereby.

The directives relating to local content requirements in the oil and gas sector should, if well implemented, have a significant effect on bringing down the cost of oil production in Nigeria. The current practice in which some "local content companies" operate as intermediaries without adding any value in the process has simply increased the cost of procuring relevant goods and services in the sector by the amount of money received by the "local content companies" or "local content partners". Accordingly, instead of increasing local capacity in the sector, the practice has created rent seekers. It is therefore hoped that only Nigerian companies, which intend to invest in acquiring appropriate capacity to create and domesticate value in the sector, will benefit from the local content regime.

We also hope that the government would leverage on the lessons learnt from the implementation of the local content requirements in the oil and gas industry to review all local content requirements in other sectors of the economy such as the requirement for local content by the National Office for Technology Acquisition and Promotion for the registration of certain classes of technology contracts, with a view to eliminating the abuse of the regime by rent seekers, who add no value to the industry or the country. The National Assembly should also learn from the pitfalls in the Local Content Act and its implementation in considering the local content bill intended for general application in all business sectors in Nigeria, which is pending before it. Local content requirements should aim to balance the need to empower Nigerians with the imperative to make Nigeria competitive, so that only Nigerian businesses, which demonstrate capacity to create and domesticate value – and ultimately replace foreign-sourced goods and services in appropriate cases – will benefit from local content legislation. Any local content regime, which promotes rent-seeking, is prejudicial to the Nigerian economy and the Nigerian people.



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