



OLUWASEUN FAPOHUNDA
SENIOR ASSOCIATE TOPE ADEBAYO LP

Introduction

The Nigerian petroleum sector is a heavily regulated industry with unique laws and regulations to guide both government and key players in their respective operations. This industry remains the highest contributor to the nation's GDP and its importance to the economy is responsible for the strict oversight role played by the ministry of petroleum resources over industry participants.

On 15th February 2023, President Muhammadu Buhari signed the Business Facilitation (Miscellaneous Provision) Act, 2022 (BFA) into law. This piece of legislation was galvanized by the Presidential Enabling Business Environment Council (PEBEC) with the objective of institutionalizing reforms by the amendment of relevant legislation to eliminate bottlenecks within government institutions and promote the ease of doing business in Nigeria.

Prior to the signing of the BFA, the Vice President of Nigeria Prof. Yemi Osibanjo had in May 2017 signed an executive order for the ease of doing business in

THE CONCEPT OF DEEMED APPROVAL IN THE OIL & GAS INDUSTRY.



Nigeria. This executive order provided for the ways government business and operations are to be conducted in the country and set in motion a foundation for the implementation of key reforms. Hence, we do not find it surprising that the Petroleum Industry Act of 2021 as subsequent legislation incorporated some of these reforms which the BFA 2022 has now consolidated and seeks to enforce.

One of the major initiatives of the BFA is the introduction of default approvals or deemed grants by government ministries, departments and agencies (MDAs) upon delay or failure to communicate the approval or rejection of an applicant's application within a stipulated timeframe as determined by such MDA.¹

This article gives a high level analyses of the various types of

consent obtainable in the petroleum sector and juxtaposes the same with the concept of deemed grants or default approval by the BFA.

OBTAINING CONSENT UNDER THE PETROLEUM INDUSTRY ACT 2021

The petroleum industry is a highly regulated industry due to the need to ensure that operators within the sector engage in activities that bring about optimal development of the nation's petroleum reserves. Some of the regulatory powers exercised by the government include its discretionary powers to grant licenses & leases to an applicant, rights of revocation, rights to grant approvals and ministerial consent, amongst other regulatory functions.

Under the Petroleum Industry

¹Section 4 of the BFA 2023



Act (PIA) 2021, certain activities within the petroleum sector are restricted or require either the consent of the Nigerian Upstream Petroleum Regulatory Commission (“NUPRC” or “the Commission”), Nigerian Midstream & Downstream Petroleum Regulatory Authority (“NMDPRA” or “the Authority”) or the Minister of Petroleum Resources (the “Minister”) which an applicant is obligated to obtain prior to engaging in such activities.

Some of the activities requiring consent from the Authority include a transfer of license or permit by a license holder,² transfer of any interest in license or permit by a permit holder;³ revocation of license by the dissolution of company/corporation⁴ or the acquisition or merging of interest in a license by a license holder directly or indirectly.⁵ In the same vein, the Commission's consent is required where a licensee seeks to exercise its rights/power to pledge, mortgage or charge any interest in a

license or lease.⁶

Section 95 of the PIA and the second schedule provides for instances where the prior consent of the Minister is required such as where the sale of shareholdings in an Incorporated Joint Venture Company is contemplated⁷ or where the assignment, transfer or acquisition of any license/ lease is in question.

The Guidelines and Procedures for Obtaining Minister's Consent to the Assignment of Interest in Oil and Gas Assets issued by the defunct DPR further provides a step-by-step approach for obtaining ministerial consent and S. 95(8) & (9) of the PIA further mandates the Commission to act on an application within 60 days. Where an applicant has met all the conditions required for the grant of ministerial consent and the Commission fails to communicate a refusal with reason in writing to an applicant, such an application is deemed granted and the Commission is obligated to record such grant in the appropriate register.

DEEMED GRANTS UNDER THE BUSINESS FACILITATION ACT 2023

Although not new to the petroleum industry,⁸ the BFA provides for the concept of default approvals and deemed grants by government MDAs to applicants. This concept kicks off with the submission of an application to an MDA for its acceptance or otherwise and crystalizes when

that MDA fails to communicate a rejection within the specified period.

In the event of deemed grants, an MDA by virtue of S. 4(5) of the BFA is obligated to issue the consequential certificates/documents/approvals within 14 days upon notification by the applicant or subject such issuing officer to prescribed disciplinary proceedings under the civil or public services rules. Subsection 6 of the same provision then takes this concept of deemed grant further by stating that the notification to such MDA shall be construed as a certificate or document in evidence of the grant therein setting a historic standard in Nigeria different from what is obtainable in the petroleum sector.

Obtaining regulatory consent in other jurisdictions

Under the Petroleum Code in Senegal, assignment or transfer of mining titles are exercisable with the prior approval of the Minister of Energy. An approval is deemed to be granted where no response to the request for approval is received within 60 days of its filing.

In the United Kingdom however, licenses and consents are processed online by the North Sea Transition Authority “NSTA” (formerly known as the “Oil and Gas Authority” or “OGA”) through an online system known as the License Application Repository (“LARRY”) and UK Energy Portal respectively.

²Section 117 of the PA 2021

³Section 120(2)(f) of the PIA 2021

⁴Section 120(2)(a) of the PIA 2021

⁵Section 212 of the PIA 2021

⁷Section 95(15) of the PIA 2021

⁸Section 95 (7) of the PIA



APPLICABILITY OF THE BFA TO CONSENTS AND ASSIGNMENTS

Considering that the BFA seeks to ease the doing of business in Nigeria, how does this law impact foreign direct investments? A few questions that arose amongst industry players with the inclusion of this provision in the PIA have been: what is the practicality of enforcing this law in the petroleum sector and how do we give effect to these provisions without offending the regulator with whom they have to continually interface? Would a company which seeks to engage in the construction of petroleum pipelines apply for a license/permit and subsequently proceed with such a capital-intensive project without first obtaining the requisite permits? Also, what would be the fate of such a petroleum pipeline construction company considering the subsequent stages of permits incidental to the venture? Can industry players use the letter of notification to get financing or financial partners? Are foreign investors comfort-

able with our system enough to commit based on a provision in the PIA and the BFA without a laid down procedure that ensures that the deemed licence/lease is issued? What is the process for ensuring that once the timeline has lapsed, an applicant would get the deemed licence/lease in hard or soft copy? Considering the powers of the Minister under the PIA, is the Minister the person to hold responsible for infractions by the NUPRC and NMDPRA where they fail to issue licenses/permits? On issues like ministerial consent for assignment of interest, taking into consideration that the NUPRC's role is limited to compilation and recommendation, what happens where the Minister fails to issue consent and to whom do we report him/her? What is the framework for mandating the Minister to act in such instances? In the case of **Lekoil 310 Limited V. Minister of Petroleum**,⁹ the court held **that the consent of the Minister cannot be granted by default and must be positive, affirmative and definite**. Where does this decision stand in light of the

provisions of the PIA and the BFA? Can industry players embark on projects and assign interest based on the provisions of the PIA and BFA without more without encountering a backlash from the regulators? On the strength of the Lekoil case, the simple answer is YES. However, it would be interesting to see how that plays out in the days to come.

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⁹Suit No: FHC/L/CS/482/2018