



REVIEW OF THE PETROLEUM INDUSTRY BILL 2021 – PART THREE



CHAPTER ONE – GOVERNANCE AND INSTITUTIONS (CONTINUED)

PART IV – The Nigerian Midstream and Downstream Petroleum Regulatory Authority

Establishment and Objectives

Section 29 (1) of the Petroleum Industry Bill 2021 establishes the Nigerian Midstream and Downstream Petroleum Regulatory Authority (the “Authority”) to oversee and regulate the technical and commercial aspects of both the midstream and downstream operations in the Nigerian oil and gas industry.¹ Much like the Commission established to oversee upstream operations, the establishment of the Authority is a step in the right direction for industry stakeholders who have advocated for a one stop shop regulatory agency which is able to regulate and give approvals for both technical and commercial aspects of projects executed along each of the industry value chain.

Scope of the Authority’s Functions

The Authority’s oversight functions cover amongst others, the making of regulations concerning every aspect of midstream and downstream petroleum operations, the grant, renewal, modification, cancellation, reissue and termination of licences, permits and authorisations for midstream and downstream petroleum operations² and compliance monitoring, development of midstream and downstream petroleum infrastructure, promoting a competitive market, the security of natural gas supply for the domestic gas market, ensuring implementation of environmental laws and policies as well as monitoring, regulating and enforcing health, environmental and safety measures in midstream and downstream operations and developing and enforcing tariff framework and pricing for natural gas and petroleum products.³

The Authority is also responsible for determining the domestic gas and crude oil demand requirements and ensuring supply obligations are met, developing open access rules applicable to petroleum liquids and natural

gas transportation pipelines, terminal facilities and bulk storage facilities, ensuring accuracy of metering pumps, and related measurement facilities and establishing customer protection measures, promoting competition and private sector participation and promoting the interest of customers, amongst others.

Among other areas in which the Authority may make regulations, the Authority is also empowered to make regulations concerning the duration and conditions of licences and permits for midstream and downstream petroleum operations including regulations concerning licences and permits already in effect prior to the date of any regulations issued by the Authority for midstream and downstream petroleum operations. Perhaps with respect to pre-existing licences and permits, the Bill should have provided that the duration of such licences and leases shall not be affected by any new regulation to be made by the Authority, in order to avoid uncertainties.

As is the case with the upstream Commission, no Government ministry, department or agency shall exercise any power or function or take any action which may have direct impact on midstream or downstream operations without first consulting with the Authority whose decision on such step shall be complied with. The intent is of course to limit multiplicity of industry regulators and its attendant problems.

Exercise of Power

Similar to the Commission, pursuant to Section 216 of the PIB, the Authority is required to go through established procedures in the making of regulations across the industry value chain. Accordingly, to ensure

¹ This is a departure from the current institutional framework where the Nigerian Midstream and Downstream Regulatory oversight was vested in the minister through Department of Petroleum Resources (“DPR”) and other parastatals including the Petroleum Products Pricing Regulatory Agency (“PPPRA”) and the Inspectorate.

² This power is currently vested in the Minister of Petroleum Resources by virtue of the Petroleum Act, 1969 and is now to be solely vested in the Authority. A public register of such licences and permits and actions taken on them is required to be kept by the Authority

³ Section 31



adequate checks and balances in performing its regulatory functions, the Authority is required to consult with stakeholders⁴ prior to finalizing any regulations or amendments to regulations in accordance with the procedures outlined in the Bill.

Additionally, the Authority is required to publish its decisions, directions or determinations which have implications for customers and industry participants and the reasons behind such decisions as may be necessary.

The special watchdog powers of the Authority shall be performed by the Special Investigation Unit (the “SIU”) or any person authorized by the Authority which shall undertake necessary investigation where there exists a possibility that illegal operations are being undertaken within the midstream and downstream petroleum industry. The SIU or other authorized persons shall have powers to enter premises where an illegal operation is believed to be carried out at any reasonable time, conduct examination on facilities and machineries, and arrest with a warrant in conjunction with any law enforcement agency including the Nigeria Police Force. This as we mentioned earlier, is a good departure from the power to arrest without warrant granted to the Minister under the PA.

The SIU may also request individuals or entities undergoing investigation to provide its books of account, and or other records kept by it, in relation to its midstream and downstream petroleum operations to officers of the Authority. A failure to comply with

any such request or refusing an officer a right of entry

⁴ The relevant stakeholders are lessees, licensees and permit holders that may be impacted by the regulations and such other persons that may be interested in the subject matter of the proposed regulation.

or inspection during the process of investigation is an offence punishable with a term of 5 years imprisonment or a minimum fine of N 5,000,000.00 as opposed to the 6 months imprisonment and fine of between N200 and N2000 provided under the PA and in the case of a continuous offence, to an additional minimum fine of N100,000 for each day the offence continues. The increased fine is of course in keeping with current commercial realities.

Governance Structure

The governance structure of the Authority basically mirrors that of the Commission. The Authority shall be governed by a Board, which will oversee its policy and general administration. The Board shall provide strategic direction to the Authority, including the determination of employee’s terms and conditions of service, budgetary approval, structuring of the Authority into different departments and the recommendation of employee’s remuneration, allowances, and benefits. Members of the Board shall consist of one non-executive chairman, two non-executive members; the chief executive of the Authority, two other executive directors who are responsible for Finance and Accounts and Distribution Systems, Storage and Retailing Infrastructure, one representative of the Commission not below the rank of executive commissioner, one representative of the Ministry not below the rank of director, and one representative of the Ministry of Finance not below the rank of Director.

Much like the Board of the Commission, although there are seven executive directors each responsible for different portfolios viz: hydrocarbon processing

plants, installations and transportation infrastructure; distribution systems, storage and retailing infrastructure; health, safety, environment and community; economic regulations and strategic planning; corporate services and administration; finance and accounts; and Midstream Gas Infrastructure Fund; only two of these directors are admitted into the Board. Appointment of members to the Board is made by the President, subject to the confirmation of the Senate except for the appointment of ex-officio members as listed in the Bill. We note also that appointment of each of the seven directors shall comply with the Federal Character Commission Act, subject to confirmation by the Senate. The President is also empowered to suspend or remove a member of the Board for reasons as enumerated in Section 37 of the Bill. This we hope to a certain extent will prevent arbitrary exercise of the power of removal by the President and allow for a level of independence of the Authority.

The Fund of the Authority

The Authority is also expected to establish and maintain a Fund comprising monies derived from National Assembly appropriation, fees charged for services rendered, not more than 0.5% of the wholesale price of petroleum products sold in Nigeria which shall be collected from wholesale customers, grants, gifts and other sources of income as specified. The Authority is also required by the end of each financial year, to pay any money that accrued to the Fund as enumerated above, which have not been utilized for approved budgetary obligations, administrative and operating costs, payment of remuneration etc., into the Consolidated Revenue Fund.⁵ See our comments on the similar provision under section 24 of the Bill as it relates to the upstream Commission in our previous article. However, we note that unlike the Commission there is no requirement to the effect that all expenditures of the Authority shall be subject to appropriation by the National Assembly, which then suggests that the directive given by the President in 2015, requiring all revenue generating agencies to pay all their revenues into the Consolidated Revenue Fund and draw their expenditure from budgetary allocation would not apply.

The Authority is required to keep proper accounts of its income and expenditure for each financial year which shall be audited within 6 months after the end of each financial year pursuant to guidelines supplied by the Auditor-General of the Federation. Additionally,

the Bill has put in place a measure of accountability by requiring the Authority to keep books of accounts, submit its audited mid-year and annual financial report to the Minister, and to publish its annual report and financial statement on its website.

Appointment of members to the Board is made by the President, subject to the confirmation of the Senate except for the appointment of ex-officio members as listed in the Bill. We note also that appointment of each of the seven directors shall comply with the Federal Character Commission Act, subject to confirmation by the Senate. The President is also empowered to suspend or remove a member of the Board for reasons as enumerated in Section 37 of the Bill. This we hope to a certain extent will prevent arbitrary exercise of the power of removal by the President and allow for a level of independence of the Authority.

The Midstream Gas Infrastructure Fund

The PIB provides for the establishment of the Midstream Gas Infrastructure Fund (“MGIF”, “Fund”) which shall be subject to appropriation by the National Assembly based on the Fund’s programme of action. The Fund shall be established for the purpose of funding Government’s equity investments of participating or shareholder interests in infrastructure projects related to midstream gas operations, aimed at increasing domestic consumption of natural gas in Nigeria, encouraging private investment in such projects and reducing or eliminating gas flaring. The MGIF shall be a body corporate with a Governing Council (“Council”) which shall supervise and make investment decisions for the Fund. The Council shall be comprised of the Minister of Petroleum Resources as the Chairman of the Council, a representative of the Central Bank of Nigeria (“CBN”) not below the rank of a director, a representative from the Ministry of Finance not below the rank of a director, the Chief Executive of the Authority, the Executive Director of the MGIF and three independent members to be appointed by the President for a term of four years with the possibility of reappointment for an additional term. The Legal Adviser of the Authority shall also sit on the Council as the Secretary.

⁵ Section 47(4)



The source of the MGIF shall include 0.5% of the wholesale price of petroleum products and natural gas sold in Nigeria which shall be collected from wholesale customers⁶ and is separate from the levy collected from the same source to fund the operations of the Authority, gas flare penalty arising from midstream operations⁷ funds and grants accruing from multilateral agencies, bilateral institutions and related agencies for the development of midstream gas infrastructure, donations, amongst others.

The MGIF shall have a Transaction Advisor responsible for providing transaction advisory services, including technical and commercial evaluation of proposals, defining project screening criteria and profitability targets for projects, etc. The process of selection of the Transaction Advisor is laudable and ensures operational checks and balances as the Bill provides that selection shall be through a competitive and transparent criterion as specified by the Council and managed by the Executive Director, MGIF subject to the approval of the Council. For the purpose of transparency and accountability, the MGIF is also required to submit an

annual statement of its operations to the Council and Minister of Finance as well as publish a certified annual audited account. We expect that the account would be published on the Authority's website since no clear indication is made in the Bill, or alternatively, on the MGIF website in the event it hosts one.

Although the MGIF is not subject to the provisions of the Fiscal Responsibility Act, the Infrastructure Concession Regulatory Commission Act, and the Public Procurement Act, the Bill provides that a Midstream Gas Infrastructure Fund Procurement and Fiscal Regulations shall be made which the MGIF shall comply with. The Bill is silent on the appropriate regulator but we expect the relevant body with powers to make such regulations is the Authority. What has the Bill done with the Nigerian National Petroleum Corporation? Watch out for our next publication.

⁶ Wholesalers are expected to pay this levy within 21 days of the sale of petroleum products and natural gas in Nigeria and the Authority is empowered, after consultations with the Council, to make regulations regarding late payment, non-payment, or submission of false information regarding the levy.

⁷ However, funds accruing from payment of gas flare penalty is required pursuant to section 33(y) of the Bill to be utilized for midstream gas infrastructure investment within the Host community of a designated facility.

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Aderemi is a Partner in the firm's Energy and Natural Resources Practice Group. With two decades of experience in the legal profession, she is well versed in corporate and commercial transactions with particular expertise in energy law and policy. She has consistently advised both indigenous companies and multinationals, including various government MDAs on legal and regulatory issues and has been involved in the development of legal, regulatory and policy framework documents and transactional documents particularly in the oil and gas, power and mining sectors.

Aderemi has been recognized by leading ranking firms such as Chambers and Partners Global and IFLR1000 for her expertise in the industry. She is a member of the NBA, member of AIPN, secretary to the Construction Projects and Infrastructure Committee of the NBA/SBL, member of the Policy and Advocacy Working Group of REAN, and was a member of one of the Working Groups that advised on the Ease of Doing Business in Nigeria initiative of the Federal Government.

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