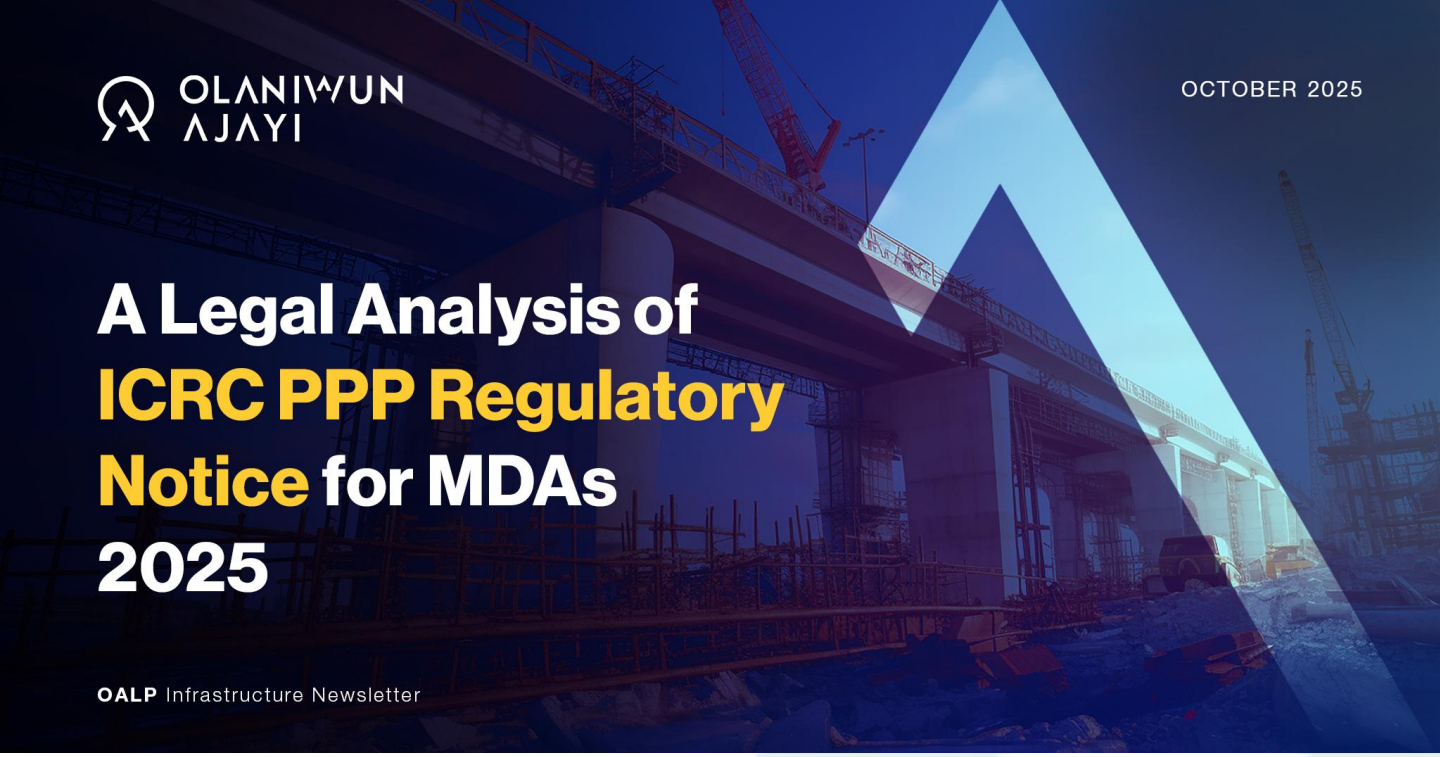

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OCTOBER 2025

A Legal Analysis of ICRC PPP Regulatory Notice for MDAs 2025

OALP Infrastructure Newsletter

INTRODUCTION

The President, acting pursuant to Section 33 of the Infrastructure Concession Regulatory Commission Act (the **ICRC Act**)[1], has authorized the issuance of a new regulatory notice (the **Notice**) directed at Federal Government Ministries, Departments and Agencies (**MDAs**), which introduces a set of revised financial approval thresholds for PPP projects to be undertaken by any federal MDA involved in the financing, construction, operation or maintenance of infrastructure in the country (the **Approved Thresholds**).

HIGHLIGHTS OF THE NOTICE

Essentially, the Notice introduces significant changes to the approval process for PPP projects currently in the pipeline that have not yet secured approval, and for all future PPP projects in Nigeria. Under this new regime, and in a deviation from what is obtainable under the ICRC Act where the Federal Executive Council (**FEC**) is the sole approving authority for PPP projects at the federal level, approval powers have now been delegated to ministerial and agency level Project Approval Boards (**PABs**) for projects within specified financial thresholds.

Specifically, projects valued at less than ₦20 billion may now be approved at the Ministerial PAB level, while projects valued at less than ₦10 billion may be approved at the Agency PAB level. However, projects that exceed these limits, or projects that involve multiple MDAs, will still require the approval of the FEC.

Approved Thresholds

S/N	MDAs	PROJECT COST	APPROVING AUTHORITY
1.	Ministries, Departments and Agencies (MDAs)	Above ₦20,000,000,000.00 (Twenty Billion Naira)	FEC
2.	Ministries	₦20,000,000,000.00 (Twenty Billion Naira) and below	The Project Approval Board (PAB) of the Ministry
3.	Parastatals/ Agencies	Above ₦10,000,000,000.00 (Ten Billion Naira) but below ₦20,000,000,000.00 (Twenty Billion Naira)	The Project Approval Board (PAB) of the Supervisory Ministry
4.	Parastatals/ Agencies	₦10,000,000,000.00 (Ten Billion Naira) and below	The Project Approval Board (PAB) of the Parastatal/ Agency
5.	MDA	Any project that requires more than one agency to implement	FEC

1. *Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act 2005 (the ICRC Act)*

APPLICABILITY OF THE APPROVED THRESHOLDS NOTICE AND ITS STATED OBJECTIVES

PPP projects currently under development but which have not yet obtained FEC approval prior to the issuance of the Federal Government of Nigeria Circular (SGF Ref. No. 59804/II243) dated 7 July 2025 will, from the commencement of that Circular, now fall under the scope of the newly introduced Approved Threshold regime as set out in the Table above.

Beyond the change in approval thresholds, the Notice introduces several other significant provisions that will have a material impact on the development, implementation, and monitoring of PPP projects in Nigeria. One of the most critical is the requirement for full private sector financing. Under the new Approved Threshold regime, all projects must be entirely funded by the private sector, with no recourse to government financial support. This means project proponents can no longer rely on, or request government guarantees, comfort letters, or direct public funding, but must ensure that all financing is mobilized independently from private sources, which may be problematic and deter investment, given the Nigerian social and economic context.

Additionally, all PPP Agreements shall be executed only by the Project Owners (MDAs), as Grantors, to ensure sustainable service delivery, since PPPs are time-bound and require a hand-back of the project at the end of the concession period. The Infrastructure Concession Regulation Commission (the **ICRC** or the **Commission**) will continue to play a significant role in PPP Projects, notwithstanding the Approved Thresholds. Significantly, the ICRC is mandated to lead project negotiations and conduct due diligence on all prospective PPP partners. It must also issue the ICRC Certificate of Compliance for every PPP project, which is a prerequisite for approval by either the FEC or the PABs of the respective MDAs. Further, the ICRC is responsible for keeping custody of executed PPP agreements, approving any proposed changes to project terms and conditions, and preparing and submitting periodic reports to the President on the performance and status of PPP projects nationwide.

This is largely consistent with the provisions of the ICRC Act which mandates the ICRC to take custody of every concession agreement, monitor compliance and efficient execution of the concession agreement, generally ensure compliance with the provisions of the ICRC Act and perform such other duties necessary to ensure efficient performance of the Commission under the ICRC Act.[2]

THE MANDATE OF THE ICRC ACT VS. THE NOTICE

The most severe red flag flaw of this Notice is its direct conflict with the ICRC Act, which is the principal legislation governing PPPs in Nigeria. The notice, as a subsidiary legislation, attempts to override the primary legislation governing concessions by the Federal Government in Nigeria. The Notice does this by attempting to alter the procedure for approval of concessions by the FEC as stipulated in the ICRC Act, by directing that the PABs take up this responsibility.

Specifically, Section 2(1)–(2) of the ICRC Act makes clear that while MDAs may identify and prioritize infrastructure projects for concession, such projects must ultimately be submitted to the FEC for approval before any contract is entered into.

The ICRC Act clearly vests final approval of PPP projects in the FEC, with the ICRC acting as regulator. By attempting to confer approval powers on PABs, the Notice departs from this statutory framework and risks being ultra vires.

While it may be argued that the ICRC Act by sections 33 and 34 which states that:

i. the Commission may, with the approval of the President, make such regulations as in its opinion are necessary or expedient for giving full effect to the provisions of the Act and for the due administration of its provisions; and
ii. Without prejudice to the generality of Subsection (1) of this Section, the Board may issue guidelines to give full effect to the provisions of this Act.

envisages the possibility of delegated authority and could presuppose that this Notice is anchored on the powers of the President further to sections 33 and 34 of the ICRC Act, the fact still remains that this Notice at best only constitutes a subsidiary legislation.

In the words of Mukherjea, J. 'Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists[3]…'

2. *Section 20 of the ICRC Act*
3. *(2012) LPELR-1812SC*

The ICRC cannot through a guideline (which this Notice purports to be), reassign or dilute the statutory "approval' power conferred on the FEC by the ICRC Act to another body (the PABs). The Notice thus sits on a fragile footing to the extent that it overreaches and treats PABs as the final approving authority for projects that the Act requires be submitted to the FEC.

It is trite that a subsidiary legislation must conform to the scope and intent of the principal legislation under which it is made. Where a subsidiary instrument purports to expand, contradict or derogate from the provisions of its enabling statute, it is invalid to the extent of such inconsistency. As further affirmed in **NNPC & ANOR v FAMFA OIL LIMITED**[4], a subsidiary legislation cannot override the principal law, and Section 34(1) of the ICRC Act only permits the ICRC to issue administrative guidelines, not to alter statutory responsibilities.

The Proper Legal Channel

By virtue of legislative supremacy, only the National Assembly can amend the ICRC Act, as expressly provided under section 4(2) of the Constitution of the Federal Republic of Nigeria (as amended) (CFRN). Accordingly, where the Federal Government identifies regulatory challenges at the FEC level, the legally prescribed approach would be to seek an amendment to the ICRC Act rather than attempting reform through subsidiary legislation

Such an amendment could formally establish PABs, redefine the ICRC's role for smaller projects, and provide safeguards such as an appeals process to limit litigation risk.

By contrast, introducing changes through a regulatory notice creates significant legal uncertainty. Nigerian courts have consistently held that a statute cannot be amended or repealed by subsidiary legislation, as seen in, *Godwin Ugwuanyi V. NICON Insurance Plc*[5], the courts affirmed that subsidiary instruments must conform with their parent Act or risk being declared void.

On this basis, the Notice's attempt to reassign the FEC's statutory approval powers to PABs is ultra vires and risks nullification if challenged.

Determination of Project Costs

A further point of concern is in establishing how the project cost threshold will be benchmarked. There is ambiguity as to whether the project cost threshold referenced in the Notice should be interpreted with reference to the intrinsic value of the underlying assets, or the value of the anticipated improvements to be done by the concessionaire to the project assets or whether it is tied to the value of the concession arrangement itself, such as concession fees, lease rentals, or other government revenue streams expected under the arrangement.

The ICRC Act[6] already points to an authenticated project cost in the Outline Business Case process for example, certified by an independent, accredited technical and financial adviser, and reconciled with the project financial model, but the Notice does not expressly spell out this methodology. A precise approach is therefore necessary to avoid regulatory ambiguity in establishing the metrics for determining the value of the project cost thresholds introduced by the Notice.

THE "NO GUARANTEE" CLAUSE: A DOUBLE-EDGED SWORD

The directive in the Notice[7] that projects to be implemented "under the current threshold" must now be fully financed by the private sector without recourse to any form of guarantee, comfort letters, or government funding, is a bold attempt to mitigate fiscal risk on the government's side.

Given the broad language used in the Notice and the inclusion of projects to be approved by the FEC in the threshold table, there is a seeming ambiguity, and it is quite unclear if the above provision amounts to an outright prohibition on guarantees for all concessions or strictly for concessions to be approved by the PABs.

The ICRC Act originally provides that no MDA or Federal Government body shall give any guarantee, letter of comfort, or undertaking in respect of any concession agreement made pursuant to this Act, except with the approval of the FEC[8].

In other words, the Act (as is) does not categorically prohibit such guarantees; rather, it subjects them to the highest level of executive oversight to prevent abuse while still allowing flexibility where a project's strategic importance or risk profile justifies limited government support.

4. *((2012) LPELR-1812SC*
5. *(2004) 15 NWLR (Pt. 897) 612*
6. *Section 8 of the ICRC Act*
7. *Clause 3.2 of the Notice provides that "all the projects to be implemented under the current threshold regime shall be executed on the basis that the private sector would fully finance the project without recourse to any form of guarantee, comfort letters or government funding".*
8. *Section 3 ICRC Act.*

Against this backdrop, a blanket restriction would be difficult to justify. First, the ICRC Act does not impose a categorical ban; it permits guarantees with FEC approval. Second, the only restriction that coherently aligns with the Act and institutional roles is a prohibition at the PAB level, i.e., no guarantees or comfort undertakings for projects approved solely by PABs since FEC is not involved in those approvals, and the Federal Government should not be bound to credit support that its highest decision-making body has not sanctioned.

Moreover, restricting guarantees and other forms of credit support at PAB levels may inadvertently deter investment in smaller or mid sized projects that often require limited, targeted enhancements to achieve bankability. In practice, PPPs are not "one size fits all"; calibrated support instruments are frequently necessary to allocate risk efficiently and attract competitively priced capital.

It would therefore be helpful for the ICRC to issue clarificatory guidance on the implementation of the Notice—particularly on whether the prohibition applies only to PAB approved concessions—so that potential investors do not misinterpret the regime and prematurely discount otherwise viable projects.

Outrightly prohibiting government support will deter investment in projects that are otherwise viable but require limited forms of credit enhancement or fiscal support. This undermines the very objective of the nation's PPP advancements, which is to mobilise private investment in public infrastructure.

CONCLUSION

While the Notice seeks to fast-track infrastructure delivery, it suffers from serious legal flaws by delegating approval powers that the ICRC Act reserves for the FEC. To avoid invalidating future PPPs, implementation should be paused until the Act is properly amended to clarify the role of PABs.

The Notice's restriction of guarantees and government support to projects requiring FEC approval ensures that MDAs cannot unilaterally commit the government financially. This safeguard promotes fiscal discipline but may also discourage investment in socially critical yet commercially marginal projects. A better approach would be for the FEC to allow such support on a case-by-case basis, consistent with global best practice.

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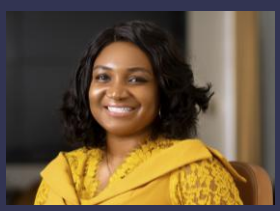

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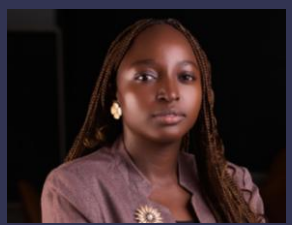

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