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The International Comparative Legal Guide to: Business Crime 2012

A practical cross-border insight
into business crime

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Nigeria

Adekunle Obebe



Dayo Adu



Bloomfield – Advocates & Solicitors

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The Nigerian Police, Independent Corrupt Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) prosecute business crimes. The EFCC is a specialised agency of the government saddled with the mandate to prosecute economic and business crimes. A police officer can prosecute a case at the magistrate court level.

The EFCC investigates economic and financial crimes covering several issues such as bribery, bank frauds, tax evasion, capital market fraud and illegal bunkering. There are no different enforcement authorities at national and regional levels. The agencies above are vested with enforcement authorities at both levels.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

The EFCC and the Nigerian police prosecute economic and financial crimes while the ICPC prosecutes crimes connected with bribery and corrupt practices. It must however be noted that most of the business crime prosecution is carried out by the EFCC.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Yes, there is civil and administrative enforcement against business crimes. The Investment and Securities Tribunal, which was set up by the Securities and Exchange Commission (SEC) to regulate public listed companies, also has the mandate to impose civil and administrative penalties against public quoted companies. The Central Bank of Nigeria (CBN) may also impose civil or administrative penalties against banks.

2 Organisation of the Courts

2.1 How are the criminal courts in Nigeria structured? Are there specialised criminal courts for particular crimes?

The courts of general criminal jurisdiction are magistrate courts,

State High Courts and the Federal High Court. Appeals from the State and Federal High Courts are heard in the court of appeal and in rare cases in the Supreme Court. There are no specialised criminal courts.

2.2 Is there a right to a jury in business-crime trials?

Nigerian law does not practice the jury system in either civil or criminal matters.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Nigeria to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and misrepresentation in connection with sales of securities

Under the Criminal Code Act it is unlawful for a person to publish any statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceal materials, recklessly make or publish dishonestly any statement, promise or forecast which is misleading, false or deceptive, or record or store in or by means of any mechanical, electronic or other device create information which he knows to be false or misleading in a material particular with intent to induce another person to deal in securities. Under the Investment and Securities Act (ISA), where an offence has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and liable to be proceeded against, or where it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer, shall also be deemed to be guilty of the offence and shall be liable to be proceeded against.

o Accounting fraud

Under the Criminal Code Act it is unlawful for any person, being a clerk or servant or being employed or acting in the capacity of a clerk or servant, to do any of the following acts with intent to defraud; destroy, alter, mutilate, or falsify any book, document, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him on account of his employer, or any entry in any such book or document, or is privy to omitting any material particular from any such book, document or account.

o Insider trading

Under the Investment and Securities Act and Companies and Allied Matters Act, it is unlawful for any person who is an insider of a company to buy or sell or otherwise deal in securities of the company which are offered to the public for sale or subscription if he has information which he knows is unpublished, price sensitive information in relation to those securities.

o Embezzlement

Under the EFCC Act, embezzlement is one of the crimes that the agency is mandated to investigate.

o Bribery of government officials

Under the ICPC Act, it is unlawful for any person to offer to any public officer, or being a public officer solicitor, counsel or accept any gratification as an inducement or a reward.

o Criminal anti-competition

There are no statutory provisions for criminal anti-competition.

o Tax crimes

Under the Personal Income Tax Act (PITA) and the Companies Income Tax Act (CITA), both provide that it is unlawful for any person or company to make any false statement or representation or unlawfully refuse or neglect to pay tax. The EFCC has also formed a special branch which is charged with investigation of tax crimes.

o Government-contracting fraud

Under the ICPC Act, it is unlawful for any person who, without lawful authority or reasonable excuse, offers an advantage to a public servant as an inducement to, or reward for, or otherwise on account of such public servant's giving assistance or using influence in, or having given the promotion, execution, or procuring of any contract with a public body for the performance of any work, the providing of any service, the doing of anything or the supplying of any article, material or substance.

o Any other crime of particular interest in Nigeria

Money Laundering

Under the Money Laundering (Prohibition) Act, it is unlawful to collaborate in concealing genuine nature or ownership of resources derived from illicit traffic in narcotics.

Advanced Fee Fraud

Under the Advanced Fee fraud and Other Fraud Related Offences Act, where an offence under the Act has been committed on the part of a director, manager or secretary or any officer of a body corporate, it is deemed that the officer and the body corporate are liable for the offence.

Offences under the Companies and Allied Matters Act (CAMA)

Under CAMA, there are various offences which may lead to criminal offences including failure to keep proper accounting records, insider trading and making false statements to auditors or regulatory bodies.

3.2 Is there liability for inchoate crimes in Nigeria? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

A person is guilty of attempting to commit an offence when a person, intending to commit an offence begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence he is said to attempt to commit.

It is immaterial except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete fulfilment of his intention is prevented by circumstances independent of his will or whether he desists from his own motion and from the further prosecution of his intention.

Finally, it is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence. The same facts may constitute one offence and an attempt to commit another offence.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

Yes, there are entity liabilities for criminal conducts. An employee's conduct will be considered to be carried out on behalf of the entity where the employee does or omits to do any act on behalf of the company which if he were not an employee of the entity would constitute an offence. The entity will be criminally responsible.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

Yes, there are personal liabilities where they 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.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

There is no preference that authorities expressly follow, however the weight of the crime and regulatory provisions determine whether to pursue either entity liability, personal liability or both.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

There are no limitation periods for the prosecution of criminal offences.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No they cannot.

5.3 Can the limitations period be tolled? If so, how?

There are no provisions for limitation periods to be tolled.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Investigations are generally initiated when there is a complaint or report to the police authorities. However, specialised agencies (ICPC and EFCC) commence investigations on the receipt of petition or complaints. There are no guidelines governing the government initiation of any investigation. Once it is suspected that a crime has been committed, the government may refer the case to the specialised agencies.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

Yes, there are formal mechanisms for cooperating with foreign prosecutors. Nigeria is a signatory to a number of treaties, bilateral and multilateral agreements with different countries. Nigeria is also a signatory to mutual legal assistance agreements that has to do with cross border crimes and business crimes i.e. United Nations convention against transnational organised crimes.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The EFCC and ICPC, by virtue of their enabling laws, have the power to invite any person to answer questions or produce documents relevant to an investigation. The EFCC may also arrest and detain any individual that fails to cooperate with the investigation.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

The EFCC and ICPC may issue an invitation to a company to produce documents. However, there must be reasonable grounds for suspecting that an offence has been committed and that the recipient of the invitation has relevant information. The agencies also have the power to raid a company under investigation and seize documents.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Nigeria recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Nigeria's labour laws protect personal documents of employees, even if located in company files?

It is often impractical to identify privileged material at the time of seizure, such that potentially privileged material may be seized, but

the agencies are obligated to return such privileged documents and if they fail to return the documents it cannot be relied upon at the trial of the matter.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

In the same circumstances as explained in question 7.2 above.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

In the same circumstances as explained in question 7.2 above.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The ICPC and EFCC have the power to invite an officer of a company to answer questions or submit to investigation. The agencies may also arrest the officers where they fail to cooperate with the investigators. The questioning can take place at the offices of specialised agencies.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The ICPC and EFCC have the power to invite any person that may have relevant information to answer questions or submit to investigation. The agencies may also arrest a third person where they fail to cooperate with the investigators. The questioning can take place at the offices of specialised agencies.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

A person interviewed can refuse to answer questions for whatever reason. The right to self-incrimination is a constitutional right. All persons have a right to be represented by a legal practitioner during questioning.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal Proceedings may be instituted in the 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 magistrate courts, and 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.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

There are no specific rules or guidelines governing the government's decision to charge an entity or individual.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

No, there are no provisions under Nigerian law for pretrial diversions or deferred prosecution.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

A corporate entity may be subject to civil penalties or remedies. An example is public quoted companies, which can be sanctioned by the Investment and Securities Tribunal (IST).

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

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

9.2 What is the standard of proof that the party with the burden must satisfy?

The Evidence Act provides that the standard of proof for the prosecution is to prove beyond reasonable doubt.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The Magistrate or judge sitting on the case is both the arbiter of facts and law. The Magistrate or judge determines whether the burden of proof has been satisfied.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Yes, the Criminal Code Act provides that any person who conspires with another to do any act will be liable. A person may also be

guilty of an offence if he aids, abets, counsels or procures the commission of an offence and may be punished to the same extent as a principal offender.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

There are two essential elements that must both be present when a crime is committed, the physical and the mental element. If the intent is not present it can be a valid defence to a criminal charge and the burden of proof thus lies with the defendant.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Ignorance of the law is not an excuse before the law. The burden of proof lies with the prosecution.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

It is a defence that defendant was ignorant of the fact that led to the offence and the burden of proof lies with the prosecution.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

Yes, the person is expected to report the crime and failure to do so may make the person liable.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

There are no specific rules or guidelines to offer leniency. It is a prerogative the government can exercise based on its discretion. Where a person voluntarily discloses criminal conduct to the government he may be charged for a lesser offence, settle for a plea bargain or become a witness in the case.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Nigeria, and describe the favourable treatment generally received.

Once an entity has discovered that a crime may have been committed, the entity must formally inform the appropriate agency and fully cooperate with the investigation. There are no statutory provisions for leniency, however the government can exercise its discretion and prerogative of leniency and this will be based on a case-by-case basis.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

Plea bargaining in the sense of an agreement as to sentence is not recognised under Nigerian Law. There have however been some cases where the Attorney General of the Federation has entered into pseudo plea bargaining agreements with some entities to settle criminal prosecution by payment of financial penalties.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

Plea bargaining is not recognised in Nigeria. However, in the few cases that plea bargaining has been applied, the entity may plead not guilty to the charge and would be liable to a financial penalty. The court must approve the plea bargain.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

Yes, there are rules and guidelines that must be followed: (a) the sentence must be pronounced in open court; (b) the Sentence must be pronounced in the presence of the accused person; and (c) the sentence must be covered by the law which created it. The court

must pronounce a sentence for every offence for which a defendant is convicted. The court may also order forfeiture of property shown to be acquired from such crime.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The court would consider the demeanour of the company, i.e. if the company was cooperative during the investigation process. It must however be noted that the imposition of a sentence is at the judge's discretion since there are no laid down guidelines for imposing sentences.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Yes, both parties have the right of appeal.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Yes, criminal sentences are appealable; both parties have a right to appeal against the sentence.

16.3 What is the appellate court's standard of review?

Appellate courts seek to correct or reverse an error or injustice committed by a lower court. An Appeal may be allowed on the following grounds: a) that the judgment was unreasonable; b) that it was wrong on a point of law; and c) that the appellant suffered a miscarriage of justice at the trial court.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Where the Appeal is against the sentence only, the court may quash the sentence and substitute it with another sentence. Where the appeal is against conviction and the court allows the appeal, the court shall quash the conviction and acquit the Appellant or order a re-trial.

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