Commentary on the Nigerian Oil and Gas Industry Content Development (NOGICD) Bill, 2023

The Nigerian Oil and Gas Industry Content Development Bill, 2023 (NOGICD Bill or "the Bill") is pending before the National Assembly and it proposes to repeal the Nigerian Oil and Gas Industry Content Development (NOGICD) Act, 2010 (NOGICDA or "the Act"). The Act was enacted to, amongst other objectives, encourage continuous growth of Nigerian content in the country's oil and gas industry. It established the Nigerian Content Development and Monitoring Board (NCDMB or "the Board") which is saddled with the responsibility of implementing the provisions of the Act.

In 2019, the National Assembly (NASS) attempted to repeal the Act through the introduction of Nigerian Local Content Development and Enforcement Commission Bill, 2020 (NLCDEC Bill) which proposed the expansion of Nigerian Content (NC) to the petroleum, solid minerals mining, construction, power, information and communications technology, manufacturing, and health sectors. Unfortunately, the NLCDEC Bill was not signed into law.

The NOGICD Bill, therefore, represents a second attempt to repeal the Act and the Bill seeks to provide the legal framework, structure and programmes for the overall development of NC in the Nigerian oil and gas industry. Amongst other objectives, the Bill seeks to develop domestic capabilities in the oil and gas value chain through education, skills transfer and expertise development, transfer of technology and know-how, and active research and development programmes.

This publication summarizes the salient provisions of the Bill and our commentaries thereon:

1. Establishment of NCDMB

The NOGICD Bill provides for the continued existence of the NCDMB and expanded the directorates of the Board from four (4) to eight (8). The new directorates include: the Directorate of Project Certification and Authorisation; the Directorate of Capacity Development and Start-Ups; the Directorate of Corporate Services and Board Projects; and the Directorate of Human Resources.

As obtained under the NOGICDA, the representatives of the Council were retained, except for the representative from the erstwhile Nigeria National Petroleum Corporation which has now been replaced with representatives from the Nigerian Upstream Petroleum Regulatory Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Authority.

2. Expansion of Scope of the Nigerian Content Development (NCD) Fund levy

The Bill expands the scope of contracts liable to the deduction of the NCD levy to include designated midstream and downstream projects, operations, activities or transactions such as refineries, liquefied natural gas plants, tank farms, jetties associated with oil and gas operations, or any other projects, operations, activities or transactions categorized by the NCDMB and approved by the Minister of Petroleum Resources (MoPR). However, retail outlets, liquefied petroleum gas projects, petroleum products haulage and distribution are expressly exempt from the deduction.

3. Introduction of Nigerian Content Research and Development Fund and Tax Credit

Operators are required to set up a Nigerian Content Research and Development Fund (R&D Fund), which shall be domiciled with the Central Bank of Nigeria (CBN), and they shall contribute 0.5% of their taxable annual profit into the fund. Fifty (50) percent of the contributions into the fund would be allocated to specific R&D programmes in Nigerian tertiary or research institutions to aid improvement of the operator's business activities, while the remaining fifty (50) percent would be applied to R&D activities within the facilities of the operator in Nigeria or for the funding of startup and incubation activities under the Bill.

The contribution shall be collected by the Federal Inland Revenue Service (FIRS) and 0.5% of the net profit paid into the R&D Fund would be tax-deductible. In addition, withdrawals from the fund would not be liable to value added tax and bank charges. Further, operators are not allowed to spend from the fund without the approval of the Board.

Where an operator, contractor, or alliance partner undertakes R&D activities that create new knowledge or improve processes leading to the production of goods or services locally, the entity would be entitled to a tax credit of 15%, provided that it obtained the approval of the Board before the commencement of such R&D activities. For complex or mutually beneficial research and development projects, the Board may collaborate with multiple operators/ contractors to execute.

4. Mandatory Subcontracting to Indigenous Nigerian Entities

The NOGICD Bill mandates that contracts granted to non-Nigerian individuals or entities in the oil and gas industry shall contain a requirement for the subcontracting of a minimum of forty (40) percent of the work to an indigenous Nigerian company (INC) or companies. However, the Board may on a case-by-case basis, determine the minimum portion of the contract that may be exclusively subcontracted to an indigenous Nigerian company. To qualify for subcontract, an indigenous company must:

- not be an agent of, subsidiary of, or connected to, the contracting entity.
- be registered and operated in Nigeria.
- possess the necessary skills, equipment and technical expertise to execute the project.
- have fulfilled its civic obligations with respect to taxes, social security, etc.

Furthermore, the INC should not be in receivership, and none of its directors must be convicted in any country for any criminal offence regarding fraud and other related matters.

5. Standardization of Goods and Services

The Bill mandates all operators to ensure that manufacturers meet the standards of relevant regulatory bodies and agencies before presenting goods for procurement under any competitive bidding process. In addition, suppliers and contractors in any competitive bidding process are required to disclose the percentage of Nigerian-sourced raw materials used in the production of Made-in-Nigeria goods needed for the execution of the project.

It emphasizes collaboration between foreign and local firms, such that consultancy contracts awarded to foreign companies must now involve sharing engineering designs, calculations, and other key project information with Nigerian partners. Foreign companies engaging in contracts must adhere to international best practices and comply with Nigerian regulations. Additionally, all materials, processes, and personnel utilized in projects must be certified by relevant Nigerian regulatory bodies.

It also emphasizes the use of Nigerian standards in the industry (i.e., certification by the Standards Organization of Nigeria - SON). Operators are required to prioritize standards developed or approved by any legally recognized agency for standardisation. Hence, the use of foreign standards is only permitted when it is unavoidable, and such must be with the approval of the Board with steps taken to develop a Nigerian standard. Similarly, a foreign professional must domesticate the professional certificate with relevant Nigerian professional body and must work along with a practicing Nigerian professional.

6. Submission of NC Performance Report

The NOGICD Bill requires operators to submit annual NC Performance Report to the NCDMB within 120 days from the beginning of the year; an extension from the sixty (60) day timeline specified in the NOGICDA. The NC Performance Report is expected to cover the proposed activities/projects for the year including R&D, training programmes on the use of latest technology, employment and details of Nigerian employees, quantity of made-in-Nigeria and foreign goods procured by the operator, and particulars of payments to the government such as taxes, royalties, signature bonus, amongst others. The report must be

signed by a principal officer of the operator and an independent auditor, and can be made available to interested members of the public for a fee that would be prescribed by the Board.

7. Bidding and Contract Report

The Bill proposes modification to the contracting process in the oil and gas industry, specifically regarding contract awards to INC. In the NOGICDA, a Nigerian company could win a contract even if its bid was 10% higher than the lowest bid, provided that it has the capacity to perform the work. However, the NOGICD Bill seeks to reduce the threshold to 5%, and introduces a new provision for projects and contracts denominated in Naira. Currently, the requirement to submit advertisements, pre-qualification criteria, technical bid documents, technical evaluation criteria, etc., to the Board for approval applies only to contracts valued at over US$1,000,000. While the Bill retained this threshold for USD-denominated contracts, it has now introduced a threshold of NGN100,000,000 for contracts denominated in Naira. In effect, operators are required to submit the list of contracts, purchases and subcontracts of the specified threshold to the Board within thirty (30) days before the first day of the quarter in which they would be executed, and the Board would communicate the outcome of the review by the first day of the quarter to the operator. Similarly, within thirty (30) days of the end of a quarter, an operator must notify the Board of the list of contracts, subcontracts and purchases of the specified threshold which were awarded in the quarter.

Further, operators are required to disclose awarded contracts including scope of work on the virtual platform of the e-market of the Board which would be accessible to the public. The Bill provides that an unsuccessful applicant to a contract can appeal to the NCDMB within two (2) days of publication of the bid and the Board shall determine the appeal within three (3) days of receipt. Further appeal in this regard goes to the Joint Committee of the National Assembly (NASS) on Local Content which shall determine the appeal within five (5) days of receipt of notice.

The Bill also seeks to reduce the contracting cycle in the Nigerian oil and gas industry to 180, 178 and 120 days for open competitive, selective, and single sourcing tenders, respectively. The Board is required to determine any application for permit or approval within fifteen (15) days after which the application is deemed approved. Likewise, where other connected Federal Government agencies delay in issuing approvals, an operator is authorised to submit a complaint to a standing Committee of the Senate or House of Representatives which shall summon the relevant agency within five (5) working days to resolve the matter.

Upon completion of a contract, the awarding company must make payment by the agreed date or within sixty (60) days from the date of issuance of the job satisfaction document, failure of which the delayed payment would be liable to interest compounded at the prevailing commercial interest rate.

8. Expatriate Quota (EQ)

The Bill maintains the need for prior approval from the Board before making an application to the Nigeria Immigration Service (NIS) for an EQ. However, unlike the NOGICDA, it provides detailed conditions for approval, particularly in terms of demonstrating that the skill/expertise is unavailable locally and the necessity for expatriate skills. Therefore, it introduces a requirement that any EQ approval contingent upon the lack of available local skills must include an undertaking by the applicant to train Nigerians to succeed the expatriate(s). Unlike NOGICDA that specifies that such training must happen, and the expatriate's position Nigerianized within four years, the Bill does not specify any time limit within which the replacement should take place.

According to the Bill, the NCDMB is required to communicate the decision on an EQ application within fourteen (14) days of receipt, otherwise the application is deemed to be approved. The Bill further removes the provision that restricts operators or project promoters from engaging more than 5% of management position as expatriates for each operation.

9. Anti Discriminatory Provision

Nigerian and foreign employees who occupy identical roles and carry out similar functions in the Nigerian oil and gas industry are expected to have equal treatments, working conditions and remunerations. Similarly, operators with operations outside Nigeria must provide equal employment conditions to the employees working in and outside the country to meet the standard of their international headquarters, except where the local circumstances in Nigeria do not permit the application of any aspect of such condition of service.

10. Indigenous Priority in Contracting

The Bill retains the requirement to give first consideration to qualified Nigerian companies in the award of contracts in the industry. Based on Section 9(4) of the Bill, an indigenous company is qualified where it possesses the required equipment, skilled personnel, and substantial working capital or access to working capital to execute the project. In addition, all the operators including regulatory bodies in the industry are required to prioritise Made-in-Nigeria good/services with greater components sourced from Nigeria to the extent that such raw materials are approved by SON or any legally recognised agency for standardisation. The Council of the Board is therefore saddled with the responsibility of making regulations to specify the applicable margins of preference with respect to procurement of goods and services by players in the industry.

Where a foreign firm is undertaking a project/contract, it must show proof of its joint venture with a local company and the agreement must stipulate the terms of the arrangement between the parties.

11. Establishment of E-Market Place, Joint Qualification System (JQS) and Nigerian Oil and Gas Content Consultative Forum (NOGCCF)

The Bill authorises the Board to appoint a well-established ICT company to manage the oil and gas e-marketplace through a transparent bidding process. This differs from the current practice under the NOGICDA where the Board administers and operates the e-market place. However, the Board would issue the regulations on the roles and responsibilities of the ICT company. Amongst others, the e-market place shall provide a virtual platform to facilitate transactions required for the efficient delivery of goods and services in the industry.

Like the NOGICDA, the Bill establishes the JQS and the NOGCCF as industrial data bank of available capacities and competencies in the industry, and as a platform for information sharing in the industry, respectively.

12. Definition of "Nigerian Company" and "Indigenous Nigerian Company"

The term "Nigerian Company" is defined as a company registered in Nigeria in accordance with the provisions of the Companies and Allied Matters Act (CAMA). This is a major deviation from the NOGICDA

which specifies that such companies must have a minimum Nigerian shareholding of 51 percent. On the other hand, the Bill defines indigenous Nigerian company as a legal entity wholly owned by Nigerians without foreign affiliation except technical partnerships.

13. Use of Latest Technology for NC Development

Operators are required to adopt latest scientific and technological skills used by international companies in their Nigerian operations. They must submit detailed plans to the Board outlining their strategy to implement these technologies, including training and expenditures on Nigerian staff. Any cost incurred by an operator in acquiring the latest technology for the benefit of Nigerians shall not be subject to taxation and shall be deemed as part of the cost of production of the operator for the year under assessment of tax.

14. Penal Sanctions

The NOGICD Bill stipulates varying fines and imprisonment terms, in addition to the defaulting company being barred from participating in any procurement process in the industry for a minimum of ten (10) years, for the following criminal offences:

- An attempt to or the act of influencing a public officer to act contrary to the Bill.
- To engage in fronting practice or in any form of illicit financial flow arising from any transaction including but not limited to the execution of any project or contract under the Bill.
- To sell or transfer an interest or contract gotten based on being a Nigerian company/individual to a foreigner.

Upon conviction, the above referenced offences attract imprisonment for a period between six (6) months and two (2) years, and a minimum fine of NGN20million. However, the offence of transfer of interest/contract to a foreigner attracts imprisonment for a maximum period of one (1) year or a maximum fine of NGN5million. Further, the Bill prescribes an imprisonment for two (2) years for a public officer who fails to conduct due diligence on the availability of a skill or service in Nigeria and proceeds to issue work permits to non-Nigerians.

Where an offence is not considered criminal under the Bill, it may trigger punishments such as blacklisting for a minimum period of five (5) years, suspension and imposition of administrative fine. Also, where a person defaults to make payment of a statutory fee or surcharge mandated in the Bill, the defaulter will be required to pay the total sum and a fine of not less than 50% of the unpaid sum.

Commentary

The oil and gas sector remains a major contributor to the Nigerian economy, and it is crucial that relevant policies are put in place to enhance the optimal performance of the sector. Therefore, we commend the NASS for sponsoring the NOGICD Bill with the view to encouraging the growth of Nigerian entrepreneurs and companies in the Nigerian oil and gas industry, and consequently, increasing their contribution to the country's GDP.

Our observations regarding some of the provisions of the Bill are discussed below:

1. One of the notable provisions of the Bill is the inclusion of timeline within which the Board is required to communicate or respond to applications of operators in the industry, failure of which the application would be deemed to be approved. This is quite commendable as it would engender active communication between the Board and operators. In addition, it would enhance decision making process and reduce unnecessary administrative bottleneck. However, the practicality of this provision may be a challenge. For example, will the Ministry of Interior simply approve the EQ application submitted to it by an operator, without a documented prior consent of the Board, on the basis that the 14-day ultimatum for which the Board should have approved such has lapsed?

   Likewise, the specification of the timeline for the completion of tenders is a welcome development which is targeted at reducing the contracting cycle and ultimately, delays in project delivery in the industry. It aligns with the objectives of the Presidential Directive on Local Content Compliance Requirements, 2024 which is aimed at attracting investments to the industry by creating conducive operating environment.

2. The addition of designated midstream and downstream projects, activities and operations to the scope of the NCD levy has effectively expanded the levy to the entire value chain of the oil and gas industry. While this would potentially increase the revenue for the Board, it would invariably increase the cost of doing business across board in the industry and ultimately passed on to consumers in the form of price increment.

   In addition to the above, the Bill also sought to introduce, via section 34(1), a contribution of 0.5% of the "taxable annual profit" of an operator to a research and development fund. We concede that the role of research and development in the oil and gas sector cannot be overemphasized as it is critical for innovation and development. Thus, the purpose of instituting the R&D Fund is quite understandable. However, this additional contribution imposed on operators would increase the number of levies that they are required to pay. If the plan to expand the scope of the NCD levy of 1% to the entire oil and gas value chain, and the introduction of another R&D contribution of 0.5% succeeds, it would conflict with the policy thrust of the current administration, which seeks to streamline and reduce the plethora of taxes and levies being paid by corporate entities in the country! We do not believe that this is the right trajectory to take, given the desire to incentivize further investment in the sector, and the declaration by the government of this decade as the "Decade of Gas".

3. Without prejudice to the observation in (2) above, it is important to highlight an ambiguity in the modality of the operation of the R&D Fund. Section 34(1) of the Bill states that the contribution to the fund is 0.5% of the "taxable annual profit" of the operator. However, there is no definition of the term in the Bill, and thus, it is unclear what constitutes the taxable annual profit of an entity for this purpose. This uncertainty is further exacerbated by Section 34(5) of the Bill, which provides that 0.5% of the "net profit" contributed to the fund would be tax-deductible! One plausible view is that the net profit of the operator represents the taxable annual profit for the purposes of the R&D Fund envisioned in the Bill. Alternatively, it may be interpreted to mean that the portion of the contribution that would be tax deductible is restricted to 0.5%of the net profit of the operator! Consequently, it is important that the Bill defines the relevant terms to provide clarity to operators on their compliance requirements.

   Further, the Bill seems to suggest that each operator would be required to establish a fund with the CBN, while the responsibility for paying into the fund rests on the FIRS after collecting same from the operator. However, there is no specific timeline within which the FIRS is required to remit the contributions to the fund. We suggest that the Bill is updated to include the timeline.

4. We commend the drafters of the Bill for specifying the midstream and downstream contracts that would be liable to the NCD levy, thereby extinguishing any possible controversy on the scope of application of the levy. Unfortunately, the Bill did not extend same

treatment to clarify the scope of the levy in the upstream sector which has remained the key contentious issue with respect to compliance with the provisions of the subsisting NOGICDA regarding the levy, and currently retained in the Bill. Specifically, the phrase *"project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry…"* has been subjected to multiple interpretations, with the NCDMB taking an encompassing view that the levy applies to all contracts that could be traced to upstream operations as well as all contracts with upstream companies, even when the underlying transaction does not relate to the petroleum industry, e.g., catering or legal services provided to an exploration and production company.

Closely related to this ambiguity is that the Bill retains the requirement to impose the NCD levy on subcontracts. Due to the nature of oil and gas projects, they often require significant technical and engineering inputs and thus, they may be subject to multiple layers of subcontracting. Therefore, the imposition of the levy on each subcontract results in multiple deduction and cost escalation, in an industry that the government is pushing hard to reduce the cost of production per barrel.

Notwithstanding the lingering controversy, there has not been a judicial pronouncement/interpretation on the scope of the levy, and whether it should cascade to all the levels of subcontracting by the operator, as the recent case between the International Association of Drilling Contractors and the NCDMB was struck out on the grounds of technicalities. Therefore, the Bill provides an ample opportunity to resolve the above disputes - clarify the extent of application of the levy on the upstream sector of the industry, and whether it should be deducted at once at the operator level. We implore the relevant stakeholders to address this important concern before the Bill is approved by the NASS and assented to by the President.

5. The Bill grants a tax credit of 15% to operators whose R&D activities result in the development of new or improved products. However, it did not specify the base on which the credit would be applied. Thus, it is expedient that the Bill clearly stipulates whether the tax credit would be 15% of the tax payable in the relevant year, 15% of the expenditure incurred on the R&D activities or any other defined base.

   On a related note, the Bill provides that costs associated with acquiring latest technology for the benefit of Nigerians should not be subject to tax. The likely interpretation is that the exemption is with respect to transaction taxes. Nonetheless, the Bill may be updated to specify the relevant tax(es) for clarity to all relevant stakeholders.

6. The Bill proposes to repeal the NOGICDA and without any express limitation, this includes the Schedule to the Act which specifies the level of Nigerian Content required in different projects/ activities in the industry. Thus, the expectation is that the NOGICD Bill would have a corresponding Schedule since it contains a provision that the MoPR would conduct annual review of the Schedule to the Bill. Therefore, the Bill should be updated to include the Schedule accordingly.

7. The removal of the minimum Nigerian shareholding in the definition of "Nigerian Company" in the current NOGICDA implies that only registration with the Corporate Affairs Commission in accordance with the CAMA makes an entity eligible to be called a Nigerian entity. This aligns with the definition of "company" in the CAMA. However, it is important to note that the Bill mostly used the term "indigenous Nigerian company" (INC), which refers to an entity wholly owned by Nigerians. Thus, it may be inferred that the Bill seeks to effectively increase the level of involvement of Nigerians in strategic positions in the industry. It is, however, doubtful whether the "indigenous Nigerian companies" have the capacity to satisfy the demands of operators in the onshore and shallow water terrain, whose operations and contracts have been reserved for the former, in addition to projects in the offshore and deep offshore terrain that is open to foreign companies! We will suggest that the definition of an INC should be revisited to accommodate some non-Nigerian ownership, in the spirit of partnership (the concept well espoused in the Bill), and fostering a gradual Nigerianization of the sector.

   Similarly, the mandatory subcontracting to INC would guarantee that these entities continuously participate in significant portion of projects in the industry, and expectedly, this should deepen their capacities and competencies. This aligns with one of the objectives of the Bill, which is for Nigerians to achieve and maintain control over the economic activities in that sector in particular, and in Nigeria, in general. Overall, the Bill also seeks to protect the interest of Nigerian employees through the anti-discriminatory rule which demands equal treatment of both local and foreign employees in the industry.

8. The requirement contained in section 67 of the Bill that an operator should pay their contractors within sixty days of issuance of job satisfaction document (where the specific date of payment has not been included in the contract), or in any case, that payment should not exceed one hundred and twenty (120) days, in our view, is an overreach of legislative provision under the Bill. Payment cycles are contractual terms between two willing parties, and the government or any government institution cannot assume that power or responsibility to mandate payment cycle and impose interest on any outstanding amount beyond the payment date. We propose that this provision should be revisited with a view to expunging it.

9. Section 66(4) and (5) prescribe the involvement of the NASS' relevant Standing Committees (Senate and House of Representatives) in the resolution of a tender, which has been delayed by any agency of government, and for which the affected stakeholder has escalated the issue to the NASS. While stakeholders should exercise their right to fair treatment by government agencies (including timely resolution of their matters), we believe that this provision might be construed as the NASS taking on both an Executive decision-making role, and a quasi-adjudicatory power - roles which the Constitution assigns to other branches of government. We suggest that this should be re-looked and possibly taken out to prevent constitutional challenges being mounted against the Bill.

10. The Bill requires contractor, subcontractor or supplier carrying on an activity under any Nigerian Local Content arrangement to continue on such activity as though it was contracted under the Bill. This clause aims at facilitating transitioning, however it is not exhaustive. Generally, transition provisions are crucial in ensuring continuity, minimizing disruptions, and providing clarity to stakeholders. We, therefore, suggest the inclusion of a more robust transition provision to prevent uncertainties about the treatment of ongoing processes or procedures at the time of enactment of the Bill.

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