

Ease of doing business: The implications of Lekoil v. Ministry of Petroleum Resources

The Federal High Court (FHC), recently ruled that an indigenous oil exploration company could not deem the consent of the Minister of Petroleum Resources (the Consent) granted on default as recommended by the Executive Order One (EO1) signed in May 2017 by the Presidency. The Judge held that EO1 could not supersede requirement for the Consent.

Considering Nigeria's efforts at enhancing favourable business environment, it becomes imperative to analyse the implications of this decision.

Facts

Lekoil's subsidiary ("the Company") entered into an agreement to acquire Afren Plc's participating interest in oil prospecting license asset (OPL 310). In line with the Petroleum Act and the Oil Pipeline Act, the Consent was required to give full validity to the acquisition. Therefore, Afren applied for the Consent, in January 2016.

The Ministry of Petroleum Resources (MPR) did not issue the Consent for over 3 years; neither did it provide satisfactory explanation for its non-issuance.

In 2017, the Presidency issued EO1 mandating governmental agencies to publish procedures and timelines for obtaining relevant permits/approvals. The agencies are required to approve or reject (based on reason) an application within the timeline as published on its website. Otherwise, the applicant will deem the application approved on default (Default Approval).

On this premise, Lekoil decided to approach FHC for a declaration of a Default Approval of the Consent; perhaps, but FHC ruled against Lekoil's application.

Ease of doing business and EO1

Before attempting an analysis of the impact of the decision, it is necessary to provide some useful background on the ease of doing business initiative and EO1.

The World Bank publishes an annual index (Report) on ease of doing business that measures, amongst other parameters, the ease of obtaining relevant permits for business activities. The Report for 2017 ranked Nigeria 170 out of 190 countries and 174 out of 190 countries, for ease of doing business and permit processing respectively.



The above rankings were not encouraging, especially as the Federal Government of Nigeria was striving to attract foreign investment. In this regard, the Presidency took deliberate steps towards improving the factors that influence rankings. This included setting up the Presidential Enabling Business Commission (PEBEC), primarily to enhance ease of doing business.

PEBEC identified areas, key to achieving its task. These include transparency and collaboration amongst government parastatals. PEBEC and the Presidency sought to give these initiatives legal backing, and set up a regulation in form of EO1.

Recognising that acceleration of regulatory approvals and permit processes can significantly increase the ease of doing business (with attendant positive impact on government revenues, investments and economic activities); PEBEC made the "Default Approval" one of its focal points in EO1.

Analysis

Nigeria operates under separation of power principle with the three arms performing dedicated functions. Legislature makes the law, Executive implements while the Judiciary interprets the law. The major rationale for the decision under consideration is that the Default Approval (creation of the Executive) cannot take the place of actual Consent, being the creation of the law. Furthermore, Lekoil's application was made before EO1 became effective. Essentially, the implication of the decision is that EO1 has no force of law, thus cannot abrogate or supersede the

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Understandably, one of the snags noted about executive orders was their potential ineffectual nature considering they are not proper legislation. However, it is arguable that EO1 did not seek to abrogate the provision of the law on the premise that granting the Consent falls within the powers of the Executive. The Executive, headed by the Presidency just sought to make its process for granting the Consent more effective.

In practical terms, PEBEC put EO1 together to cure inherent inefficiencies militating against ease of doing business in Nigeria owing to lack of transparency, delay in getting government approvals/permits and duplication of operations amongst others. These issues, which have become systemic, not only impose additional cost for investors and the general business environment, they also reflect negatively on the country's perception and image.

In my opinion, the court should have considered the effect of the relevant agencies' efficiency or otherwise on the overall economy and not the legal form of when the application was made. An application for approval should not remain pending based on existing law (recommending executive approval), which appears inconsonant with the current reality the Executive perception of modality for implementation. Anything otherwise, will amount to perpetuating inefficiency.

From this stand point, it is inevitable not to conclude that the ruling of FHC on 28 March 2019 is an attempt to hinder the Default approval and it does not appear in tandem with the spirit of improving ease of doing business in Nigeria.

It is undeniable that the introduction of EO1 birthed changes in operations of some agencies and there have been improvement since its introductions. PEBEC is supporting government

agencies to reform their processes to meet the demands of international best practices.

Nigeria's ranking (for ease of doing business) in the 2018 Report (24 places upwards when compared with 2017) evidences the impact of PEBEC's activities (which include EO1). The Country moved to 145 (from 170) out of 190 countries. It is noteworthy that the country moved to 146 in the 2019 World Bank report, showing that Nigeria cannot afford to rest on its oars. PEBEC must keep pushing the boundaries and consolidate on the gains of its reform activities.

EO1, if rigorously implemented is capable of improving transparency and efficiency of government, the Country's ease of doing business and economic development parameters (employment, Gross Domestic Product, foreign reserve and rate, balance of payment, inflation, interest rate), if each arm of government wills.

In view of the overarching impact of ease of doing business, all arms of government must see the bigger picture of the economic development for the overall interest of the Country and the judiciary should adopt a pragmatic approach and interpret legislation/orders to cure inherent mischief.

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