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Venturings:

A Commentary on Upstream *"Assignments, Mergers, Transfers and Acquisitions"* under the *Petroleum Industry Act No. 6 of 2021*

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Introduction

Section 95 PIA aptly titled "***Assignments, Mergers, Transfers and Acquisitions"*** (hereafter, AMT&A transactions), provides the primary upstream regulatory framework for the above subject, and is the core focus of this article. Reflective of the evolution of upstream AMT&A transactions since Nigeria became an oil producing country in the early 1960s, *a pertinent question is how, and has the **PIA** improved on, the erstwhile regime under the **Petroleum Act**[1] (**PA**)?*

This article discusses AMT&A in the upstream landscape, leverages some recent AMT&A transactions (like Exxon-Mobil/Seplat and ENI-Agip/Oando), and *proffers insights on the way forward to consummating business-friendly and sector-growth facilitating, optimal AMT&A transactions*. For the avoidance of doubt, this article does not discuss, except from a comparative angle, the regulation of ***PA*** AMT&A transactions, because there is plethora of literature on same and also because by the ***PIA's*** transitional provisions, the ***PA*** regime has become, or will soon become, spent.[2]

Incidentally, the upstream regulator, the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) *does not appear to have fully developed Guidelines on AMT&A transactions under the **PIA**,* as their website features the ***PA*** framework version which reflects that it was *"last updated: March 2021"*.[3] Its envisaged successor, the ***Nigerian Upstream Petroleum Assignment of Interests Regulations 2023***[4] (***Assignment Regulations***) is still marked as 'Draft' on NUPRC's website, as at the date of this article.[5]

*In Focus: **Section 95 PIA** Provisions*

Section 95 PIA's sixteen (16) subsection provisions are respectively interspersed with relevant commentary as follows:

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[1]***Cap. P10, Laws of the Federation of Nigeria (LFN) 2004***.

[2]See generally, ***section 317 PIA (Transitional and Saving Provisions)***.

[3]See NUPRC website for the 7-page ***'Guidelines and Procedures for Obtaining Minister's Consent to the Assignment of Interest in Oil and Gas Assets Pursuant to Paragraphs 14-16 of the First Schedule to the Petroleum Act Cap. P10 LFN 2004, Section 17(5)(D) of the Oil Pipelines Act Cap 07 LFN 2004 and the Petroleum (Drilling and Production) Regulations 1969 as Amended'***, *Department of Petroleum Resources, 12.03.2021*: https://www.nuprc.gov.ng/wp-content/uploads/2021/04/DPR-Guidelines-on-Asset-Divestment-2021.pdf. See also generally, ***'Guidelines for the Award and Operation of Marginal Fields in Nigeria'***, *DPR, 31.05.2020*: https://www.nuprc.gov.ng/wp-content/uploads/2020/08/Guidelines-for-the-Award-and-Operations-of-Marginal-Fields-in-Nigeria.pdf (both accessed 02.10.2024). See especially, ***Regs 8 (Negotiation of Farmout Agreements), 10 (Equitable Consideration), 11 (Other Commercial Considerations)*** and ***12 (Elements of Farmout Agreements)***.

[4]See the ***Assignment Regulations*** at: https://www.nuprc.gov.ng/wp-content/uploads/2023/07/Draft-Nigeria-Upstream-Petroleum-Assignment-of-Interests-Regulations.pdf (accessed 09.10.2024).

[5]Whilst its ***Regulation (Reg) 25 (Citation)*** provides that *"These Regulations may be cited as the Nigerian Upstream Petroleum Assignment of Interests Regulations, 2023"*, the ***Assignment Regulations*** is expressed as *"MADE at Abuja this … day of ………, 2023."*

> "(1) *A holder of a petroleum prospecting licence or petroleum mining lease* ***shall not assign, novate or transfer his licence or lease or any right, power or interest, or a shareholder of an incorporated joint venture shall not sell or transfer its shares*** ***without prior written consent* *of the Minister*.**"[6]

Comment:
The NUPRC's (***Assignment Regulations***) can be regarded as the operational manual for giving effect to ***section 95 PIA*** generally, and to ***section 95(1)***, specifically.[7] *Although watermarked as 'Draft' on the NUPRC website; presumably, the* ***Assignment Regulations*** *provided the implementation framework for considering and approving recent AMT&A transactions.*[8] Furthermore, the final version will supersede and replace the predecessor ***Guidelines and Procedures*** referenced in *footnote 3* of this article.[9]

Notably, ***section 84 PIA*** reinforces the requirement for prior ministerial/regulatory consent by providing that: *"(1) Unless otherwise prohibited by this Act or regulation under this Act, where the Minister grants a licence or lease, a licensee or lessee may enter into a contract with a third party for the exploration, prospecting, production or development of crude oil or natural gas or both.* ***(2) The power to enter into contracts under subsection (1) shall not confer on any licensee or lessee the right to assign an interest in any licence or lease, except in accordance with the provisions of this Act.***"[10]

> "(2) *The consent of the Minister under subsection (1) shall be granted* ***upon the recommendation of the Commission.***"

Comment:
This provision at first blush presupposes that the Minister has no discretion: he must consent to the relevant AMT&A transaction, once the Commission recommends same. However, ***section 95(7)(a)*** expressly provides that *the Minister may approve or reject the recommendation*; consequently, *the right import of* ***section 95(2)*** *is that the Commission's review and input is a condition precedent or prerequisite to the Minister's action or decision.* This is even the logical approach since the Commission is in effect, the primary upstream operating arm (or 'secretariat') of the Ministry of Petroleum.[11]

The effect of the apparent conflict between ***section 95(2)*** and ***95(7)(a)*** is that the *"shall"* in the former is to be construed as *"may"*, or not mandatory; since it is trite that depending on the context, *"shall"* can be constructed as *"may"* and *vice versa*.[12]

> "(3) *For the purpose of subsection (1),* ***a change of control*** *in the holder of a licence or lease*

[6]Emphasis supplied. The predecessor provision was ***Paragraph (Para) 14, First Schedule PA***: "***Without the prior consent of the Minister****, the holder of an oil prospecting licence or an oil mining lease* ***shall not assign his licence or lease, or any right, power or interest therein or thereunder***." Emphases supplied. It is submitted that ***section 95(1) PIA*** has the requisite clarity, thereby obviating arguments on 'the boundaries' or exact purport of "*any right, power or interest therein or thereunder*" regarding assignments of licences or leases under the **PA**. In ***Moni Pulo Limited v. Brass Exploration Unlimited & 7 Ors. (2012) 6 CLRN 153-235*** the FHC held that an indirect assignment through acquisition of shares of the entity that held a participating JV interest in an asset was ineffective to confer any rights on the acquirer regarding the asset, in the absence of ministerial consent. The ***Guidelines and Procedures*** seemed to have been the forerunner in providing such clarity, as can be seen for example from its ***Para 3 (What Constitutes and Assignment)***, and ***Para 4 (Procedure for an Assignment)***, amongst others.
[7]See ***Reg 23 (Repeal) Assignment Regulations***: "*Upon commencement of these Regulations, any guidelines in force relating to the assignment of interests in a licence or lease is hereby repealed and replaced.*"
[8]Such as the Oando/Agip; and Equinor/Chappal Energies transactions. See James Gavin, ***'Oando Acquisition Shows Rising Momentum for Nigerian Deal Flow, but Obstacles Remain'***, *African Energy, 29.09.2024*: https://www.africa-energy.com/news-centre/article/oando-acquisition-shows-rising-momentum-nigerian-deal-flow. See also, ENI SpA, ***'Sale of NAOC Completed'***, *22.08.2024*: https://www.eni.com/en-IT/actions/global-activities/nigeria.html. Excerpts: "*In August 2024, we closed the sale of* **Nigerian Agip Oil Company Ltd (NAOC Ltd)**, *… This transaction was made possible by the agreement signed in September 2023 between Eni and Oando PLC, and the formal approval received in July 2024 from the [NUPRC], along with all other necessary authorisations from the relevant local and regulatory authorities*"; Camillus Eboh, ***'Nigerian Oil Regulator Approves Eni, Equinor Assets Sale'*** *Reuters, 04.07.2024*: https://www.reuters.com/markets/deals/nigerian-oil-regulator-approves-eni-equinor-assets-sale-2024-07-03/; and ***'Equinor Sells Nigerian Business to Chappal Energies'***, *Equinor, 29.11.2023*: https://www.equinor.com/news/20231129-sells-nigerian-business (all accessed 10.10.2024).
[9]In the absence of updated **Guidelines**, it is arguable that the **PIA** AMT&A consent regime is discoverable from both the ***Assignment Regulations*** and the ***Guidelines and Procedures*** given the language of ***Regs 1 and 8(1) the Assignment Regulations***: "*1. Objectives (1) The objective of these Regulations are to* ***make regulations to govern the procedure for the (a) assignment of interest in a licence or lease granted under the Act or any law preserved by the Act****; and (b) grant of Consent to any such assignment by the Minister or the Commission in accordance with the Act. (2)* ***The Commission may from time to time publish guidelines pursuant to these Regulations.***" *8(1): "An application for the consent of the Minister pursuant to the Act and these regulations shall be made to the Commission in the manner prescribed in guidelines."* However, ***Reg 23 Assignment Regulations*** which provides that "***Upon commencement of these Regulations, any guidelines in force relating to the assignment of interests in a licence or lease is hereby repealed and replaced***" confirms that the intent is not for ***Guidelines and Procedures*** to exist side by side. Emphases supplied.
[10]Emphases supplied.
[11]*Cf.* ***section 3(1)(h) PIA***: "*upon the recommendation of the Commission and pursuant to the provisions of this Act and the regulations, [the Minister shall] revoke and assign interests in petroleum prospecting licences and petroleum mining leases*".
[12]"*It is settled that the word 'shall' does not always mean 'must' – a matter of compulsion. It could be interpreted, where the context so admits, as 'may', whereas 'may' is not always 'may'. It may sometimes be equivalent to 'shall':* ***Okonkwo & Anor. V. UBA Plc (2011) 6-7 S.C. (Pt.1) 189 at 200***." See B. P. Ishaku, ***'Judicial Law Dictionary'*** *(2nd ed., (Ritpank), 2017), 379*. See also Hon. R. N. Ukeje, ***'Nigerian Judicial Lexicon'*** *(2016, Ecowatch), at 409 -410: " 'Shall' or 'Must' – There is no doubt that it is not always that a court of law would interprete the word "shall" or "must" as mandatory. The court must look at the context in which the word is used to arrive at an interpretation which best meets the intention of the legislature or the law giver:* ***Chief AndrewMonye v. Presidential Task Force on Trade Malpractices [2002] 15 NWLR (Pt. 789 209 at 222, [C.A.]***" ***'Stroud's Judicial Dictionary of Words and Phrases'***, *(7th ed., Sweet & Maxwell) Vol. 3, p. 2525* cites: "*For a case of 'shall' being taken as 'directory' rather than 'mandatory', see* ***Stork [2004] S.C.L.R. 513, Sheriff Court***."

under subsection (1) shall be deemed to be an assignment."[13]

<u>Comment</u>:
By necessary implication, this provision is to be read together with ***section 95(14)***; and same has been discussed in further detail below.[14] It is respectfully submitted that a better drafting approach might have been to merge ***section 95(3) and (14)*** together; albeit the current style of keeping them separate is not fatal, even if inelegant.

> *"(4) A licensee or lessee wishing to assign, novate or otherwise transfer its interest, or a shareholder of an incorporated joint venture wishing to sell or transfer its shares under subsection (1),* ***shall make an application for approval of the transfer to the Commission in the format prescribed by the Commission****, and be accompanied with any other information that may be pursuant to any regulations published by the Commission."*

<u>Comment</u>:
This provision is clear enough, and applicants will leverage both substantive and subsidiary ***PIA*** prescriptions (the latter, such as the ***Assignment Regulations***), to effectuate the obtainment of regulatory approvals to their desired transactions.

> *"(5)* ***Notwithstanding the provisions of subsection (1)****, a holder of a licence or lease* ***may by way of security, wholly or partly assign, pledge, mortgage, charge or hypothecate its interests under the applicable licence, lease or grant a security interest in respect of the interest, provided that the consent of the Commission shall be obtained.****"*[15]

This removes any doubt whether financing transactions are exempted from the full-length approval process, in order to hasten financing timelines.

<u>Comment</u>:
This is a welcome provision that recognises the need for regulatory requirements to keep up with business realities. Essentially, financing (debt) transactions – as opposed to outright assignments and transfers, requires lower-level consent protocol, by dispensing with ministerial consent.[16]

The intent is clearly reinforced by the *"notwithstanding"* phraseology that prefaces ***section 95(5)***.[17] This removes any doubt whether financing transactions are exempted from the full-length approval process, in order to hasten financing timelines. *To make assurance doubly sure, the security being taken where applicable, may be structured to fall outside the purview of* ***section 95 PIA's*** *"change of control" definitions and thus escape categorisation as an "assignment" or other AMT&A transaction requiring ministerial consent.*[18]

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[13]Emphasis supplied.

[14]Although ***section 318 PIA (Interpretation)*** does not define "*assignment*", **Reg 24 (Definitions and Interpretation)** provides that "*'Assignment' means any assignment, as defined under Regulation 3 of these Regulations.*" ***Reg 3 (Assignment of Legal Title or Ownership Interest Directly or Indirectly in a Licence or Lease)*** fills in the requisite gaps.

[15]Emphasis supplied.

[16]*Cf.* ***Reg 24's*** definition of: **"Security"** as "*a mortgage, charge (fixed or floating), pledge, lien, assignment, hypothecation, or other Security Interest securing any obligation of a licensee or lessee or any other agreement or arrangement having a similar effect*"; **"Secured Creditor"** being "*any bank or financial institution or any consortium or group of banks or financial institutions including: (a) debenture trustee or security agents appointed by any bank or financial institution as debenture holder; (b) special purpose vehicle involved in the securitisation of financial assistance; (c) any specially created entity for assets reconstruction which has acquired receivables under any financial assistance with securities therefore, from any Secured Creditor; or (d) any trustee holding securities on behalf of banks and financial institution, in whose favour Security Interest is created for due repayment of any financial assistance by the Licensee or Lessee*"; and **"Security Interest"** as "*any mortgage, charge, security, interest, lien, pledge, assignment by way of security, equity, claim, right of pre-emption, option, covenant, restriction, reservation, lease, trust, order, decree, judgment, title defect (including retention of title claim), conflicting claim of ownership or any other encumbrance of any nature whatsoever (whether or not perfected other than liens arising by operation of law) including set-off, title transfer, title retention and trust arrangements in a licence or lease, the economic or commercial effect of which is, in the reasonable opinion of the Secured Creditor, similar to conferring Security.*"

[17]It is settled that the word "*notwithstanding*" creates an exception to a general rule, and implicates supremacy of such exception to the general position. "*When the term 'notwithstanding' is used in a section of a statute, it is meant to exclude an impinging, or impeding effect of any other provision of the statute or other subordinate legislation, so that the section may fulfil itself. –* ***Nigeria Deposit Insurance Corporation v. Okem Enterprises Ltd. [2004] 10 NWLR (Pt. 880) 107 at 182, [S.C]; [2004] 50 WRN 1, SC' KLM Airlines v. Kumzhi [2004] 8 NWLR (Pt. 875) 231 at 258, [C.A.]; [2004] 46 WRN 59, S.C. NNPC v. Lutin Investments Ltd. [2006] 2 NWLR (Pt. 965) 506 at 529, [S.C.]****.*" See R.N. Ukeje, CJ (as she then was), **'Nigerian Judicial Lexicon'**, (***supra***), *p. 338*. See also B.P. Ishaku, **'Judicial Law Dictionary', (*supra*)**, *p. 281*.

[18]*Cf.* ***Reg 17, Assignment Regulations (Effect of Consent by the Commission)***: "*(1) A secured creditor may, pursuant to a consent granted by the Commission under these regulations, apply to the Minister in the case of foreclosure under the security agreement to have the interest in the licence or lease assigned to: (a) the secured creditor; or (b) to a third party. (2) An application under sub-regulation 1 of this regulation shall be subject to the requirement for consent of the Minister under these regulations.*" This recognises that a financing transaction (requiring only NUPRC's consent) may ultimately ripen into a transaction requiring ministerial consent.

An upside of this provision is that re-financings can also be quickly done; and this harks to the ease of doing business, and the competitiveness of the Nigerian upstream sector for global capital.[19]

> "(6) *The Commission shall* ***within 60 days of the receipt****, act on the application of the licensee or lessee under subsection (4) and on the request for consent under subsection (5) and* ***the consent of the Commission with respect to subsection (5) shall not be unreasonably withheld.***"[20]

Comment:

The effort to specify regulatory action timelines, defining 'the how' of the exercise of the Commission's discretion, particularly that *"consent shall not be unreasonably withheld"* as reflected in ***section 95(6) and (7)*** foreshadowed similar, even if more comprehensive reform provisions of the ***Business Facilitation Act 2022***[21] ***(BFA).***[22] It is also respectfully submitted that the ***BFA's*** non-specific provisions (excluding ***BFA*** amendments to listed legislation) also apply to the ***PIA***, unless inconsistent with the ***PIA*** (in the instant case, to the AMT&A regulatory process).[23]

The foregoing also means that where the NUPRC's decision is not judicially or judiciously exercised, same could be challenged in the Courts as unreasonable, arbitrary, perverse and abuse of discretion; and therefore putatively *ultra vires*, null and void.[24] Failing to act within stipulated timeline too, could be a ground to institute an action.[25]

Is there a duty on the NUPRC to render its decision within sixty (60) days or the mandatory requirement is that it must act *"within 60 days of the receipt"*? Whilst it appears that the former is correct, nothing stops the NUPRC from furthering the best practices performance expectations of ***section 95*** by concluding the review and reaching a decision within 60 days. Thus, acting within 60 days might be regarded as the minimum measurement, but concluding same and reaching a decision within 60 days or less will definitely not hurt transaction flows.[26]

Generally, the foregoing, *(whether discretion has been properly exercised, delayed or not exercised at all)*,

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[19]*Cf.* Ejiofor Alike, ***'NUPRC Touts Global Competitiveness of Entry Fees for Nigeria's Seven Offshore Assets, 24 Acreages'***, *AriseNews, 13.10.2024*: https://www.arise.tv/nuprc-touts-global-competitiveness-of-entry-fees-for-nigerias-seven-offshore-assets-24-acreages/; *"To support the reform efforts, Verheijen recalled that* ***Tinubu issued the five new executive orders aimed at providing fiscal incentives for investment and reducing the cost and time of finalising as well as implementing contracts*** *to develop and expand gas infrastructure."* See ***'How Tinubu's Oil Sector Reforms Accelerated Takeoff of New Gas Project'***, *ThisDay, 18.09.2024*: https://www.thisdaylive.com/index.php/2024/09/18/how-tinubus-oil-sector-reforms-accelerated-takeoff-of-new-gas-project/; Lekan Fatodu, ***'Tinubu Pledges Investor-Friendly Government, Set Address Concerns On Ease Of Doing Business'***, *Upstream Gaze (NUPRC Magazine), Vol.4 (June 2023), pp 12-15*: https://www.nuprc.gov.ng/wp-content/uploads/2023/07/NUPRC-GAZE-Magazine-Vol.4.pdf; Akpandem James, ***'PIA, Regulation and Return of Investments in Oil and Gas'***, *Upstream Gaze* ***(supra)***, *pp 8-11; "The enactment of the [PIA] in August 2021 was deservedly greeted with great relief by both the local and international community who had watched - with dismay - the inertia around Nigeria's inability to implement her declared industry wide reform since the Petroleum Industry Bill (PIB) was first proposed as an executive bill in the late 2000s.* ***Nigeria's loss as a result of the unpardonable failure to enact wholesale reform legislation for her oil and gas industry, was nothing less than colossal.***" See Afolabi Elebiju, ***'Posers and Answers: The Petroleum Industry Act 2021, Production Sharing Contracts and Stabilisation Issues'***, *LeLaw Tax Monograph Series (No.4), April 2023*: https://lelawlegal.com/add111pdfs/Afolabi_Elebiju__Petroleum_Industry_Act_2021_Production_Sharing_Contracts_Stabilisation_Issues.pdf. See also, ***'President Signs Three Executive Orders on Oil and Gas Reforms'***, KPMG, *Issue No 3.5 (March 2024)*: https://assets.kpmg.com/content/dam/kpmg/ng/pdf/2024/03/President%20signs%20Three%20Executive%20Orders%20on%20Oil%20and%20Gas%20Reforms.pdf (all accessed 10.16.2024). According to KPMG, *"On 28 February 2024, … President Bola Ahmed Tinubu, GCFR, signed three Executive Orders as* ***part of the [FGN]'s commitment to improve the investment climate and position Nigeria as the preferred investment destination for the Petroleum Sector in Africa****. The Executive Orders are as follows: 1.* ***Oil and Gas Companies (Tax Incentives, Exemption, Remission, etc.) Order, 2024*** *2. Presidential Directive on Local Content Compliance Requirements, 2024* ***3. Presidential Directive on Reduction of Petroleum Sector Contracting Costs and Timelines, 2024.***" Emphases supplied. See particularly, KPMG's discussion of the ***'Presidential Directive on Reduction of Petroleum Sector Contracting Costs and Timelines, 2024'*** at *pp. 5-6*.

[20]Emphasis supplied.

[21]***The Business Facilitation (Miscellaneous Provisions) Act No. 5 of 2022***.

[22]For a detailed discussion of the ***BFA***, see Afolabi Elebiju, ***'Signposts and Landmarks: The Business Facilitation (Miscellaneous Provisions) Act No. 5 of 2022: A Critique of Recent Strides in Nigeria's Business Regulatory Policy Reform Journey'***, *LeLaw's Nigerian Business Regulatory Landscape Reform Series (No. 1), December 2023*: https://lelawlegal.com/add111pdfs/Signposts_and_Landmarks_updated.pdf (accessed 09.10.2024). Excerpts (from *p.2*): *"Objectives – Improvement of Ease of Doing Business: The BFA's long title aptly describes it as 'An Act to provide for the ease of doing business, ensure transparency and productivity in Nigeria; and for related matters'. Section 1 proceeds to provide that: 'The objectives of this Act are to - (a) promote the ease of doing business in Nigeria and eliminate bottlenecks; and (b) amend relevant legislation to promote the ease of doing business in Nigeria and institutionalise all the reforms to ease implementation.'"*

[23]*This means that* ***sections 1-8 BFA*** *applies to complement* ***PIA's*** *AMT&A regulatory process, unless specifically inconsistent therewith.* See Afolabi Elebiju, ***'Signposts and Landmarks'(supra)***, *pp 2-5*.

[24]See *footnote 12 (p.3)*, in Afolabi Elebiju, ***'Monopolies and Unfair Business Practices: A Consideration of the Petroleum Industry Act 2021's Anti-Trust Regulatory Framework in the Midstream and Downstream Sectors of the Nigerian Oil and Gas Industry'***, *LeLaw Thought Leadership, September 2024*: https://lelawlegal.com/index.php/page/blog. *"Under the principles of administrative law, when the basis of exercise of a power, judgment or discretion is prescribed, non-compliance renders the regulatory outcome ultra vires and potentially liable to be successfully challenged as null and void. … Cf. 'Posers and Answers' (supra), footnote 46; and generally, Afolabi Elebiju,* ***'Public Interest Litigation, Citizens' Rights and Regulatory Irresponsibility: Periscoping the Central Bank of Nigeria's Q1 2023 Currency Change Exercise'***, *December 2023*: https://lelawlegal.com/add111pdfs/Public_Interest_Litigation_Citizens_Rights_Regulatory_Irresponsibility_(Final).pdf. *See also Afolabi Elebiju, et al,* ***'Validity Questions: Nigeria's Companies and Allied Matters Act 2020 (CAMA) and Limited Partnerships (LPs)'***, *LeLaw Thought Leadership, February 2023*: https://lelawlegal.com/add111pdfs/Validity_Questions_CAMA_updated.pdf *(both accessed 27.09.2024)."*

[25]Such default will be a clear breach of mandatory statutory provision, and although there is no express default approval provision (like ***section 95(7)(b)'s*** for ministerial consent, an argument in that regard can be made. Such timing default concerns are not moot because, *"Exxon Mobil Corp's deal to sell its Nigerian onshore assets to Seplat Energy will be approved in days after getting clearance from the regulator, President Bola Tinubu said on Tuesday.* ***The $1.28 billion deal has been closely watched since it was first announced in 2022****…*" Emphasis supplied. See Felix Onuah, ***'Exxon-Seplat $1.28 Billion Deal Approval Imminent, Nigeria President Says'***, *Reuters, 01.10.2024*: https://www.reuters.com/markets/deals/exxon-seplat-128-billion-deal-approval-imminent-nigeria-president-says-2024-10-01/ (accessed 10.10.2024). Elsewhere the report stated " *'As such, the ExxonMobil Seplat divestment will receive ministerial approval in a matter of days, having been concluded by the regulator,' Tinubu said. The [NUPRC] has not yet announced approving the deal."*

[26]***Reg 11(1) and (3) Assignment Regulations*** further binds the NUPRC with *definitive performance obligations* as follows: *"(1) The Commission shall in accordance with the Act make a recommendation to the Minister on every application for consent pursuant to these regulations and* ***notify the assignor upon making the recommendation****"*; and *"(3) The notice to the assignor under sub-regulation 1 of this regulation shall* ***inform the assignor of the recommendation, the conditions if any that may be attached to the grant of consent by the Minister including any transaction fees or bonuses.***" Emphases supplied.

> ***An upside of this provision is that re-financings can also be quickly done; and this harks to the ease of doing business, and the competitiveness of the Nigerian upstream sector for global capital.***

would be issues of fact to be determined by the relevant circumstances.[27] It is respectfully submitted that the regulatory intent on the attainment of quick financing deals will weigh heavily in the mind of the Court where it is alleged that consent has been unreasonably withheld.

> *"(7) **Within 60 days of the receipt of the recommendation of the Commission** under subsection (4), **the Minister shall consider it for approval, such approval not to be unreasonably withheld**, and where - (a) the Minister rejects the recommendation of the Commission, **the Minister shall provide the reason for such rejection**; and (b) **no response on the application has been received within 60 working days from the receipt of the recommendation of the Commission, the consent of the Minister under subsection (1) shall be deemed to have been granted.**"*[28]

<u>Comment</u>:

The foregoing takes ***section 95(6)*** to a higher level, by with the provision for default approval in ***95(7)(b)***. *Another difference is that whilst the NUPRC's approval is only not to be unreasonably withheld in **section 95(6)**, the instant version goes ahead to mandate the Minister to provide the reason for rejecting the NUPRC's recommendation.* Such tightening of the ministerial discretion could be because it is assumed that the NUPRC being manned by people with professional expertise, their recommendation to the Minister (who will typically be a politician, rather than an industry expert), should not be lightly regarded.[29]

As with any grievances with perceived regulatory default section on ***section 96(6)***, the instant provision too could be the basis of an action against the Minister. It will also be a matter of business judgment whether the relevant applicant parties think it is worth their while to institute court actions, because of long-term regulatory relationship reasons.[30]

Despite ***section 95(7)(b)***, for significant multi-billion transactions, there may be pushback against default approval in lieu of positive (actual) approval because decisions were not rendered on time. As we speak and unless it can be confirmed that the NUPRC has not yet made its recommendation to the Minister (currently also the President), *either or both of ExxonMobil and Seplat can argue - and convincingly for that matter based on **section 95(7)** - that the transaction has been approved by default.*[31]

> *"(8) Where the consent of the Minister is granted in respect of the application for a*

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[27]See Wade & Forsyth, ***'Administrative Law'*** *(10th ed. Oxford (2009)), p.* 296: *"**Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.**"* Emphasis supplied.

[28]Emphases supplied. ***Quaere***: *will the fact that the President is also currently the Minister of Petroleum likely to affect the unvarnished discharge of section 95(7) approval obligations?* Incidentally, President Buhari was also the Minister of Petroleum and the yet to be approved ExxonMobil-Seplat transaction was reportedly announced in 2022 long before President Buhari's tenure expired and President Tinubu assumed office on 29th May 2023.

[29]*Cf.* however, ***Reg 11(4) Assignment Regulations***: *"The Minister may grant or refuse to grant consent to an application for consent in accordance with the Act, taking into consideration the due diligence investigation report and the recommendations of the Commission, **provided that the Minister shall not be bound by the recommendations of the Commission.**"* Emphasis supplied. By way of further detail, note that ***Reg 11(6)*** provides that: *"The Commission shall within 7 days of receipt of notification of grant of Consent by the Minister communicate to the assignor the decision of the Minister on the application."*

[30]Using the long-drawn-out ExxonMobil-Seplat transaction as an example, it is unlikely that the applicant parties will contemplate legal action for delayed regulatory approval. ExxonMobil whilst divesting their onshore and shallow water assets *vide* the Seplat deal, they are not exiting Nigeria and indeed there has been news on prospective new US$10 billion investment in Nigeria's deep offshore (see Felix Onuah, ***'Exxon Plans $10 Billion Oil Investment in Nigeria, Presidency Says'***, *Reuters, 26.09.2024*: https://www.reuters.com/business/energy/exxon-plans-10-billion-oil-investment-nigeria-presidency-says-2024-09-26/. Seplat on its own is Nigerian headquartered even though listed in the UK and experience has shown that industry players do not take decisions to sue their regulator lightly; they are unlikely to sue their regulator, unless absolutely necessary. An added point may be that ctions against regulators (especiallyside from the fact that the President is the Minister of Petroleum

[31]*Cf.* ***section 4 BFA*** on default approvals. See also the views of the commentator in ***'Signposts and Landmarks' (supra)*** at *p. 4* (and related footnotes which are omitted here) in respect of ***section 4 BFA***: *"Notably, post-EO1 2007 the Federal High Court (FHC) in Lekoil v. Minister of Petroleum Resources held that the law does not recognise default approval: an applicant may not take lack of feedback within the stipulated timeline as positive approval of his/its application. **Jurisprudentially, default approvals has obviated the need for potential recourse to seeking orders of mandamus from the FHC to compel the performance of public duty that an aggrieved applicant for a delayed regulatory approval might have considered pursuing. However, the subsequent enactment of section 4 BFA shows the clear intent of the legislature to ensure the inviolability of default approval as an established statutory principle, which the Courts are bound to give effect to.** Furthermore, BFA is later in time to many other legislation that the Court might hold was superior in effect to EO1 2017 or its peers."* See also excerpts from **Signposts and Landmarks**' *footnote 11*: *"**Section 4 BFA is one of the strong illustrations of the legislature's effort to tighten the screws on bureaucracy**. Whilst its default approval and section 3's transparency provisions whittles down the scope of discretion cum arbitrariness that can be used to pressure private sector for corrupt purposes; the enforcement elements of the provisions disincentivises breach of same. It makes 'less powerful', public service personnel that might have otherwise been accustomed to, or want to 'wrongly exert the weight'of their office, for corrupt personal gain. **Government would however need to signal that it possesses the requisite enforcement appetite to make the provisions efficacious. This author is not aware of specific actions taken since BFA's enactment in this regard.**"* Emphases supplied.

> *transfer,* ***the Commission shall promptly record the transfer in the appropriate register.****"*

Comment:
This administrative or record keeping task is consistent with the **PIA's** overarching intent to *"promote transparency, good governance and accountability in the administration of the petroleum resources of Nigeria"* (**section 2(c)**) whilst the NUPRC's technical regulatory functions include to *"develop, maintain and publish a database of upstream petroleum operations"* (**section 7(z)**).[32] Note however, that failure to pay the consent fees within stated timeline vitiates the consent.[33]

> *"(9)* ***The Commission shall communicate the refusal or approval of an application*** *for an assignment, novation or transfer of a licence or lease* ***in writing to the applicant.****"*[34]

Comment:
This further builds on the specificity required to perform **section 95** regulatory functions, and is a welcome development, also consistent with the **BFA's** principles.[35]

> *"(10) Where the application for an assignment or a transfer of a petroleum prospecting licence or petroleum mining lease is refused,* ***the Commission shall inform the applicant of the reasons for the refusal and may give reasonable time within which further representations may be made by the applicant or by third parties in respect of the application.****"*

Comment:
The latter part of this provision provides additional safeguard against high-handedness; sometimes, the opportunity offered to make representations and additional submissions may make the difference between success and failure of many an application. This is positive optics which further assure the industry that applications will essentially be considered on their merit, and not on extraneous considerations.

The Courts may also find it an easier task to determine the correctness or otherwise of regulatory actions, given that the representations will comprise part of the factual context.

> *"(11) The Minister may grant consent to* ***an assignment, novation or transfer of a petroleum prospecting licence or petroleum mining lease****, subject to the following terms and conditions which the Commission may consider appropriate,* ***that the proposed transferee*** *- (a) is a company incorporated in Nigeria; (b) is of good reputation and standing; (c) has sufficient technical knowledge, experience and financial resources to enable it effectively carry out all responsibilities of a licensee or lessee under the licence or lease; and (d)* ***shall comply with the Federal***

[32]See also **section 67 PIA**: *"The administration and management of petroleum resources and their derivatives shall be conducted in accordance with this Act* ***and the principles of good governance, transparency and sustainable development or Nigeria.****"*
[33]See **Reg 11(9) Assignment Regulations**: *"Where the Consent is granted on the condition that the assignor shall pay any fees or bonus****, the assignor shall have 90 days to pay such fees or bonuses. Failure of the Assignor to pay such fees or bonuses within the time prescribed in this regulation shall vitiate the Consent granted.****"* Emphasis supplied.
[34]Emphasis supplied.
[35]*Cf.* **section 4(3) BFA**: *"Where an application is rejected within the stipulated timeline, the MDA shall communicate the rejection to the applicant stating the grounds for the rejection."*

> ***Competition and Consumer Protection Act.***"[36]

In this regard, a recent high profile acquisition transaction was reportedly refused on the basis of the proposed acquirer's alleged financial and technical capacity considerations.[37] ***Reg 22*** of the ***Assignment Regulations (Assignment Without Prior Consent)*** not only clarifies the effect of non-compliance, it also prescribes sanctions.[38]

Comment:
These conditions are not strange generally, and in many other sectors are often part of regulatory considerations even when not expressly stated. *It is also worth noting that the* ***FCCPA*** *approval requirements do not apply to purely financing transactions, since they do not implicate the "assignment, novation or transfer" of licences or leases.*[39]

Regarding the ***FCCPA*** merger regulatory framework, some learned commentators have opined that:

> *"Nigeria now has a dedicated, sector-neutral merger control regulator in the [FCCPC], established under the [FCCPA]. Before the FCCPA, the capital markets regulator doubled as the merger control regulator, and changes of control that were either indirect or occurred at the level of foreign parent companies rather than within a Nigerian company were not regulated under Nigerian general merger control law. All this has now changed. Following enactment of the FCCPA, the FCCPC exercised its powers thereunder and in November 2020 issued the Merger Review Regulations 2020 (the Regulations). The Regulations: (a) stipulate the requirements for the approval of a merger by the FCCPC; (b) outline the jurisdictional limits of mergers under the FCCPA; (c) clarify the process for merger notification and handling of notified mergers; (d) provide guidance on the regulatory review process; and (e) prescribe the procedure for remediation and disposition of notified mergers."*[40]

It has also been stated that:

> *"Beyond the comprehensive framework established by the FCCPA, the FCCPC has engaged in close collaboration with sector-specific regulators to develop and implement sector-specific competition regulations. This co-operative effort is undertaken under section 105(5) of the FCCPA, which mandates sector-specific regulators with competition regulation mandates to enter into agreements with the FCCPC. Among other things, these agreements outline the procedures for the concurrent exercise of competition powers by the FCCPC and the sector-specific regulator, ensuring a harmonised approach to regulation and promoting a level playing field across sectors."*[41]

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[36]Emphases supplied. *Cf.* the 'predecessor' provision, *viz* ***Para 16, 1st Schedule PA***: "*The Minister shall not give his consent to an assignment unless he is satisfied that - (a)* ***the proposed assignee is of good reputation****, or is a member of a group of companies of good reputation, or is owned by a company or companies of good reputation; (b) there is likely to be available to the proposed assignee (from his own resources or through other companies in the group of which he is a member, or otherwise)* ***sufficient technical knowledge and experience and sufficient financial resources*** *to enable him to effectually carry out a programme satisfactory to the Minister in respect of operations under the licence or lease which is to be assigned; and (c) the proposed assignee is* ***in all other respects acceptable to the Federal Government****.*" The question may arise: *why is the provision focusing on only the transferee? What if the transferor has been in breach of license or lease conditions?* But *cf.* ***Para 3(2), 7th Schedule PIA***: "*A petroleum mining lease shall not be renewed without prior payments of the renewal bonus under this Act.*" Or ***Para 4***: "*Penalty for default in payment of rent 4. Failure to pay the rent as prescribed in the relevant regulation shall result in a penalty as prescribed in the said regulation or any other enactment, provided that where no penalty is prescribed in the said regulation, there shall be an application of an interest rate of LIBOR or any other successor rate plus 10% to the outstanding payment in US Dollars and where the payment of the applicable rent is not made within three months, revocation of such licence or lease under this Act shall be initiated.*" See also ***Para 13 (Revocation, Seizure and Distrain)***.

[37]See Emmanuel Addeh, ***'Nigeria: FG Rejects Shell's $1.3bn Onshore Asset Sale, Says Renaissance Consortium Unqualified'***, *AriseNews, 16.10.2024:* https://www.arise.tv/nigeria-fg-rejects-shells-1-3bn-onshore-asset-sale-says-renaissance-consortium-unqualified/#:~:text=On%20January%2016%20this%20year,in%20Nigeria%20and%20an%20international (accessed 23.10.2024). Excerpts: "*Contrary to a report that the plan by Shell to sell its onshore oil assets to Renaissance Consortium was in the 'waiting room', THISDAY has learnt that the proposed $1.3 billion deal has been roundly rejected by the federal government. People with deep knowledge of the goings-on in the oil and gas sector, specifically relating to the transaction, told THISDAY that after a thorough appraisal of the proposal made by the consortium, the [NUPRC] found that the group of companies did not have the requisite qualifications to manage the assets.*"

[38]"*(1)* ***Any assignment of interest in a licence or lease without the prior Consent of the Minister in accordance with the Act and these regulations shall not confer any legal rights on the assignee and such assignment shall not be recognized under the Act****. (2)* ***Any assignment of interest in relation to a licence or lease or of any right or power thereof in a manner that is inconsistent with the provisions of these regulations shall amount to a fraudulent dealing with the licence or lease and may be a ground for the revocation of the licence or lease****. (3) The provisions of sub-paragragh 2 above notwithstanding, the licensee or lessee in such circumstances shall be* ***liable to the payment of an administrative fine of $50,000 to the Commission****.*" Emphases supplied.

[39]***Reg 5, Assignment Regulations*** clarifies that: "*Transfer of any right, power or interest in a licence or lease pursuant to these regulations shall include, but shall not be limited to, any of the following: (a) creation of a power attorney in relation to the licence or lease (b) devolution of ownership of shares or interest in ownership of shares by operation of law or testamentary device. Operation of law may refer to a judgment of a competent court of law, an award from an Arbitration Panel, the appointment of a Receiver, Receiver/Manager or Administrator under the [CAMA] or any comparable legislation in a foreign jurisdiction. Testamentary device shall refer to the transfer of shares through a Will or Letters of Administration.*"

[40]G. Elias *et al*, ***'The Energy Mergers & Acquisitions Review'*** *(Nigerian Chapter), Law Business Research Ltd (4th ed., 2022), p. 24:* https://www.gelias.com/images/Papers/Nigeria_Chapter_in_The_Energy_Mergers__Acquisitions_Review_-_4th_Edition.pdf (accessed 02.10.2024).

[41]Chiagoze Hilary-Nwokonko *et al*, ***'Merger Control Trends and Developments in Nigeria 2024'***, *Chambers & Partners*: https://practiceguides.chambers.com/practice-guides/merger-control-2024/nigeria/trends-and-developments (accessed 10.10.2024). See excerpts from *footnote 7 (at pp. 2-3)*, ***'Monopolies and Unfair Business Practices' (supra)***: "*... For some general discussions on the FCCPA, see Afolabi Elebiju and Pelumi Odetoyinbo****, 'Virtuous vs Vicious Cycle? Nigerian Mergers & Acquisition Framework under the Federal Competition and Consumer Protection Act 2019'****, LeLaw Thought Leadership Insights, July 2019:* https://lelawlegal.com/add111pdfs/Consumer_Protection1.pdf *(accessed 26.09.2024). The commentators stated in part (at p.1): 'Apparently, the purpose of the FCCPA is to harmonize all the sector-specific anti-trust provisions, vide its own umbrella provisions.' In case of any conflict between the FCCPA and PIA, it may be a question what the exact issue is and the wording of the relevant provisions to determine which legislation will prevail. Some of the rules of statutory interpretation such as generalia specialibus non derogant (special provisions/legislation*

An overview of the merger notification and review process has also been well laid out by a learned author, subject to subsequent regulatory developments since the publication of his treatise.[42]

In practice, the ***PIA*** (NUPRC) and ***FCCPA*** (FCCPC) regulatory approvals are sought contemporaneously, with the FCCPC processes[43] being completed quicker; whilst their regulatory approval is granted, subject to (***PIA's***) ministerial consent. Upon receipt, the applicant will furnish the NUPRC with the FCCPC's approval as part of their ongoing documentation submissions, since the NUPRC/ministerial consent application will not be conclusive without it.[44]

> *"(12) The Commission shall make regulation to prescribe for payment of fees as a condition for any transaction under subsection (1), **which fee shall be based on a percentage of the value of the transaction** and shall not be tax deductible."*[45]

Comment:
It appears that the latter part of ***section 95(12)*** may be considered necessary, given that "*all sums the liability of which was incurred by the company to the Federal Government or any State or Local Government Council by way of levies, stamp duties and fees*" is listed as part of allowable deductions *vide* ***section 263(f) PIA***.[46] It is also doubtful though whether being a capital expenditure, acquisition costs would have been deductible anyway.

> *"(13) The consummation **and details of any transaction** to which subsection (1) applies shall be - (a) **fully disclosed to the Federal Inland Revenue Service by the parties to the transaction**; and (b) published in the Federal Government Gazette by the Commission."*[47]

Comment:
Section 95(13)(a) mandates such full disclosure of the commercial terms as would enable the FIRS make a proper determination of the tax impact of the AMT&A transaction, and doing the needful, regarding the appropriate tax treatment. Such mandatory disclosure enhances the prospect of the FIRS not being on the back foot-as-has previously been the case when it is mostly post transaction audits that often pick up the issues.

In practice, major transactions and - not the least M&As - will implicate full scale tax audits, especially where the transaction is a merger which will entail absorption of the target entity into the surviving entity; or scheme of arrangement, resulting in dissolution of the target entity. This seems to also have legal basis, for example in ***section 29(12) Companies Income Tax Act (CITA)***.[48]

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*prevail over their general peers) may be complex to apply because sectorally PIA is special, but arguably on anti-trust, FCCPA is. However, it may be argued that PIA prevails because although being later in time but expressly recognising FCCPA whilst prescribing her own specialist (sectoral) anti-trust regime; it only makes FCCPA applicable to the extent of FCCPA's recognition in the PIA. This is despite FCCPA's supremacy clause (sections 104 and 164), since the PIA is later in time and therefore would ordinarily not be affected, since the supremacy clause referenced existing law at the time FCCPA came into force. See Vepa P. Sarathi, **'Interpretation of Statutes'** Eastern Book Company, (5 ed., (2010), pp. 371-374, for detailed discussion of the application of the rule. For a discussion of pre-FCCPA Nigerian anti-trust discourse, see Afolabi Elebiju**, 'The Investment & Securities Act of 1999: An Overview of Anti-Trust Considerations in the Regulation of Mergers in Nigeria'** [2001] 6 JIFM 272; [2001] 9 ICCLR 230; (2001) 22 BLR 116."*

[42] See Seye Ayinla, ***'Merger Notification and Review Process' (Chapter 4)*** in ***'Nigerian Merger Control Principles and Practice',*** *LexisNexis (2022), pp 97-129.*

[43] This includes submission of information and documentation, FCCPC reviews and due diligence, payment of requisite FCCPC fees at every stage in line with regulatory prescriptions, etc.

[44] Concerns have been raised about transaction costs as applicants are obliged to pay regulatory application and approval fees to both the FCCPC and the NUPRC. See ***Reg 15 (and 1st Schedule), FCCPA Merger Review Regulations, 2020***: https://fccpc.gov.ng/wp-content/uploads/2022/07/Merger-Review-Regulations.pdf; and ***Reg 20 (Fees)*** Since outsized transaction costs can potentially have a chilling effect on transactions, Can the fees be streamlined (maybe paid only to the NUPRC which will then cede a certain percentage to the FCCPC)? Such approach is consistent with the *"one government"* or (to a lesser extent), *"one stop shop"* approaches in the ***BFA*** and the ***Nigerian Investment Promotion Commission Act, Cap. N118 LFN 2004 (NIPC Act)*** respectively. There could also be additional regulatory fee exposure if the target entity is going to list, is already listed or intends to delist from the Nigerian Stock Exchange (NGX): NGX and SEC fees respectively. See for example NGX, ***'Listing Fees'***: https://ngxgroup.com/exchange/raise-capital/listing-fees/; and SEC, ***'Registration of Securities' (Fee Table)***: https://sec.gov.ng/registration-of-securities/ (all accessed 23.10.2024). All these will add up and may yield significant cumulative sums. However, AMT&A transactions also represent an opportunity for the government to earn from economic activities in the upstream sector, apart from taxes, royalties and fines; and this accords with the objectives of the ***PIA*** that the nation optimally derive economic benefits from her oil and gas resources. At the end of the day, a middle ground may be the way to go, since Nigeria is playing catch up on attracting investment to her upstream sector. It may be a helpful exercise to comparatively review Nigerian upstream regulatory transaction costs *vis a vis* some African countries like Angola, Egypt Mozambique, Algeria, Ghana, Morocco, Cameroun, Gabon and Equitoria Guinea, etc.

[45] *Cf.* ***Reg 20 (Fees) Assignment Regulations***: Fees *"(1) Upon the approval of the Assignment by the Minister, **the Minister shall impose a fee or premium or both which shall range from five percent to ten percent of the total value of the transaction as consent fees**, same of which shall not be tax deductible. (2) **The Minister's consent shall not be conveyed until the appropriate fee and or premium has been fully paid.** (3) […] (4) The Minister may, at [his] discretion, waive the payment of the consent fee and or premium payable, where the Assignment is between or among members of a group of companies which are Affiliates."* Note that ***section 318 PIA*** defines *"affiliate"* as *"the relationship that exists between two persons when one controls or is controlled by, an entity which controls, the other person, where 'control' means the direct or indirect ownership of more than 50% of the voting rights in a company, partnership or legal entity".* *Cf.* the predecessor to ***Reg 20(4) Assignment Regulations***, *viz* the proviso to ***Para 15, 1st Schedule PA***: *"Provided that **the Minister may waive payment of that other fee or that premium, or both, if he is satisfied that the assignment is to be made to a company in a group of which the assignor is a member, and is to be made for the purpose of re-organisation in order to achieve greater efficiency and to acquire resources for more effective petroleum operations**."* Emphases (in quoted provisions (in main body and footnote herein), supplied.

[46] *Cf.* however, ***section 27(a) CITA***: *"Notwithstanding any other provision of this Act, no deduction shall be allowed for the purpose of ascertaining the profits of any company in respect of capital repaid or withdrawn **and any expenditure of a capital nature**"*. Emphasis supplied. Acquisition of shares is therefore substantively, a form of capital expenditure.

[47] Empases supplied.

[48] ***Cap. C21, LFN 2004***. It provides that: *"No merger, take-over, transfer or restructuring of the trade or business carried on by a company shall take place without having obtained the Service's direction under subsection (9) of this section and clearance with respect to any tax that may be due and payable under the Capital Gains Tax Act."* See also generally, ***5th Schedule CAMA (Form and Content of Company's Financial Statements)*** prescribing the manner in which such transactions will also be disclosed in the financial statements.

Thus, ***section 95(13) PIA*** may obviate the prospects of post-AMT&A tax disputes;[49] or even fast track same, if the FIRS refuses to sign off on an M&A transaction (e.g. the merger of two upstream companies) on a potentially objectionable basis; and where such sign-off is prerequisite to concluding the merger.[50]

Section 95(13)(b) is consistent with the ***PIA's*** overarching objective of making public all regulatory payments under the ***PIA***; as exemplified for instance, by ***section 83 PIA***.[51] The disclosure provisions ensures that there is some standardisation to the nature and quantum of transaction details that must be disclosed to the FIRS, and eventually published in the ***Federal Gazette***.[52]

> *"(14) For the purpose of this section, **'change of control'** means any person or persons acting jointly or in concert, **to acquire direct or indirect beneficial ownership of a percentage of the voting power of the outstanding voting securities of the holder, by contract or otherwise, that exceeds 50% at any time."***[53]

Comment:

The ***section 95(14)*** threshold requirement essentially represents the legislator's *'de minimis'* considerations, in promotion of transaction efficiency, since below threshold transactions are less rigorous and should therefore be more quickly completed. An issue may arise as to *whether some prospective investors will opt for minority stake, principally because of the less rigorous process which excludes ministerial consent?*

This may ultimately turn on the dynamics of the particular transaction, the business objectives of the prospective investor (for example, some unlike others, may only be desirous of majority stake). Thus, a quicker transaction timeline may be more important to some, *vis a vis* majority stake and *vice versa* for some others.

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[49]See for example, ***'All Things Not Bright and VATable'***, *'Taxspectives by Afolabi Elebiju,' Originally published in ThisDay Lawyer, 28.06.2011, p.12*; also available at: https://lelawlegal.com/add111pdfs/All-Things-Not-Bright-and-VATable11.pdf (accessed 24.10.2024). Excerpts: *"Hon. Justice A. Bello of the Federal High Court, Abuja's recent decision (March 2011) in* ***CNOOC E&P NIGERIA LIMITED v. AGF & 2 ORS [FCH/ABJ/CS/605/07]*** *that assignment of contractor's working interest in a PSC was not VATable, recently brought the above song to mind. The interest assigned was a chose in action, not 'goods' or 'services' as defined in the VAT Act (VATA). This write-up examines the ramifications of the decision given the controversy surrounding FIRS' insistence on charging VAT on assignment of license interests, amongst others.* ***Facts and Decision****: CNOOC acquired 90% of South Atlantic Petrol Limited (SAPetrol's) working interests in OML 130 for a consideration; in line with historic practice and the advice of tax consultants, VAT was not invoiced, nor paid, on the transaction.* ***The FIRS, pursuant to a tax audit, imposed VAT and demanded same from SAPetrol, which then demanded the VAT from CNOOC****. This action was brought for declaratory reliefs that VAT was not applicable to the transaction; CNOOC joined SAPetrol as co-Defendants with the FIRS and the AGF. Although SAPetrol was also reportedly contesting the FIRS position, CNOOC would have been the party liable to pay VAT (if applicable), on the transaction. The Court rightly held that VAT was not chargeable because the transaction is outside the scope of VATA: 'I agree entirely with the submissions… that the 3rd Defendant's contractor rights in the … PSC do not constitute either 'goods' or 'service' as contemplated … the Plaintiff is therefore not liable to the 2nd Defendant for any sum whatsoever as VAT on the purchase rd of the 3 Defendant's contractor rights in the PSC.' (p. 11)"*

[50]Tax disputes arising from significant transactions (such as M&As) is now getting more common. For example, in ***Sahara Energy Exploration & Production Limited v. FIRS (2021) 58 TLRN 80***, the Tax Appeal Tribunal held that the Respondent was entitled to enforce a US$7.5 million capital gains tax (CGT) assessment (inclusive of penalty and interest), against the Appellant arising from a 2007 farm-out transaction of 45% (part of its) participating interest in OPL 284-DO to BG Exploration and Production Limited. Even in liquidation scenarios, companies must file tax returns, since resolution/closure of their tax position is part of their potential terminal status: ***Michael Oluwole Oladotun (Liquidator, Nu Metro Retail (Nig.) Ltd v. Exec Chairman FIRS & 2 Ors (2024) 81 TLRN 100***.

[51]*Cf. footnote 18* in Afolabi Elebiju's ***'Posers and Answers' (supra)***: *"Per section 83 PIA inter alia: (1) upstream operators are to provide yearly summary of royalties, fees, taxes, profit oil shares and other payments to Government within six months of the following year to the [NUPRC]; (2) such summaries shall be non-confidential and published on NUPRC's website; (3) the text of any contract, lease, licence and any amendment or side letter with NNPC shall be non-confidential and published on NUPRC's website within a year after the effective date; (4) breach is punishable with a daily administrative fine of US$10,000 for the duration of the default; (5) the text of any new lease, licence, contract or amendment shall be immediately publishable on the NUPRC's website. Given these provisions, there will be public disclosure of the respective agreements in due course."* *Cf.* also, ***Para 1(c), 7th Schedule PIA (Petroleum Fees, Rents and Royalty)****: "1.* ***Commission shall through regulations publish the rates or fees payable in respect of … application to assign an interest or sublet a petroleum exploration licence, petroleum prospecting licence or petroleum mining lease***". Emphasis supplied.

[52]Typically, transaction announcements are done in the media by the Parties apart from even news items by 3rd parties.

[53]*Cf.* ***Reg 7(1)(a)-(b) Assignment Regulations****: "An application for the consent of the Minister pursuant to the Act and these regulations shall be made in the following cases: (a)* ***assignment of title or ownership interest directly whether in whole or part.*** *[sic] (b)* ***assignment of title or ownership interest indirectly whether in whole or in part <u>provided that any such indirect assignment involving the transfer of shares of any type which would not amount to a change of control as described in these regulations shall not require an application for consent</u>***. Emphases and underlining supplied. It is respectfully submitted that unless the above provision can be explained away as a drafting error, it is *ultra vires* ***section 95(3) and (14) PIA*** *which specifies a 50% threshold irrespective of whether the assignment is direct or indirect*. for example, ***section 119(1) Companies and Allied Matters Act No. 3 of 2020 (CAMA)****: "*Notwithstanding the provisions of section 120, every person with significant control over a company shall, within seven days of becoming such a person, indicate to the company in writing the particulars of such control." Per **section 868** *inter alia:* a "*person with significant control*"

Arguably, the wording of ***section 95(14)*** implies that intra-group transfers do not amount to change of control and therefore would not amount to an "assignment" *per* ***section 95(3)***.[54]

Notably, ***the Assignment Regulations' Reg 9(3)*** provides that ***"Notwithstanding sub-regulation 2 of this regulation, the prior written consent of the Minister shall be required in a transaction*** *where by way of* ***private placement or public listing, or an acquisition of more than 25% or more****, in any Stock Exchange, of a part or of the whole of the shares of a company which holds a Licence, Lease or Interest*". This is arguably contradictory, (by adding new requirements), to substantive ***section 95*** provisions with the related administrative law implications.[55]

> *"(15) A holder of a petroleum exploration licence shall not assign, novate or transfer his licence or any right, power or interest without prior written consent of the Commission."*[56]

<u>Comment</u>:
Given earlier subsections, especially ***section 95(1) and (2)***, is this provision not a tautology? The considered answer is in the negative; the provision was included to make assurance doubly sure, and for added emphasis.

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means any person: directly or indirectly holding at least 5% of the shares or voting rights in a company; directly or indirectly holds the right to appoint or remove majority of the directors or otherwise having the right to exercise or actually exercising significant influence or control over a company. Also, cf. "*control*" for tax purposes within the context of the **CITA**.

[54]*Cf.* the general lenient regulatory disposition to group restructuring especially for business efficiency purposes. See for example, ***section 29(9) CITA (as amended by section 12(c)(ii) and (iii) Finance Act 2019); section 42 VATA (as amended by section 45 Finance Act 2019); and section 32 CGTA (as amended by section 49 Finance Act 2019).***

[55]This appears to be inconsistent with ***section 95(3) and (14)***, and would being subsidiary legislation, therefore be void to the extent of its inconsistency. However, given the reference to "*private placement or public listing or an acquisition of more than 25% or more, in any Stock Exchange*" it could be interpreted to mean that this provision is not applicable to typical bilateral transactions. In other words, the target company must be public listed for the 25% threshold for ministerial consent to apply to the AMT&A transaction. On this basis, the instant ***Reg 9(3) Assignment Regulations*** may be less objectionable as not being inconsistent with ***section 95(3) and (14)*** and therefore *ultra vires*.

[56]In many sectors, only the approval of the sectoral regulator is required, there is no need for ministerial consent. Whilst this may be explained away on sectoral peculiarities, could this justify an argument for dispensing with ministerial consent too in the upstream sector? As to difference in sectoral regulatory approaches on some issues, for instance director removal and disqualification (in the context of erstwhile CAMA provision), see Afolabi Elebiju and Sam Ngwu, ***'Anomalies: The Illogics of Section 283(c) and 20(1)(d) Companies and Allied Matters Act 2020 Directors' Removal/Disqualification Overkill'***, *LeLaw Thought Leadership, March 2022, esp at pp.10-11 and 13*: https://lelawlegal.com/add111pdfs/AESam_-_Director_Removal_Final_Review.pdf. In the opening paragraph of their '***Conclusion'***, the authors stated: "*We struggle with the question: why have a different treatment for directors removed by sectoral regulators vis a vis those affected by section 283(c) CAMA?*" "*In addition, there are some sectoral merger regulatory authorities which may be involved depending on the business of the company. For instance, the National Insurance Commission ("****NAICOM****") would be a merging authority where the entity/entities involved is/are an insurance company, and the Nigerian Communications Commission ("****NCC****") for the telecommunications industry. The Central Bank of Nigeria ("****CBN****") performs a similar role for mergers in the financial services sector.*" "***The role of the SEC under the ISA as amended by the FCCPA in mergers and acquisitions is limited to fairness consideration in the exercise of its primary function as the regulator of the capital market****. Additionally, the SEC, on August 30, 2021, released New Rules and Amendments to its SEC Rules of 2013, which previously regulated mergers in Nigeria. Part 4 of the New Rules and Amendments covers mergers, acquisitions and combinations involving the acquisition of shares, assets, businesses or subsidiaries of a public company, which also aligns with its primary function as the regulator of the capital market.*" See Anthony A. Idigbe, et al, ***'Merger Control Laws and Regulations Nigeria 2024'***, ICLG: https://iclg.com/practice-areas/merger-control-laws-and-regulations/nigeria (both accessed 10.10.2024). Note also that *per* ***section 47 NAICOM Act (Merger of Failing Insurance Institutions)***, NAICOM is empowered, "*subject to the approval of the Minister, ... to direct that - (a) a failing insurance institution shall merge or consolidate with any other insurance institution, subject to such conditions as it may deem fit to impose; (b) an insurance institution merged or consolidated with a failing insurance institution shall settle the financial liabilities of the failing insurance institution; (c) any asset of the failing insurance institution shall be transferred to and be vested in the insurance institution concerned with the merger or consolidation.*" ***Section 30 Insurance Act (Procedure for Amalgamation)*** vests the relevant regulatory approval powers in NAICOM or the Court in the specified circumstances: "*30-(1) Subject to the provisions of this section, no insurer shall - (a) amalgamate with, transfer to or require from any other insurer any insurance business or part thereof, without the approval of the Commission; or (b) without the sanction of the Court- (i) amalgamate with any other insurer carrying on life insurance business, or workmen's' compensation insurance business ; or (ii) transfer to or acquire from any other insurer, any such insurance business or part thereof.*" On its own part, the ***Pension Reform Act 2014*** does not contain any specific merger review powers in the National Pension Commission (PenCom), unless one is to regard same as ancillary to ***sections 23 (Functions of the Commission)*** and ***24 (Powers of the Commission)*** provisions. According to a comparative commentary on the banking sector: "*Unlike sections 210 and 211(amongst other PIA provisions which references/incorporates the FCCPA), section 65 Banks and Other Financial Institutions Act No.5 of 2020 (BOFIA) expressly excludes it/FCCPC from any anti-trust oversight for the banking sector. It provides: "(1)* ***The provisions of the [FCCPA] shall not apply to - (a) any function, act, financial product, or financial services issued or undertaking, and transaction howsoever described by a bank or other financial institutions licensed by the Bank; and (b) the Bank, the Governor, or other executive officer or staff of the Bank****. (2) Notwithstanding anything to the contrary in this Act but subject to subsection (3) of this section, sections 92 (1), (2) and (3), 94 and 98 of the [FCCPA] shall apply to a merger, acquisition or other form of business combination which involves a bank, specialised bank or other financial institution. (3)* ***All references to the [FCCPC] in sections 92 (1), (2) and (3), 94 and 98 of the [FCCPA], shall be deemed and construed as a reference to the Bank****. (4) Notwithstanding anything to the contrary in this section, the Governor may prescribe additional or other rules and procedures for mergers, acquisitions and other business combinations involving banks, specialised banks and other financial institutions." Emphasis supplied. This contrast reinforces the view that both the PIA and the FCCPA apply (to the extent permitted by the PIA) on anti-trust regulatory framework of the Nigerian mid and downstream subsectors.*" See Afolabi Elebiju, ***'Monopolies and Unfair Business Practices (supra)***, *footnote 17 at p.5*. See also discussions in *footnotes 14 and 16* of the same article, regarding the ***FCCPA*** and the ***Electric Power Sector Reform Act 2023*** and ***Nigerian Communications Act, Cap. N97 LFN 2004*** respectively.

This is because NUPRC review and input/recommendation is prerequisite to Ministerial consent. However, the communication of NUPRC's consent would have to be after Ministerial consent has been communicated - as it would be an aberration for NUPRC to indicate consent to a transaction on which ministerial consent has been withheld.[57] To all intents and purposes, in such scenario, NUPRC consent would be nurgatory.

Again, it complements ***section 95(1),(3) and (14)***, which presumes that there are (below threshold) transactions which requires only NUPRC consent, since they are exempt from ministerial consent requirements.

Conclusion

The instant provisions represent deliberate ambition to grow the Nigerian upstream sector, and by extension, the entire oil and gas industry. However, it is important to ensure that the right sequencing and timing (*per* ***PIA*** and ***FCCPA*** framework) is maintained, otherwise there may be regulatory pushback that will implicate transaction delays.

Anecdotally, such error has been fingered as the cause of delayed regulatory approval of some upstream transactions, as the regulator takes mandatory compliance with the statutory phrase of *"without prior written consent"* seriously.[58] It is irrelevant that the stake being transferred does not involve a third party

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[57]In practice, the NUPRC and ministerial consent applications are not made separately, since the former is considered part of the latter (assuming it progresses to ministerial approval stage).

[58]In practice, the preferred regulatory approach is that the assignor/transferor undertake ***pre-transaction notification*** to the regulator including providing details of the proposed counterparty(ies) before the parties commence negotiations or make media releases. A sequencing or timing error is not just an error of technicality, but arguably a substantive one, as well. Under the ***PA*** regime, *obiter* in the Supreme Court decision in ***Crestar Integrated Natural Resources Ltd v. SPDC & 2 Ors. [2021] 16 NWLR (Pt. 1800) 453 at 484E-F*** suggested that a Share Purchase Agreement (SPA) did not require ministerial consent. In her concurring judgment, *Peter-Odili, JSC (as she then was)* held: "*I agree with learned counsel for respondent that the SPA therefore did not require the consent of the Minister … and accordingly no such consent was required or sought before parties entered into the SPA. It is therefore not correct that the SPA was subject to statutory control. For emphasis, it is correct that an assignment of an interest in an OML cannot be concluded without ministerial consent but the SPA is certainly not a document which assigned an interest in an OML. Ministerial consent was therefore not required to conclude the SPA.*" Given that the relevant provision required "*prior written consent*", and affected any interest "*therein or thereunder*" execution of an SPA prior to ministerial consent can at best be regarded as inchoate pending consent, but on a strict construction has actually breached the requirement for prior written consent in an OML, it is hard to agree with this view. *Cf.* with the ***Guidelines and Procedures' Para 4.2 (Notification of Intention to Assign***: "*4.2.1. The Assignor shall notify the DPR in writing of its intention to carry out an Assignment. 4.2.2.* ***The Assignor shall not proceed with any process incidental to the Assignment, including making announcements, advertisements, publications or press releases, in respect of the assignment, without the prior approval of the DPR****. 4.2.3. The notification to DPR shall state the reason* ***for the proposed assignment****, the method for the conduct of the assignment, and the possible technical and economic value such assignment would bring to the operation of the license or lease. 4.2.4.****Where the Assignor intends to carry out such transaction*** *through selective tendering, negotiated transfer or an open bidding process (involving prequalification, technical and commercial stages),* ***such procedure shall be stated in the notification of intention****. 4.2.5.* ***The Assignor shall undertake that the process for Assignment shall be transparent and in accordance with global best practices****. 4.2.6.The DPR shall respond within 10 working days from date of receipt of the notification,* ***failing which the Assignor may proceed to the next stage of the Assignment process****.*" Emphasis supplied. Note that the ***Crestar*** decision was delivered in June 2020 whilst the ***Guidelines and Procedures*** was issued in March 2021; the ***PIA*** was enacted in August 2021.

(for example, where a party wants to exit a multilateral JV and the potential acquirers of its stake are the other extant JV parties).[59]

As previously mentioned, Nigerian regulatory authorities need to benchmark AMT&A transaction costs against peer oil producers especially on the African continent to ensure Nigeria's competitiveness. Hopefully, the horizon is expected to brighten up much more, following the enactment of reform proposals and even recent cabinet reshuffle which should signal greater efforts to improve Nigeria's country competitiveness; including in the upstream sector.

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[59]Parties must not fall into the error of thinking that all they need focus on is transfer of their JOA or PSC interest is compliance with contractual requirements of the JOA provisions, and obversely it is also important to take account of contractual provisions (such as pre-emption) in the proposed assignor/transferor's plans. [Akinrele, leave 2 or 3 lines spacing here.