

# PROGRESSIONS: FROM ROAD TRUST FUND TO ROAD INFRASTRUCTURE DEVELOPMENT AND REFURBISHMENT TAX CREDIT

THOUGHT LEADERSHIP BY:

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“ There have also been revenue shortfalls that have hampered our efforts to fully fund critical projects... Pursuant to the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme, 19 Eligible Road Projects are to be undertaken by 6 leading manufacturing and construction firms, located in 11 States, and in each of the six Geo-political Zones. Through this Scheme, companies that are willing and able to spend their own funds on constructing roads to their factories or farms, will recover their construction costs by paying reduced rates, over a period of time. We shall ensure complete transparency in these set-offs ”

- President Muhammadu Buhari (PMB), January 2019<sup>2</sup>

“ ... the losses to businesses and residents of Apapa Lagos as a result of the imbroglio on the roads at about ₦86 billion on daily basis ”

- Aliko Dangote, President, Dangote Group, August 2018<sup>3</sup>

**O**n 25<sup>th</sup> January 2019, PMB signed **Presidential Executive Order No. 007 of 2019: The Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Order 2019 (EO 007)** further signalling the Federal Government (FG)'s resolve to frontally address the deplorable state of Nigerian roads. It is stating the obvious that Nigeria has a massive infrastructural deficit; and same requires urgent, concerted and consistent attention. Nowhere is

<sup>1</sup> We acknowledge the contributions of our former colleague, *Ms. Ayo Fadeyi* to the earlier drafts of this article; albeit, the responsibility for any errors herein are fully ours.

<sup>2</sup> John Owen Nwachukwu, 'Full Text of President Buhari's Speech as He Signs Executive Order 007', Daily Post 25.01.2019: <http://dailypost.ng/2019/01/25/full-text-president-buharis-speech-signs-executive-order-007/> (accessed 28.01.2019).

<sup>3</sup> Joshua Basse, 'Apapa Gridlock: Case for Eastern Ports as Alternative', Business Day, 06.08. 2018, p. 9.

this more evident than in our decrepit road network. The staggering losses to gridlock due to bad roads is alarming and has a negative impact on the Nigerian economy.<sup>4</sup> Unfortunately, despite various studies on these losses and their debilitating impact on the economy, Nigeria has instead of aggressively developing her infrastructure especially in line with her growing population, allowed existing ones to fall into disrepair or perennially underutilised them.<sup>5</sup>

However, in 2013 the FG instituted the **National Integrated Infrastructure Master Plan (NIIMP) 2014-2043**.<sup>6</sup> According to the National Planning Commission (NPC), about US\$3 trillion is required to implement the NIIMP.<sup>7</sup>

The NPC's 2015 publication, 'Current State of Infrastructure' served up the following statistics: of the 200,000km national road network, Federal Roads (FRs) comprise 18% (35,000km), States 15% (17,000km), and Local Government Roads 6.7% (150,000km). NPC categorised 40% of FRs as being "in poor condition"

(in need of rehabilitation); 30% "in fair condition" (requiring periodic maintenance); 27% "in good condition" (requiring only routine maintenance); and 3% being unpaved trunk roads that needed to be paved.

In 2016, Babatunde Fashola (SAN) Minister of Power, Works and Housing (MPWH) stated that "only 28,980km out of the 193,200km total road network length in Nigeria since her 55 years of independence has been constructed."<sup>8</sup> Anecdotal evidence, confirmed by everyday hardship experienced and significant loss of productivity occasioned thereby, is that Nigerian roads have worsened subsequently, with notorious examples including the Apapa - Oshodi expressway leading to Nigeria's premier port. According

to the World Economic Forum's **Global Competitiveness Report on Road Quality Index 2016-2017**, Nigeria was obviously not among the top ten (10) African countries with quality roads.<sup>9</sup>

Against this backdrop, in February 2017, the FG through the Ministry of Budget Planning and National Development launched the **Economic Recovery & Growth Plan 2017-2020 (ERGP)** with infrastructural development as one of its key planks. The FG also planned to collaborate with the private sectors through public private partnerships (PPPs) to achieve the ERGP targets.

The Federal Executive Council (FEC) whilst approving the 2018 draft budget proposal in October 2017 approved the Road Trust Fund (RTF or Scheme), a PPP



4 According to a researcher, "the inefficiency and lack of urban transport services and infrastructure is a major impediment to economic growth and urban productivity in cities of developing countries. Increased motorization, public operating transport inadequate road maintenance, insufficient bikeways and walkways poor traffic management and lack of enforcement of road rules are contributory factors to congestion, road accidents and air pollution. In many cities, traffic congestion leads to lost [sic] in work and leisure time, increased fuel consumption and emission, and high accident rates. The cost of road accidents in developing countries two-thirds of which occur in urban areas, is as high 1-2 percent of GDP, taking into account high fatality and injury rates and property damage ... In Nigeria urban centers, the state of infrastructure is poor. Similarly in the city of Lagos most part of the road network are filled with pot holes leading to traffic congestion, delay in travel time, damage to vehicles and accidents. Congestion undermines the major advantage of accessibility which motor transport affords..." See Austin Otegbulu, 'Economic Valuation of Poor Road Infrastructure Lagos: A Focus on Urban Households', *Global Journal of Human Social Science*, Vol. 11, Issue 10 (December 2011): [https://globaljournals.org/GJHSS\\_Volume11/2-Economic-Valuation-of-Poor-Road-Infrastructure-Lagos.pdf](https://globaljournals.org/GJHSS_Volume11/2-Economic-Valuation-of-Poor-Road-Infrastructure-Lagos.pdf) (accessed 28.12.2018).

5 The Federal Road Safety Corps (FRSC) in 2017 reportedly stated that on the Abuja - Jos road, there existed 1,674 potholes whilst the number is double along the Onitsha-Enugu highway, Aba-Port Harcourt road and Kaduna - Kano roads respectively. See Mike Ochonma, 'Road: Terminal Illness in Search of Physician', *BusinessDay* 25.01.2019: <https://businessday.ng/why-nigeria-is-broke/article/road-terminal-illness-in-search-of-physician/> (accessed 26.01.2019). Nigeria is reportedly looking forward to benefitting from the US\$770 million United Nations Road Safety Trust Fund (UNRSTF) to strengthen the FRSC and achieve 50% reduction in the country's road fatalities by 2030. See 'Nigeria Looks To Benefit From \$77m Annual Road Trust Fund', *Eagle Online*, 13.04.2018: <https://theeagleonline.com.ng/nigeria-looks-to-benefit-from-770m-annual-road-trust-fund/> (accessed 24.04.2019).

6 The NIIMP aims at achieving a coordinated approach to physical infrastructural development, which includes transportation (road, rail, water), power and communication; promotion of private sector participation; and strengthening of the policy, legal, regulatory and institutional framework. See News Agency of Nigeria, 'FG Develops 30-Year National Integrated Infrastructure Master Plan', *Vanguard*, 24.06.2014: <https://www.vanguardngr.com/2014/06/fg-develops-30-year-national-integrated-infrastructure-master-plan/> (accessed 25.01.2019).

7 Obinna Chima, 'Fate of Nigeria's Infrastructure Master Plan Worries NESG', *ThisDay*, 26.08. 2017: <https://www.thisdaylive.com/index.php/2017/08/16/fate-of-nigerias-infrastructure-master-plan-worries-nesg/> (accessed 27.01.2019).

8 Emmanuel Elebeke, 'Nigeria Paved Only 28,980km out of 193,200km Road Network in 55 Yrs - Fashola', *Vanguard*, 24.05.2016: <https://www.vanguardngr.com/2016/05/nigeria-paved-28980km-193200km-road-network-55-yrs-fashola/> (accessed 24.05.2016).

9 World Economic Forum, 'The Global Competitiveness Report 2016- 2017': [http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf) (accessed 27.01.2019).

arrangement championed by the Federal Ministry of Finance (FMF) and the Federal Ministry of Power, Works and Housing (FMPWH). The RTF allows private sector involvement in road construction in exchange for tax credit to be utilised over a three-year period. Expectedly, the Scheme is to widen the pool of funds for road constructions. **EO 007** has now taken things up another notch.

How does the Scheme stand, relative to existing tax laws? Has **EO 007** now fully institutionalised this PPP model of developing Nigerian roads? How is it an improvement over the Scheme? Has the Scheme now merged into it? This article gives a ladle on the Scheme and **EO 007**'s bases, potential benefits, and associated issues.

### Part A – The RTF Scheme

#### Was the Scheme Really Needed?

In a sense, the Scheme was a no-brainer, given the funding pressures of FG's deficit budgets whilst the need to bridge Nigeria's infrastructure gap remains compelling. What is a bit surprising is why it took government so long to devise it, as its forerunner under the tax laws have yielded limited

impact. Another instructive omission was that the **Infrastructure Concession Regulatory Commission (Establishment etc.) Act (ICRC Act)**<sup>10</sup> could probably have been called in aid to pursue comparable initiatives like the Scheme's or even legislation enacted to that effect, if necessary, to attract and assure investors. This particularly after the debacle of the failed concessioning of the Lagos-Ibadan expressway by the Yaradua/Jonathan administrations.<sup>11</sup>

Expounding the rationale for, and the potential intervention impact of the Scheme in October 2017, the former Minister of Finance, Kemi Adeosun stated:

*“It is a form of Public-Private Partnership that will accelerate the provision of federal roads by allowing private sector operators to collectively fund road provision in exchange for tax credits. This will complement the Federal Government's budgetary allocation to roads. Private sector participation is being incentivised through a tax credit scheme that enables all participating companies to claim tax relief based on the amount of capital contribution (on*

*a pro-rata basis)... We have already consulted with the private sector in the development of the RTF and some companies have identified roads they wish to reconstruct and are organising their funding. However, this scheme is designed such that financial intermediaries will be promoting road trust fund projects and soliciting commitments from interested companies.”*<sup>12</sup>

What is the legal basis of the Scheme compared to other 'statutory' (available) tax reliefs? Will the Scheme over-ride, or supplement existing tax reliefs? These questions are answered seriatim below.

#### RTF vs. Other Infrastructure Related Tax Incentives

RTF can be said to be a revision of the existing infrastructure tax relief (ITR) scheme that grants tax relief to companies incurring expenditure in public infrastructure. Mr. Fashola (SAN) reiterated this by stating that: “this is going to be implemented under a tax recovery order that exists under the CITA [Companies Income Tax Act]. It is not a method that is new, but it is something we are going to be using frequently.”<sup>13</sup>

<sup>10</sup> Cap. I25A, LFN 2004, enacted as ICRC Act of 2005.

<sup>11</sup> Olasunkanmi Akoni & Monsuru Olowoapejo, 'How Jonathan Stalled Lagos-Ibadan Expressway Project – Babalakin', Vanguard, 26.06.2018: <https://www.vanguardngr.com/2018/06/jonathan-stalled-lagos-ibadan-expressway-project-babalakin/> (accessed 22.01.2019).

<sup>12</sup> Olalekan Adetayo and Ifeanyi Onuba, 'Road Construction: FG Approves Tax Relief for Private Sector', The Punch, 27.10.2017: <https://punchng.com/road-construction-fg-approves-tax-relief-for-private-sector/> (accessed 28.12.2018). Companies like Dangote Group, Lafarge, and Nigeria LNG Limited were indicated as participating in the Scheme. For instance, Dangote Group signed up for the 35km Apapa - Oworonshoki road, (from Creek Road to Ikeja Toll Gate): Bennet Oghifo, et al, 'Federal Government Hands Over 35km Apapa Oworonshoki Expressway to Dangote for Repair', ThisDay, 20.09.2018: <https://www.thisdaylive.com/index.php/2017/09/16/fg-hands-over-35km-apapa-oworonshoki-expressway-to-dangote-for-repair/>, (accessed 22.01.2019); Dangote Group's future taxes will be used to fund the current ₦72 billion contract for the reconstruction of the Apapa-Oshodi expressway Lagos. The project and its cost not having been included in the 2018 budget, the FMPWH obtained approval of the FEC that it be carried out under the Scheme. With a twenty four (24) month completion timeline, the project will be put to the five year guarantee test provided under the Scheme. See Mike Ochonma, '₦72bn Apapa-Oshodi Road Project to be Funded By Dangote Tax Payment', BusinessDay, 10.08.2018, p.1; Lafarge Africa undertook to build a road in Cross River State; whilst Nigeria LNG Limited signed a contract with the FG, represented by the FMPWH and Julius Berger Nigeria Limited, to fund 50% (N60.3 billion out of N120.6 billion) construction cost of the 34km Bonny Island - Bodo Road: Oluseyi Awojlugbe, 'NLNG, Julius Berger Sign Agreement for ₦120bn Bonny-Bodo Road Project', The Cable, 14.09.2017: <https://www.thecable.ng/nlng-julius-berger-sign-agreement-n120bn-bonny-bodo-road-project>, (accessed 27.01.2019). Currently, very few of these projects have been concluded under the Scheme; one exception is the Dangote/NPA/Flour Mills Wharf road. See Amaka Anagor-Ewuzie, 'Apapa: NPA reacts to BusinessDay Editorial Clarifies on Efforts in Addressing Gridlock', BusinessDay 20.12.2018, p.47.

<sup>13</sup> See News Agency of Nigeria, 'Invest in Road Infrastructure and, Get Tax Relief, Fashola Tells Corporate Organisations', Vanguard, 10.04.2017: <https://www.vanguardngr.com/2017/10/invest-road-infrastructure-get-tax-relief-fashola-tells>, (accessed 18.12.2017).

An example of some tax reliefs exist under the Nigerian tax laws similar to the Scheme, for instance, **section 34 CITA**.<sup>14</sup> It provides for *Rural Investment Allowance (RIA)* claimable by any company that incurred capital expenditure on the provision of electricity, water, tarred road or telephone for the purpose of its trade or business located at least twenty (20) kilometres away from such facilities provided by the Government. The RIA is graduated such that investment in areas that do not have: (a) amenities at all (no electricity, water, tarred road and telephone) gets 100% tax relief; (b) electricity, 50%; (c) water, 30%; (d) tarred road, 15%; and (e) telephone, 5% tax relief. *RIA can only be claimed in the year the capital expenditure was incurred, neither can investment allowance be claimed on the same assets on which RIA has been claimed: section 32(1)&(3) CITA.*

Contrastingly under **the Scheme**, cost recovery can be made over three (3) years. Also, the **Scheme** is in form of a tax credit (TC) which is more valuable. This is because whilst tax allowance (TA) is applied above the line (before the tax payable is determined, thereby lowering taxable income), TC is deducted from the tax payable, after the TC has been

ascertained (i.e. below the line). Besides, TC reduces a company's tax bill on naira-for-naira basis compared to TA, which reduces taxes by a percentage based on the company's tax bracket. By offering a more attractive incentive to potentially address infrastructural challenges, the Scheme is set to catalyse significant investments.

In 2012, President Jonathan wielded his tax exemption powers under **section 23(2) CITA** and issued the **Companies Income Tax (Exemption of Profits) Order 2012 (Order)** which conferred ITR and certain fiscal incentives on qualifying companies to encourage employment, employee-retention and infrastructural development in the country. **Para 3 of the Order** grants an "additional" 30% CIT exemption (of the infrastructure cost) to companies that incur expenditure on listed infrastructure or facilities.<sup>15</sup>

*The ITR is treated as an additional deduction and may be claimed in the assessment period in which the company provided the infrastructure or maybe carried forward for a maximum of two assessment periods.*<sup>16</sup> **The Order** was effective for a term of 5 years from its 27<sup>th</sup> April 2012 commencement date.<sup>17</sup> The mere fact that **sections 32 and 40 CITA's** provisions are somewhat similar to the Scheme does not invalidate its relevance. This is because the Scheme provides an additional means for facilitating infrastructural development.<sup>18</sup>

#### **FEC Approval vs. Presidential Powers**

Whilst it was the FEC that approved the Scheme, the law empowers only the President to exempt any company or class of companies from all or any **CITA** provisions or from tax or any profits of any company/class of companies from any source, on any ground which appears to him



<sup>14</sup> Cap.C21, LFN 2004. Similar to **section 11 Petroleum Profit Tax Act (PPTA), Cap. P13, LFN 2004.**

<sup>15</sup> The list covers: power (electricity), roads and bridges, water, health, education and sporting facilities, but expandable to include "such other infrastructure and facilities as may be determined by Order issued from time to time by the Minister of Finance" and published in the FG Gazette, upon the recommendation of the FIRS that they are of a public nature (**Para 3(3), Order**). Such infrastructure or facilities must be generally accessible to the public in the area where they are sited (**Para 3(4), Order**). To qualify for the exemption, the infrastructure must be completed and in use by the Company and the public (**Para 3(5), Order**).

<sup>16</sup> **Paras 3(1), (2) and (6), Order.**

<sup>17</sup> **Para 5 Order.**

<sup>18</sup> In determining whether a company is entitled to such incentives, the wholly, reasonably, exclusively and necessarily (WREN) test will be required to establish if the company incurred such expenses during the assessment period. An allusion can be made to **SPDC v. FBIR [1996] 8 NWLR (Pt.466), 256**, where the Supreme Court (SC) held that the expenditure incurred by Shell in respect of exchange losses, Central Bank of Nigeria charges, and scholarship awards were wholly, exclusively and necessarily incurred by Shell in the course of its petroleum operations and as such deductible in computing Shell's adjusted profits for the year. **Uwais, JSC** stated in the **Shell's case (Supra)** that: "Once there is a statutory or contractual obligation, and in this case it is the former, for a company engaged in petroleum operations to perform, such obligation is "wholly, exclusively and necessarily" for the purpose of the operations of the company..."

sufficient by an order: **section 23(2) CITA**.

Does this raise any ultra vires issues for FEC? Has FEC thereby improperly exercised presidential powers? In our opinion, the answer is no, because FEC is the President-in-Council comprising the President, Vice President and all the Ministers. Moreso, since FEC is by **section 144(5) 1999 Constitution** charged with such responsibilities for the functions of government as the President may direct; thus, it is another avenue for exercise of executive powers. Hence, its decision (within the ambit of the law) is deemed valid.<sup>19</sup>

In addition, **section 100 CITA** empowers the National Assembly (pursuant to the President's proposal), by a resolution of each legislative chamber to impose, increase, reduce, withdraw, or cancel any rate of tax, duty or fee chargeable under **CITA**.

The Scheme's main attraction for private companies is the opportunity to enjoy tax credit (TC) claim (akin to **sections 38(2) and 42 CITA**). This TC is an incentive which allows taxpayers to deduct the amount of credit accruing to them from the total amount of tax payable thereby reducing the tax liability of such company.

### Conclusion – RTF/Scheme

If the Scheme is properly managed, it could greatly accelerate road development, with requisite positive spill over effects on the economy. State



Governments (SGs) like Lagos State (LASG) - have also embraced PPP infrastructure financing, such as the 49.36km Lekki – Epe expressway. Unfortunately LASG had to 'buy back' the project from the concessionaire in order to 'moderate' toll pricing, without sending wrong signals to the investment community.<sup>20</sup>

States can also adopt a hybrid version of the Scheme. Although they do not receive company taxes under **CITA**, they can leverage the pay as you earn (PAYE) on the company's employees under the **Personal Income Tax Act (PITA)**<sup>21</sup> and any other taxes or levies payable to them, as a means to shoring up State road infrastructure projects for interested companies. States can achieve this by giving incentives like PAYE tax holidays or free land acquisition in turn for major road constructions executed by such companies within the State.

It is prescient that the FMF, FMPWH and BPP should maintain and sustain the Scheme by ensuring that all roads constructed under this Scheme has a five(5) years or more guarantee as required by the FG.<sup>22</sup>

## Part B – Executive Order 007 2019 on Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme (EO 007)

### Overview

As earlier stated in January 2019, PMB signed **EO 007**,<sup>23</sup> further enlivening the FG's decision to solve the road infrastructure deficit in the country. According to PMB: *“This is another opportunity to demonstrate the commitment of this administration to conceive, design, develop and deliver Public Private Partnerships with notable investors so as to close the road infrastructure gap in the transportation sector...”*<sup>24</sup>

<sup>19</sup> In *Nigeria LNG Limited v. AG Federation & 2 Ors (2018) 33TLRN 9 at 93, Justice M.B Idris* held that: “It must be noted that the 1999 Constitution has, in several places empowered persons or authorities to enact certain laws or rules of practice, when enacted become subsidiary legislation under the Constitution... For a subsidiary legislation to be valid, it must conform with the mandate of the substantive legislation, especially where the substantive legislation is the Constitution.”

<sup>20</sup> ‘Lekki Concession: Lagos Explains Rights Buy-back’, PM News, 28.08.2013: (accessed 10.05.2019).

<sup>21</sup> Cap. P8, LFN 2004.

<sup>22</sup> Nduka Chiejina, ‘How Far can Road Trust Fund Go?’, The Nation, 27.10.2017: (accessed 27.01.2019).

<sup>23</sup> Sani Tukur, ‘Buhari Signs Executive Order Allowing Private Companies to Build Federal Roads’, Premium Times, 25.01.2019: <https://www.premiumtimesng.com/news/top-news/307943-breaking-buhari-signs-executive-order-allowing-private-companies-to-build-federal-roads.html>, (accessed 25.01.19)

<sup>24</sup> News Agency of Nigeria, ‘Buhari Signs Executive Order 007, Okays Construction of 794km of Roads’, Pulse Nigeria, 26.01.2019: <https://www.pulse.ng/news/local/buhari-signs-executive-order-007-okays-construction-of-794km-of-roads/wz222vs> (accessed 27.01.2019).

For starters, **EO 007**'s attempt to mobilize private capital means Eligible Road Projects would not be subject to budgetary delays, bureaucracies and other interferences, for example when the National Assembly (NA) massively tinkers with budget proposals or delays in passing Federal budget.<sup>25</sup>

**EO 007** is to be administered by the Road Infrastructure Refurbishment and Development Tax Credit Scheme Management Committee (the Committee) under the chairmanship of the Minister of Finance with the Minister of Works as his deputy and the Permanent Secretary, Ministry of Finance as Secretary.<sup>26</sup> **Schedule 1** (which may be amended by the President on the advice of the Minister of Finance) further stipulates the *modus operandi* of **EO 007**.

Although the laudable initiative that the promulgation of **EO 007** represents has attracted

considerable positive attention, we examine by way of some major questions, its implementation implications:

**EO 007** will allow private companies build eligible federal roads and be paid in the form of tax credit,<sup>27</sup> *vide* a single uplift equivalent to the prevailing Central Bank of Nigeria's (CBN)'s Monetary Policy Rate (MPR) plus 2% of the Project Cost, which does not constitute a taxable income to the participant or beneficiary.<sup>28</sup>

Will the 'compensation' (single uplift of current CBN MPR plus 2% of Project Cost) be attractive enough, considering the opportunity cost of capital to incentivise participants to undertake **EO 007** road projects? Some commentators have argued to the contrary.<sup>29</sup>

**Para 1(3)** provides that **EO 007** will be in force for ten (10) years from its commencement date. In our

view, this expressed lifespan gives comfort to potential participant/investors against policy flip flop by the FG, especially upon the entry of a new administration. **Para 1(7)** also recognises that the President may amend **EO 007** "from time to time as may be deemed necessary."

If the performance of **EO 007** in closing road infrastructural development/ maintenance gaps nationwide is deemed impressive at the end of its tenor, there is a possibility that it could be extended, *vide* another **EO** by subsequent administration.<sup>30</sup> If the program is scrapped during its 10 year lifetime (say by a succeeding administration assuming office in 2023 or 2027 and), since the FG is a continuum, investors that are already exposed would be entitled to requisite reliefs that will make them whole.<sup>31</sup>

Upon the Committee's approval of the Participant's<sup>32</sup> application for RITC, an RITCC is issued to the

<sup>25</sup> Leke Baiyewu, 'Reps Blame Buhari for 2019 Budget Delay', *Punch* 22.11.2018: <https://punchng.com/reps-blame-buhari-for-2019-budget-laying-delay/> (10.05.2019).

<sup>26</sup> **Para 1(4) EO 007**.

<sup>27</sup> Tagged Road Infrastructure Tax Credit (RITC), and which is evidenced by Road Infrastructure Tax Credit Certificate (RITCC): **Para 4 EO 007: Para 2 and 3 EO 007**.

<sup>28</sup> **Para. 2(2)(3) EO 007**.

<sup>29</sup> "The return has no potential for catalysing roads development in any material way but it could facilitate some CSR-driven initiatives from corporate organisations who are keen to get tax relief for their material CSR activities.... This however is seems too ambitious for the FGN to expect tax credits to be a sufficient primary channel in itself for underpinning private financing of road infrastructure. The question is if this will be a good measure of opportunity cost of capital for average company that has capacity to undertake infrastructure projects in the first place. The opportunity cost may actually be an equity rate of say 25-35%." See Femi Awofala, 'The 2019 Road Infrastructure Investment Tax Credit Executive Order 007', *Highbrow Living*, March 2019, p.59; <https://investadvocate.com.ng/2019/02/11/the-2019-road-infrastructure-investment-tax-credit-executive-order-007-and-the-search-for-bankable-solution-for-road-infrastructure-in-nigeria/> (accessed 29.04.2019). In his introduction, Mr. Awofala had wondered (at p. 58), "whether the Order issued can be said to be the bankable solution for Road Infrastructure development and delivery in Nigeria."

<sup>30</sup> The Lagos-Ibadan Expressway, depicts the challenges associated with continuity of policy by successive administrations. The road was meant to be reconstructed through a concession agreement between the FG and Bi-Courtney. However, the concession (PPP) arrangement was revoked by former President Jonathan in November 2012. The FG moved away from PPP and awarded the construction contract to two firms. As at date (seven years after revocation), the road is still being constructed and litigation is ongoing regarding termination of the concession, etc. See 'The Lagos-Ibadan Expressway Conundrum', *ThisDay* (editorial), 19.04.2019: <https://www.thisdaylive.com/index.php/2019/04/18/the-lagos-ibadan-expressway-conundrum/> (accessed 15.05.2019).

<sup>31</sup> *Akanji v. Federal Ministry of Lands Housing and Urban Development & Ors* (2016) LPELR-41631(CA) pp. 37-38, paras. F-C, where Per Abiru, J.C.A held that: "It is elementary that where one of the parties to a valid contract defaults in the performance of the contract, the other party has one of two options opened to him and these are (i) to regard the contract as still subsisting and sue for specific performance of the contract or for an injunction where the obligation is a negative one; or (ii) to regard the contract at an end and sue for damages for the breach of it". Also, it is settled law, that in an action for breach of contract, the cause of action accrues for the plaintiff's benefit from the time the breach occurs, and not when the damage is suffered. See *FCDA & Anor v. Kuda Engineering And Construction Company Ltd* (2014) LPELR-22985 (CA).

<sup>32</sup> **Para 5** defines "Participant" as one of: (a) a Nigerian company "designated as a Sponsor of an eligible Road..."; (b) a Nigerian company "certified by the Committee as eligible to participate in the [RITC] Scheme"; (c) SPVs owned by consortia of companies which is registered with the SEC as Infrastructure Fund for managing amounts received by the consortia for any Eligible Road(s) related projects, and which is represented by a Fund Manager registered with the SEC and certified by the Committee to be eligible to participate in the RITC Scheme; and (d) Nigerian corporate institutional investors registered by the Committee as eligible to participate in the [RITC] Scheme.

Participant on an annual basis, upon provision of requisite information.<sup>33</sup> *What are the indicative timelines for the Committee's certification of information or registration of would be Participants/Beneficiaries,<sup>34</sup> as this was not expressly stated?*

Whilst it appears that the intent is for 'business-friendly' timelines, bereft of the usual public sector bureaucracies, it is possible that based on historic experience, this will not always be the case. **Para 4(2)** indirectly expresses this promptness intent by providing that a Participant shall be entitled to utilize the RITCC against its CIT *in and from the relevant fiscal year in which the Project Cost is incurred until it is fully utilised.* **EO 007** therefore obligates the Committee to be mindful of tax filing deadlines of Participants/Beneficiaries and it can therefore be presumed that the Committee will not in any way occasion delays that will make **EO 007** stakeholders miss their filing deadlines.<sup>35</sup>

FG's desire to preserve cash flows must be taken to underpin the

general 50% limit of the CIT payable by a Participant or Beneficiary that the RITCC may be utilized to discharge in any year of assessment. Eligible Roads in Economically Disadvantaged Area (EDAs) are exempted from the 50% limit,<sup>36</sup> which speaks to the FG's strategic means of incentivising road developments in such EDAs, in order to fast track their development.<sup>37</sup>

#### **Tradability of Unutilized RITC: Any Cause for Concerns?**

**Para 4(4) EO 007** allows a Participant or Beneficiary to dispose whole or part of its RITC to a willing buyer on a Relevant Securities Exchange (RSE) or pursuant to such other approved transactions. *Would this in any way imply a restriction on the ability of Participants/Beneficiaries to agree commercial terms for their RITCs in the ordinary course of business?* Presumably, "other approved transactions" does not mean that the Committee will review their commercial terms before approving same? *Such provision should not provide a basis to interfere with freely negotiated commercial (bilateral) bargains, otherwise that would be*

*an unnecessary 'paternalistic invasion'?*

Clarity is required in this regard to assure prospective Participants or Beneficiaries as there ought not to be any impediments to a Participant deriving optimum value from their RITC transactions. For example, ability for extra margin on RITC sales could make such transactions more attractive and worthwhile, potentially leading to a wider uptake of the RITC Scheme.<sup>38</sup> Furthermore, relieving the Committee of such 'unnecessary' administrative burden, enables them focus on more germane **EO 007** issues. Consequently, there may be need to amend **Para 4(4)(5) EO 007.**

Similarly, **Para 4(7) EO 007** provides that a Participant or Beneficiary will have to register the RITCC as a tradable instrument on the RSE. *Does this mean that bilateral transactions outside of the RSE are precluded? Whilst such provision helps to contribute its own quota to deepening our capital market by facilitating commercially driven RITCC transactions; but given its inherent advantages the bilateral transactions option should also be available.*<sup>39</sup>

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<sup>33</sup> **Para 3(1)-(3) EO 007.** The RITCC "shall denote the Project Cost incurred by the Participant in the relevant fiscal year as certified by the Committee and as specified in the First Schedule to this Executive Order as it relates to ongoing Eligible Road projects and the uplift on the relevant Project Cost. The Certificate shall also denote the [RITC] due to the Participant, which shall be based on the Project Cost as certified and communicated by the Committee."

<sup>34</sup> **Para 5** defines a "Beneficiary" as "a company appointed by the Participant to utilise the whole or part of the [RITC] initially issued to a Participant... or any other person that has purchased or otherwise acquired the rights to utilise the [RITC] initially issued to a Participant in the Scheme."

<sup>35</sup> This is moreso that they could incur penalties and be exposed to other sanctions for late filings: **section 55(3) CITA.**

<sup>36</sup> **Para. 4(2) EO 007.**

<sup>37</sup> **Para 5** defines EDAs to mean "any area or location ... designated as 'Economically Disadvantaged' by the President, on the advice of the Minister of Finance", who in turn shall consider whether the average income level of the residents of such areas fall below the national minimum wage; the availability of infrastructure (social amenities/ utilities) in such areas; the volume of economic activities being undertaken in such areas; and "any other factors that may be considered for the determination of an [EDA] by the Minister of Budget and National Planning." Presumably, input from the National Bureau of Statistics (NBS) will also be helpful in assisting the Minister of Budget and National Planning to form his views.

<sup>38</sup> **Para 4(4)** makes disposals subject to the anti-avoidance rule against artificial transactions. Assuming **EO 007** omitted to so provide, that would still not have been fatal, because in the absence of express exclusion (which is unlikely), **EO 007** would still have been subject to provisions of the **Transfer Pricing Regulations 2018**. A further safeguard is the provision of **Para 4(12)** in part that "any gains or losses arising on the disposal of a [RITC] shall be subjected to tax in the manner prescribed by the applicable tax legislation."

<sup>39</sup> Bilateral transactions may be faster, easier to execute and subject to less formalities compared to RITCC transactions envisaged by **Para 4(7) EO 007** involving registering and deregistering RITCCs with RSEs in addition to obtaining Committee approval.

In fact, RSE and non-RSE RITCC transactions should not be seen as mutually exclusive. Thus, the FG can revisit this provision with the aim of ensuring nothing discourages prospective Participants or Beneficiaries from engaging with RITC transactions.

Once given, the RITCC is an asset in the financial records of a Participant/Beneficiary under **Para 4(12) EO 007** lucidly supports our view that a Participant should be given free hand to deal with its assets as it wishes without further approval from the Committee.

Another dimension of the tradability of the RITC instrument is that **EO 007** could be viewed as a form of tax reform. Nigerian tax law prohibits group taxation relief, predicated on each corporate entity being taxable separately; thus affiliates cannot set off their losses against profits of other group affiliates for an overall group friendly tax treatment as in some other countries like the United Kingdom.

Prior to **EO 007**, every company's tax situation is self-contained, but now transactions between Participants and Beneficiaries has widened that restriction. Indeed subject to compliance with arm's length principles pursuant to the **Transfer Pricing Regulations 2018**, even related party RITC transactions would be permissible, thereby indirectly



(albeit in a muted form), able to achieve the result of group tax relief.

### **Restriction of RITC Participant from Enjoying other Tax Claims**

**EO 007** restricts a Participant entitled to RITC to enjoy any other tax related benefits like capital allowance, reliefs or incentives on the Project Cost incurred on any Eligible Roads. This essentially means that RITC and RIA under the **section 34 CITA** are mutually exclusive. The **section 34 CITA** incentives will almost never be the first choice for any Sponsor because the RIA provision of tarred roads is just 15%. Furthermore, although the entire project cost will qualify as “wholly reasonably, exclusively and necessarily” incurred (this meeting the WREN test), being capital (rather than recurrent) expenditure, same can only be recovered overtime.

Thus, in the year of the expenditure, the sponsor will only enjoy the 15% RIA and various capital allowances claimable on qualifying expenditure incurred.<sup>40</sup> *Prima facie*, RITC would appear to

be more beneficial, obviating the need for financial modelling/comparative analysis to confirm which option (RIA or RITC) will deliver more mileage for them in their circumstances.<sup>41</sup> This is moreso that RITC would be a more valuable tax asset because it is a below line item (directly reducing tax payable) compared to RIA as an above the line item (as earlier explained).<sup>42</sup>

### **Stakeholders' Input**

It is important that stakeholders' input be always elicited and considered as part of the decision making process under the RITC Scheme, even though there is no express provision for that. For example **Para 5's** definition of “Eligible Roads” includes in part that it “means any road approved by the President on the recommendation of the Minister of Finance based on the list of roads presented to the Minister by the Committee.” Our considered view is that this process will be more value-additive if other stakeholders such as public interest entities, community associations, prospective RITC

<sup>40</sup> See **Schedule 2 Table ICITA**.

Whilst Participants or Beneficiaries are limited to utilising RITCCs to the maximum of 50% in the year the Project Cost was incurred, where such Project

<sup>41</sup> Cost or Eligible Road relates to EDAs, no such restrictions apply.

<sup>42</sup> See p.5 (*infra*).





investors (especially Sponsors), and even State and Local Governments are able to make inputs to the Committee's efforts in compiling the list of roads to be submitted to the Minister of Finance. Such active or proactive input will help concretize value from the provision that "The list of Eligible Roads may be updated as more Eligible Roads are considered, recommended and approved pursuant to this Order, from time to time by the President on the advice of the Minister of Finance, provided that such updates shall be published in the Official Gazette of the Federal Republic of Nigeria."

Apparently, the RITC transactions contemplated by **EO 007** could help deepen Nigeria's capital market including through derivative trading of RITC related instruments which will ultimately impact Nigeria's infrastructural space. As stated earlier, this should not preclude two party

(bilateral) deals as a parallel option to RSE based RITC transactions. In our respectful view, the more the transactional options available, the more robust the RITC Scheme is and the more enhanced its capability to deliver on its infrastructure transformation potential.

### **The Committee: Exercise & Boundaries of Discretionary Powers**

**Schedule 1 EO 007** provides for the establishment, composition, functions and information requirements of the Committee in performing its functions of administering the Scheme and issuing or authorizing transfer of RITCCs. Some of the powers of the Committee entails it exercising discretions in coming to decisions and forming judgments, which in turn are also input for further actions by the Minister of Finance and the President. The detailed provisions of **Schedule 1** in this

regard furthers transparency, and gives an indication of FG's seriousness of intent that the RITC Scheme succeed.

But where stakeholders like Participants and Beneficiaries (or prospective parties) feel hard done by Committee decisions, what sort of relief do they have? For example, what if the Committee improperly disallow some items as part of Project Cost? Whilst **EO 007** does not make express provision generally (apart from MoU provision for resort to courts and arbitral panels), presumably the rule remains *ubi jus ibi remedium*.

Will RITC dispute be regarded as a tax dispute? We think not, because **CITA and FIRS (Establishment) Act (FIRSEA)** envisages that tax disputes can only be with the Revenue.<sup>44</sup> However, contractual disputes with a tax dimension can occur between non-Revenue parties and such will not qualify as a tax dispute. The issue of whether the Committee is a juristic person is moot, since the Memorandum of Understanding (MoU) indicates that the FG (represented by the Minister of Finance (who is also Chairperson of the Committee), will be a party to the MoU and Eligible Road Contract Documents.

**EO 007** envisages that MoU<sup>45</sup> would be used as preliminary document embodying the terms of the RITC road development or maintenance undertaking, pending formal contract.<sup>46</sup> In this wise, the MoU is equivalent to a term sheet that headline transaction terms that will be

<sup>43</sup> Cap.F36, LFN 2004.

<sup>44</sup> See section 59 FIRSEA; In terms of Section 18(2) CITA No. 11 2017, appeals shall be as provided in the FIRSEA.

<sup>45</sup> The MoU is expected to be signed between the Participants (Project Sponsors and Project Contractors), the Minister of Finance as Chairman of the Committee, and other Relevant Parties: **Para 2(3)(e)(k) First Schedule**

<sup>46</sup> See **Second Schedule** which contains a draft MoU and specifically states that the "Memorandum of Understanding is non-exhaustive and all other terms and conditions are subject to mutual agreement as may be documented in the Eligible Road Project Contract Document. The Memorandum of Understanding is documented subject to contract..."



documented in formal agreements. What happens if parties sign the MoU but do not proceed to formal contract?<sup>47</sup>

### Conclusion

**EO 007** adequately depicts a transparent and forward looking FG policy aimed at improving road infrastructural development in the country. The meticulous attention paid to enshrining the functions and operating modalities of the Committee is impressive. It is hoped that the Committee will be conscious of its mandate to make the RITC Scheme work in a manner that will engender confidence amongst prospective investors (whether as Participants, Beneficiaries) and other private sector professionals. Even where not expressly stated, the Committee has enough latitude to admit wider stakeholder input into its decision making

processes to enhance the quality of its own input to Ministerial and Presidential decision/actions regarding the RITC Scheme.

Given the imperative to improve Nigeria's road infrastructure as a key driver of our economic vitality, FG's enactment of the RITC Scheme is a step in the right direction, and hopefully all hands will be on deck to ensure that it is a resounding success. Furthermore, since the PMB administration will start a new four year term in May 2019, there is opportunity to assess the RITC Scheme's first few years of operations and fine tune it as necessary by incorporating improvements vide amendment to **EO 007**. In the meantime, we believe the attention to details in **EO 007** should give it a good chance of being a successful policy initiative that could become a wider platform in the years to come.

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<sup>47</sup> This was the case in *BPS Construction & Engineering Co. Ltd v. FCDA* [2017] 10 NWLR (Pt. 1572), 1 at 28 G-H, where *Kekere Ekun JSC* held that: "It is clear that a memorandum of understanding or letter of intent, merely sets down in writing what the parties intend will eventually form the basis of a formal contract between them. It speaks to the future happening of a more formal relationship between the parties and the steps each party needs to take to bring that intention to reality... Notwithstanding the signing of a memorandum of understanding, the parties thereto are not precluded from entering into negotiations with a third party on the same subject matter."