



# Executive Order on Ease of Doing Business in Nigeria:

## Knuckling Down to Get Business Done

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### Background

President Buhari's administration is on record as being the first to consciously determine to address Nigeria's perennially low ranking in global ease of doing business (EDB)/ competitive ratings, acknowledging inevitability of taking composite reform actions to significantly improve Nigeria's EDB rankings. This is commendable, given anxieties caused by the President's five month delay in constituting his cabinet, inclement global and national macro-economic landscape headlined by shrinking government revenues from falling crude prices and production cuts as a result of unrest in the Niger Delta, as well as policy actions or inactions that put pressure on Nigeria's foreign exchange metrics. Little wonder that Nigeria's EDB rating actually slipped in 2016 from 2015, after marginally improving in 2014.<sup>1</sup>

In pursuance of the declared goal to improve Nigeria's EDB ratings, the President inaugurated the *Presidential Enabling Business Environment Council (PEBEC)*, chaired by the Vice President, in July 2016. PEBEC comprises the Minister of Industry, Trade and Investment (MITI) as Vice-Chair, 9 other ministers, the Head of Service of the Federation, Governor of the Central Bank, representatives of the National Assembly, and the private sector. PEBEC's mandate is to make recommendations on institutional reforms to promote Nigeria's investment attractiveness.<sup>2</sup> In February 2017, PEBEC approved a 60-Day National Action Plan "with clear deliverables and timelines for [MDAs] responsible for implementing each line item in the Plan."<sup>3</sup>

On 18<sup>th</sup> May 2017, the Acting President issued three Executive Orders (EOs); effective immediately and targeting public service improvements to touch every sphere of Nigeria's economy.<sup>4</sup> In this Newsletter, we discuss one of the EOs (and which appear to build on PEBEC's work), the 26 paragraph *Executive Order On the Promotion of Transparency and Efficiency in the Business Environment* with its attendant implications on businesses and investors in Nigeria.

### Constitutionality and Use of EOs

Eos essentially are a set of commands directly given by the President to an executive agency, class of persons or body under the executive arm of government. Apparently the instant EOs would not be the first to be issued in Nigeria (examples would be presidential powers exercised pursuant to delegated legislation), but have attracted attention because of their significance and also given our 21<sup>st</sup> century realities that have basically democratised news media access. They also signal intent to more actively use EOs by the Buhari administration going forward, as a veritable means of championing and instilling reform, short of legislative process which typically takes

longer time frames. Clearly, there is so much to do in so little time - the President's current tenure expires in 2019. Across the Atlantic, as at May 2017, USA's President Trump has signed 36 EOs since his assumption of office in January, 2017. So it is possible that we will see many more "paradigm shift, game changing" EOs from the Buhari administration.

Irrespective of views whether Nigerian Presidents should use EOs in directing the policy of the Federal Government, such acts are constitutionally sanctioned - as exercise of inherent executive powers conferred on the President. Furthermore, **section 315(2) 1999 Constitution (as amended)** provides: "the appropriate authority [President or Governor] may at any time by **order** make such modification in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution." Since the President is the Chief Executive of the Federation, it behoves him to exercise functions of his office to drive policy direction, especially to give full effect to laws already in place or their amendment to ensure fulfilment of electoral promises. As mentioned previously, it is desirable that the President from time to time issue EOs to steer economic policies which promotes investment in Nigeria.

### Promotion of Transparency and Efficiency in the Business Environment

#### Transparency

This EO is particularly focused on improving Nigeria's EDB through transparent and efficient service delivery by various government Ministries, Department and Agencies (MDAs). To promote transparency in MDAs' dealings, the EO makes it mandatory for

<sup>1</sup>In 2016, Nigeria ranked 169<sup>th</sup> (out of 190 countries, 37<sup>th</sup> out of 48 in Africa) in the World Bank's Ease of Doing Business (EDB) compared with 170<sup>th</sup> (36<sup>th</sup> sub-Saharan Africa) in 2015, and 147<sup>th</sup> (20<sup>th</sup> in Africa) in 2014. In 2016, Nigeria ranked 40<sup>th</sup> in sub-Saharan Africa in Ease of Paying Taxes (182<sup>nd</sup> globally, compared with 45<sup>th</sup>/179<sup>th</sup> in Africa and globally in 2015). Nigeria is 127<sup>th</sup> in 2016 - 2017's Global Competitiveness Index (26<sup>th</sup> in Africa), compared with 21<sup>st</sup> and 124<sup>th</sup> sub-Saharan Africa and globally in 2015 - 2016.

<sup>2</sup>According to the World Bank, "Doing Business 2017: Equal Opportunity for All" finds that entrepreneurs in 137 economies saw improvements in their local regulatory framework last year. Between June 2015 and June 2016, the report, which measures 190 economies worldwide, documented 283 business reforms. Reforms reducing the complexity and cost of regulatory processes in the area of starting a business were the most common in 2015/16, as in the previous year. The next most common reforms were in the areas of paying taxes, getting credit and trading across borders. Brunei Darussalam, Kazakhstan, Kenya, Belarus, Indonesia, Serbia, Georgia, Pakistan, the United Arab Emirates, and Bahrain were the most improved economies in 2015/16 in areas tracked by Doing Business. Together, these 10 top improvers implemented 48 regulatory reforms making it easier to do business." See: <http://www.doingbusiness.org/reports/global-reports/doing-business-2017> (accessed on 6.10.17)

<sup>3</sup>In April 2017, PEBEC published its scorecard on the 60 Day Action Plan (covering 21<sup>st</sup> February - 21<sup>st</sup> April 2017), reflecting a 70% overall completion of targeted reforms, including: (a) Starting a Business (88%); (b) Dealing with Construction Permits (86%); (c) Getting Credit (75%); (d) Registering Property (33%); (e) Trading Across Borders (60%); (f) Entry and Exit of People (71%).

<sup>4</sup>They are: Executive Order On the Promotion of Transparency and Efficiency in the Business Environment (to facilitate EDB), Executive Order On Support for Local Contents in Public Procurement by the Federal Government and Executive Order On Budgets (to facilitate timely submission of annual budgetary estimates by all statutory and non-statutory agencies, including Federal Government owned companies.)

them to **make public all the requirements for licence, permits, waivers, approvals and tax related information.**

Pursuant to the EO, every MDA must ensure that its fees, timelines and other deliverables it owes applicants are published within its premises and regularly updated on their websites. This is a welcome departure from common situations where applicants faced uphill task accessing information on regulatory processes and requirements for permits, licenses and approvals. The sense of frustration encountered by applicants was a ready excuse for corruption in order to remove 'intentional' bottlenecks. With the envisaged transparency, the cover would be blown for public servants who had a penchant for stalling processes so they could "offer to help" in exchange for bribes. The EO puts added pressure on regulators - especially business facing ones (needing to approve new products, or transactions) and whose enabling law actually prescribes timeline for granting approvals, but who observe same in breach, rather than in compliance. It also sends a signal that such historic defaults will no longer be tolerated.

One of its key elements is resolving any conflict on fees or procedure in favour of the application where an applicant has relied on published requirements by the MDAs – per *paragraph 2* of the EO. Applicants are entitled to rely on published requirements in their applications; where there is discrepancy between the MDA's actual practice and any published list relied upon by the applicant, the latter would prevail.

Timelines and deliverables would provide basis for measuring MDAs' performance and will instil a sense of 'ownership' in public servants, and resultant productivity. A colleague shared news of how he just collected a driver's license he applied for in 2013 in June 2017, albeit the license will expire in August 2017! Another area that the government could look at is the duration of permits and licenses. Given the stresses associated with obtaining driver's license and international passports, it is the height of inefficiency



for them to have three (3) and five (5) year durations respectively. Extending their validity to say ten (10) years for example, means there would be less pressure with dealing with incessant renewal applications.

While public servants may be regarded as 'having nowhere to hide' – since the EO compels MDAs to comply upon pain of sanctions, the ultimate effectiveness would also be a result of active citizens' engagement in demanding compliance with the EOs in their interaction with MDAs.

#### **Default Approval**

Another striking development is "default approvals". *Paragraph 3* of the EO provides that: "where the relevant agency or official fails to communicate approval or rejection of an application within the time stipulated in the published list, all applications for business registrations, certification, waivers, licenses or permits not concluded within the stipulated timeline **shall be deemed approved and granted.**" This provision's strong potential to de-incentivise undue regulatory delays means that such would no longer be a drag on the pace of business transactions.

In a default approval scenario, the applicant may within fourteen (14) days of the lapse of the MDA's stipulated

timeline to grant the approval, make an application to the relevant supervising Minister for the issuance of any necessary certificate or document to evidence such approval.

The EO is however silent on the procedure for making such application and its supporting documentation. It follows that such applicant desirous of formalising the grant would forward an application showing that the relevant MDA's requirements have been met and timeline has lapsed including any document submitted in the application to the MDA. One of the blind spots in the EO which needs emphasis is the position of an applicant where the Minister declines to 'formalise' a deemed grant. *Paragraph 8* of the EO, "an Applicant whose application is deemed granted under this Directive **may** apply to the Minister for the time being in charge of the application for the issuance of any document or certificate in evidence of the grant within 14 days of lapse of the MDA's stipulated timeline for the application" presupposes that such an application to the Minister would be discretionary. It is however safe to assume that no reasonable applicant (that had invested resources in making the regulatory application) will fail to take the next step to obtain ministerial approval to regularise the default approval.



Can the Minister refuse to issue a certificate to evidence the deemed grant? The answer would appear to be in the negative, unless the application is patently unmeritorious, given the presumptive intent of the EO.

Another critical issue is the status of regulatory applications predating issuance of the EO. Do they also enjoy the benefit of default approval? Regrettably, applications made prior the issuance of the EO would not enjoy the benefit of a deemed grant – otherwise the EO could become objectionable for being retroactive. However, same is unlikely to be challenged – not by public servants being enjoined to deliver improved services or applicants who are meant to be beneficiaries of the EO. Nonetheless, given that the EO itself has an effective date of 18<sup>th</sup> May 2017, it would have been helpful to have transitional provisions to deal with prior regulatory applications.

#### One Government

Another important aspect of the EO is the reiteration of singularity of government MDAs. Thus, where an application to any MDA requires a supporting documentation issued (or to be issued) by another MDA, the onus of verification or certification lies with the MDA processing the application: a photocopy or any other *prima facie* proof would suffice for such application. Such inter-MDA interface will likely speed up approval processes and also reduce the applicant bearing the burden of regulatory delay of an MDA to jeopardise the prospect or timeliness of its current application before another MDA. Furthermore, MDAs can - unless put on their enquiry by any untoward occurrence rely on the presumption of regularity - rely on documents purportedly issued by sister MDAs. One of the requirements for a government bid is the submission of original copy of bidder's Tax Clearance Certificate (TCC). The implication of this is that photocopy of bidder's TCC would suffice for the bid without the need for verification of such TCC.

Also, MDAs are required to publish their Service Level Agreements (SLAs) regulating their service delivery to third parties. These SLAs are particularly important as they stipulate the timeline for application and issuance of licence, certificates, waivers, business registration or permits. The EO further reiterates the bindingness of such SLA while reposing the responsibility of adherence to the head of such MDAs. It is hoped that these SLAs would be implemented with lessons learnt from the pitfalls suffered by SERVICOM established by President Olusegun Obasanjo in 2004. Despite the reports from the public on poor service delivery by MDAs – untreated/missing files, corruption, inefficiency to mention a few - to SERVICOM, no major corrective or disciplinary actions were taken against erring civil servants to produce envisaged culture shift.

#### Fast-Track Visa Application / Visa on Arrival

Pursuant to *paragraph 14* of the EO, ordinary tourist and business entry visas to Nigeria shall be issued or rejected with reason within 48 hours. Arguably, where no response is received from the issuing Embassy or High Commission within 48 hours, such visa application shall be deemed granted (pursuant to *paragraph 3*). Alternatively, applicants may seek to obtain their visas at any port of entry under the visa on arrival policy and **must** be issued with a valid visa upon meeting all the published requirements for a grant as stipulated under *paragraphs 15 and 16* of the EO.

No doubt, this is a revolutionary shift from what was obtainable previously, as it would further make Nigeria an attractive travel destination for tourists and investors. Needless to say, the airports being investors and tourists' first point of contact with Nigeria ought to have a welcoming ambience. News that Lagos State Government will soon start rebuilding the expressway to Murtala Mohammed International Airport cannot but be welcoming news, much as the decrepit on condition of the roads leading to Apapa ports – Nigeria's premier port - is a huge let down.

#### Port Operations

The ports play a critical role in Nigeria's economy and their historic sub-optimality has resulted in massive loss of revenues (e.g. on goods diverted to neighbouring West African ports but would end up being smuggled into, and consumed in Nigeria). Users of the ports have faced various challenges in the past ranging from congestion, delayed cargo clearance, touting, uncoordinated actions of duplicative agencies, amongst others. To ameliorate these challenges faced by users, the EO prohibits any form of touting by official or unofficial persons while allowing only on-duty staff, and except with the permission of the head of the agency, an off-duty staff at the ports. This is to enhance proper identification of officials on duty and any form of solicitation could be reported to appropriate authority.

To ease operations at the ports, all MDAs are required to make arrangements to merge into a single customer interface, making them customer/investor/tourist friendly while taking account of inflow and outflow data which would be sent to the National Bureau of Statistics (NBS). By implication, time spent undergoing numerous checks at the ports would be significantly reduced. More so, the port operation is to run on a 24 hour circle paving way for increased commercial activities, given the EO's prescription for 48 hour cargo clearance timeline.

#### Business Registration

The Corporate Affairs Commission (CAC) charged with incorporation of companies and business registration is to ensure that all registration processes including search, filings and payment are fully automated. Prior the issuance of the EO, the MITI had amended the *Companies Regulations 2012* so that CAC can decide on name reservation applications within 12 hours of submission, whilst registration of companies, business name and incorporated trustees shall be within 24 hours from submission of completed forms. Previously cumbersome incorporation forms were replaced with

a single form CAC 1.1 (*Regulation 3*). In the same vein, under *Regulation 11*, options for submission of forms to the CAC have now been expanded to include online submission through its website. Statutory Declaration of Compliance required for incorporating companies which was solely the exclusive preserve of lawyers are now deposited to by CAC's in-house lawyers, thereby reducing the compliance burden of incorporation.

These innovations should fast track the incorporation process, by obviating hitherto incessant queries. There is greater flexibility as applications can be done anywhere in the world without the need to physically visit CAC's offices – except to collect original copies of the registration certificate at the designated pick up point. In the future, it should be possible for CAC clients to download and print incorporation certificates or CTCs of corporate filings, upon logging in to CAC's website. The CAC however, must build its capacity to attend to numerous applications filed on a daily basis. Premium should also be placed on security of its system and routine vulnerability checks.

### Conclusion

We hope the EO will signpost similar efforts by the States, as the instant EO provisions are only binding on Federal MDAs. Faithful implementation and adherence to the EOs should improve Nigeria's investment competitiveness and EDB ratings, but such improvement would be more substantial if all States were to issue similar EOs in respect of regulatory processes under their remit. And this is not to say that some States have not been a purveyor of reforms. Lagos State, the nation's economic heartbeat, reformed its justice sector and property registration regime to popular acclaim, including digitalising its property records. Lagos also made

provision for limited partnerships and limited liability partnerships to widen the options for business vehicles, exemplifying a healthy regulatory competition amongst States in Nigeria.

But there is more to be done. Real estate reform – to optimise ease of acquisition, registration, disposal, secured lending, building approvals, etc across all the States will have dramatic improvement in Nigeria's competitiveness rating.<sup>5</sup> Real estate is also illustrative of how the Federal and State Governments should collaborate to drive efficiencies that will not only benefit the economy generally (financial services, agriculture, employment, etc.), but help accelerate the bridging of the housing deficit. One further point is that policy actions like EOs should have measurable benchmarks like the ones issued by the Federal Government - these would challenge the public service to pull their weight as everyone realises that non-compliance will raise a red flag and risk exposure to sanctions.

As someone said, eternal vigilance is the price of liberty. Strict implementation of the EOs is therefore key, and it is gratifying that the EO stipulates mechanisms and review timelines in this regard.<sup>6</sup> Anyone in doubt should check *BusinessDay's* front page headline on Thursday 8<sup>th</sup> June 2017: “Executive Order: NPA Re-expels Seven Agencies from Ports”. These agencies whose presence constituted an overhang of MDAs at the ports, had been expelled by presidential directive under the Jonathan administration (October, 2011), but somehow found their way back (or maybe never left the ports)!

The MITI has described itself as the “Ministry of Enabling Environment”. This would be an appellation well deserved if Nigeria were to leapfrog to the top 10s of global/African EDB rankings by 2019 as

envisioned by the Buhari administration and driven by PEBEC.

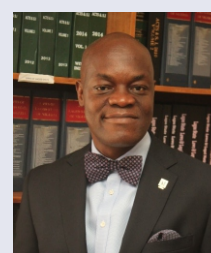
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<sup>5</sup>A significant development in May 2017 was the presidential assent to two bills passed by the National Assembly to facilitate access to affordable credit for Nigerians: *The Secured Transactions in Movable Assets Act* (or *Collateral Registry Act*) and the *Credit Reporting Act*. These will have beneficial impact on EDB in Nigeria and be a boost to retail financial transactions generally. Also noteworthy was the May 30 2017 inauguration of the Nigeria Industrial Policy and Competitiveness Advisory Council (comprising public and private sector membership), to champion an industrial agenda for 250% boost of manufacturing sector's current contribution to GDP in five years.

<sup>6</sup>For instance, some specific actions and timelines are prescribed from the date of the issuance of the EO: MDAs are to publish a complete list of all requirements for obtaining permits, licences and approvals, including fees and timelines, in their premises and on their websites **within 21 days**; all relevant MDAs at the airports shall merge their respective departure and arrival interfaces into a single customer interface, without prejudice to necessary backend procedures, **within 30 days**; each Port in Nigeria shall dedicate an existing export terminal for agricultural exports and the Apapa Port shall resume 24-hour operations **within 30 days**; and all registration processes at the CAC are to be fully automated **within 14 days** of the EO.