1.0 Introduction

Nigeria has a huge infrastructure deficit and securing infrastructure finance becomes critical to accelerating infrastructure development, which underscores the need for an appropriate regulatory environment in attracting long term investment within the infrastructure space.

In 2014, the federal government estimated in its National Infrastructure Integrated Master Plan (NIIMP) that Nigeria needed as much as $3.0 trillion over 30 (Thirty) years to close its infrastructure gap and meet the international benchmark for infrastructure stock.

The consensus has always been that it is not the lack of infrastructure finance that impedes investment but the lack of bankable projects, lack of policy commitment, lack of strong enforcement regime and a number of other structural problems which makes it difficult for investors to get value for money.

In addressing the financing gap, the most effective approach unarguably has been through the collaborative model of Public Private Partnership (PPP) in catalyzing infrastructure financing. Despite the increase in budgetary allocation for capital projects, mobilizing private capital remains fundamental to match the huge financing requirements in accelerating world-class infrastructure development in Nigeria.

Without a robust institutional and regulatory framework, the appetite for infrastructure investment with private capital will be weak, if not eventually dry up. Investment risks cannot be isolated from the institutional and regulatory environment underpinning project developments.

In order to assess the Nigerian environment for infrastructure investment, an analysis of the regulatory framework therefore becomes imperative. But first there will be need to identify the sources and nature of infrastructure finance.

2.0 Infrastructure Finance Through Budgetary Allocation

Traditionally the Nigerian government has been responsible for financing the implementation, operations, and maintenance of infrastructure projects through budgetary allocations but overtime this model has proven to be unsustainable. The budgetary resources from government to fund the infrastructure projects typically come from two major categories of sources: tax collection and public sector borrowings. Other sources come from aids and donations.
In 2017, capital projects received a budgetary allocation of N2.1 Trillion out of N7 Trillion, the highest so far in the history of budgetary allocation for capital projects in Nigeria. Thus, even if all the monies in the budget were allocated for infrastructure projects, the financing requirements for closing the infrastructure gap will not be enough. Globally public finance is increasingly being used to leverage private finance in case of infrastructure project funding.

Since government cannot single-handedly finance infrastructural development in Nigeria, it is necessary to consider viable alternatives under the public-private partnership.

2.1 Public Private Partnerships (PPPs):

Private sector provides financing to infrastructure projects using a wide range of financial instruments such as equity, debt and subordinated debt. Financing from these sources have important implications on a project’s overall cost, cash flow, ultimate liability and claims to the project incomes and assets.

Equity gives ownership interest of the common stockholders in the project to the provider of equity capital who has the last claim on project cash flows and project assets. Debt instruments obligate the borrower to make payment of specified amount(s) at a particular time.

The priority of claims on project cash flows and assets is senior to that of equity capital. Subordinated debt has an intermediate position between debt and equity regarding the priority of claim on project assets and cash flows. Regarding the return, equity capital has a comparatively higher return than debt. Subordinated debt return ranks in between the returns of debt and equity.

In Nigeria, the participation of private sector has been sought in various infrastructure projects. Governments have adopted innovative procurement routes like public private partnerships (PPPs) for involvement of private sector in the development of infrastructure projects. Various PPP models were successfully adopted to develop numerous infrastructure projects in Nigeria. These include the construction of the Lagos-Ibadan expressway, the Abuja light rail project, the second Niger Bridge, Inland Container Depots in Kebbi, Kogi, Anambra and Delta State, Lekki Toll Road in Lagos, Muritala Mohammed II Airport Project in Lagos, Tinapa Free Trade Zone in Cross River, the Lekki Deep Seaport, Lekki-Epe Expressway, Lagos among others.

Many government funded projects are actually Public Private Partnerships (PPP) projects, where sponsors generally organize a special purpose vehicle (SPV) or a concessionaire company to deal with lenders, investors, insurance providers, contractors and other parties especially government authority. Both parties then agree on the preferred project model which includes but is not limited to Service
Contracts, Operation and Management Contracts, Leases, Concessions, the Design-Build-Finance-Transfer (DBFT), Build-Operate-Own (BOO), Design-Build-Finance-Operate (DBFO) and the Build-Operate-Transfer (BOT) model which was the model adopted in the concessioning of the Lekki-Epe Expressway in Lagos State. These models and their variants often facilitate effective partnership between the public and private sector and where properly implemented, usually involve the effective identification, allocation and sufficient mitigation of risks involved in delivering the infrastructure project.

3.0 Framework For Public Private Partnership In Nigeria

The principles of the Public Private Partnership (PPP) framework are designed to achieve better value and affordable services. As expressed in the National Policy Document on PPP, there are economic, social and environmental objectives for the adoption of the PPP model as a strategy for infrastructure development. PPPs are seen as financial models that enable the public sector to make use of private finance capital in a way that enhances the possibilities of both the government and the private company.

4.0 Infrastructure Concession Regulatory Commission Act (ICRCA), 2005

The legal and regulatory frameworks provide the lynchpin for the entrenchment of PPP models in Nigeria. Typically, the regulatory environment encompasses the rules of procedure governing the way and manner institutions saddled with regulatory functions exercise their powers.

The Infrastructure Concession Regulatory Commission Act (ICRCA) was enacted by the Federal Government of Nigeria to provide the requisite regulatory and institutional framework within which all Ministries, Departments and Agencies (MDAs) of the Federal Government can effectively enter into partnership with the private sector in the financing, construction, operation and maintenance of infrastructure projects as provided for in the ICRCA.

The ICRCA establishes the Infrastructure Concession Regulatory Commission (ICRC) which is responsible for providing policy guidance and for preparing, procuring and implementing all federal PPP projects although it has no formal enforcement power over the Ministries, Departments and Agencies (MDAs), which remain responsible for contracting and implementing PPP agreements. The ICRC developed a PPP policy which provides the guidelines for MDAs intending to enter PPP agreements.
In light of evaluating the regulatory landscape for infrastructure finance, construction and development in Nigeria, it is pertinent to analyze the industry specific regulations relating to PPPs in order to ascertain the extent of an integrated or coherent regulatory architecture for PPPs in Nigeria.

5.0 Highways Act 1971

The Highways Act empowers the Minister of Transport to construct and operate toll gates and collect tolls on the Federal Highways. What this means is that in concessions of federal roads that require tolling, the authority lies with the Minister of Transportation in Nigeria. Unfortunately, the main infrastructure legislation, the ICRCA, does not contain a saving provision with regard to this piece of legislation, nor does it make a reference to the Highways Act. The challenge is that projects driven by the Ministry of Transport may likely suffer a change or discontinuation upon a new minister appointed, thereby stalling the sustainability of project delivery. It is pertinent to ensure a more concrete framework is in place to drive sustainability of projects beyond the tenor of the minister in office in order to strengthen the pipeline of successful project delivery.

6.0 Utilities Charges Commission Act 1992

Utilities Charges Commission Act 1992 established the Utilities Charges Commission that regulates tariff charged by public utilities in Nigeria. The implication of this is that the approval of the Commission may be required in fixing the tariffs between the private investor (concessionaire) and the Government. Like the law discussed above, the ICRCA does not contain a saving clause nor does it make a reference to the Utilities Charges Commission Act. Specific market understanding is critical to addressing tariffs or charges and a well-coordinated relationship between the ICRC and the Commission will be needed to address pricing conditions within the Utilities industry, in order to avoid price shocks or upheavals. A well-coordinated structure in fixing and addressing utility price can impact on the viability or bankability of projects. However under the Electric Power Sector Reforms, Act 2005, section 98(6) provides: “The provisions of the Utilities Charges Commission Act, 1992 as amended,

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shall not apply to any person to whom a license has been issued under this Act, in respect of the licensed activities of that person.”

The effect is that the tariff made pursuant to the provisions of the Utilities Charges Commission Act will be inapplicable to power sector projects in Nigeria. Despite the fact that the Nigerian Electricity Regulatory Commission (NERC) saddled with the task of fixing or determining the tariff of the Nigerian Electricity Supply Industry (NESI), there remains a lot to be done in achieving a cost reflective tariff which currently contributes to the liquidity crisis in the NESI. In order to incentivize private finance in the industry there is need for a framework and a well-coordinated model between the PPP unit of the ICRC and NERC in objectively determining a cost-reflective tariff removed from the vestiges of needless political interferences.

7.0 Bureau of Public Enterprises (Privatisation and Commercialisation) Act 1999

This Act only applies to the privatisation and commercialisation of public enterprises listed in the Act. The Act does not apply to “greenfield” projects but provides the legal framework for the privatisation programme in Nigeria.

It establishes the National Council on Privatisation (NCP) and the Bureau of Public Enterprises (BPE) as the supervisory and implementing agencies respectively for privatisation transactions. The NCP is charged with the responsibility for determining the assets of government which should be divested or privatized while the BPE which holds the public assets in trust for the Ministry of Finance until successfully sold or commercialized has the responsibility of implementing the approved policies of the NCP. However, the relationship between the BPE and the ICRC appear not to be clear, but the practice is that the ICRC is responsible for the coordination, facilitation of PPP projects initiated by the NCP and the BPE. In order to drive increased and sustained private investment in public assets, there is need for a framework that defines the respective roles of ICRC and BPE in a way that deploys the technical support of ICRC in facilitating private sector engagement in project delivery.

8.0 Debt Management Office Act

The Debt Management Office (Establishment, c.t.c) Act was enacted to establish the debt management office (DMO) which among other things, is responsible, for the preparation and implementation of a plan for the efficient management of Nigeria’s external and domestic debt
obligations at sustainable levels compatible with desired activities for growth, development and participation in negotiations aimed at realizing the objectives.

The DMO supervises the money and capital markets by ensuring that the two segments of the financial sector work perfectly together and develop the range of appropriate instruments that are needed to hedge financial risks in the PPP projects. By virtue of section 6 of the DMO Act, all PPP processes that involve Federal Government borrowings and guarantees and other long-term contingent liabilities must be approved by the DMO.

Part of the DMO's mandate is to be satisfied that any contingent liabilities are manageable within the government's economic and fiscal forecast. To this end, the DMO advises the FEC as part of the approval process for individual projects. The project teams consult the DMO for approvals before involving the multilateral agencies such as International Finance Corporation (IFC), Multilateral Investments Guarantee Agency (MIGA) or International Development Agency (IDA) for provision of guarantees or other financial instruments.

9.0 Electric Power Sector Reforms Act, 2005

The electric power sector being critical to unlocking economic growth prospect, the Nigerian government signed the Electric Power Sector Reforms Act (EPSRA) 2005 into law on 11 March 2005, which provided the statutory framework for participation of private companies in electricity generation, transmission, and distribution. Specifically, the EPSRA provides for the formation of companies to take over the functions, assets, liabilities and staff of the defunct National Electric Power Authority (NEPA). The EPSRA also makes provision for the licensing and regulation of the generation, transmission, distribution and supply of electricity.

The EPSRA also established the Nigerian Electricity Regulatory Commission (NERC) as the regulator for the Nigerian Electricity Supply Industry (NESI). Following the privatization exercise of the NESI, some of the power infrastructure assets held by the federal government through BPE have now been relinquished to private sector operators with some generation facilities fully owned by the private investors and distribution networks partially owned at ratio of 60:40 between the private sector and the government respectively, thereby underlying the synergy between government and the private sector in deploying the PPP model. The NESI is currently undergoing reforms, given the historic neglect it has suffered and the dearth of expertise within the sector. Therefore, it is important that capacity development is well undertaken to build a pipeline of bankable projects within the NESI. It
is also pertinent that the role of government through the NERC, BPE, and ICRC are coordinated to make the investment space more attractive for private finance. Although in making the NESI attractive for private capital investment, the government has attempted to address the issue of credit worthiness of the off-taker by establishing Nigerian Bulk Electricity Trading Company Plc. (NBET), which is supported by the World Bank Partial Risk Guarantee (PRG) instrument, government needs to sustain partnerships with the International Development Finance Institutions (IDFI) in drawing the needed technical and financial support for accelerating project delivery within the NESI. Credible relationships between the Nigerian government and the IDFI can enhance project bankability and leverage private finance around infrastructure projects.

10.0 Lagos State Public Private Partnership Law, 2011

Lagos State is the only government amongst the State governments of Nigeria with infrastructure-related laws. The main infrastructure law in Lagos State is the Lagos State Public Private Partnership Law (LSPPP Law) which was enacted and signed into law on the 24 June 2011. The LSPPP Law, in the main, encompasses in one document the framework for PPPs; capturing the entire infrastructure spectrum in all facets of the economy, compared to its predecessor which was limited to roads, bridges and highways as suggested by the title of the law. The state has been at the vanguard of promoting the use of private finance for infrastructure.

An interesting and pioneering PPP supported by Lagos state which attracted $290 million of private investment from both local and international investors was the Lekki-Epe toll road project. It demonstrated that a green field toll road project was capable of attracting private finance.

11.0 Challenges To Attracting Private Finance

The challenges to attracting private finance in infrastructure projects would typically be around macroeconomic instability, political risk and inadequate structures to address disputes. The macroeconomic environment in Nigeria makes borrowing from Nigerian Banks expensive as interest rates are reportedly very high with a double-digit inflation rate, thus making it unlikely for commercial banks to provide affordable long-term finance to investors. According to Central Bank of Nigeria (CBN), saving deposit rates are around 3-4%, while loans are given out to most sectors at over 20%. The challenge is that since interest rates offered by banks for local currency debt to support infrastructure investments are too high, project developers tend to depend on US dollar/Euro debt,
which exposes the project to significant exchange rate risks given that the project cash flows are typically generated in local currency. Wary investors may not be inclined to follow this route at being exposed to significant exchange rate risks arising from microeconomic instability unless there is some form of hedging comfort, thus generally limiting private finance in supporting infrastructure development in Nigeria. Participation of Development Finance Institutions (DFIs) in providing the technical and credit enhancement support needed to catalyze private finance in projects can go a long way in making projects bankable. The government of Nigeria has the responsibility to put in place an attractive regulatory environment in the NESI. The much needed credit enhancement within the NESI can attract private finance and develop sustainable delivery of a pipeline of bankable projects within the NESI.

The proclivity of policy inconsistency within a country would unarguably constitute a disincentive to private sector investment and a political risk that private investors would take into account before providing finance for investment. A political risk would typically be around policy reversal caused by change in government or ministers within government or change of applicable law which poses a big disincentive to attracting private capital investment. For example the cancellation of the Lagos-Ibadan expressway concession and the Lagos International Airport concession clearly demonstrate government’s failure to stick to policy commitment, thereby undermining the confidence of private investors to show willingness in participating in infrastructure financing and investment.

The absence of a world-class dispute resolution mechanism within a country constitutes a bulwark to private investment in infrastructure projects. Communal disputes when not well managed can undermine the interest of private participation in infrastructure financing, an example of which was the delay in the negotiation process of the Lekki toll road concession which was attributed to communal resistance to the project within the state, thus making it imperative for projects to have community buy-in for successful service delivery. Closely related is the assurance that the sanctity of contracts will be enforced by a world-class judicial system that is effective and efficient. An example of a project which sent an unpleasant signal to wary investors is the way the federal government ignored a court order in favour of the concessionaire in the Murtala-Mohammed Airport Terminal 2 concession project. Private investors are usually wary of the Nigerian judicial process and therefore would typically opt for a dispute resolution process outside the province of Nigeria under PPP arrangements.
12.0 Conclusion

The regulatory framework for Public Private Partnership (PPP) in Nigeria remains fragmented which makes the entire investment environment within the infrastructure space unclear in a way that accounts for the lack of a sustained pipeline of successful project delivery. Although the infrastructure market space is still evolving, a more coherent legal architecture which underpins the PPP framework in Nigeria will go a long way in strengthening the legal landscape for private finance in the nation’s infrastructure assets. Rather than creating impediments to infrastructure project delivery, the policy, institutional and regulatory framework should be orchestrated to accelerate a pipeline of successful infrastructure project delivery in Nigeria, which is needed to match the deficit in the infrastructure market space. That way the policy, institutional, regulatory and public finance environment would be able to leverage and catalyze the huge private capital needed to address the infrastructure deficit in Nigeria.

Going forward, it is pertinent to underscore that with the government’s commitment to setting up the right policy, legal and regulatory environment, coupled with designing projects that are bankable with the support of International Development Finance Institutions (IDFIs), private sector appetite for infrastructure investment will increase. This would result in the flow of the required financial resources needed to build and upgrade critical public infrastructure in the Nigeria infrastructure market space thus sustaining private sector confidence for Public Private Partnership (PPP) projects to work in Nigeria.