

# **An Overview of the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme Executive Order 2019 and its Potential Constitutional and Legal Challenges**

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## **Abstract**

The Road Infrastructure Development and Refurbishment Investment Tax Credit Executive Order 2019 provided the basis for the participation of private companies in the development and refurbishment of public road infrastructure in Nigeria and the utilization of road tax credits issued under the scheme to offset agreed project costs of participants. The scheme accords with the Federal Government's national strategic plans of encouraging corporate investments, reducing road infrastructure deficits and increasing infrastructure spending beyond the average capital expenditure in annual national budgets. The Executive Order, which was made pursuant to the executive and tax-exemption powers of the President under both the Constitution and extant taxation law, clearly spelt out the objectives and nature of the scheme as well as provided for its institutional, regulatory and investment promotion frameworks. While it is a welcome development, there is a need to strengthen the Executive Order by addressing potential constitutional and legal challenges in view of its basic funding mechanism, which is company income tax due or payable to the Federation. These challenges include the constitutionality or otherwise of the Federal Government utilizing the road tax credits solely for its infrastructure requirements to the exclusion of states and local governments; the possible conflict with the ICRC Act on legal and regulatory frameworks; and the extent of compliance of its processes with regulatory legislation including the Procurement Act and the Fiscal Responsibility Act. Resolutions of these inherent weak links are necessary if the Executive Order is to succeed and the investments of project participants are not to be jeopardized.

**Keywords:** Executive Orders, Companies Income Tax, PPPs, Tax Credit, Revenues

## **Introduction**

The Road infrastructure Development and Refurbishment Investment Tax Credit Scheme Order, otherwise known as Executive Order 007, (the Executive Order)<sup>i</sup> was issued by the President of the Federal Republic of Nigeria on 25<sup>th</sup> January 2019 within the context of the duty of the Federal Government to enhance its road infrastructure for a more efficient mobility of people, goods and services throughout the Federation. It had, as its primary influence, the promotion of national integration, operation of roads transportation sector and dynamic management of the economy.<sup>ii</sup> The scheme, which was starting with six private companies<sup>iii</sup> based on their demands for road projects in locations where they have significant business operations, would see to the construction or refurbishment of 19 roads with a total network of 794.4km in eleven states across the six geopolitical zones of Nigeria. This paper examines the rationale and significance of the Executive Order, the incremental development of private sector funding of public infrastructure in Nigeria and the structure of the Executive Order. In considering its structure, the paper will examine the validity of the Executive Order, the concept of the scheme as a PPP model, the elements that make it attractive to business entities and the potential challenges that could make its implementation legally and constitutionally vulnerable.

## **Rationale and Significance of the Executive Order**

The Executive Order is yet another daring effort by the Buhari Administration to increase Nigeria's road infrastructure stock from its present dismal rate of 25-30% to about 70% of Gross Domestic Product (GDP), thereby increasing Nigeria's economic growth and prosperity.<sup>iv</sup> By the Executive Order, it is obvious that the Buhari Administration appeared to tow global initiatives for practical solutions to infrastructure delivery by using tangible and intangible resources as catalyst for private sector infrastructure financing.<sup>v</sup> Such tangible and intangible resources could be land, land rights, bonds, contributory funds, betterment levies, developer exactions, impact fees and similar schemes.<sup>vi</sup> These are in addition to conventional financing sources in project finance, i.e. loans, equity contributions and mezzanine arrangements.<sup>vii</sup>

History has shown that sustainable infrastructure development does not occur in an institutional or policy vacuum but is built on clear policy visions.<sup>viii</sup> It was this types of visions, revolutionary ideas and off-budget financing that saw to the reconstruction of Paris in 1852, the rehabilitation of transportation projects throughout New York metropolitan area by the Port Authority of New York and New Jersey, the financing of new towns of Orestad in Denmark and Milton Keynes in UK, the road upgrade project in Bogota, the development of the Medinaty City in Cairo<sup>ix</sup> and the expansion of European Railways network from 1,865 miles to over 215,000 miles between 1840 and 1913.<sup>x</sup> It was also on such principles that the Federal Capital Territory Administration (FCTA) developed its land swap programme, where it sought to swap its land for urban infrastructure funding and delivery.<sup>xi</sup>

At its inception in 2015, the Buhari Administration made conscious efforts to reduce Nigeria's infrastructure deficit by the increase of capital investments in its national budgets. For the first time in a long period, the Administration earmarked 30% or ₦1.8 trillion of its 2016 total spending for capital projects. This was remarkable as the increase was 223% over the 2015 capital budget, which was mere ₦557 billion.<sup>xii</sup> The road infrastructure, which is the subject of this paper, correspondingly got a bigger chunk. In an obvious policy consolidation, the Administration produced the Economic Recovery and Growth Plan (ERGP) in 2017, whose objectives included massive investment in transport infrastructure through sources that included utilization of alternative and mix private funding.<sup>xiii</sup> The Executive Order therefore, was in sync with the resolve of the Administration to reduce the nation's infrastructure deficits and achieve the aspirations contained in the ERGP.

Nigeria has a total road network of 193,200 km, comprising 34,123 km federal roads, 30,500 km state roads and 129,577 km local government roads. Notably, 35% of these roads are paved, while the remaining 65% comprised of unpaved road infrastructure.<sup>xiv</sup> Presently, about 522 roads are either under reconstruction or refurbishment.<sup>xv</sup> However, due to paucity of funds, the work on these roads had either stopped or their progress is at snail-speed. Even critical roads that hold high hopes or which special arrangements were made for, did not escape these uncertainties. The Lagos-Ibadan Expressway and the Abuja-Kaduna-Kano road constructions did not progress as expected while the Second Niger Bridge, which has a special PPP funding

arrangement from Nigeria's Sovereign Wealth Fund (SWF), also suffer time overrun. The entire road networks at all levels of governments have failed or are failing.

Incidentally, the costs for construction, refurbishment, maintenance and even operations of these roads are very high. The report of national strategy under Vision 20: 2020 (NV2020) recognized that the root cause of these inefficiencies leading to high costs of maintenance included poor initial construction and design; lack of coordination in construction and maintenance; lack of coherent national road policy, inconsistent regulation and application of road standards; limited professional and business capacity; inappropriate road design standards, increased vehicular traffic and weights; and lack of road markings, safety barriers, and signage.<sup>xvi</sup> These factors, needless to observe, contribute in no small measure, to faster rate of road depreciation, high incidence of maintenance, high rates of accident and corresponding fatalities.

The estimates of infrastructure investment requirement, using international benchmarks, under the Nigeria's National Integrated Infrastructure Master Plan of 2014 (NIIMP)<sup>xvii</sup> suggested that the rehabilitation, expansion and upgrading of Nigerian road infrastructure networks would require an investment of about USD \$350 billion over the next 30 years or ₦4.2 trillion per annum. Specifically, this investment will see to the rehabilitation of about 120,000 km of existing roads, an increase of paved roads from the current 70,000km to more than 180,000km, construction of about 95,000km of new roads and refurbishment of feeder roads to all major seaports and airports. For maximum impact, the NIIMP suggested that USD \$22 billion would have to be invested in the first 5 years.

The funds provided for roads infrastructure in Nigeria's National Budgets were grossly inadequate. In fact, they could not even take care of current indebtedness not to talk of paying for existing contracts. For instance, the average budgets for road infrastructure since 2016 to date was about ₦76 billion per annum. As at June 2019, the indebtedness to road contractors was more than ₦300 billion even after the Federal Government had paid about ₦504 billion. It should be noted that the figure of ₦300 billion debts did not include the claim for reimbursements by state governments, which as at November 2019, was over ₦900 billion.<sup>xviii</sup> This average annual national budget for road infrastructure as at date was grossly insufficient.

If the implementation of the Executive Order were to be successful, the effort of the Administration would see to the substantial improvement of the country's infrastructure investment to about 6% of GDP as recommended by the World Bank if Nigeria were to achieve its sustainable development goals.<sup>xix</sup> Hence, any scheme of funding that could actualize this ambitious national aspirations by making money available to increase or modernize Nigeria's failing and inadequate road infrastructure should therefore be welcomed.

### **Historical Perspectives of Private Funding of Public Infrastructure in Nigeria**

By the Executive Order, the Federal Government intended to leverage on private sector finance to construct and rehabilitate some of Nigeria's road infrastructure, particularly those impactful to the business operations of participants. The initiative was in line with both ERGP and NIIMP's infrastructure funding strategy,<sup>xx</sup> which at 48% and ahead of the 3 tiers of government, i.e. Federal, State and Local Governments, put the highest obligation of infrastructure funding in the private sector. Both strategic plans recognized PPP as one of possible public infrastructure delivery methods. They also anticipated that the Infrastructure Concession Regulatory Commission (ICRC), a body established by the Infrastructure Concession Regulatory Commission Act,<sup>xxi</sup> was to manage and ensure efficient execution of all PPP arrangements of the Federal Government.<sup>xxii</sup> Before delving into the structure of the Executive Order, it is important to trace the incremental development of private sector participation in the funding of public infrastructure in Nigeria, which led to this novel infrastructure funding by the utilization of tax credit certificates.

Nigeria's active sojourn in private sector funding of public infrastructure and services started with the establishment of the Technical Committee on Privatization and Commercialization (TCPC) in 1988,<sup>xxiii</sup> whose mandate was to privatize and restructure specific entities of the Federal Government for profitability and effectiveness. This initiative followed global trend, which coincided with the PPP renaissance that started in 1980 when the UK's Margaret Thatcher Administration decided to privatize British government's commercial concerns to the private sector.<sup>xxiv</sup> It was also about the same period that the United States authorities executed Power Purchase Agreements to facilitate operations of private Independent Power projects.<sup>xxv</sup>

It should not be missed that hitherto, there was evidence of PPP practice since the seventeenth century in France, eighteenth century in UK and nineteenth century in the US.<sup>xxvi</sup>

The PPP however emerged as a popular and modern public infrastructure funding mechanism with the success of the Private Finance Initiative (PFI) model that was introduced by the UK's John Major Administration in 1992.<sup>xxvii</sup> It influenced many countries to consider it as a preferable and viable infrastructure procurement and financing model. The Uganda, South Africa, Nigeria and Ghana PPP conceptualizations of Bujugali,<sup>xxviii</sup> DTI Campus,<sup>xxix</sup> Murtala Muhammed Airport Terminal 2 (MM2)<sup>xxx</sup> and Cenpower<sup>xxxi</sup> projects in 1994, 2001, 2002 and 2003 respectively were pointers to the popularity of the modern concept of PPP in the succeeding decades.

Specifically, Nigeria embarked upon an aggressive programme of infrastructure funding through the private sector since 2001 when it commenced the concession programmes of some of its air and sea terminals, and indeed had continued to deepen such policy to such an extent that all major ministries and agencies at the federal, state and even local government levels are presently pursuing one infrastructure project or the other with private finance. This aligned with the new national thinking that encouraged the private sector to take central role in infrastructure policy implementation, financing and delivery. Such policy was the thrust of the Structural Adjustment Programme (SAP) of 1986,<sup>xxxii</sup> which culminated in the promulgation of the Technical Committee for Privatization and Commercialization Act of 1988 and its forerunner, the Public Enterprises (Privatization and Commercialization) Act.<sup>xxxiii</sup> That was also the thrusts of Vision 20: 2010 of 1989, the Vision 20: 2020 of 1999,<sup>xxxiv</sup> and the National Implementation Plan I & II of Vision 20: 2020 of 2009.<sup>xxxv</sup> It was also the thrusts of the Power Sector Reform of 2005,<sup>xxxvi</sup> the NIIMP in 2014,<sup>xxxvii</sup> and the ERGP in 2017.<sup>xxxviii</sup>

To consolidate on the new policy direction, the Federal Government promulgated the Infrastructure Concession Regulatory Commission (ICRC) Act in 2005 and inaugurated its Board in 2009. The ICRC moved quickly to develop the National policy on PPPs and the Guidelines on Procurement, Value for Money (VfM) and Risk Management,<sup>xxxix</sup> and directed all ministries to establish PPP desk offices. In the same vein, this administration introduced additional infrastructure funding mechanisms that included Presidential Infrastructure Development Fund (PIDF), Sukuk Fund and multilateral loans. The financing of projects

through tax credits is thus another effort in the journey for private financing of public infrastructure.

### **The Structure of the Executive Order**

The Executive Order was made up of six sections with two schedules. The First Schedule laid down the regulations for the administration and operation of the scheme while the Second Schedule gave an outline of the project agreement, referred to as Memorandum of Understanding (MOU), to be signed with participants. The Executive Order was very clear on its objectives and had striven to be comprehensive in institutional, regulatory and investment promotion frameworks. To ensure clarity, it provided the definitions of its peculiar concepts and terminologies including ‘beneficiary’ under the scheme, ‘disposal’ of road infrastructure tax credit certificates, ‘economically disadvantaged areas’, ‘eligible road’ for construction or refurbishment, ‘participant’ and ‘project cost’.<sup>xl</sup> Before we embark upon the analysis of other specific sections of the Executive Order, there is need to first consider the legal and judicial bases of executive orders generally and, in particular, the validity or otherwise of the Executive Order under discussion.

### **The Validity of the Executive Order**

The validity or otherwise of executive orders under the Constitution has been a subject of debate in Nigeria. The term ‘executive order’ has not been defined in the Constitution or the Interpretation Act or any other legislation. However, in the United States where the idea of executive orders emanated, it was defined as a presidential directive that require or authorize some actions within the executive branch<sup>xli</sup> or a presidential policy directive to the federal bureaucracy.<sup>xlii</sup>

Flowing from these precise definitions, executive orders were simply commands directly given by the president to an executive agency, class of persons or body under the executive arm of government, which command was in furtherance of government policy or act of the legislature. Such executive order might require the implementation of an action, set out parameters for carrying out specific duties, define the scope of existing legislation or be a subsidiary instrument within the contemplation of section 37 of the Interpretation Act.<sup>xliii</sup> For instance

section 315 of the Constitution gives the president and other appropriate authorities wide powers to modify any existing law to bring it in conformity with the Constitution.<sup>xliv</sup> However, such executive orders would not empower the president to add to, subtract or even restate the clear provisions of the law,<sup>xlv</sup> or compromise the separation of powers under the Constitution.<sup>xlvi</sup> To such extent, executive orders are only valid where the president acted within the boundaries of his constitutional or statutory authority.<sup>xlvii</sup>

The Executive Order was promulgated pursuant to the executive powers of the President, which are rooted in the Constitution. Section 5 of the Constitution provided for the executive powers of the president. Such powers extend to the execution and maintenance of all federal laws including Companies Income Tax Act<sup>xlviii</sup> (CITA) and the Federal Highways Act,<sup>xlix</sup> which give the Minister for Works and Housing responsibility for construction, rehabilitation, maintenance and management of all federal roads in Nigeria.<sup>1</sup> Section 5 of the Constitution reads:

Subject to the provisions of this Constitution, the executive powers of the Federation: (a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.<sup>li</sup>

It is trite that the section makes the Executive Order valid, binding and enforceable<sup>lii</sup> since it was based on the President's constitutional and statutory authority, and had also acted within the boundaries of such authority.<sup>liii</sup> The action of the President is also in line with extant legislations and judicial pronouncements on the general validity of executive orders in a democracy.<sup>liv</sup> In *Attorney General of Abia State & Ors. v Attorney General of the Federation*,<sup>lv</sup> the Supreme Court held that the Executive Order issued by the President, the Revenue Allocation (Federal Account, etc.) (Modification) Order, Instrument No. 9 of 2002, was valid and consistent with the Constitution.

Besides the executive powers of the president under the Constitution, the Executive Order was made pursuant to section 23(3) of CITA,<sup>lvi</sup> which allowed the President to exempt any company



or class of companies from payment of tax on all or any of its profits. CITA is the primary tax legislation for companies in Nigeria and falls within the laws made by the National Assembly. It made extensive provisions on the administration, enforcement and exemption of income tax on companies. Specifically, the President has the power to exempt any company or class of companies from all or any provision of the Act.<sup>lvii</sup> Section 23(3) of CITA states:

The President may exempt by order – (a) any company or class of companies from all or any of the provisions of this Act; or (b) from tax or any profits of any company or class of companies from any source, on any ground which appears to it sufficient.<sup>lviii</sup>

Considering the definition and scope of ‘tax exemption’ against the context of road infrastructure tax credit issuance and utilization in the Executive Order, it is necessary to determine the propriety or otherwise of the Executive Order being made pursuant to the tax exemption under section 23(3) of CITA. However, before looking at the definition of the term ‘tax exemption’, it is important to consider the nature of tax legislation. In the case of *FBIR v Integrated Data Services Limited*,<sup>lix</sup> it was held that tax legislation are laws that impose pecuniary burden and are, under the rules of interpretation, subject to strict interpretation. The court further stated that in a tax legislation, one had to look merely at what was clearly said, and that ‘There is no room for any intendment. There is no equity about tax. There is no presumption about tax. Nothing is to be read in and nothing is to be implied. One can only look fairly at the language used.’<sup>lx</sup>

Although CITA did not define the term ‘tax exemption’, it is generally regarded<sup>lxi</sup> as an amount of taxpayer’s income that is not subject to tax. The Black’s Law Dictionary has defined the term to mean ‘Immunity from the obligation of paying taxes in whole or in part’. Tax credit, on the other hand, is an amount of money that a taxpayer can subtract from taxes owed to the government. The tax credit under the Executive Order is therefore not a tax exemption since it is to be utilized to offset the project cost incurred by a participant. If strict interpretation is deployed as suggested in *FBIR v Integrated Data Services Limited*,<sup>lxii</sup> it remains to be seen whether the validity of the Executive Order cannot be questioned considering that the scheme is, *strictu sensu*, not a tax exemption, but a tax payment option.

### **The PPP Concept and Frameworks under the Scheme**

The initiative was established under section 1(1) as road infrastructure development and refurbishment investment tax credit scheme, and had made no pretension as to its true nature, which under section 1(2), is a PPP intervention for a period of 10 years.<sup>lxiii</sup> Although there are different conceptual definitions provided by different jurisdictions and identified multilateral, bilateral and development institutions, PPP is generally considered as a long-term contract between a private party and a government entity for the provision of a public asset or service in which the private party bears significant risk and management responsibility, and also in which remuneration is linked to performance.<sup>lxiv</sup> In fact in Canada, an arrangement must satisfy two conditions to be called a PPP, namely provision of public infrastructure and the transfer of risks between partners.<sup>lxv</sup>

It should be noted however that the ICRC Act, which is the PPP legislative framework in Nigeria, did not use the familiar terms of ‘PPP’ and ‘private sector’. Rather, it adopted ‘concession’ and ‘project proponent’. Section 36 of the Infrastructure Concession Regulatory Commission Act defined concession as a contractual arrangement whereby ‘the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure.’ On the parties to the transaction, the executive order defined a participant to include project sponsor and the project company, which could either be a special purpose vehicle of participants or even institutional investors.<sup>lxvi</sup> These perfectly accommodate the PPP model stipulated in the Executive Order.

Be that as it may, the definitions of PPP in all jurisdictions including those that adopted concession as the dominant or exclusive nomenclature have same parameters of ‘what is’ and ‘what is not’ a PPP. The Executive Order had, to a large extent, incorporated these general parameters. Section 1(2) sought to achieve 3 major components of a PPP initiative, namely, leveraging on private sector funding, ensuring value for money consideration and guaranteeing full recovery of funds. These parameters are the basic characteristics of any PPP arrangement. It is important to observe that different nomenclatures are used to describe these parameters in PPPs. They are also referred to as ‘fundamentals’,<sup>lxvii</sup> which sought to explain parties and structures of a PPP; or ‘basic principles’<sup>lxviii</sup> which listed affordability, value for money and

risk transfer as essential features; or ‘stages’ which look at the PPP life cycle of project conceptualization, procurement, implementation and maturity as the identifying elements of PPP; or to view it from the scope of contractual obligations and input specifications in the transaction.<sup>lxix</sup> These differences in approach are, arguably, attributable to the difference in disciplines and perspectives. Notwithstanding, the different variations and perspectives, the three components contained in the Executive Order are, though common to all PPP definitions, are presumably from a finance perspective. These key elements are clearly spelt out in the Executive Order as utilization of private funds, striving for Value for Money consideration and return on investments.

The Executive Order had made provision for both its institutional and regulatory frameworks. While Section 1(4) provided for the institutional framework, section 1(5) stipulated the regulatory framework. The Executive Order established a committee under the chairmanship of the Minister of Finance to implement and administer the scheme. The committee has membership strength of 14 members with the Permanent Secretary of the Ministry of Finance as secretary of the committee.<sup>lxx</sup> The membership of the committee was drawn from all relevant ministries and agencies of the Federal Government including the ICRC. The function of the committee was clearly spelt out to include acceptance, evaluation, registration, negotiation and issuance of award letters for participation in the scheme. In addition, the Committee is also charged with evaluation of work done as well as facilitating timely issuance of tax credit certificate and execution of specific duties of its members.

In the same vein, section 1(5) states that the regulations for the administration and operation of the scheme shall be as provided for in the First Schedule to the Executive Order. Paragraph 2(3)(k) of the First Schedule clearly provided that the MOU in respect of the scheme shall be subject to the terms and conditions of contract stipulated in the indicative MOU contained in the Second Schedule therein.<sup>lxxi</sup> The MOU provided for the parties to the contract, the purpose of the transaction, the conditions precedent, the representations and warranties as well as the governing law and transaction jurisdictions, which it stipulated to be Nigerian laws and Nigerian courts. In other words, the coordination of the scheme as well as the process of administering the projects was clearly provided in the Executive Order. This creates certainty for any serious participant.

These sections on institutional and regulatory frameworks need to be examined carefully as to whether they can validly coexist with the clear provisions of sections 19(a) and 20(c) of the ICRC Act. Section 19(a) empowered the Board of ICRC to provide general policy guidelines relating to its functions, which it did with the National Policy on PPP, while section 20(c) obligated it to ensure compliance with the provisions of the Act. These provisions provided the basis for the institutional and regulatory frameworks for PPP operation in Nigeria. It is instructive that paragraph 2(2) of the first schedule to the Executive Order had made it clear that for the purposes of implementation, members should apply the principles and procedures as laid down by their respective ministries and agencies in performing their functions. Could this provision precipitate or avoid conflict, and if there is one, could the substantive enactment of the National Assembly (ICRC Act) prevail over the executive order of the President (Executive Order 007)?

### **The Incentives under the Scheme**

The Executive Order had made spirited efforts to encourage companies to participate in the scheme. Sections 2, 3 and 4 are the meat of the Executive Order and provided the assurances required by investors to participate in the scheme. It entitles participants to utilize tax credits for project costs, ensures a two per cent uplift over the CBN's advertised rates for the project costs, guarantees that such uplifts are not taxable and tried to reduce bureaucratic bottlenecks by directing the committee to facilitate the performance of specific tasks by relevant Ministries and Agencies. Specifically, under section 2(1) of the Order, the private sector participant is entitled to utilize the project cost as a credit against its future income tax payable, referred as 'Road Infrastructure Tax Credit'. It appeared therefore that the Federal Government is swapping the development or refurbishment of its road infrastructure with the income tax due or payable by a participating company. Hence, the scheme could easily and appropriately be described as 'Infrastructure-for-Income Tax Swap' or 'Tax Swap'. The Income Tax swappable in an assessment year is limited to 50%, though there is no such limit for road projects in areas designated, under section 5, as economically disadvantaged.

The Federal Inland Revenue Service is responsible, subject to the approval of the committee, for the issuance of the Road Infrastructure Tax Credit Certificate,<sup>lxxii</sup> which among other things,

would denote certified project costs incurred by the participating company. It also contains the CBN's two per cent uplift. Such tax credit certificate is allowed under section 4(2) to be used for income tax payments as from the tax year in which the project is incurred until it is fully utilized. In other words, any unutilized tax credit within the year of assessment can be carried forward to subsequent tax years.<sup>lxxiii</sup> Interestingly, the Certificate is a chose in action, tradable as a security. Thus, a participant is entitled to dispose of a certificate in whole or in part to a willing buyer on a relevant securities exchange<sup>lxxiv</sup> subject to the conditions stipulated therein. It should be noted however that gains and losses arising from the disposal of the road tax credit is subject to taxation in the manner prescribed by tax legislation.<sup>lxxv</sup> These and similar provisions in the Executive Order make the road tax credit certificate under the scheme the best type of tax credit in the market.<sup>lxxvi</sup>

### **Potential Constitutional and Legal Challenges**

While the initiative should be commended and its format valid, it is however fraught with constitutional, legal and administrative challenges that should be addressed urgently. These challenges are real against the fact that the basic funding mechanism under the scheme is the company income tax due or payable to government, which arguably is a direct utilization by only the Federal Government of a portion of accruable revenues under the Companies Income Tax Act. Nigeria operates a federal system of government in which the federal government shares legislative powers, and shares revenues, with the 36 states of the federation including the Federal Capital Territory (FCT). The FCT, though considered a State under the Constitution,<sup>lxxvii</sup> is part of the Federal Government and is subject to all laws, regulations and policies applicable to federal ministries, departments and agencies. The Federal Government exercises exclusive authority over matters listed in the Exclusive Legislative List, while both the National Assembly and State Assemblies could legislate on matters in the Concurrent Legislative List.<sup>lxxviii</sup> In addition, the State Governments exercise exclusive authority<sup>lxxix</sup> over all matters residual to the Exclusive and Concurrent Legislative Lists.<sup>lxxx</sup> It is on this legislative basis that the Federal Government shares all revenues accruing to the Federation based on specific formula with the 36 States of the Federation and the FCT.

The first challenge, which is constitutional, is on the nature of the road infrastructure tax credit. This is in view of clear constitutional provisions on scope, domiciliation, appropriation and utilization of public funds. Section 162 of the Constitution provides that all revenues collected by the Government of the Federation shall be paid into the Federation Account with section 162(3) going further to state that any amount standing to the credit of the Federation Account shall be distributed among the Federal, State and Local Governments on terms prescribed by the National Assembly.<sup>lxxxix</sup> The National Assembly had prescribed the distribution among the three tiers through the Allocation of Revenue (Federation Account, etc.) Act. Sections 2, 3 and 4 of the Executive Order provides for the nature, issuance, utilization and transferability of a road tax credit certificate. Of particular interest to understanding the nature of the ‘tax exemption’<sup>lxxxix</sup> or ‘tax credit’<sup>lxxxix</sup> is that the Certificate is a chose in action that qualifies as a transferable instrument. Sections 4(4)–(12) made extensive provisions on the process of transfer and regulation of the road tax credit certificate. Many questions would naturally come to mind on the constitutionality of the tax credit utilization.

First, is the road infrastructure tax credit a ‘tax exemption’ or ‘revenue utilization’? One of the principal legislation from which Mr. President derived his authority in making the Executive Order was section 23(3) of CITA. As seen above, the President has ample powers to exempt any company from the payment of tax due to it. However, the tax exemption under the Executive Order was issued purposely for the development or refurbishment of a designated road infrastructure. To a beneficiary, it is not an exemption as the company will use same amount for road infrastructure, while it is exemption to the Federal Government since such proceeds are not paid into the Federation Account and, hence, qualifies as an extra-budgetary expenditure. To the State and Local Governments, such proceeds are resources that ought to be paid into the Federation Account for distribution among the three tiers of government. It needs to be emphasized, for the purposes of understanding these perspectives that the road tax credit certificate is only issued pursuant to a development or refurbishment of a designated road infrastructure.

Is the road infrastructure tax credit qualified as ‘revenue’ whose proceeds would be paid into the federation account? Could the road infrastructure tax credit come within the contemplation of distributable revenues under section 162(3) of the Constitution or is it a resource solely of

and belonging to the Federal Government? Could the Federal Government hide under the cover of tax exemption to utilize tax proceeds of the Federation for its infrastructure requirements? Answers to these questions have far reaching implications on the viability or otherwise of the scheme. It is hoped that the state governments will not accuse the Federal Government of unilaterally spending monies that belongs to them all. After all, the road infrastructure tax credit certificate is regarded as a tradable asset under the Executive Order.<sup>lxxxiv</sup> For guidance on answers to the above questions, the Constitution provides:

80 (1) All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) *shall be paid into and form one Consolidated Revenue Fund of the Federation.*

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorized by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.

(3) No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorized by an Act of the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.

In the same vein, the Constitution further provides:

162 (1) The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation,...; and

(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each State on such terms and in such manner as may

be prescribed by the National Assembly.

The implications of section 81 and 162 of the Constitution is that any revenue accruable to the Federation, which is subject to expenditure, must be paid into the Federation Account, which are to be distributed among the three tiers of government in a manner prescribed by the National Assembly. No tier of government can exclusively use such funds for its activities no matter how important. Kutigi, JSC had the opportunity to observe that ‘If any of the three tiers of government decides to form, create or constitute new bodies or things whatsoever, the tier and that tier of government alone, must be prepared to fund such things or bodies from its own share of allocation and not any more directly from the Federation Account.’<sup>lxxxv</sup>

The second challenge, which is legal, is on project procurement and fiscal responsibility. Under paragraphs 2(3)(g) and 3(2) of the first schedule, it is the responsibility of the Management Committee to facilitate the review and evaluation of project costs as well as to recommend that a project is economically viable, cost efficient and can be completed within 12-48 months. Though the Committee, under paragraph 2(3)(h) of the first schedule, is to liaise with and apply the set procedures of Bureau for Public Procurement on the procurement of Federal Government contracts, it appears that except for the competition window in paragraph 2(3)(i) of the first schedule, the standard expression of interests in projects under this scheme is *sole sourcing*. If sole sourcing is the norm, procurement planning under the Public Procurement Act and adherence to Fiscal Responsibility Act will certainly be difficult.

The idea of sole sourcing is, to a large extent, at variance with the provisions of the Public Procurement Act, the Guidelines of the ICRC and the Fiscal responsibility Act, whose fundamental principles are competition, proper planning and transparency. See section 16 of PPA, Section 4 of the ICRC and Part IV of the Fiscal Responsibility Act. How do you determine value for money, how do you ensure legislative appropriation for projects and how do you create a level playing field for all investors? Could there be any room to create systems and modules, like the Swiss Challenge, which will ensure value for money? It is however reassuring that there is a window that allows the Committee to liaise with BPP and the Ministry of Works.

The third challenge, which is administrative, is on the project drivers. Section 1(4) of the Executive Order established the scheme’s Management Committee to be chaired by the



Minister of Finance as the Chairman, the Minister for Works as the Deputy Chairman and the Permanent Secretary in the Ministry of Finance as the Secretary. The detailed composition of the Committee is stated in paragraph 1(1) of First Schedule to the Executive Order while its functions are contained in paragraph 1(2) thereof. Essentially, the function of the Committee is to implement and administer the scheme in all its ramifications. Since the scheme is a PPP, one would have thought that the ICRC would be its main driver in line with the aspirations and intendment of the National Policy on PPP.

Experience has shown that a PPP project requires two Committees for effective project delivery, namely, the Steering Committee and a Project Delivery Committee. In addition, it requires a coordinating institution that has the expertise to manage a project from conceptualization to implementation and ultimate transfer to the Government. The coordinating institution could be a committee of experts or technocrats as found in India or an independent Agency like that of the UK or Canada. The Scheme's Management Committee is amorphous and tends to undermine or discourage the institutional capacity of the ICRC, in which the SGF in 2013 directed all Ministries and departments to defer their PPP projects to ICRC for supervision as contemplated under the ICRC Act. The provision that Ministry of Finance should create and maintain a Fund for the operation of the Scheme cannot derogate from the ad-hoc nature of the Committee.

The leadership of the scheme's Management Committee has also brought to fore the silent argument on the proper categorization of PPP. Is it an engineering project, is it a financing scheme or is it a commercial transaction? By putting the Minister of Finance at the helm of the Management Committee and the elaborate provision on the creation, utilization and disposal of tax credit certificates, it is obvious that the Executive Order posited PPP to be a financing scheme. This posture will add to the confusion regarding the strident efforts to bringing certainty and more effectiveness in the proper categorization of PPP in Nigeria.

Besides these challenges, the Executive Order is curiously silent on land acquisition and compensation under the Land Use Act.<sup>lxxxvi</sup> While refurbishment of designated highways may not pose any challenge since such highways are under the control of the federal government pursuant to the provision of the Federal Highways Act,<sup>lxxxvii</sup> construction of new roads by corporate interests in their areas of business operations may create resistance or agitations from

relevant local communities. It is doubtful if the Management Committee constituted under the First Schedule of the Executive Order could comprehensively address issues of land acquisition and compensation to enable project participants takeover and commence work timeously and effectively.

### **Recommendations**

The challenges discussed above are not insurmountable. It is therefore on these bases that this paper makes the following recommendations in the hope that basic objectives of the Executive Order could be achieved without much controversy.

1. The Executive Order should take heed to the strict interpretation of tax legislation as expounded in *FBIR v Integrated Data Services Limited*<sup>lxxxviii</sup> to the effect that nothing is implied or read into a tax legislation. The framers of the Executive Order should therefore look again at section 23(3) of CITA,<sup>lxxxix</sup> as that section fundamentally deals with powers of Mr. President to grant tax exemptions and not to stipulate tax payment or tax utilization options.
2. The Federal Government should as a matter of urgency get the buy-in of State and Local governments on the utilizations of taxes under the Executive Order, since such taxes ought to accrue into the federation account and, by the provision of section 162(3) of the constitution, distributable to the three tiers of government. This will certainly prevent the dilemma of the Federal Government like that before the Supreme Court in the case of *Attorney General of Abia State & Ors vs Attorney General of the Federation*.<sup>xc</sup>
3. The Executive Order should, in line with the fundamental principles under the Public Procurement Act,<sup>xc</sup> the Infrastructure Concession Regulatory Commission Act<sup>xcii</sup> and the Fiscal Responsibility Act,<sup>xciii</sup> introduce systems and modules that would ensure competition, proper planning and transparency in the selection and procurement of projects under the scheme.
4. The Federal Government should allow the ICRC to take the commanding heights in the implementation of the Executive Order. The ICRC is the statutory body charged with the responsibility of PPPs at the federal level. It is therefore more specialized and better

positioned than the Management Committee, which is *ad-hoc* in nature, to handle the conceptualization, procurement and implementation of projects under the scheme. The Federal Government should not be seen as undermining its agencies.

5. The Executive Order should make comprehensive provisions on land acquisition and compensation as contemplated under the Land Use Act. This would enable project participants to effectively takeover project sites, commence work and deliver projects within agreed and stipulated time frames.

### **Conclusion**

Barring the constitutional, legal and administrative challenges, which must be resolved to attract serious corporate investors, the Executive Order contains many measures that could give adequate comfort to interested investors. A presidential approval could strengthen any lapse in the procurement process while the tradability of tax credit certificates will encourage adequate project financing by institutional moneylenders. In the same vein, the composition of the Management Committee is very comprehensive as it included all relevant stakeholders, even though the location of the secretariat and the membership of the office of the Chief of Staff do not lend credence to the technical seriousness required for infrastructure projects of these types.

While its impact on Nigeria's road infrastructure development is being awaited and the contemplated amendment of the Executive Order by the president pending, this writer hopes that the Management Committee will strategically place the ICRC on such a vintage position to take the commanding heights of the scheme. The expertise, which the ICRC has garnered over the years, will rub positively on the implementation of the scheme to navigate the constitutional, legal, administrative and even the technical and political challenges inherent in infrastructure projects of this magnitude. This is in addition to the certainty and stability that will be brought to bear for the investment comfort of the private sector.

## Endnotes

<sup>i</sup> The Road infrastructure Development and Refurbishment Investment Tax Credit Scheme Order, No. 007 of 2019; <<https://pwc-nigeria.typepad.com/files/executive-order-no-007-of-2019.pdf>> accessed on 23 September 2019. The executive order was signed by President Muhammadu Buhari on 25<sup>th</sup> January 2019.

<sup>ii</sup> Ibid, preamble.

<sup>iii</sup> The companies were Dangote Industries Limited, Lafarge Africa Plc, Unilever Nigeria Plc, Flour Mills Nigeria Plc, Nigeria LNG Limited and China Road and Bridge Corporation Nigeria Limited.

<sup>iv</sup> UNCTAD, Trade and Development Report 2018, *Bridging Gaps or Widening Divides: Infrastructure Development and Structural Transformation* (2018) (2018) < [https://unctad.org/en/PublicationChapters/tdr2018ch4\\_en.pdf](https://unctad.org/en/PublicationChapters/tdr2018ch4_en.pdf)> accessed on Thursday, 17<sup>th</sup> October 2019. It has been shown that every 10% increase in infrastructure investment will result in 6% increase in economic development and prosperity.<sup>iv</sup> Conversely, every infrastructure depreciation accounts for decline in economic growth. Beyond economic growth, a correlation has been shown to exist between security and healthy infrastructure stock.

<sup>v</sup> George E Peterson, *Unlocking Land Values to Finance Urban Infrastructure* (The World Bank, 2009), <<http://documents.worldbank.org/curated/en/723411468139800644/Unlocking-land-values-to-finance-urban-infrastructure>> Accessed 5 September 2019.

<sup>vi</sup> Ibid.

<sup>vii</sup> Yati Md Lasa and Norizan Ahmad and Roshana Takim, 'Critical Success Factors in Obtaining Project Financing for Private Finance Initiative Projects in Malaysia' (7 September 2015) <[https://www.academia.edu/36000400/CRITICAL\\_SUCCESS\\_FACTORS\\_IN\\_OBTAINING\\_PROJECT\\_FINANCING\\_FOR\\_PRIVATE\\_FINANCE\\_INITIATIVE\\_PROJECTS\\_IN\\_MALASIA?](https://www.academia.edu/36000400/CRITICAL_SUCCESS_FACTORS_IN_OBTAINING_PROJECT_FINANCING_FOR_PRIVATE_FINANCE_INITIATIVE_PROJECTS_IN_MALASIA?)> Accessed 12 June 2020.

<sup>viii</sup> UNCTAD, *Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion* (United Nations, 2018), 112.

<sup>ix</sup> Ibid, George E Peterson, *Unlocking Land Values to Finance Urban Infrastructure*

<sup>x</sup> Ibid, UNCTAD, *Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion* (United Nations, 2018), 112.

<sup>xi</sup> Phase IV Transformation Agenda Project – Land for Infrastructure Swap model, Government Notice No. 236 of 2014.

<sup>xii</sup> Budget IT, 'Unboxing FG's 2016 Proposed Budget', (5 February 2016), p. 25 <<https://yourbudget.com/wp-content/uploads/2016/02/Unboxing-FGs-2016-Budget.pdf>> Accessed 12 June 2020.

<sup>xiii</sup> Economic Recovery and Growth Plan (ERGP) 2017-2020 of 2017, p. 79 <<https://yourbudget.com/wp-content/uploads/2017/03/Economic-Recovery-Growth-Plan-2017-2020.pdf>> accessed on 16 October 2019.

<sup>xiv</sup> Mercy Ogunusi, *Public Private Partnership in Public Asset Procurement* (2015), <[https://www.academia.edu/32747053/Public\\_Private\\_Partnership\\_in\\_Public\\_Asset\\_Procurement.pdf](https://www.academia.edu/32747053/Public_Private_Partnership_in_Public_Asset_Procurement.pdf)> accessed on Saturday, 26<sup>th</sup> October 2019.

<sup>xv</sup> Sen. Muhammed Adamu Aliero, Chairman Senate Committee on Works of the 9<sup>th</sup> National Assembly in an interview with the Daily Trust Newspaper of 7<sup>th</sup> March 2020.

<sup>xvi</sup> Nigeria Vision 20: 2020, First National Implementation Plan (2010-2013), Volume Two: Sectoral Plans and Programmes (May 2010), P. 27

<sup>xvii</sup> Nigeria Integrated Infrastructure Master Plan 2014, p. 75 <[https://www.niimp.gov.ng/?page\\_id=991](https://www.niimp.gov.ng/?page_id=991)> accessed on 23 September 2019.

<sup>xviii</sup> The Minister for Works and Housing, Babatunde Fashola at the National Assembly Joint Committee on Works as reported in the Vanguard Newspaper of 24 October 2019.

<sup>xix</sup> The World Bank is however of the view that a more moderate spending of about \$14.2 Billion annually is required over the next decade to address Nigeria's infrastructure challenges

<sup>xx</sup> Nigeria Integrated Infrastructure Master Plan 2014 <[https://www.niimp.gov.ng/?page\\_id=991](https://www.niimp.gov.ng/?page_id=991)> accessed on 23 September 2019.

<sup>xxi</sup> No. 18 of 2005.

<sup>xxii</sup> Sections 19 & 20 of the ICRC (Establishment, etc.) Act of 2005.

<sup>xxiii</sup> The Privatization and Commercialization Act, No. 25 of 1988.

<sup>xxiv</sup> George Nwangwu, *Public Private Partnerships in Nigeria: Managing Risks and Identifying Opportunities* (Palgrave Macmillan 2016), 30.

<sup>xxv</sup> George Nwangwu, *Public Private Partnerships in Nigeria: Managing Risks and Identifying Opportunities* (Palgrave Macmillan 2016), 30.

<sup>xxvi</sup> *ibid*, 30.

<sup>xxvii</sup> *ibid*, 30.

<sup>xxviii</sup> Edward RA Yescombe, *Public Private Partnerships In Sub-Saharan Africa – Case Studies For Policy Makers*, (Mkuki na Nyota publishers for Uongozi Institute, 2017), p. 23; <<https://www.africaportal.org/publications/public-privat-partnerships-sub-saharan-africa-case-studies-policy-makers-2007/>> accessed on 23 September 2019. The Bujagali PPP project is a 250MW hydroelectric power project in Uganda, which was conceptualized in 1994 at a total project cost of \$902m. It achieved financial close in 2007 and commenced commercial operation in 2012.

<sup>xxix</sup> *Ibid*, p. 43. The project was to provide an office accommodation for 2400 staff of the South African Government. It was conceptualized in 2001 and delivered in three years thereafter.

<sup>xxx</sup> A PPP arrangement between the Nigerian Government and Bi-Courtney Limited to, *inter alia*, reconstruct the International Airport in Lagos. It was conceptualized in 2003 and commissioned in 2007 at a total project cost of \$66 million.

<sup>xxxi</sup> *Op. cit. Edward Yescombe*, p. 31. It is a 340MW power-generation project valued at \$900 million. It was developed from an unsolicited bid in 2003, achieved financial close in 2014 and commenced commercial operations in 2017.

<sup>xxxii</sup> D Abah and PW Naankiel, 'Structural Adjustment Programme in Nigeria and its implications on Socio-Economic Development 1980-1995' [2016] (6)(2), *The Calabar Historical Journal*; 2-17 <[https://www.researchgate.net/publication/318755508\\_Structural\\_Adjustment\\_Programme\\_in\\_Nigeria\\_and\\_its\\_implications\\_in\\_nigeria\\_net\\_Socio\\_Economic\\_Development\\_1980-1995](https://www.researchgate.net/publication/318755508_Structural_Adjustment_Programme_in_Nigeria_and_its_implications_in_nigeria_net_Socio_Economic_Development_1980-1995)> accessed 15 October 2019.

<sup>xxxiii</sup> Public Enterprises (Privatization and Commercialization) No 38 of 1999 <<https://bpe.gov.ng/about/history>> accessed on 23 September 2019.

<sup>xxxiv</sup> Nigerian Vision 20:2010 <[http://www.nigerianstat.gov.ng/pdfuploads/Abridged\\_Version\\_of\\_Nigeria%20Vision%202010.pdf](http://www.nigerianstat.gov.ng/pdfuploads/Abridged_Version_of_Nigeria%20Vision%202010.pdf)> accessed on 23 September 2019.

<sup>xxxv</sup> Nigeria Vision 20:2020 – Economic Transformation Blueprint, <[http://www.nationalplanningcycles.org/sites/default/files/planning\\_cycle\\_repository/nigeria/nigeria-vision-20-20-20.pdf](http://www.nationalplanningcycles.org/sites/default/files/planning_cycle_repository/nigeria/nigeria-vision-20-20-20.pdf)> accessed on 23 September 2019.

<sup>xxxvi</sup> The reform culminated in the promulgation of the Electric Power Sector Reform Act 2005, <<https://lawsfnigeria.placng.org/laws/E7.pdf>> accessed on 14 October 2019.

<sup>xxxvii</sup> Nigeria Integrated Infrastructure Master Plan 2014 <[https://www.niimp.gov.ng/?page\\_id=991](https://www.niimp.gov.ng/?page_id=991)> accessed on 23 September 2019.

<sup>xxxviii</sup> Economic Recovery and Growth Plan (ERGP) 2017-2020 of 2017 <<https://yourbudgit.com/wp-content/uploads/2017/03/Economic-Recovery-Growth-Plan-2017-2020.pdf>> accessed on 16 October 2019.

<sup>xxxix</sup> National Policy on Public Private Partnerships <<https://estateintel.com/app/uploads/2016/05/National-Policy-on-Public-Private-Partnership.pdf>> accessed on 23 September 2019.

<sup>xl</sup> The Executive Order, s. 5.

<sup>xli</sup> KR Meyer, 'Executive Orders and Presidential Power' [1999] (61), *The Journal of Politics*, 445 quoted in Elijah Oluwatoyin Okebukola and Abdulkarim A Kana, 'Executive Orders in Nigeria as valid Legislative Instruments and Administrative Tools' [2012] (3), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 59 <<https://www.ajol.info/index.php/naujilj/article/download/136320/125810>> Accessed 5 June 2020.

<sup>xlii</sup> P. Raven-Hansen, 'Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291' [1983] (1983) *Duke Law Journal* 285-286 quoted in Elijah Oluwatoyin Okebukola and Abdulkarim A Kana, 'Executive Orders in Nigeria as valid Legislative Instruments and Administrative Tools' [2012] (3), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 59 <<https://www.ajol.info/index.php/naujilj/article/download/136320/125810>> Accessed 5 June 2020.

<sup>xliii</sup> Elijah Oluwatoyin Okebukola and Abdulkarim A Kana, 'Executive Orders in Nigeria as valid Legislative Instruments and Administrative Tools' [2012] (3), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 59 <<https://www.ajol.info/index.php/naujilj/article/download/136320/125810>> Accessed 5 June 2020.

<sup>xliv</sup> *Attorney General of Abia State & Ors v Attorney General of the Federation* (2003) 4 NWLR (Pt. 809) 124 @ 150 [F-C].

<sup>xlv</sup> *INEC v Balarabe Musa* (2003) 3 NWLR (Pt. 806) 72. The Supreme Court held that any guideline stipulated by INEC outside the conditions prescribed in the constitution is null and void provided that such guidelines are not procedural, evidential or purely administrative (p. 44-45, paras E-C).

<sup>xlvi</sup> *Unongo v Aper Aku* (1983) 2 SCNLR 332 @ 361.

<sup>xlvii</sup> KR Meyer, 446.

xlviii Cap C21, LFN 2004

xlix Cap. F13, LFN 2004.

<sup>1</sup> Ibid, Federal Highways Act, s. 1.

<sup>li</sup> s. 5(1), CFRN

<sup>lii</sup> *Op Cit.*, Elijah Oluwatoyin Okebukola and Abdulkarim A Kana

<sup>liii</sup> Ibid.

<sup>liv</sup> Ibid.

<sup>lv</sup> (2003) 4 NWLR (Pt 809) 124 @ 177 para F

<sup>lvi</sup> Cap C21, LFN 2004

<sup>lvii</sup> Ibid, s. 23(3).

<sup>lviii</sup> Ibid.

<sup>lix</sup> (2009) LPELR-8191 (CA)

<sup>lx</sup> *Best Children International Schools Limited v FIRS* (2018) LPELR-46727 (CA).

<sup>lxi</sup> Teju Somorin, 'Tax Exemptions under the Nigerian Tax Laws', *Business Day Newspaper* (Lagos, 16 March 2016) <<https://businessday.ng/personal-finance/article/tax-exemptions-under-the-nigerian-tax-laws/amp/>> Accessed on 30 May 2020.

<sup>lxii</sup> supra.

<sup>lxiii</sup> Ibid, s. 1(3).

<sup>lxiv</sup> World Bank, PPP Legal Research Centre, 'What are Public Private Partnerships?', <<https://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships/>>. Accessed 03 January 2020.

<sup>lxv</sup> Canada Council for Private Partnerships, (n. 15)

<sup>lxvi</sup> Executive Order, s. 5; and sch. 2, parties clause of the Indicative MOU.

<sup>lxvii</sup> Adekilekun Mubarak Tijani, 'Legal And Regulatory Framework For Public-Private Partnerships In Infrastructure Development: A Case Study Of Three African Models And Core International Frameworks' (PhD thesis, University Of Kuala Lumpur 2014), 39 <[http://studentsrepo.um.edu.my/4615/1/Adekilekun%2C\\_M.T\\_Thesis.pdf](http://studentsrepo.um.edu.my/4615/1/Adekilekun%2C_M.T_Thesis.pdf)>. Accessed 03 December 2019.

<sup>lxviii</sup> Ibid, 43.

<sup>lxix</sup> Infrastructure Concession Regulatory Commission, *The National Policy on Public Private Partnership* [July 2009], 11 <<https://estateintel.com/app/uploads/2016/05/National-Policy-on-Public-Private-Partnership.pdf>> Accessed 09 April 2020.

<sup>lxx</sup> The Executive Order, sch. 1.

<sup>lxxi</sup> The Executive Order, sch. 2.

<sup>lxxii</sup> Ibid, s. 3(1).

<sup>lxxiii</sup> Ibid, s. 4(3).

<sup>lxxiv</sup> Ibid, s. 4(4).

<sup>lxxv</sup> Ibid, s. 4(12).

<sup>lxxvi</sup> There are three types of tax credit, namely, refundable, nonrefundable and partially refundable tax credits.

<sup>lxxvii</sup> CFRN, Sections 299 and 301.

<sup>lxxviii</sup> *AG of the Federation v AG of Lagos State* (2013) LPELR-20974 (SC).

<sup>lxxix</sup> See *Attorney General of Lagos State v Attorney General of the Federation* (2003) 12 NWLR (pt. 833) 68, where Uwaifo JSC held that residual matters are within the exclusive legislative competence of House of Assemblies of States and in which the National Assembly lacks such legislative powers. (para C-F).

<sup>lxxx</sup> Constitution of Federal Republic of Nigeria 1999 (CFRN), S. 4(7).

<sup>lxxxi</sup> CFRN, s. 162: "(1) *The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, ...;*" and "(3) *Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each State on such terms and in such manner as may be prescribed by the National Assembly.*"

<sup>lxxxii</sup> Used as the enabling power under section 23(2) of CITA.

<sup>lxxxiii</sup> Used in the text of the Executive Order.

<sup>lxxxiv</sup> See section 4(12) of the Order

<sup>lxxxv</sup> *Attorney General of Abia State & Ors v Attorney General of the Federation* (2003) 4 NWLR (Pt. 809) 124 @ 163-164, [F-A].

<sup>lxxxvi</sup> Cap. L4, LFN 2004.

<sup>lxxxvii</sup> Cap. F13, LFN 2004.

lxxxviii (2009) LPELR-8191 (CA).

lxxxix Cap. C21, LFN 2004.

xc (2003) 4 NWLR (Pt. 809) 124.

xc<sup>i</sup> Cap. P44, LFN 2004.

xc<sup>ii</sup> No. 18 of 2005.

xc<sup>iii</sup> No. 31 of 2007.