

INSIGHTS

Nigeria: what consents are now required in upstream M&A transactions?

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The recent *Moni Pulo* decision of the Nigerian High Court^[1] has changed the settled understanding of when Ministerial consent is required in Nigerian upstream M&A deals. This article considers the consequences of that court decision, the effects seen in recently completed transactions, and the implications when structuring acquisitions/disposals of Nigerian upstream interests. **The *Moni Pulo* decision and its background** A typical feature of petroleum legislation across the world is the need for prior governmental consent before any change is made to the identity of the upstream concession interest-holder. Exactly what kind of change in identity or what sort of transaction will necessitate a consent is not always perfectly prescribed in the law or the underlying petroleum concession, often leading to difficult questions of interpretation, as happened in the *Moni Pulo* case. In Nigeria, this position is governed by Schedule 1 Paragraph 14 of the Petroleum Act 1969 (as amended), which states that "without the prior consent of the Minister, the holder of an oil prospecting licence or an oil mining lease shall not assign his licence or lease, or any right, power of interest therein or thereunder"². This consent requirement clearly covers "asset transfers"³ (in the nature of farm-outs, or assignments, of participating interests in an Oil Prospecting Licence/Oil Mining Lease (even possibly Production Sharing Contracts)). The position though was far from certain in regard to "share transfers"⁴ (ie the transfer of shares in an OPL/OML/PSC interest holder, or transfers of shares in a company higher in the corporate chain to the interest holder or in its ultimate parent company). The generally understood practice that was largely followed (until *Moni Pulo*) was that these share transfers *did not* require prior Ministerial consent. This position was challenged in the *Moni Pulo* case. The factual background involved the purported transfer of the entire shareholding in a company that held an interest in OML 114 (and was Moni Pulo Limited's partner in the OML). This share transfer was completed without obtaining (or seeking) Ministerial consent. The complaint was whether this was permissible under Nigerian law. The judgment of the Federal High Court of Nigeria offered a fresh interpretation of the law and Moni Pulo Limited successfully argued that Ministerial consent should have been obtained before this share transfer could be validly made. **Consequences of the decision** As a result of the *Moni Pulo* judgment, any share transfer that involves a holder of a Nigerian upstream interest is susceptible to requiring prior Ministerial consent (though see below for some of the complications with this position). While the court's decision appears to justify this requirement through its interpretation of the Petroleum Act, the effect is to provide a regulator with a consent-right that it did not previously employ or even seem to enjoy, and without clearly defined restrictions on the exercise of its discretion or a settled process for applications. The repercussions of that decision are already felt in the Nigerian upstream M&A market. Oando plc's 2014 acquisition of ConocoPhillips companies holding interests in a number of OML/OPLs

is the sort of deal that, pre-*Moni Pulo*, may not have sought Ministerial consent; post-*Moni Pulo*, this consent was necessary. Even with Oando's status as a Nigerian "national champion"^[2], the Ministerial consent process was problematic to navigate. The expected deal timetable was significantly delayed and extended as the parties waited for the consent to be granted.^[2] Many other sales, such as those recently agreed as part of the various divestiture programmes of the Majors, are now undergoing that same process and await receipt of consent before they can complete. **Future implications** Many Nigerian legal commentators have expressed some dissatisfaction with the *Moni Pulo* judgment and the (first-instance) ruling was subject to appeal (though it is understood that no appeal will be made). While the decision helps to clarify a long-standing lacuna, it raises many new questions. *What types of transaction are caught?* *Moni Pulo* involved the transfer of the *entire* shareholding in a company. It seems presently open to question whether the judgment means that Ministerial consent is needed for share transfers of *less than the entire* shareholding (including those which do not result in change of control of the company); or for share transfers that take place higher up the corporate structure (ie *indirect changes* in the control/ownership of a company). It is possible to interpret the judgment as extending the consent requirement to any arrangement governing/limiting how shareholders may exercise their voting rights where such is seen as a change of control. The court's decision offers some guidance, with the central reasoning behind the court's approach being: "*The Minister of Petroleum Resources has a duty to satisfy himself or herself that the '[persons] who have acquired the '[shares in the [person holding the] participating interest in OML 114 are qualified to participate in the OML 114.'*"^[2] This appears to suggest that the critical matter to be considered is the *control* of the interest-holder and whether this has materially changed, but this understanding is by no means certain or settled. Of course, certain restrictions on share/asset transfers will be found in the underlying OML and production sharing contract terms (as well as in the joint operating agreement) and these must be considered as well. In addition, the Department of Petroleum Resources has recently introduced new guidelines requiring any company intending to divest its interest in an OML or OPL or divestment of interests by a parent in the company holding such assets to notify the authorities of this transaction before making public announcement or placement of advertorials to prospective bidders and well ahead of signing/completion of the transaction. This appears to represent a form of a pre-approval. *What are the effects on the transaction timetable?* Recent practice has shown that it is difficult to predict the length of time needed to successfully obtain Ministerial consent. Share sale agreements will need to contemplate the resulting possibility of delays to the expected deal timetable. *Who is responsible for obtaining the Ministerial consent?* While the interest holder appears to be primarily responsible for obtaining the consent, both buyer and seller have a proper concern to ensure the process is duly undertaken. Share sale agreements will need to recognise that Ministerial consent may now be a condition to complete the share transfer. The agreement will also need to establish procedures under which the parties will work to obtain Ministerial consent and allocate responsibilities. The sale agreement might also need to address what should happen if any conditions become attached to the grant of the consent (or any requirement to amend the underlying OML/PSC terms). There may also be application fees to consider (and their allocation of liability). *What transaction structure should be used?* Sellers/buyers may now choose to reconsider the basis under which they make their transactions. One of the key justifications (often raised by sellers) for proceeding with a share sale structure was that this avoided the need for Ministerial consent. Clearly, this may well not be the case. *How will this position develop in the future?* This is a summary of some of the present concerns that feature in the current Nigerian upstream M&A market. It is hoped that these uncertainties will largely be addressed with the (eventual) passing of the Petroleum Industry Bill; the latest draft of which included explicit provisions requiring Ministerial consent for share acquisitions, mergers or

changes in control (up to the ultimate parent).

[1] *Moni Pulo Limited v Brass Exploration Limited et al* Case FHC/L/CS/835/2011.

[2] As reported by various media sources, such as

<http://www.nigeriaoilandgasintelligence.com/oando-awaits-ministerial-consent-for-final-close-of-conoco-phillips-nigerian-asset-acquisition/>