

Anti-bribery and corruption compliance in Nigeria

Received (in revised form) 7th April, 2020

Austin Mbadugha

Partner, NICCOM, Nigeria



Austin Mbadugha

Austin Mbadugha is a Partner at NICCOM LLP, a fast-paced law firm in Lekki Phase 1, Lagos, Nigeria. He was formerly a Manager within the Forensic & Integrity Services unit of Ernst & Young, and has worked in a number of countries in sub-Saharan Africa. His core areas of expertise are Investigations, Data Privacy, Corporate Compliance, Transaction Forensics and Due Diligence.

ABSTRACT

Compliance has received increased attention since the late 1990s. Countries have either enacted new and stronger laws and/or increased enforcement of existing laws to address specific areas, especially in the areas of bribery and corruption, money laundering, labour and data privacy. As will be seen, the laws of certain countries have extraterritorial impact, and are able to sanction crimes committed outside the shores of such countries. What is the status of the law in Nigeria in relation to anti-bribery and corruption (ABAC)? This paper seeks to offer a broad definition as to the meaning of bribery and corruption, as well as highlight the regulatory framework for ABAC compliance in Nigeria. It also provides guidance for businesses in Nigeria as to the leading practices to prevent, detect and respond to incidences of bribery and corruption.

Keywords: anti-bribery and corruption, compliance, adequate procedures, failure to prevent bribery, FCPA, UKBA, official bribery

OVERVIEW

Most people have some sort of understanding as to actions that constitute bribery and corruption, and there is a near-consensus that such actions can confer some form of unfair advantage on or more

of the concerned parties. There have been increased enforcements of anti-bribery and corruption (ABAC) laws and regulations globally,¹ and ‘corrupt’ persons (politicians, government employees and even corporations) are the major casualties of such enforcements, rightly so. In Nigeria, local enforcement has largely targeted individuals, and this enforcement has been viewed as ‘political’ or ‘tribal’ by a cross-section of the polity.

The words ‘bribery’ and ‘corruption’ are often used together and/or interchangeably in everyday discussion. Both are, however, not exactly the same. Bribery connotes the act of giving, offering, demanding or receiving something of value by one party to another party, to influence the actions of that other party. There is usually a dishonest intent in instances of bribery. It is, however, not a requirement — facilitation payments are in fact bribes (as we shall see), although there is usually no dishonest intent when such payments are offered or made. There are two major types of bribery² — official bribery, that is the ‘corruption’ of public or government officials to influence an official act, and commercial bribery, the ‘corruption’ of a private individual(s) to gain a commercial or business advantage. It is pertinent to point out that an attempt to give or receive a bribe is sufficient to prove bribery on the part of the offeror and/or the offeree.

Corruption has a broader meaning than bribery. Corruption comprises any act or attempt to use one’s position, circumstances or authority to gain an unfair advantage. To qualify as corruption, the advantage obtained or sought to be obtained must be unfair. If Company A develops a vaccine that provides immunity to the recent coronavirus disease

14 Oluwole Street, off
Chief Collins Uchidiuno
Street, Lekki Phase 1,
Lagos State,
Nigeria
Tel: +234 811 319 0110;
E-mail: austin@niccomllp.
com

Journal of Financial Compliance
Vol. 4, No. 1 2020, pp. 76–82
© Henry Stewart Publications,
2398-8053

2019 (COVID-19), it is not unfair for Company A to patent such vaccine, although such patent will confer a business advantage. If the Chairman of the Board of Company A, however, coaxes the head of the local Patents Board, who is a personal friend, to approve the patent application of Company A without scrutinising same properly, that may qualify as corruption.

The Association of Certified Fraud Examiners, a global body of fraud investigators, identified corruption as one of the three major categories of occupational fraud (together with fraudulent financial reporting and asset misappropriation).³ Bribery, kick-backs, illegal gratuities, nepotism, collusion and economic extortion are some common forms of corruption.

Corrupt payments are often made in cash. Other methods of making corrupt payments, however, include the following:

- Gifts, travel and entertainment
- Cheques or other financial instruments
- Hidden interests in business ventures
- Loans
- Transfer of property without payment or at considerably reduced price
- Free services
- Sexual favours
- Futuristic promises of favours

REGULATORY FRAMEWORK FOR ABAC COMPLIANCE

Nigeria has a robust legal framework for ABAC locally. A number of extant laws contain provisions that criminalise bribery and other corrupt practices. For instance, the Corrupt Practices and Other Related Offences Act 2000, created the offence of official corruption, as well as other crimes relating to bribery and corruption. The Act also created and empowered the Independent Corrupt Practices Commission to enforce the provisions of the Act and prosecute corrupt individuals. The Act prescribed a jail

term of seven years as general punishment for engaging in corrupt acts. In deserving circumstances, corrupt public officials can also be made to forfeit corrupt gratification received.

In addition, the Economic and Financial Crimes Commission (Establishment) Act 2003, established the Economic and Financial Crimes Commission (EFCC) and empowered the EFCC to prosecute any individual who engages in economic or corrupt actions that contravene the Act or other extant economic laws. If convicted of engaging in corruption or other economic crimes, the properties of a convicted person acquired from economic and financial crimes may be forfeited to the Federal Government in addition to imprisonment and other punishment that may be imposed.

Other local statutes that regulate bribery and corruption include the Fifth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Criminal Code (applicable to the southern part of Nigeria) and the Penal Code (applicable to the northern part of Nigeria), among other laws.

A number of foreign laws also regulate ABAC compliance in Nigeria, especially for big corporations with multinational presence. The two most popular anticorruption laws that have extraterritorial reach are the US Foreign Corrupt Practices Act 1977 (the FCPA) and the UK Bribery Act 2010 (the UKBA). The FCPA prohibits payments intended to induce or influence a foreign official to use his or her position to assist in 'obtaining or retaining business for or with, or directing business to, any person'. It also requires businesses to maintain adequate and accurate books and records, ensuring that the true purposes of payments made by such businesses are recorded accurately. The FCPA is applicable to issuers (listed companies in the United States), domestic concerns (citizens, residents or businesses organised or operating in the United States) and foreign

persons or entities (directly or through agents) while in the territory of the United States. It also imposes liability on such persons or entities for the corrupt actions of subsidiaries, affiliates or agents outside the United States. The Criminal Division of the US Department of Justice (DOJ) and the Enforcement Division of the US Securities and Exchange Commission enforce the provisions of the FCPA.

The UKBA replaced two antiquated laws that hitherto regulated bribery and corruption within its territory — the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906.⁴ The UKBA created categories of offences relating to bribing another person and being bribed, and created a specific offence of bribery of foreign public officials. It also created a strict liability offence for commercial organisations (corporations, partnerships, joint ventures and other business forms) — the offence of failure to prevent bribery. (An organisation may, however, escape liability for the offence of failure to prevent bribery if it can show that it had adequate procedures in place to prevent bribery — more on this later). The UKBA applies to any activity undertaken in the United Kingdom or overseas by UK citizens or residents, as well as activities by UK organisations and their subsidiaries. The UKBA is primarily enforced by the UK Serious Fraud Office (SFO).

As have been noted, both the FCPA and the UKBA have extraterritorial reach. Thus, Company X, a company registered in the United Kingdom, will be liable under the UKBA for corrupt payments by its Nigerian subsidiaries, affiliates or agents. Similarly, if a Nigerian subsidiary of a listed bank in the United States sends an expensive Rolex watch to the Head of Procurement at the Central Bank of Nigeria to influence the release of foreign exchange to the Nigerian subsidiary, the listed company in the United States may be liable.

FACILITATING PAYMENTS

A brief comment must be made with respect to facilitating payments, which are quite common in the Nigeria public sector. Facilitating payments, otherwise known as grease payments, are small-value payments made to officials in furtherance of ‘routine governmental action’, which involves nondiscretionary acts on the part of such officials.⁵ Simply put, they are small amounts paid to government officials to perform actions that they are legally obligated to perform.

For instance, a lawyer may pay a token to a court’s registrar to ensure that an enrolled order of Court in respect of an application is obtained as and when due. Or the managing director of a freight company visiting the director general (DG) of customs may give an inexpensive diary to the personal secretary of DG to facilitate a speedy entry into the DG’s office, although the secretary may be contractually and/or legally obligated to allow him to enter that office.

Facilitating payments are permissible under the FCPA where such payments are permissible under the written laws of the foreign official’s country, and if the payments are reasonable and bona fide. Facilitation payments are also permissible where the payment (reimbursed) amount was incurred by the foreign official in the promotion, demonstration or explanation of products or services, or in the execution or performance of a contract with a foreign government or agency thereof.

Facilitating payments are not permitted under the UKBA. More importantly, they are not permissible under Nigerian law.

ABAC COMPLIANCE

Unfortunately, corruption is a major business challenge for companies operating in Nigeria.⁶ Official bribery is the most common form of corruption here, although commercial bribery and other forms of

corruption are also widespread. One of the top ten FCPA-related fines ever imposed on a company was as a result of bribes paid to government officials in Nigeria to win business.⁷ In 2020, the Transparency International's Corruption Perception Index (CPI), which ranks countries and territories across the globe based on the relative degree of public-sector corruption, ranked Nigeria 155 out of 180 countries, with a score of 26 out of 100.⁸ The ranking was an all-time low for Nigeria, which had ranked 148 out of 180 two years prior (based on the 2017 CPI released in 2018).

Most businesses are regulated by the government centrally and/or regionally to some degree, and are required to interface with government agencies and/or officials who ensure and enforce compliance with extant laws and regulations. The points of interactions by businesses (and personnel of such businesses) and such agencies/officials are called touch points. Some scenarios which exemplify touch points are as follows:

- Submitting conveyancing documents to the Lands Registry for stamping, in respect of a piece of land on which a leisure park is to be situated;
- Applying to the Federal Ministry of Environment for permission to undertake an Environmental Impact Assessment in relation to a proposed meat processing factory;
- Obtaining an Oil Prospecting Lease (OPL) from the Department of Petroleum Resources, or applying for an already-obtained OPL to be converted to an Oil Mining Lease (OML);
- Filing corporate tax returns with a regional office of the Federal Internal Revenue Service;
- Applying to the Nigeria Immigration Service for an increase in the expatriate quota of an oil company that needs to employ more experienced expats to manage a complex project;
- Procuring South African visas for employees scheduled to travel to Johannesburg for technical trainings;
- Entertaining inspectors from the National Agency for Food and Drug Administration and Control during an unscheduled visit to a business's premises;
- Obtaining police clearance certificates for directors of a company as a prerequisite for bidding for certain government contracts;
- Submitting a television advert recording for an alcoholic beverage to the National Broadcasting Commission for preapproval;
- Liaising with customs to ascertain the amount payable as custom duties in relation to agricultural raw materials imported into Nigeria;
- Depositing to an affidavit before the Commissioner of Oaths at the Federal High Court; and
- Filing annual returns and audited financial statements of a listed company with the Security and Exchange Commission and the Nigerian Stock Exchange.

Typically, the more regulated a business's industry is, the greater the number of touch points that will exist for such a business. Thus, a company in the financial services or oil exploration industry is more likely to interact more with government and public officials than a company that provides agricultural consultancy services.

Businesses can interact with government directly through their personnel, or through third parties engaged by the business to facilitate such interactions. Whether a business chooses to deal with government directly or through touch point vendors (TPVs, otherwise known as third party intermediaries), it is important to state that bribes and other corrupt payments will likely be demanded by or offered to public officials at such touch points than through any other aspect of the business's operations. Thus, the touch points of any business are highly susceptible to the risk of bribery and corruption.

TPVs pose a higher ABAC risk to businesses, in any event. TPVs can be used by businesses as sham to cover up bribes and corrupt payments to government officials — such payments are usually recorded as payment to the TPV for ‘services rendered’. TPVs can also pay bribes on behalf of the business in a bid to get faster results, so as to be retained or re-engaged by the business for subsequent services.

The enforcement of the FCPA and the UKBA, among other laws, has been on a steady rise since the 2010s. The US DOJ and the UK SFO have prosecuted many companies engaged in the corrupt practices, and have imposed significant fines on erring companies. In 2019 alone, 14 companies paid US\$2.9bn cumulatively to the DOJ and SEC to resolve corruption cases, according to the FCPA blog. As earlier stated, one of the top ten fines ever paid (US\$800m) as a result of noncompliance with the FCPA was by a company that paid bribes to government officials in Nigeria to win state contracts.

To avoid corporate responsibility in relation to incidences of bribery and corruption, the UKBA requires businesses to ensure that they put adequate procedures in place to prevent noncompliance with extant ABAC laws. The UK Ministry of Justice has attempted to define adequate procedures along six flexible principles:

1. Proportionate procedures — having adequate ABAC policies, procedures and controls relative to the size and complexity of a given business;
2. Top level commitment — ensuring that the Board and Management engender a culture of zero-tolerance to bribery and corruption, and that such culture is clearly communicated within the business;
3. Risk assessment — performing periodic and documented checks on the processes and operations of the business to discover new bribery and corruption risks areas and monitor known areas.

4. Due diligence — undertaking checks on new and existing members of management and staff as well as on the vendors and third-party associates of the business, with a view to identifying integrity risks at the point of onboarding and revetting.
5. Communication and training — training the business’s employees, vendors and third-party associates on ABAC, communicating recent ABAC information and re-emphasising the business’s stance on bribery and corruption.
6. Monitoring and reviewing — checking that the processes and procedures of the business are adequate in the light of key changes in the size and structure of the business or new regulatory framework applicable to the business, as well as performing periodic integrity assessments.

While these principles were enunciated as a defence to the offence of failure to prevent bribery, they are also very effective in preventing, detecting and responding to occurrences of bribery and other forms of corruption within a business. For instance, vetting of a prospective vendor can identify adverse integrity information about that vendor, which may halt the engagement of such a vendor (Prevent). Similarly, risk assessments may identify ongoing incidences of bribery and corruption (Detect), and inform the business’s response to such incidences (Respond).

KEY TO-DOS FOR BUSINESSES IN NIGERIA

Businesses in Nigeria can do the following, as part of adequate procedures:

1. Develop an anticorruption policy applicable to the business’s stakeholders (employees, agents, vendors and other third-party associates). The policy will contain the business’s stance on payments to government officials, gifts and hospitality to and

from third parties, documentary support for payments, posting of transactions, approvals required for different categories of payments and recordation, punishment for noncompliance and so on. Such policy should be approved by the Board and/or top-level management, and should be reviewed periodically.

2. Communicate and reiterate the business's stance on bribery and corruption to stakeholders periodically. Management should ensure that the business's anticorruption policy is circulated to every stakeholder, and that each stakeholder confirms compliance with the provisions of the policy on a periodic (maybe annual) basis. Management should also send out notifications on key happenings with the enforcement space to further deter stakeholders from engaging in corrupt acts on behalf of the business.
3. Train stakeholders on bribery and corruption. It is important to confirm that the stakeholders of the business understand the regulatory framework regarding bribery and corruption. It is recommended that such trainings should be done annually, and evidence of such trainings (including attendance to such trainings) maintained by the business.
4. Perform due diligence on stakeholders to ensure that the past conduct of such stakeholders aligns with the business's outlook on ABAC. As have been noted before, the actions of a business's stakeholders may result in liability for the business.
5. Undertake a comprehensive risk assessment of the business's operations annually, preferably by both internal personnel and external professionals. Document the different integrity risks that can affect each area of operation in a risk register.
6. Undertake periodic independent compliance assessments/forensic audits on the operations of the business, especially those areas identified as high risk for bribery and corruption, to identify risk areas.

The last two points need to be re-emphasised. It is important for every business to understand the various risks that can affect its operations, including integrity risks. Such risks can be identified during a holistic assessment of the entire operations of the business, and strategies to be adopted in addressing each risk documented.

In addition, it is important to engage external forensic and compliance professionals to assess the level of compliance of the business with internal and external regulatory framework. The engagement of external professionals will reduce the familiarity threat and will improve the quality and independence of such assessments. Law firms and professional services firms with the requisite experience and know-how can assist businesses in this regard.

CONCLUSION

The regulatory framework for ABAC compliance in Nigeria is quite robust. While it may appear that enforcement is mostly political, there is the need for all natural and juristic persons in Nigeria to comply with local and foreign laws regulating bribery and corruption. As has been elucidated, non-compliance may result in dire consequences, and not only for local businesses — Foreign businesses may be sanctioned heavily for the corrupt actions of their local affiliates and subsidiaries.

AUTHOR'S NOTE

This paper is dedicated to Linus Osita Okeke, who repeatedly encouraged me to write, and who taught me how to.

REFERENCES

- (1) Webb, J. (2017) 'Anti-bribery enforcement actions increase across the globe: Prosecutors crack down on corruption,' available at <https://www.forbes.com/sites/jwebb/2017/03/02/anti-bribery-enforcement-actions-increase-across-the-globe-prosecutors-crack-down-on-corruption/#22b427891819> (accessed 29th March, 2020).

- (2) Association of Certified Fraud Examiners (2015) 'Fraud examiners manual', 2015 International edn, Association of Certified Fraud Examiners, Inc., Austin, TX.
- (3) Ibid.
- (4) Mendelson, M. F. (ed) (2017) *The Anti-Bribery and Anti-Corruption Review* (6th edition). London: Law Business Research Ltd.
- (5) The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (2012) 'A resource guide to the U.S. Foreign Corrupt Practices Act', available at www.justice.gov/criminal/fraud/fcpa (accessed 29th March, 2020).
- (6) Vanguard (2020) 'Corruption Nigeria's biggest challenge – EFCC', available at <https://www.vanguardngr.com/2020/02/corruption-nigerias-biggest-challenge-efcc/> (accessed 31st March, 2020).
- (7) Cassin, R. L. (2009) 'KBR and Halliburton resolve charges,' The FCPA Blog, available at <https://fcpublog.com/2009/02/12/kbr-and-halliburton-resolve-charges/> (accessed 12th March, 2020).
- (8) Transparency International (2020) 'Corruption perceptions index 2019', available at <https://www.transparency.org/cpi2019> (accessed 15th March, 2020).