



UDO UDOMA &  
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## **NIGERIA RETHINKS LOCAL CONTENT:**

**THE SENATE'S NIGERIAN OIL AND GAS CONTENT DEVELOPMENT (AMENDMENT) BILL 2020  
(AND HOW IT COMPARES WITH THE HOUSE OF REPRESENTATIVES' NIGERIAN CONTENT  
DEVELOPMENT AND ENFORCEMENT BILL 2019)**

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**Introduction** In our recent article on "[The Nigerian Content Development and Enforcement Bill and the Petroleum Sector: Key Themes and Implications](#)",<sup>1</sup> we reviewed the Nigerian Content Development and Enforcement Bill, on which Nigeria's lower legislative house, the House of Representatives has been deliberating since December 18, 2019 (the HOR NCDE Bill).

The HOR NCDE Bill proposes to repeal the Nigerian Oil and Gas Industry Content Development Act 2010 (the Local Content Act 2010), and to enact a new multi-sector statute that would extend local content regulation and enforcement across the mining, information communication technology, construction and power sectors if enacted (the NCDE Bill).

Interestingly, the Nigerian Senate is deliberating on another local content-focused bill: the Nigerian Oil and Gas Industry Content Development Amendment Bill (the Senate NOGIC Amendment Bill). The Bill, which was sponsored for legislative consideration by Senator Teslim Folarin,<sup>2</sup> has passed its second reading. The Senate NOGIC Amendment Bill however proposes to amend and clarify, rather than repeal, the Local Content Act, and preserves its singular petroleum sector focus.

The Nigerian legal system permits parallel deliberations by legislative houses of bills with the same or overlapping substantive content. Sub-sections 58(1) and (3) of the Constitution of the Federal Republic of Nigeria 1999, however, requires both Houses of the National Assembly to agree on a bill before its presentation to the President for assent, which may drive a combination of the current parallel processes. Ultimately, both bills have common objectives of developing and increasing Nigerian content - indigenous participation and capacity - in the Nigerian oil and gas sector. As the reviews continue, it remains to be seen whether the two legislative houses will, in the spirit of the commonality of these shared objectives, attempt to combine their respective bills. It is, however, uncertain whether such combinations can succeed, unless the wide differences in their "singular-versus-multiple sector" focus and their "amend-versus-repeal" approaches, among other issues, are resolved.

In this note, **Folake Elias Adebowale, Mesuabari Mene-Josiah and Chidinma Chukwuma** consider some of the Senate NOGIC Amendment Bill's proposed changes to the Local Content Act 2010 in the context of some of the key changes proposed by the HOR NCDE Bill, and assess their potential impact where the Bill is enacted as currently drafted.

<sup>1</sup> Read the article at: <https://lnkd.in/eUsck4x>.

<sup>2</sup> Number SB 417 in the National Assembly Journal number 22 dated 22nd May 2020



### Scope and interpretation issues

Unlike the HOR NCDE Bill, the Senate's NOGIC Amendment Bill retains its petroleum sector focus and substantially preserves the Local Content Act, while also proposing various amendments to its provisions that appear generally to be designed to clarify existing prescriptions and to set out compliance requirements and steps in greater detail. In our [article on the HOR NCDE Bill](#), we identified and discussed various interpretation and compliance challenges arising from the 2010 Local Content Act and the HOR NCDE Bill.

Since the enactment of the Local Content Act, the Nigerian Content Development and Enforcement Board (NCDMB) has had residual powers conferred by section 70(l) of the Local Content Act to empower it to provide "guidelines, definitions and measurement of Nigerian content indicator to be utilised in the oil and gas industry in Nigeria." Section 5(k) of the HOR NCDE Bill preserves the provisions of section 70(l). Challenges continue with interpreting and complying with parts of the Act in the absence of definitive judicial or legislative interpretation.

While the Senate Bill commendably attempts to address a few of these challenges, it does not wholly resolve them. To illustrate, we have set out and compared a few of the key terms common to the 2010 Local Content Act, the HOR NCDE Bill and the Senate's NOGIC Amendment Bill below.

### "Nigerian" and "Indigenous" Entity Terminology under The Local Content Act 2010

Curiously, the Local Content Act does not use the term "Nigerian company" outside of its definition in section 106 of the enactment as "a company formed and registered in Nigeria in accordance with the provision of the Companies and Allied Matters Act with not less than 51% equity shares by Nigerians" in section 106. The statute includes many potential variants, including "Nigerian indigenous operator" (section 3(1)), "Nigerian indigenous service companies"(section 3(2)), "Nigerian indigenous contractors"(section 15), "Nigerian contractors and service or supplier companies"(section 45), and "indigenous companies" (sections 41(1)(a), 48 and 49(1)) to identify sector participants to which its different provisions purport to apply. There is no definition in the Act of any of these terms, or of the term "Nigerian service company", which has created interpretation and compliance challenges in relation to the Act. In the absence of judicial or legislative confirmation, this has resulted in industry participants either assuming and acting on the basis of their own understanding or seeking clarification from the NCDMB.



### **“Nigerian”, “Indigenous” and other Terminology under the HOR’s NCDE Bill 2019**

The HOR NCDE Bill proposes to impose more stringent requirements for qualification as a “Nigerian company”. It defines a Nigerian company as “an entity in Nigeria under the Companies and Allied Matters Act 1990 or any succeeding legislation,” and requires that such entities shall “include Business Names and the equity share in the said company shall not be less than 90% owned by Nigerians and the management positions of the company shall be composed of not less than 90% of Nigerians”. It also defines “Nigerian services” as services offered by Nigerian professional companies and Nigerian professionals. The Bill provides, in sections 225 and 226, that every Ministry, Extra Ministerial Department and Agency of the Federal Government of Nigeria shall, in the award of contracts give “Nigerian preference” to “Nigerian companies and firms” provided that; where Nigerian companies and firms lack the capacity to execute the contract bid for, preference shall be given to foreign companies or firms with a demonstrable and verifiable plan for indigenous capacity development, prior to the award of the contract. Section 226 goes further to specifically require that where any contract is to be awarded to any foreign company, the entities named above shall ensure that Nigerian counterpart staff are engaged from the conception stage to the termination of the project.

Like the Local Content Act, the HOR NCDE Bill has various references to entities to which it proposes to apply, including “Nigerian indigenous company and/or firm” (sections 2, 23 and 95), “Nigerian independent operators” (section 11), “indigenous engineering companies and/or firms”(section 7(2)), “ Nigerian indigenous service companies” (section 12), “Nigerian companies and firms” (sections 5(g), 225). It also offers a definition for “indigenous company” as a company incorporated in Nigeria and registered with the Corporate Affairs Commission (CAC) with “a minimum of 90% equity stakes and voting rights by Nigerians, with at least 80% Nigerian staffers in management positions, or at least 90% technical and R&D employees being Nigerians”.

This term is used (in section 23, for instance) as a basis for determining eligibility for the award of a contract where a Nigerian indigenous company has demonstrated capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry. The HOR NCDE Bill also capitalises, but does not define, several terms that it utilises frequently (please see sections 2, 219, 225 and 226) including “Ministries”, “Extra Ministerial Departments”, “Agency of the Federal Government of Nigeria”, “Federal Government Owned Companies (either fully or partially owned)”, “Federal Institutions”, “Public Corporations”, “Private Sector Institutions” and “Business Enterprises”. The HOR NCDE Bill’s use of undefined terms creates even more uncertainty around the scope, application and interpretation of its provisions.



**Eligibility under the Senate's NOGIC Amendment Bill for "first consideration" and "exclusive consideration"**

The Senate's NOGIC Amendment Bill preserves the Local Content Act's definition of "Nigerian company" and attempts to standardise its usage in some key provisions of the statute.

Section 3(1) of the Local Content Act provides that Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such conditions as may be specified by the Minister. Section 3(2) requires that exclusive consideration must be given to Nigerian indigenous service companies that demonstrate ownership of equipment, Nigerian personnel, and capacity to execute such work, to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the Schedule to the Act.

The Senate's NOGIC Amendment Bill proposes to replace the undefined terms, "Nigerian independent contractors" and "Nigerian indigenous service companies" as used in section 3 of the Act with the words "Nigerian companies" and "Nigerian service companies" respectively. This would help to clarify that Nigerian companies, as currently defined in section 106 of the Local Content Act, are the entities to be accorded "first consideration" in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry. The Senate's NOGIC Amendment Bill, however, does not define the term "Nigerian service companies", which preserves the uncertainty in relation to which entities are to be given "exclusive consideration" in bids for contracts and services on land and swamp operating areas contained in the Schedule to the Act, as prescribed by section 3(2). Where the legislative intention is simply to require that such consideration be exclusively conferred on service companies with 51% Nigerian equity ownership, or other entities, it is hoped that the bill will, before it is enacted, be revised to include a specific definition of the introduced term "Nigerian service company" to make such intent clear, consistent with the definition and usage of the new term "Nigerian company" in section 3(1).

Similarly, the bill proposes to replace the term "Nigerian indigenous contractor" with the term "Nigerian companies" in section 15, with the effect that all operators and alliance partners will be required to give full and fair opportunity to Nigerian companies in bidding processes for acquiring goods and services. Unfortunately, however, the Senate's NOGIC Amendment Bill still preserves terms like "Nigerian service company", "Nigerian contractors and service or supplier companies" (section 45) and "indigenous companies" used in sections 41(1)(a), 48 and 49(1) of the Local Content Act.

Neither the Local Content Act nor the Senate's NOGIC Amendment Bill define the terms "indigenous" or "indigenous company". In relation to the Bill, however, this is consistent with its proposed deletions of the word



"indigenous" where its use appears to be superfluous. This can be observed, for instance, in its current placement before the word "Nigerianised" in section 31(2) in relation to the requirement that all indigenous (Nigerianised) positions shall attract salaries, wages and benefits as provided for in the operators' conditions of service for Nigerian employees. Unfortunately, the bill is not consistent in this commendable effort to provide greater clarity by replacing references to various "indigenous" entities with "Nigerian company" or proposing defined variants consistent with the term, such as "Nigerian service company".

For example, the word 'indigenous' is still used in Sections 41(1)(a) in describing the Minister's duty to make regulations prescribing targets aimed at ensuring the full utilisation and steady growth of indigenous companies engaged in exploration activities; at section 48 in dealing with the fiscal framework and tax incentives for foreign and indigenous companies that establish facilities, factories, production units or other operations in Nigeria to carry out production and manufacturing or to provide services and goods otherwise imported into Nigeria; and at section 49(1), which requires all operators, project promoters, alliance partners and Nigerian indigenous companies operating in the Nigerian oil and gas industry to insure all insurable risks related to their operations with an insurance company in Nigeria. It is hoped that greater clarity and consistency will be achieved as reviews and deliberations on the Bill progress through the National Assembly.

The Senate's NOGIC Amendment Bill's attempts to provide interpretive clarity on the usage of key terms and to delete or amend some unclear provisions are commendable, but are not exhaustive or consistent in the draft, including in relation to "Nigerian service companies", "Nigerian contractors and service or supplier companies", "indigenous companies" and "Nigerianised".

### **New Definitions "Minister":**

The Senate's NOGIC Amendment Bill proposes an amendment to the definition of "Minister" by defining the "Minister" as the Minister responsible for Petroleum Resources. The Local Content Act, however, defines the "Minister" as "the Minister of Petroleum Resources" which is consistent with the definition of the Minister in the Petroleum Act.

### **"Designated midstream and downstream projects, operations, activities or transactions":**

The bill proposes to introduce a new definition of "Designated midstream and downstream projects, operations, activities or transactions" to mean "refineries, liquefied natural gas plants, tank farms, jetties associated with oil and gas operations, or any other projects, operations, activities or transactions categorised by the Nigerian Content Development and Enforcement Board as projects, operations, activities or transactions to which this Act shall be applicable subject to the approval of the Minister, howsoever excluding retail outlets, liquefied petroleum gas projects, petroleum products haulage and distribution."



### **Prescription of Guidelines, Definitions, and the Measurement of Nigerian Content Indicators**

Section 5(k) of the HOR NCDE Bill preserves the provisions of section 70(l) of the Local Content Act and similarly empowers the Nigerian Content Development and Enforcement Board to provide "guidelines, definitions and measurement of Nigerian content indicators to be utilised in the oil and gas industry in Nigeria." The Senate NOGIC Amendment Bill also preserves the powers of the Nigerian Content Development and Enforcement Board to provide guidelines, definitions and measurement of Nigerian content indicators to be utilised in the Nigeria oil and gas industry.

### **Extension of Nigerian Content prescriptions in the Schedule**

Acknowledging that the local content prescriptions in the Schedule to the Act are not exhaustive, where the minimum Nigerian content for any service is not explicitly prescribed in the Schedule, section 11(2) of the Local Content Act currently empowers the NCDMB to prescribe an appropriate minimum content level for various services and projects pending the inclusion of such prescription in the Schedule through legislative amendments of the statute. Section 18 of the HOR NCDE Bill preserves these provisions.

In contrast, however, the Senate's NOGIC Amendment Bill seeks to amend section 11(2) beyond ad hoc NCDMB prescriptions, subject to legislative amendment which empowers the Minister charged with responsibility for petroleum resources to make regulations setting the minimum target level for services or projects where they are not specifically addressed in the Schedule, or, notably, where current industry capacity to meet the prescribed target is inadequate. The consequence of these amendments is that the NCDMB will no longer have powers to unilaterally make minimum Nigerian content prescriptions in such instances and that participants will have to wait for the Minister to make regulations prescribing or waiving such targets.

The NCDMB is currently empowered to make prescriptions or exceptions on a case-by-case basis, whereas the proposed amendment may potentially delay or stall individual projects in the short term where Ministerial regulations are not issued or readily available. A related challenge is that there is no provision in either the Local Content Act or the bill that empowers the Minister to delegate any powers conferred on him by the Act.

The President can generally exercise powers directly or through the Ministry of Petroleum Resources, but the Petroleum Act specifically prohibits the Minister charged with responsibility for petroleum resources from delegating his powers to make regulations. The inability to delegate such powers could impact on timing for addressing immediate demands of the dynamic Nigerian petroleum industry where industry-wide regulations have to be considered and made to address issues that may be more readily resolved or addressed on a case-by-case basis.



Notably, the Senate's NOGIC Bill's proposed amendment of section 11(4) of the Local Content Act to enable the NCDMB to recommend to the Minister for approval, the "importation of the relevant items" is potentially useful in that it clarifies the applicable process to participants where there is inadequate capacity to meet targets prescribed by the Schedule to the Local Content Act. Authorisations to "import" such goods or services are proposed to be made subject to an approved Capacity Development Initiative (CDI) aimed at developing the relevant capacity locally.

The factors to be taken into consideration for the approval of such CDIs are proposed to include that:

- (a) the entity requesting approval to import goods or services into Nigeria must have advertised the need for the goods and services on the Joint Qualification System (JQS) for a period of not less than 30 days before applying to the Board; and
- (b) the advert shall, at a minimum, indicate the description of the goods or services required.

The Local Content Act had empowered the Minister to take responsibility for authorising the continued importation of the relevant items up until April 2013 only, without clarifying or providing guidance as to the criteria or parameters to be applied by the Minister in so doing, or providing for the Minister to receive NCDMB recommendations. The proposed amendment provides more accountability, a measure of guidance for participants and regulators, and, perhaps most usefully, would provide for greater flexibility on an ongoing basis for services, projects and contracts of varying requirements, in contrast to the 3-year time limit stipulated in the Local Content Act which, in addition to having expired in 2013, appears arbitrary.

**100% increase in mandatory statutory contributions to the Nigerian Content Development Fund**

Section 104 of the Local Content Act currently requires the deduction at source of the sum of 1% of every contract awarded to every "operator, contractor, subcontractor, alliance partner or any other entity involved in any project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry" and that such sum shall be paid into the Nigerian Content Development Fund (the NCD Fund) for purposes of "funding the implementation of Nigerian content development in the Nigerian oil and gas industry". The Fund is currently managed by the NCDMB and is required to be employed for projects, programmes and activities directed at increasing Nigerian content in the industry. Curiously, the HOR NCDE Bill proposes to delete these requirements, but does not expressly indicate how the implementation of Nigerian content development in the oil and gas industry is to be funded.

In contrast, the Senate's NOGIC Amendment Bill proposes to amend section 104 of the Local Content Act by imposing a 100% increase in the amount required to be deducted and remitted to the NCD Fund from 1% to 2%. In



addition, section 69(5) of the Bill attempts to provide more stringent measures for enforcement of compliance with this new requirement. It introduces new sanction provisions to the effect that operators who fail to remit the increased deductions to the NCD Fund within the timeframe stipulated in regulations to be made by the Minister, shall be liable to administrative sanctions including the following:

- a) recommendation for revocation of operating licences and permits;
- b) the cancellation of projects, contracts, or certificates as applicable;
- c) the imposition of fines;
- d) refusal to process statutory approvals; and
- e) any other actions prescribed in Ministerial Regulations to be made on the NCD Fund.

As drafted, however, the effect of section 69(5) of the Bill is that until such regulations are made by the Minister charged with responsibility for petroleum resources, stipulating timelines for compliance, it may not be possible to enforce section 69(5) of the Bill if it is enacted as currently drafted.

### **Notification of non-compliance**

The Senate's NOGIC Amendment Bill seeks to introduce a new section 69 to the Local Content Act, which empowers the NCDMB to issue written notifications to operators who fail to comply with the provisions of the Act that specify the details of the infraction. An operator who is so notified is required to provide a written response to the NCDMB within 7 days of receipt of the notice. If the NCDMB is satisfied with the operator's reply, that shall be the end of the matter, but if the NCDMB is not satisfied with the response, the bill proposes that the NCDMB should have the power to impose any sanction specified in the statute or in any regulation made pursuant to it, on the relevant operator. The specific reference to, and absence of a definition of the term "operator" is potentially problematic in this regard if the intent is that the NCDMB should be able to enforce breaches of the statute given that the Act applies to all participants in the industry.

The Bill seeks to make the NCDMB's consideration of an operator's response to the notification to be final without any possibility of further engagement or an appeal process against the decision. Although an operator who is aggrieved with the decision of the Board may ventilate his grievances in court, it is expected that a more robust process of engagement should be considered in the Bill to discourage immediate recourse to court actions by operators that may be dissatisfied with the decisions of the NCDMB.

### **Extended functions of the NCDMB**

The Local Content Act, under the current section 69(1), establishes the Nigerian Content Monitoring Board. As a consequential amendment following the introduction of the new section 69(1), however, the Senate's NOGIC Amendment Bill renumbers section 69(1) of the Local Content Act as section 70(1) and re-designates the board as the Nigerian Content Development and Monitoring Board, extending its functions to include:

- (l) taking steps to encourage Nigerian professionals in the Diaspora to collaborate with resident Nigerian engineers and/or engineering facilities



- (ii) and use their expertise to develop the Nigerian oil and gas industry; promoting mutually beneficial Public Private Partnerships (PPP) by encouraging direct collaboration between foreign and Nigerian companies in the production and manufacturing of materials used in the oil and gas industry;
- (iii) collaborating with relevant entities to establish centres for acquisition of technology in strategic locations for the promotion of R&D and technology development;
- (iv) collaborating with any reasonable and responsible entity to promote Research and Development of the Nigerian content in the Nigerian oil and gas industry;
- (v) implementing interventions to enhance the capabilities of local enterprises to compete effectively on quality, price, quantity and reliability in the supply of goods and services required in the oil and gas industry; and
- (vi) participating in direct capacity development programmes to close gaps in manufacturing, infrastructure, R&D, training and other relevant areas that will advance the development of Nigerian content.

The above provisions are new as the Senate's NOGIC Amendment Bill seeks to create new subsections 70 (q- v). We should mention that the new functions of the Board proposed in the NOGIC Amendment Bill are different from the proposed new functions of the Board in the HOR NCDE Bill. Sections 47, 28, 49, 53, 54 and 55 of HOR NCDE Bill seeks to give additional powers to the Nigerian Oil and Gas Content Development and Enforcement Board, in conjunction with the Minister, to make regulations in respect of the following:

- a) the establishment of minimum standards, facilities, personnel and technology for training in the industry;
- b) the specification of modalities for involving operators as partners in training and development in relation to the matters referenced in (a) above;
- c) the prescription of targets to ensure the full utilisation and steady growth of indigenous companies engaged in the exploration, seismic data



processing, engineering design, reservoir studies; the manufacturing and fabrication of equipment and other facilities as well as the provision of other support services for the Nigeria oil and gas industry;

- d) requiring any operator or company or its professional employees engaged in the provision of engineering or other professional services in the Nigerian oil and gas industry to be registered with the relevant professional bodies in Nigeria;
- e) prescribing targets for operators or project promoters on the number and type of such joint venture or alliances to be achieved for each project to the Minister and the Board jointly.
- f) requiring any operator to invest in or set up a facility, factory, production units or other operations within Nigeria for the purposes of carrying out any production, manufacturing or for providing a service otherwise imported into Nigeria; and
- g) requiring any operator to invest in or set up a facility, factory, production units or other operations within Nigeria for the purposes of carrying out any production, manufacturing or for providing a service otherwise imported into Nigeria.

### **Submission of Nigerian Content Plans**

Section 7 of the Local Content Act currently requires all operators bidding for any licence, permit or interest and before carrying out any project in the Nigerian oil and gas industry to submit a Nigerian content plan to the NCDMB demonstrating compliance with the Nigerian content requirements of the Act. The Senate's NOGIC Amendment Bill, however, seeks to amend section 7 of the NOGIC Act by requiring operators to submit a Nigerian Content Plan that must be "to the satisfaction of the Board", and which must demonstrate "capacity to comply with the Nigerian content requirements of the statute. The use of the phrase "to the satisfaction of the Board" in the Bill suggests the proposed conferment on the Board of wide discretion to unilaterally determine whether a plan submitted by an operator complies with the local content requirements of the Act, or not. Ideally, the requirements should be exhaustively stated to guide participants in identifying compliance requirements.

### **Contracts and job forecasts to be submitted to the NCDMB**

Section 17(1) of the Local Content Act provides that for all proposed projects, contracts, subcontracts and purchase orders estimated by an operator to be in excess of \$1,000,000, operators must provide to the NCDMB for approval, advertisements, pre-qualification criteria, technical bid documents, technical evaluation criteria and the proposed bidders' lists. Similarly, section 18(1) of the statute provides that operators must submit to the Board, 30 days prior to the first day of each quarter, a list of all contracts, subcontracts and purchase orders exceeding \$1,000,000, that are proposed to be bid or executed in that quarter. The Senate's NOGIC Amendment Bill proposes to amend both sections 17(1) and



18(1) of the Act by extending their provisions to operators with contracts in excess of N100,000,000. This would potentially widen the scope of participants that are required to comply with the relevant provisions broadly.

**Expatriate Quota Positions**

Section 33 of the Local Content Act requires operators to seek and obtain the approval of the NCDMB before applying for expatriate quota positions to the Ministry of Internal Affairs or any other agency or Ministry of the Federal Government. The Senate's NOGIC Amendment Bill retains this requirement, but requires that the application to the NCDMB must state why the relevant expatriate(s) services are required, the expatriate(s)' country of residence and nationality.

**Funds for research and development**

The Senate's NOGIC Amendment Bill seeks to amend section 38 of the Local Content Act, which mandates operators in the oil and gas industry to submit and update their research and development plans every 6 months. By the proposed amendment to section 38 of the Act, all operators will be required to set aside, annually and for the purpose of carrying out research and development activities in Nigeria, a minimum of 0.5% of their gross revenue annually for purposes of carrying out research and development activities in Nigeria. 50% of the funds are required to be allocated to research and development programmes in Nigeria, with the remaining 50% required to be applied to research and development activities within operator facilities that are established in Nigeria.

**Establishment of new directorates**

The HOR NCDE Bill seeks to retain the four directorates in the Local Content Act but renames the Directorate of Monitoring and Evaluation as the Directorate of Monitoring, Evaluation and Enforcement.

Section 88 of the Local Content Act creates four directorates: the Directorate of Finance and Personnel Management, the Directorate of Planning, Research and Statistics, the Directorate of Monitoring and Evaluation and the Directorate of Legal Services. The section currently confers the Governing Council of the NCDMB with powers to establish additional new directorates as it deems fit.

The Senate's NOGIC Amendment Bill seeks to retain the Directorate of Legal Services and the Directorate of Planning, Research and Statistics, to rename the Directorate of Finance and Personnel Management as Directorate of Finance, and to create the following new directorates: Directorate of Projects, Directorate of Capacity Development, Directorate of Corporate Services & Human Resources and Directorate of Monitoring, Evaluation and Enforcement.



**Penalties for non-compliance with the Act**

The Local Content Act 2010 currently imposes penalties of a fine of up to 5% of the project sum upon conviction, or cancellation of the project of an operator, contractor or subcontractor who carries out a project in the oil and gas industry otherwise than in accordance with its provisions.

The HOR NCDE Bill proposes heavier penalties which are, a term of imprisonment of not more than 5 years, in addition to a fine of 15% of the project sum for each project in which the offence is committed. There is also the possibility that if the NCDE Bill is enacted as drafted, participants may, potentially, be liable not just for direct non-compliance with its provisions, but vicariously for third party non-compliance where such persons are deemed to be "working under" them, as provided in section 217 of the HOR NCDE Bill that "all regulatory authorities, operators, licensees, lessees, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in Nigeria shall consider, apply and also ensure the compliance by any person working under them the Nigerian content policies." There is, however, ambiguity in the bill around the meaning of the phrase "working under them" which necessitates a clarification of the legislative intention.

The Senate's NOGIC Amendment Bill seeks to impose additional penalties for the contravention of the provisions of the Act by including a new section 68(2-6) in the Act which provides that:

Section 218 of the HOR NCDE Bill provides that, after the commencement of the bill, any subsequent contract or any award "or job for the execution of work, provision of goods and services by any Ministry, Extra Ministerial Department and Agency of the Federal Government of Nigeria; Federal Government Owned Companies (either fully or partially owned), Federal Institutions and Public Corporations; in contravention of the provisions of this Act, Schedules and Regulations is void and unenforceable."

The Senate's NOGIC Amendment Bill proposes to impose additional penalties at section 68(2) to (6) of the Local Content Act 2010 including administrative sanctions including a fine of not more than 5% of the project sum, cancellation



of the project or any other sanction prescribed by the Board for offences such as: submitting a plan, returns, report or any other document and knowingly making a false statement and failing to provide a satisfactory reason for such violation; conniving with a Nigerian citizen or a Nigerian company to deceive the NCDMB as representing a Nigerian company to achieve the Act's local content requirement. The Bill proposes that such offenders be subjected to administrative sanctions including cancellation of the relevant project, withdrawal of certificates or any other Board-prescribed sanctions.

The Bill proposes that it should be an offence for operators "or other connected entities" that carry out oil and gas activities without the required local content requirement; which fail to submit local content plans; which fail to satisfy the content requirements of such plans, or which fail to submit local content performance reports or annual work plans to the Board. On conviction, it is proposed that such offenders should be liable to administrative sanctions, which may include fines of 5% of the value of the proceeds obtained (in a departure from the extant 2010 legislation) from the particular oil and gas activities in respect of which the breach is committed but must not exceed 5% of the project sum or to the cancellation of a contract with respect to the relevant "extractive activity", or to any other Board-prescribed sanctions.

Section 68(6) prescribed generic penalties of 5% or to imprisonment for up to 5 years, or to both, for all persons who commit offences under the Local Content Act for which no other penalty is provided.



**Conclusion** The scope of the Senate’s NOGIC Amendment Bill 2020 appears to be less ambitious than the multi-industry focused HOR NCDE Bill originally presented to the House of Representatives in December 2019. The Senate Bill proposes some amendments that appear to identify and to seek to resolve some of the key clarity and interpretation challenges arising from language and drafting issues in 2010, which is commendable but not exhaustively realised in the version that we reviewed. There remain areas that are not clear, which preserve inconsistencies particularly in the use of undefined variants of similar terms, all of which continue to make regulations and to potentially hinder the clear understanding of obligations and, consequentially, the achievement of effective compliance.

Proposals to empower the Minister to continue to extend Nigerian content prescriptions without a statutory time limit are a welcome acknowledgment of continuing technical, financial and other capacity gaps and how these may be addressed in the short term. It is encouraging, for instance, that the Senate Bill attempts to clarify formal steps required to demonstrate capacity (and the absence thereof) and for seeking exemptions from, and expansions of the Local Content Act’s schedule prescriptions of Nigerian Content, which are not exhaustive. Any potential impact of such processes on contract execution and project timing should, however, be considered and addressed to ensure that identified capacity gaps may be readily addressed and that much needed investment and participation in the sector are sustained and are not unduly disincentivised.

With the full benefit of a decade’s experience of seeking to interpret, apply, comply with, monitor, implement and enforce the Local Content Act 2010, the current House of Representatives and Senate processes present an invaluable opportunity for meaningful reform at a pivotal point in the Nigerian petroleum industry’s dynamic history. In addition to providing much-needed clarifications, however, such reform must, in our view, be fully cognisant of, and responsive to, current global industry-wide challenges in the aftermath of the COVID-19 pandemic. An immediate, if not the overriding, priority must be to position and support the industry’s recovery and achievement of sustainable growth in the short and long term.



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