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**The Nigerian Content
Development and Enforcement Bill
and the Petroleum Sector:
Key Themes and Implications**

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On December 18, 2019, about four months before the tenth anniversary of the enactment of the Nigerian Oil and Gas Industry Content Development Act (the Local Content Act)¹, 9 members of the National Assembly, including the current speaker of the House of Representatives, sponsored a bill for legislative consideration that, if enacted into law, would repeal the Local Content Act and enact a new "Nigerian Content Development and Enforcement Act" (the Bill).²

In addition to proposing new requirements and regulations that would further increase and support indigenous participation in the petroleum sector, the Bill ambitiously proposes similar reforms for the Nigerian mining, Information Communication Technology (ICT), construction and power sectors. Legislative deliberation on the Bill may be protracted, even without factoring in the unprecedented impact of the Coronavirus pandemic. This is due to its multi-sector focus, the increased stringency of its compliance and enforcement prescriptions and the extensive stakeholder

engagement that public consultation requires before it may be enacted.

Global COVID-19 era developments, including significantly decreased demand, the current oil glut, the slump in oil prices and low cash reserves raise significant viability considerations for a sector that, from a Nigerian economic perspective, currently accounts for approximately 60% of government revenue and 90% of foreign exchange earnings. These factors demand an exhaustive economic and legislative consideration of the wider implications of the changes proposed by this material legislation for the immediate and long-term sustainability of the Nigerian oil and gas sector and its economy.

In this note, **'Folake Elias-Adebawale, Mesuabari Mene-Josiah and Amarachi Okewulonu** assess key themes and potential implications of the Bill for the Nigerian petroleum sector.

¹ Citation.

² Number HB 621 in the Nigerian National Assembly Journal number 58 of December 17, 2019.



Scope and clarity Currently, the Local Content Act defines “Nigerian Content” as “the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilisation of Nigerian human, material resources and services in the Nigerian oil and gas industry”.

The Bill preserves the Local Content Act’s philosophy that Nigerian content be considered an element of project development, management philosophy and execution. Also, like the Act, it sets minimum Nigerian Content prescriptions based on criteria such as the number of man-hours relative to the duration of the project, size, tonnage and volume of certain goods, level of certification and the percentage of spending for the procurement of local goods and services, among other standards.

Drafting ambiguities and inconsistencies around various terms and provisions of the Local Content Act have, since its enactment, fostered uncertainty as to the scope and interpretation of its prescriptions for petroleum sector participants. It is not always clear which of its requirements apply to which participants, and these concerns do not appear to have been fully resolved by the Bill which, as presently drafted, introduces various additional undefined terms.

Interpretation: The Local Content Act Section 106 of the Local Content Act defines a “Nigerian company” as “a company formed and registered in Nigeria in accordance with the provision of the Companies and Allied Matters Act with not less than 51% equity shares by Nigerians”. Having defined the term, however, the Local Content Act does not use the term “Nigerian company” at all. Instead, it uses various undefined variations including “Nigerian indigenous operator” (section 3(1)), “Nigerian indigenous service companies”(section 3(2)), “Nigerian indigenous contractors”(section 15), “Nigerian contractors and service or supplier companies”(section 45), and “indigenous companies” (sections 41(1)(a), 48 and 49(1)) to reference sector participants envisaged by each relevant provision.

In the absence of ministerial regulations and case law to provide definitive interpretation, intending and existing petroleum sector stakeholders have tended to rely either on their understanding of industry practice in determining compliance requirements, which is far from ideal, or to independently engage the Nigerian Content Monitoring Board (NCDMB) for clarification on a case-by-case basis. This latter tendency is further to section 70(I) of the Local Content Act, which empowers the NCDMB to “provide guidelines, definitions and measurement of Nigerian content and Nigerian content indicator to be utilised throughout the industry”.



Interpretation: The 2015 Bill


The same uncertainty had pervaded previously proposed amendments of the Local Content Act, including a failed attempt to enact a "Bill for an Act to Amend the Nigerian Oil and Gas Industry Content Development Act 2010 and for Purposes Connected Therewith" in 2015 (the 2015 Bill). The 2015 Bill had also failed to address most of the existing ambiguities but had proposed to introduce a new definition for the term, "Nigerian indigenous company" (where all shareholders and board members are Nigerian and all assets are entirely owned by such companies).

While the intention under the 2015 Bill appears to have been to increase indigenous eligibility for the receipt of Nigeria Content Development Fund finance and support to increase capacity, the implication of that definition would have been that only such companies would have qualified exclusively to bid to carry out work on land and swamp operating areas in Nigeria. Similarly, the 2015 Bill had also proposed an expanded definition of the term "operator" that included not just the state national oil company and interest holders that also provide finance and/ or act as technical operators of petroleum assets. It also proposed to include other parties involved in petroleum arrangements, contracts and business ventures such as passive interest holders in petroleum assets that do not have responsibility for or undertake operational or technical activities.

Interpretation: the Bill

The Bill uses a variety of terms such as "Nigerian indigenous company and/ or firm" (sections 2, 23 and 95), "Nigerian independent operators" (section 11), "indigenous engineering companies and/ or firms" (section 7(2)), "Nigerian indigenous service companies" (section 12), "Nigerian companies and firms" (sections (g), 225). Section 5(k) of the Bill, however, preserves the provisions of section 70(l) of the Local Content Act and similarly empowers the Nigerian Content Development and Enforcement Board to provide "guidelines, definitions and measurement of Nigerian content indicator to be utilised in the oil and gas industry in Nigeria." In summary, the Bill proposes definitions including the following:

- (1) An "indigenous company" is defined as a company incorporated in Nigeria and registered with the Corporate Affairs Commission (CAC) with "a minimum of 90% equity stakes and voting rights by Nigerians, with at least 80% Nigerian staffers in management positions, or at least 90% technical and R&D employees being Nigerians". This term is used, for instance, in (section 23) as a basis for determining eligibility for the award of contract, where a Nigerian indigenous company has demonstrated capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry. Notably, the Bill still does not offer a definition for "Nigerian indigenous service companies"



Compliance

(our emphasis), notwithstanding its wholesale reproduction of clause 3(2) of the Local Content Act as its own section 12. A possible interpretation is that it is service companies that meet the thresholds set out in this definition of 'indigenous companies' that are intended. If this is correct, as was the case with the 2015 Act, there is a risk that section 12 may have much wider implications than may have been intended, potentially for participants providing technical services within and to the petroleum sector. The language of section 12 may be read to suggest that only indigenous companies that are service companies and which meet the high thresholds indicated above—with no more than 10% non-Nigerian shareholders and no more than 20% non-Nigerian board members—which can also demonstrate their ownership of equipment, personnel and capacity to execute work, may bid to carry out work on land and swamp operating areas.

The Bill's other definitions include the following:

- a) a "Nigerian company" is defined as "an entity registered in Nigeria under the Companies and Allied Matters Act 1990 or any succeeding legislation and shall include Business Names and the equity share in the said company shall not be less than 90% owned by Nigerians and the management positions of the company shall be composed of not less than 90% of Nigerians";
- b) a "multinational company" or "MNC" is defined as a company that has its head office located in a country other than Nigeria and operates in more than one country; and
- c) the term, "Nigerian services", is currently only defined to mean services offered by Nigerian professional companies and Nigerian professionals.

The term "foreign company" is frequently used but is not defined in the Bill. The Act also capitalises, but does not define, several terms that it utilises frequently (please see sections 2, 219, 225 and 226) including "Ministries", "Extra Ministerial Departments", "Agency of the Federal Government of Nigeria", "Federal Government Owned Companies (either fully or partially owned)", "Federal Institutions", "Public Corporations", "Private Sector Institutions" and "Business Enterprises". The absence of clear explanations and definitions for each capitalised term potentially introduces more uncertainty and may have the unintended effect of suggesting a more limited scope of application for the relevant obligations.

SUSTAINABILITY

ECONOMIC GROWTH

The need for legislative clarity

The significance of the issues raised by the unclear language and implications is perhaps best considered in the context of the implications for first consideration or exclusive consideration in all activities or transactions in the petroleum sector.

"First consideration" for "Nigerian indigenous operators" and "exclusive consideration" for "Nigerian indigenous companies" and "Nigerian indigenous service companies" under the Act and the Bill

Section 11 of the Bill preserves the "first consideration" provisions of section 3(1) of the Local Content Act, which provides that "first consideration" must be given to Nigerian indigenous 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. Similarly, section 12 of the Bill provides (like section 3(2) of the Local Content Act) that exclusive consideration must be given to Nigerian indigenous service companies that demonstrate capacity to execute such work to bid on land and swamp operating areas of the Nigerian petroleum industry in accordance with the First Schedule of the Bill (which reproduces the current Schedule of the Local Content Act).

These prescriptions will need to be aligned with the broader provisions of section 2 of the Bill, which sets out generalised requirements that may overlap with the above petroleum sector specific provisions. It requires contracts, grants of extractive permits, licences, leases or any other instruments conferring any right on a person to exploit petroleum or mineral resources in any part of Nigeria to be given to a "Nigerian indigenous company and/ or firm" that demonstrates the capacity to execute the project or to undertake the business activity.

"Nigerian preference" under the Bill

This term is not defined and it is not clear what it means in the context of the Bill, which introduces it. The Bill provides, in sections 225 and 226, that every Ministry, Extra Ministerial Department and Agency of the Federal Government of Nigeria shall, in the award of contracts give "Nigerian preference" to "Nigerian companies and firms" provided that; where Nigerian companies and firms lack the capacity to execute the contract bid for, preference shall be given to foreign companies or firms with a demonstrable and verifiable plan for indigenous capacity development, prior to the award of the contract. Section 226 goes further to specifically require that where any contract is to be awarded to any foreign company, the entities named above shall ensure that Nigerian counterpart staff are engaged from the conception stage to the terminal stage of the project.



Application All entities participating in the petroleum sector appear to already be subject to its provisions even without the capitalisations. Section 1 of the Bill, like section 1 of the Local Content Act, already provides that its provisions "shall apply to all matters pertaining to Nigerian content in respect of all operations or transactions carried out in the Nigerian economy".

Similarly, section 11 regulates all awards of oil blocks, licences, projects and contracts in the Nigerian oil and gas sector and section 12 regulates all "contracts, grant of any extractive permit, licence, lease or any other instrument conferring any right on a person to exploit petroleum and/or mineral resources in any part of Nigeria". Section 217 of the Bill also requires all "regulatory authorities, operators, licensees, lessees, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in Nigeria" to "consider, apply and also ensure the compliance by any person working under them the Nigerian content policies." On one interpretation, the objective of the newly capitalised terms may simply be to highlight that the Bill governs all activities and entities—including government ministries and other entities—in the petroleum sector in relation to local content obligations.

The Bill seeks to increase prescriptions for Nigerian participants and the use of Nigerian resources and to more stringently enforce compliance in the petroleum sector. To this end, it extends the powers of regulators charged with responsibility for local content matters and prescribes heavier penalties for non-compliance than the Local Content Act. As it broadly requires that participants "apply and ensure compliance by any person working under them with Nigerian content policies" (without specifying the scope of the term "persons working under them"), the implications and potential liability of such participants may be significant.

Given its proposed breadth, more stringent requirements, monitoring and enforcement mechanisms and penal consequences, it is hoped that the legislature will exploit the unique opportunity that its current consideration presents for achieving consistent and definitive legislative clarity. This will enable intending and existing sector participants to more readily establish eligibility and compliance parameters.

Preservation of Schedule prescriptions The Schedule to the Local Content Act, which is proposed to be reproduced as the First Schedule to the Bill, does not appear to have been amended by it. It is not exhaustive, to the extent that where the minimum Nigerian content for any service is not explicitly prescribed in it, the NCDMB is given the power to set an appropriate minimum content level pending the inclusion of the minimum content level for that service or project in the Schedule, through a legislative



amendment of the statute. The Bill preserves these powers for a proposed Nigerian Oil and Gas Content Development and Enforcement Board (the "New Board"). The New Board's broad functions include the provision of guidelines, definitions and measurements of Nigerian content indicators to be utilised in the Nigerian oil and gas industry.

Notably, section 11(4) of the Local Content Act is preserved in section 18(4) of the Bill which confers powers on the Minister charged with responsibility for oil and gas in Nigeria (the Minister) to authorise the continued importation of the relevant items and such approval shall not exceed 3 years from the commencement of the act where there is inadequate capacity to meet any of the Schedule -prescribed targets, the timing of which would presumably commence with the date of its enactment if the Bill is passed into law. Section 18(2) of the Bill, like section 11(2) of the Local Content Act, also provides that where a project description is not specified in the First Schedule, the Board is empowered to set the minimum Nigerian content level for that project pending its inclusion by an amendment to the First Schedule of the Act by the legislature.

The New Board, its new powers, and the Minister

The implementation, monitoring and enforcement of the Local Content Act are currently the responsibility of the NCDMB, which was established by the Act. The NCDMB has wide discretion under the Act to evaluate and designate bids, pre-qualification notifications, awards, contracts and compliance plans and to review and determine adherence to its provisions.

In relation to the petroleum sector, section 3 of the Bill seeks to establish a new board to be called the New Board. The New Board is proposed to replace the NCDMB, but with notable differences. The constitution of the governing council of the New Board is proposed to include a representative of each of the Manufacturers Association of Nigeria and a body described as the "National Insurance Board", which is not immediately clear, as a replacement for the National Insurance Commission which is currently prescribed under the Local Content Act.

Notably, the Bill seeks to confer the New Board with wider functions and more extensive powers than are currently conferred on the NCDMB under the Local Content Act. Among these are extended powers to make regulations in conjunction with the Minister charged with responsibility for petroleum resources. This markedly deviates from the Local Content Act, which gives the Minister exclusive powers to make regulations for the oil and gas industry. Sections 47, 48, 49, 53, 54 and 55 of the Bill empower the New Board to make regulations in conjunction with the Minister in respect of the following:



- a) the establishment of minimum standards, facilities, personnel and technology for training in the industry;
- b) the specification of modalities for involving operators as partners in training and development in relation to the matters referenced in (a) above;
- c) the prescription of targets to ensure the full utilisation and steady growth of indigenous companies engaged in exploration, seismic data processing, engineering design and reservoir studies; the manufacturing and fabrication of equipment and other facilities, as well as the provision of other support services for the Nigeria oil and gas industry;
- d) requiring any operator or company or its professional employees engaged in the provision of engineering or other professional services in the Nigerian oil and gas industry to be registered with the relevant professional bodies in Nigeria;
- e) prescribing targets for operators or project promoters on the number and type of such joint ventures or alliances to be achieved for each project to the Minister and the Board jointly.
- f) requiring any operator to invest in or set up a facility, factory, production units or other operations within Nigeria for the purposes of carrying out any production, manufacturing or for providing a service otherwise imported into Nigeria;
- g) requiring any operator to invest in or set up a facility, factory, production units or other operations within Nigeria for the purposes of carrying out any production, manufacturing or for providing a service otherwise imported into Nigeria; and

Section 53 of the Bill also seeks to amend and augment the current provisions of section 43 of the Local Content Act by conferring the New Board and the Minister with joint powers to make regulations prescribing targets in relation to the number and type of joint ventures or alliances that may be achieved for every project involving technology transfers. On one interpretation, it appears that the intention is for technical service and other agreements for the transfer of technology in the petroleum sector to become subject to regulations jointly issued by the New Board and the Minister.

Whether, and to what extent, the exercise of such powers will replace or be exercised in conjunction with the provisions of the National Office for Technological Acquisition and Promotions (NOTAP) Act (which currently regulates all agreements for the transfer of



technology in Nigeria regardless of sector) or regulations made by the NOTAP, may need to be clarified. To buttress the increased control and supervision of such agreements in the petroleum sector, the Bill expressly provides that foreign companies or firms are prohibited from engaging in “contracts for Works, Good and Services in Nigeria in violation of relevant laws, regulations and international best practice on acquisition of technology.”

These provisions, if enacted as drafted, would significantly depart from the Local Content Act 's preservation of the Minister's exclusive powers to make regulations for the sector and in relation to local content matters. Having said this, section 72 of the Bill also provides that the Minister charged with responsibility for petroleum resources shall chair the governing council of the New Board, which has overall responsibility for conducting the affairs of the Board.

Changes to bidding qualification thresholds and introduction of 'margins of preference'

The Local Content Act provides that awards of contracts shall not be solely based on the principle of the lowest bidder where a Nigerian indigenous company has the capacity to execute the relevant work, and requires that Nigerian indigenous companies must not be disqualified exclusively on the basis that they are the lowest financial bidders, provided that the value does not exceed the lowest bid price by 10%. Section 23 of the Bill increases this lowest price threshold to 20% where there is a "Nigerian indigenous company" as defined by the Bill which has presented a bid, the value of which does not exceed the lowest bid price by 20%.

The Bill also proposes that any entity awarding contracts in Nigeria (including government agencies) shall introduce a "margin of preference" in the evaluation of tenders for every competitive bidding, from indigenous suppliers of goods manufactured locally over foreign goods. It proposes a 15% "margin of preference" for international competitive bidding for Goods, a 7.5% "margin of preference" for works and a 15% Margin of Preference for Domestic Contractors. This appears to require that preference be given to indigenous suppliers of goods manufactured locally, and for domestic contractors, to increase their participation in the petroleum sector.

Labour clause and increasing indigenous capacity

Section 32 of the Local Content Act requires that any contract exceeding \$100 million must include a labour clause mandating the use of a minimum percentage of Nigerian labour in specific cadres as may be stipulated by the NCDMB. The Bill, however, proposes to reduce the budget requirement under the Local Content Act for the inclusion of a mandatory labour clause specifying minimum percentages of Nigerian labour to be used in specific cadres, particularly projects and contracts with budgets in excess of \$100 million, to \$1 million, to increase indigenous participation.



The Bill also requires that operators devise and submit succession plans for all positions not held by Nigerians. Nigerians must understudy foreigners for up to 5 years at which time non-Nigerian positions are required to have been "Nigerianised". Sector participants remain obligated to employ only Nigerians in junior and intermediate cadre positions as prescribed by the operator or relevant participant.

**Increased penalties
and potential
vicarious liability**

The Local Content Act's penalty for carrying out a project in the oil and gas industry not in accordance with the Act is currently a fine of 5% of the project sum upon conviction. The Bill proposes heavier penalties which are a fine of 15% of the project sum in addition to a 5-year imprisonment term for non-compliance with any of its provisions. If the Bill is enacted as drafted, participants may be potentially liable not just for non-compliance with provisions, but vicariously for third party non-compliance where such persons may be deemed to be "working under" them. Ambiguity around what the phrase "working under them" means necessitates the clarification of the legislative intention here.

Section 218 of the Bill also provides that, after the commencement of the Bill, any subsequent contract or any award "or job for the execution of work, provision of goods and services by any Ministry, Extra Ministerial Department and Agency of the Federal Government of Nigeria; Federal Government Owned Companies (either fully or partially owned), Federal Institutions and Public Corporations; in contravention of the provisions of this Act, Schedules and Regulations is void and unenforceable."

There may be far-reaching implications for breaches where the Bill's provisions are retained as drafted as it is not entirely clear whether these provisions, for instance, would apply to contracts executed by private companies so as to render such contracts void and unenforceable on account of any non-compliance.

**Compulsory
dispute resolution**

Section 227 of the Bill requires any dispute arising from any contract or project in respect of any sector of the Nigerian economy that is regulated by the Bill to be compulsorily resolved by arbitration after the parties have attempted an amicable resolution that has failed to resolve the dispute. The arbitral panel is required to be constituted by the Chief Judge of the Federal High Court and shall comprise of not less than 3 members who shall be judges of the Federal High Court.

If the Bill is enacted with these requirements it may have far-reaching implications for participants in the Nigerian oil and gas sector, as the current freedoms that Nigerian law confers on contractual parties to choose methods for dispute resolution and the jurisdictions for settling such disputes would, potentially, be eroded.



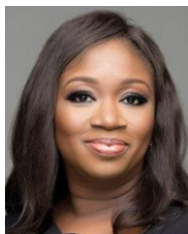
Contributions to the Nigerian content development fund

Notably, the Bill as currently drafted appears to propose the repeal of section 104 of the Local Content Act, which had required the deduction at source of the sum of 1% of every contract awarded to every "operator, contractor, subcontractor, alliance partner or any other entity involved in any project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry" and that such sum shall be paid into the Nigerian Content Development Fund for purposes of "funding the implementation of Nigerian content development in the Nigerian oil and gas industry". The Fund is currently managed by the NCDMB and is required to be employed for projects, programmes and activities directed at increasing Nigerian content in the industry. The Bill, however, does not appear to have retained this requirement, suggesting instead that the New Board will receive funding from government. The Bill also omits Local Content Act provisions relating to the Nigerian Content Consultative Forum, which currently provides "a platform for information sharing and collaboration in the oil and gas industry with respect to upcoming projects, information and available local capabilities and other policy proposals that may be relevant to Nigerian content development in the oil and gas industry".

'Minding the Gap'

The tenth anniversary of the enactment of the Local Content Act is as good an opportunity as any to assess its impact during one of the most eventful decades in the history of Nigeria's dynamic petroleum industry. The Bill as drafted preserves several Local Content Act provisions, as well as some of its interpretation issues that create compliance challenges. It proposes a number of potentially significant changes, including more stringent requirements for qualification as a "Nigerian company"—90% Nigerian-held equity and 80% Nigerian board composition—and the removal of the mandatory requirement to contribute levies of 1% of contract value to the Nigerian Content Development Fund.

The legislative process presents an invaluable opportunity for reform, not only of the issues that have arisen with the interpretation and implementation of the Local Content Act, but to address the petroleum sector's imminent challenges. It is hoped that the National Assembly, in the course of its deliberations on the Bill and engagement of stakeholders, exploits that opportunity and exhaustively considers what is required to achieve the Bill's objectives of increasing indigenous participation and exponentially growing local capacity. Current developments in the wake of the COVID-19 pandemic highlight that the overriding priority is to position the industry for responsive and sustainable recovery and growth in the immediate and long term.



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