



JUST BEFORE YOU CLOSE THAT DEAL!

AVOIDING LAND MINES IN BUSINESS REGULATORY COMPLIANCE IN NIGERIA

INTRODUCTION

With the return of democracy to Nigeria in 1999, the civilian government was determined to chart a new economic path for Nigeria and grow the economy at a much faster rate and had to woo foreign investors in to the country, bearing in mind that the economic climate in Nigeria was not business friendly.

The foreign investors sensing the determination of the government to restore the economy on a sustainable growth path started trickling in to the country. Alas, they were here and realized that the business climate was still hostile, the issues confronting them ranged from bribery of public officials, corruption, bureaucracy, red-tapism and administrative bottlenecks,

The corruption index of Nigeria on global ratings/index was at an all time high; In 2000 Nigeria was rated as the most corrupt nation in the world out of a total of 90 countries. In 2001, Nigeria was rated the second most corrupt nation out of a total of all 91 countries assessed. In 2002 Nigeria retained its number two position as the most corrupt country out of a total of 102. Though by 2005 Nigeria was ranked number six out of 186 countries.¹

The government realizing that this did not only affect the nation's image but also dissuaded foreign investors from doing business in Nigeria, eventually sponsored an Anti corruption bill providing for specialized agencies of government that will be responsible for checkmating all forms of economic and financial crimes,

¹ Transparency International Report

The Independent corrupt practices and other related offences commission (ICPC)² and Economic and financial crimes commission (EFCC) were set up to fight corruption.³

The Economic and Financial Crimes Commission (EFCC), and Independent Corrupt Practices Commission (ICPC) are mandated to prosecute all forms of business, economic and financial crimes.⁴

KEYS SECTIONS OF THE ICPC

The ICPC can investigate or prosecute any person, Blue chip⁵ company or corporation who receives anything which has been obtained by means of act constituting a felony or misdemeanor, or by means of any act done at a place outside Nigeria.⁶

The ICPC Act states that

persons⁷ with intent to defraud or conceal a crime or frustrate the Commission in its investigation of any suspected crime of corruption either

² Section 6 of corrupt practices and other related offences act 2000

³ Section 6 of Economic and financial Crimes Commission Act 2004

⁴"Section 46 of Economic and financial crimes commission Act 2004, Economic and Financial Crimes" means the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.;

⁵ A nationally recognized, well-established and financially sound company. Blue chips generally sell high-quality, widely accepted products and services. Blue chip companies are known to weather downturns and operate profitably in the face of adverse economic conditions, which helps to contribute to their long record of stable and reliable growth

⁶ Section 13 of Corrupt Practices and other related offences Act 2000

⁷ "Person" includes a natural person, a juristic person or anybody of persons corporate or incorporate;

by destroying, alteration, mutilation, or falsification of any book, documents, valuable security, account, computer system, diskette, computer printout or other electronic device has committed an offence.⁸

The Act also bars any form of soliciting, gratification by persons⁹ for contract, award, recognition or advantage in favor of any person. The Act Further states that any form of solicitation, inducement or reward for refraining or having refrained from bidding at any auction conducted by or on behalf of any public body, by any person is an offence.¹⁰

For individuals, companies and multinationals coming to do business in Nigeria, they need to be well aware of the provisions of this laws as it relates to their business interest and also avoid the pitfalls/landmines associated with bribery and corrupt practices, the provisions above states some of the offences that Multinationals and foreign companies must avoid, lest they may face prosecution.

The ICPC Act tends to focus more on public officials and their relationship with individuals, corporations, blue chip companies and multinationals while carrying out their day to day job of executing government policies.

KEY PROVISIONS OF THE EFCC ACT

The EFCC is conferred with the powers to investigate economic and financial crimes covering several issues such as bank frauds, tax evasion, capital market fraud, future market fraud and illegal bunkering.¹¹

⁸ Section 17 of corrupt practices and other related offences Act 2000

⁹"Person" includes a natural person, a juristic person or anybody of persons corporate or incorporate;

¹⁰ Section 21 of corrupt practices and other related offences act 2000

¹¹ Section 47 Economic and financial crimes commission Act 2004

The EFCC has jurisdiction to prosecute offenders that are in contravention of any of the following legislations and also enforcing the provisions of –

- (a) The Money Laundering Act 2004; 2003 No.7 1995 NO. 13*
- (b) The Advance Fee Fraud and Other Fraud Related Offences Act 1995;*
- (c) The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994, as amended;*
- (d) The Banks and other Financial Institutions Act 1991, as amended;*
- (e) Miscellaneous Offences Act*
- (f) Any other law or regulations relating to economic and financial crimes, including the Criminal code of penal code ¹²*

The Commission (EFCC) also has special power to –

- (a) cause investigations to be conducted as to whether any person, corporate body or organization has committed any offence under this Act or other law relating to economic and financial crimes*
- (b) Cause investigations to be conducted into the properties of any person if it appears to the commission that the person's lifestyle and extent of the properties are not justified by his source of income; ¹³*

It is pertinent to state that the Attorney General of the Federation may make rules or regulations with respect to the exercise of any of the duties, functions or powers of the Commission under this Act¹⁴

¹² Section 7(2) Economic and financial Crimes Commission Act 2004

¹³ Section 7(1) Economic and financial crimes commission Act 2004

¹⁴ Section 43 of the Economic and financial crimes commission Act 2004

CRIMINAL ACTIONS IN COMPETENT COURT OF LAW.

Flowing from the above, criminal proceedings may be instituted in courts that are vested with criminal jurisdiction only in the ways prescribed by law. Criminal proceedings may be initiated by the drafting and filing of charges in the state high courts in the northern states, while in the state high courts of the south criminal proceedings are initiated by drafting and filing of information.

Before the EFCC can prosecute any criminal case in a court of law the fiat of the Attorney General must first be sought and obtained for cases where the sums of money involved is above (Fifty Million Naira) ₦50,000,000.00 pursuant to gazetted regulations.

The constitution confers appellate jurisdiction on the Court of Appeal to the exclusion of any other court, appeals lie from the Federal High Courts, High Court of the federal capital territory and state high courts.

The Supreme Court is the apex court in Nigeria and the court of last resort. It has no original criminal jurisdiction, it has jurisdiction to the exclusion of every other court of law in Nigeria to hear and determine appeals from the court of appeal¹⁵.

It is trite law that he who asserts must prove. The prosecution must prove the commission of the alleged offence of which accused person is charged beyond reasonable doubt. The burden of proving affirmative defences is shifted to the defendant.

The Evidence Act provides that the commission of a crime by a party to any criminal proceeding must be proved beyond reasonable doubt¹⁶. The judge or justices sitting on the case determines whether the party has satisfied its burden of proof.

¹⁵ Section 230 of the 1999 constitution

¹⁶ Section 138 Evidence Act

CORPORATE AND INDIVIDUAL LIABILITIES

Further to being arraigned in a competent court of law, there are individual/entity liabilities for criminal conducts, An employee/individual's conduct will be imputed where employee/individual does or omits to do any act with respect to the property of the company which if he were not a member of the company would constitute an offence, employee will be criminally responsible to the same extent as if he were not such member.

There are personal liabilities where the individuals become accessories before or after the crime as alter egos of their company where there is proof of connivance, consent, error, neglect, or omission attributable to a company officer there will be personal liabilities

The ICPC Act provides for cases where individual culpability is alleged. The Act provides that:

where persons¹⁷ whether within or outside Nigeria, directly or indirectly, or on behalf of himself or any other person, enters into, or causes to be entered into, any dealing in relation to any property, or otherwise uses or causes to be used, or holds, receives, or conceals any property or any part thereof which was the subject-matter of an offence under sections 10,11, 13, 14, 15, 16) 17, 18, 19, and 20 shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding five (5) years.

The EFCC Act also has similar provisions for individual culpability. The EFCC Act provides that:

A person who whether by concealment, removal from jurisdiction, transfer to nominees or otherwise or otherwise retains the control of the proceeds of

¹⁷ Person" includes a natural person, a juristic person or anybody of persons corporate or incorporate

a criminal conduct or an illegal act on behalf of another person knowing that the proceeds is as a result of criminal conduct by the principal or Knowing that any property represents another person's proceeds of a criminal conduct, acquires or uses that property or has possession of it is guilty of an offence¹⁸.

CONCLUSION

Foreign Investors, companies, corporations have mostly settled utilized plea bargain agreements in criminal cases involving allegations of business, economic and financial crimes, Though Plea bargain agreements, in the strict sense of an agreement as to sentence, is not recognized under Nigerian Law it is being practiced. It is open for a defendant to agree with the prosecution to plead guilty on the basis of particular facts ('the basis of plea') and/or to agree to plead guilty to particular charges. Furthermore, in cases of serious or complex fraud, defendants may enter into agreements with the prosecution which include a joint submission as to sentence and forfeiture of assets.

However, a basis of plea is always subject to the approval of the court, which will consider whether it is fair and in the interests of justice. It is open to the court to reject a basis of plea where it does not represent a proper plea on the basis of the facts set out in the papers.

There are now a number of cases of plea bargain agreements in Nigeria by companies and multinationals with the government,

(a) Halliburton Co and Kellogg Brown & Root LLC (KBR) in Nigeria has paid \$35 million,

¹⁸ Section 17 Economic and financial crimes commission Act 2004



(b) Snamprogetti Netherlands BV and ENI paid \$32.5 million in Nigeria

(c) JGC Corp paid \$28.5 million in Nigeria.

(d) Julius Berger Nigeria Pic has paid \$29.5 million in Nigeria

(e) The Royal Dutch Shell Pic has paid \$10 million in Nigeria

(d) Siemens AG paid \$46 million ¹⁹

In all the cases highlighted above the companies/corporations entered in to plea bargain agreements with the government, and they now serve as precedents.

DISCLAIMER

It should be noted that the material in this publication is designed to provide general information only. It is not offered as advice on any particular matter, whether it is legal, procedural or other and should not be taken as such.

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¹⁹ Serap report