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# Client Alert

## Do We (Finally) Have Lift-off? Nigerian President Issues Policy Directives to Unlock Investments in the Nigerian Energy Sector

The President of Nigeria, Bola Ahmed Tinubu (the "**President**"), on 6 March 2024, signed Executive Orders on oil and gas reform and issued three (3) policy directives in a bid to enhance investments in the energy sector and establish Nigeria as the preferred investment destination for the energy industry in Africa.

***This is a BIG ask, but we will get into that later.***

In this Client Alert, we discuss the key highlights of the President's directives.

According to the State House, the President, in recognising the urgency to accelerate investments, has directed the:

(a) introduction of fiscal incentives for non-associated gas projects, midstream and deepwater projects;

(b) radical streamlining of contract approval processes and the adoption of "*deemed approval*" in as little as 15 days by relevant governmental authorities; and

(c) application of local content requirements without hindering project delivery schedules or cost competitiveness

(together, the "**Directives**").

### 1. The Oil and Gas Companies (Tax Incentives, Exemption, Remission, etc.) Order, 2024 (the "Fiscal Incentives Directive")

The Fiscal Incentives Directive seeks to fire up (pardon the pun) gas investments and development, and includes the following highlights:

(a) **Gas Tax Credits ("GTC") for Non-Associated Gas ("NAG") greenfield developments:** GTC shall apply to NAG greenfield developments, in onshore and shallow water areas, with first gas production **on or before 1 January 2029.**

Specifically, where the hydrocarbon liquids content ("**HCL**") of the gas does not exceed 30 barrels per million standard cubic feet ("**scf**"), the GTC shall be US$1.00 per thousand cubic feet or 30% of the fiscal gas price, whichever is lower. If the HCL content exceeds 30 barrels per million scf, but does not exceed 100 barrels per million scf, the GTC shall be US$0.50 per thousand cubic feet or 30% of the fiscal gas price, whichever is lower.

For NAG greenfield projects starting production **after 1 January 2029**, with HCL content not exceeding 100 barrels per million scf, a Gas Tax Allowance ("**GTA**") shall apply at US$0.50 per thousand scf or 30% of the fiscal gas price, whichever is lower.

*Important to note that HCL content in a NAG field will be determined in guidelines issued by the Nigerian Upstream Petroleum Regulatory Commission ("**NUPRC**").*

GTC for NAG projects shall apply for 10 years. Afterwards, they transition into a GTA at the rates detailed above. To prevent double dipping, the GTC for a company in a year must not exceed its income tax payable for that year, and the GTC must not be combined with incentives from the Associated Gas Framework Agreement ("**AGFA**") for the same greenfield NAG project.

Unused tax credits can be carried forward for up to 3 years. The fiscal gas price calculation will be based on the price used for determining royalties under the Petroleum Industry Act, 2021 ("**PIA**").

(b) **Utilization Investment Allowance for any new and ongoing midstream project:** Gas utilisation companies are eligible for this allowance when procuring plant and equipment related to new or ongoing projects within the midstream oil and gas sector.

The gas utilisation investment allowance, which is 25% of the actual expenditure incurred on such plant and equipment procured, is implemented by allowing companies to deduct this investment allowance from their assessable profits, starting from the year of purchase of the relevant plant and equipment. The gas utilisation investment allowance will not be considered in the determination of the residue of the qualifying expenditure incurred on such plant and equipment.

It is worth noting that midstream gas companies cannot enjoy or assert claims to the allowance incentive until the expiration of the tax-free period outlined in section 39(1) of the Companies Income Tax Act, as amended ("**CITA**").

Also, companies will be ineligible to claim the gas investment allowance on qualifying expenditures for plant and equipment within 5 years from the expenditure date if the:

(i) company sells or transfers the equipment to a party acquiring it for a business unrelated to the seller's business, or for scrap;
(ii) procured plant or equipment is used for purposes other than gas utilization; or
(iii) expenditure on equipment procurement is not a genuine business transaction or is considered artificial or fictitious.

Furthermore, if a gas utilization allowance has been claimed for a specific plant or equipment, it shall not be eligible for another gas utilization investment allowance by the acquiring entity or subsequent purchaser.

(c) **The implementation of commercial enablers for new brownfield and greenfield investments in the deep water**: The goal here is to achieve a competitive Internal Rate of Return ('**IRR**") for investments in the deep water. Prior to the President's (who also doubles as the Minister for Petroleum Resources ("**Minister**")) introduction of the fiscal incentives for this purpose, the shareholders of the Nigerian National Petroleum Company Limited ("**NNPC**") (being the Ministry of Finance Incorporated and the Ministry of Petroleum Incorporated) are required to take steps to procure that NNPC considers and implements commercial facilitators for new brownfield and greenfield investments in deep water regions.

## 2. Reduction of Petroleum Sector Contracting Costs and Timelines, 2024 (the "Contracting Directive")

The Contracting Directive introduces:

(a) **Financial Approval Thresholds:** The approval threshold in Joint Operating Agreements ("**JOAs**") and Production Sharing Contracts ("**PSCs**") requiring the NNPC's approval for contracts and procurements is raised to a minimum of US$10,000,000 or the equivalent in Naira determined by the NAFEX[1] FMDQ[2] exchange rate or another platform designated by the Central Bank of Nigeria ("**CBN**").

This acknowledges present contracting and economic realities, which differ from when many JOAs and PSCs were originally drafted, with numerous agreements having a contracting threshold of about US$1,000,000 or less, thereby causing an unnecessary approval cycle for minor expenditures. In addition, the new threshold is to be adjusted annually based on the consumer inflation rate reported by the National Bureau of Statistics. A concern here is that the JOA and PSC counterparties must consent to the amendment of the JOA or PSC for this purpose, however we think that this is a minor issue since it also benefits them.

(b) **Consent and Approval Timelines**: _We see audacious changes here which we anticipate will revolutionize the sector, in a manner that promotes efficiency and minimizes redundant efforts._

(i) The Nigerian Upstream Investment Management Services Limited ("**NUIMS**") and Nigerian Content Development and Monitoring Board ("**NCDMB**") are required to simplify contract approval processes and adopt a single level of approval at each contract stage.

(ii) The NNPC and NUIMS shall ensure that decisions on approvals or consents required from them pursuant to any PSC or JOA, is communicated within 15 days from the date of submission of an application. ***Where no response is received within this timeframe, the approval or consent is deemed granted*** (emphasis ours).

[1] The Nigerian Autonomous Foreign Exchange Fixing.

[2] FMDQ Group PLC ("FMDQ Group"), has evolved over the years from an OTC Market to a full-fledged Securities Exchange, and to a budding financial market infrastructure (FMI) Group, now structured as a Securities and Exchange Commission (SEC)-registered Capital Market Holding Company.

(iii) The NCDMB must review any Nigerian Content Plan ("**NCP**") and communicate its decision within 10 days. Where no response is received within 10 days, the NCP shall be deemed approved. The NCDMB may request additional information or clarification and the applicant must furnish same within 7 days. Following this, the NCDMB is mandated to respond within a subsequent 7 days, and failure to do so will result in the approval or consent being deemed granted.

(iv) Where any matter requires the approval, satisfaction or consent of the NCDMB and no timeline is provided under the Nigerian Oil and Gas Industry Content Development Act, 2010 (the "**Local Content Act**"), the NCDMB is mandated to provide its response within 15 days of receiving a request, failing which the NCDMB shall be deemed to have approved, satisfied or consented to such matter.

(c) **Third-party Contract Duration:** The duration for third-party contracts awarded pursuant to a PSC or JOA is increased from 3 years to 5 years, with the option of renewal for an additional 2 years.

## 3. Local Content Compliance Requirements, 2024 (the "Local Content Directive")

The Local Content Directive introduces:

(a) **Application of Local Content Requirements:** The NCDMB shall not approve any NCP that contains intermediaries lacking the essential capacity to perform the services. *This is a big deal, particularly for project development*, because going forward, merely having Nigerian entities as service providers to meet local content requirement is no longer acceptable. These providers must have the requisite skill and expertise to prevent project timeline delays.

This means that if there is inadequate capacity to perform the services, project sponsors have the option to procure offshore goods and services, subject to the requirements under the Local Content Act.

(b) **Capacity Assessment**: The NCDMB, in consultation with industry stakeholders, is expected to develop guidelines for assessing and verifying the capacity of companies seeking contracts for specified activities under the Local Content Act.

Thus, we anticipate engagement with stakeholders in this regard in the coming months. While the specifics of the guidelines remain uncertain, we expect to see requirements such as evidence of expertise in similar projects, team member CVs, and a detailed methodology or work plan outlining their approach to project implementation.

## Our Thoughts

In our view, the Fiscal Incentives Directive is a significant positive development for the industry. They will stimulate growth in the midstream sector, and we are already witnessing increased activity from clients, and on projects that we advise.

Also, the incentives for deep-water project development are logical and well-timed, especially given the increasing divestment of onshore and shallow-water assets by International Oil Companies ("**IOCs**"). We anticipate a surge in their investment focus on these assets.

It is equally important to note that there are a handful of upstream divestments, particularly involving onshore and shallow water assets, awaiting regulatory consent, including that of the Minister. The grant of the Minister's consent serves two crucial purposes:

(i) Demonstrates that, contrary to current market views, Nigeria encourages dealmaking in the sector.

(ii) Revenue Generation: The consent fees for these transactions are significant, and desirable, for a country facing liquidity challenges.

On the back of this, once these transactions are completed, the acquirers will likely ramp up investment in these assets to meet debt obligations and satisfy shareholders. These acquirers can leverage relevant incentives to boost their investment in gas utilisation.

In our opinion, the flexibility in the implementation of the Local Content Act not only paves the way for the emergence of fresh avenues for enterprise but also serves as a catalyst for skill development within the labour market.

We think that the Directives are commendable and signal policy direction to the market. However, it is crucial to go beyond the gazetting of the Directives. The legislature should take proactive measures to amend existing laws and integrate the Directives along with the associated incentives into our legal framework.

For instance, we are aware that the National Assembly is currently in the process of amending the Local Content Act, and in same sprit should incorporate the relevant proving of this Directives which affect its operations and matter falling within its regulatory powers. By doing, investors will be more comfortable on the status of incentives and be receptive to the same.

This step is of paramount importance because the failure to amend the relevant laws to encompass these incentives may give rise to conflicts between the existing laws and the Directives, potentially rendering the Directives invalid.