AN EXAMINATION OF THE PROVISIONS OF THE ECONOMIC AND FINANCIAL CRIMES (EFCC) ACT IN NIGERIA

By

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1.1 Introduction

The historical background to the existence of the Economic and Financial Crimes Commission (EFCC)became eminent when it was recognised from the late 1980's of the need to create a special agency to investigate economic and financial crimes in Nigeria. It wasperiod when the menace of Advance Fee Fraud with its negative impact on Nigeria had been acknowledged. It became also notable that the sophistication of economic crimes was such that there might be the need for a special commission to handle their investigation and prosecution.

The EFCC is a creation of the law with the responsibility to investigate money laundering and advance fee fraud in Nigeria. The history of the EFCC in Nigeria began with its establishment in 2003 about 15years ago, in 2003. At the course of its development Nigeria became confronted with a lot of different anti-developmental issues. Among other things include the high level of criminality and fraudulent activities. Poverty and crime have remained high to this day. Owing to this, there is a smear of the country's image. The enormity of the situation brought about the creation of the EFCC.

Since its inception, the commission has instituted quite a number of cases against high-ranking officials. In other words, the commission has managed to prosecute and convict several high ranking individuals on corruption charges, including several bank executives and government officials. The agency is answerable to the president of Nigeria. This commission deals with financial irregularities. In our time, financial crime in Nigeria is at a very high level. Such agencies as EFCC help to fight it.

Nigeria despite its oil wealth has one of the largest populations of poor people on the African Continent.[1] Undoubtedly, corruption is the main cause of poverty in Nigeria. The country is still facing gigantic governance and development challenges even with almost two decades of civilian democratic rule. Despite concerted efforts made by the successive administration to provide a better legal and institutional framework to curb corrupt practices in the public service, there are still major issues with corruption.

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[1]http://www.vanguardgr.com/2015/08/over-1-million-nigerians-living-below-poverty-line-osibanjo/1st February, 2016.

Giving the way the practice of corruption has become generally accepted in Nigeria, the research may think it is because there are no laws and institutions to curb corruption.

In the year 2002, Nigeria was listed among the Non-Cooperative Countries by the Financial Action Task Force (FATF). It was categorically made clear that compliance with Recommendation 26 of the FATF's then 49 recommendations which required the creation of a Financial Intelligence Unit as bait for the removal of the country's name from the list. Consequently, the EFCC was created in 2002 and Nigeria's Financial Intelligence Unit domiciled within the commission. It is charged with the responsibility of co-ordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in Nigeria[2]. The Statute creating the EFCC was first enacted in 2002 and subsequently re-enacted in 2004. The EFCC started operations in 2003.

These economic and financial crimes are the greatest threat to national economic and development and the nation has nothing to show for its huge earnings from oil. An Author[3] stated that corruption afflicts virtually all parts of the Nigerian society. It has eaten deep into Nigeria value system and is now threatening to spread to the culture as public adulation for wealth has increased. Transparency International covered 146 Countries in its report of 2004 wherein Nigeria was rated the third most corrupt country in the world. The Transparency International 2004 report focused more on the oil sector as a revenue source for most oil producing countries. According to Oluwabi[4], Peter Eigen, chairman of Transparency International Board of Directors observed in 2004 that oil producing countries, public contracting in the oil sector is plagued by revenue vanishing into the pockets of western oil executives, middlemen and local officials. He suggested that oil companies could help fight corruption by making public details of payments made to government and state-controlled oil firms. That access to vital information will minimise the opportunity for the payment of kickbacks to secure oil tenders, a practice that has blighted the oil industry in transition and post war economies.

The EFCC is a statutory body established under section 1 of the EFCC Act, No. 5 of 2002 which has been repealed and replaced by the EFCC Act, 2004. By sections 6(b) and 7 (1) (a) of the Act, the Commission has the function and power of examination and investigation of all cases or reported cases of economic and financial crimes as decided in the case of *EFCC v Yanaty Petrochemical Ltd*[5].

The fundamental thrust or objective of establishing the Economic and Financial Crimes Commission was to wage war against the hydra-headed monster called corruption

[2] Section 1(1)(C) Ibid.
[3] Waziri, F., Corruption, A Treat to Nigeria's Economy, Paper Presented at the Launch of the Anti-Corruption Revolution Campaign (ANCOR), South West, Lagos Airport Hotel, 2009.
[4] Oluwabi, E.A., Corruption and Financial Crimes in Nigeria: Genesis, Trend and Consequences, Lagos Business School, Lagos, 2007.
[5][2017] 3 NWLR (Pt. 1552) 170.

in the country. Thus, the Commission has the onerous duty to radically sanitize the corruptly debilitated financial community and the endemically corrupt public (civil) service, with a view to ridding the society corrupt officials and fraudsters as decided in the case of *Akingbola v F.R.N*[6].

1.2 Overview of Economic and Financial Crimes

The Economic and Financial Crimes Act was first enacted in 2002 which was later amended in 2004[7]. The 2004 Act[8] wherein in the long title it is encapsulated as an Act to repeal the EFCC Act, 2002 and enact the EFCC Act, 2004; and for matters related therewith. It has seven parts with 47 sections. The part I of the Act deal with establishment of the Economic and Financial Crimes Commission Act, composition, tenure, vacancy in membership and standing orders clauses which are contained in sections 1 to 5. Part II of the Act gives the details of the functions and special powers of the commission which are contained in sections 6 and 7 of the Act. Sections 8 to 13 of the Act are under part III which deals with the staff of the commission. Under part IV of the Act it gives the vivid details of the offences from sections 14 to 26. Part V of the Act covers the issues relating to forfeiture of assets of persons arrested for offences under the Act from sections 27 to 34. The financial provisions of the commission is contained under part VI between sections 35 to 37 of the Act and part VII deals with miscellaneous provisions from sections 38 to 47 of the Act which relates to the power of the commission to receive information without hindrances, protection of informants, immunities etc.

In the words of Waziri[9] from a practical point of view, the EFCC sees its mandate as the provision of financial security for the Nigerian economy. It implements the mandate through tackling those menaces such as official corruption, tax evasion, bank fraud, Advance Fee Fraud, Illegal Bunkering and several other shades of economic crimes that can distort key economic indices and inhibit growth. It also seeks to create a level playing field for all stakeholders within the economy.

The provisions of Act are aimed at providing financial security for Nigerians, its economy, foreign investors and the international community at large. This is hinged on the fact that economic and financial crimes are not often limited to the borders of a particular country but goes beyond its perimeters and frontiers.

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[6] [2012] 9 NWLR (Pt. 1306) 510

[7] Economic and Financial Crimes Commission (Establishment etc) Act, Cap E1, Laws of the Federation of Nigeria, 2004.

[8] Ibid.

[9] Farida Waziri, The Economic and Financial Crimes Commission's (EFCC'S) Critical Role in Growing the Economy, Paper Presented to the Nigeria-British Chamber of Commerce, on 7th May, 2011. See https://www.proshareng.com Accessed on 20th August, 2017.

Albeit, an x-tray of the Act would reveal that it is robust but it is not without challenges. This research shall endeavour to wade into the shortfalls by way of examination of the provisions.

It is imperative for the purpose of the work to have working definitions of some concept for clarification and better understanding. Some of the concepts sought to be clarified include EFCC, Designated Non-financial Institution etc. There is no universally acceptable definition of the Economic and Financial Crimes. The Act [10] defines "Economic and Financial Crimes" thus:

> The non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individual or in a group or organised 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 practices, 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 waste and prohibited goods etc

According to Chukkol[11] Economic and Financial Crimes is to be understood as crimes that are specially connected with economy and finance of a nation or society. Thus, when a state or a nation through its legislative instrument prohibits and punishes certain human conducts and activities that affect its economy and finance, such may be regarded as economic and financial crimes.

Of importance in the above definitions is that the basic features of economic and financial crimes is when the prohibited act by law affects the finances and economy of a state which consequentially cause a setback in its economic activities.

By virtue of section 46[12] Designated Non-financial Institution means dealers in jewellery, cars and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners, hotels, casinos, supermarkets or

[10] Section 46 of the Economic and Financial Crimes Commission (Establishment etc) Act, Cap E1, Laws of the Federation of Nigeria, 2004.
[11] Kharisu Sufiyan Chukkol, The Law of Crimes in Nigeria, Ahmadu Bello University Press, Zaria, 2010, Page 502.
[12] Economic and Financial Crimes Commission (Establishment) Act, Cap E1, Laws of the Federation of Nigeria, 2004.

such other businesses as the Federal Ministry of Commerce or appropriate regulatory authorities may, from time to time, designate.

Interestingly, the legal practitioners have been removed from the list of designated non-financial institution recently via a court judgment. In the case of *Registered Trustees of Nigeria Bar Association v Attorney General of the Federation & 1 Or (Unreported)*[13] JusticeKolawole struck out legal institutions required to file Cash Transaction Report with SCUMUL, an enforcement entity under the EFCC pursuant to the provisions of the Money Laundering (Prohibition) Act, 2011.

1.3 Examination of the Provisions of the Economic and Financial Crimes Act

In an attempt to examine the EFCC Act, 2004 the work shall critically examine and analyse the legal regime of the EFCC with particular reference to functions and special powers of the commission, offences and forfeiture of assets of persons arrested for offences.

The law provides that chairman shall be a serving or retired member of any government security or law enforcement agency not below the rank of Assistant-Commissioner of Police or equivalent. There are other members of the commission[14]. With the requirement of the law that the chairman must be a serving or retired member of any security agency would it not have been better if the police Act as a security agency was amended to expand its jurisdiction. On the other hand, is it not better if the Penal Code Act and Criminal Code Act were amended instead of duplicating the laws? Notably also is the fact that other staff of the agency are police officers who actually carry out the most sensitive duty which is investigation.

1.3.1 Functions of the Commission

By virtue of the Act[15] the commission is empowered to perfume the following functions thus:

(a) The enforcement and the due administration of the provisions of the Act;
(b) The investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc;
(c) The coordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other power or authority;
(d) The adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crime

[13] Suit No: FHC/BS/173/2014.
[14] See generally section 2(1)(c) Ibid.
[15] Section 6(a)-(q) Ibid.

related offences or the properties the value of which corresponds to such proceeds;

The adoption of measures to eradicate the commission of economic and financial crimes;

The adoption of measures which include co-ordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes;

The facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes;

The examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved;

The determination of the extent of financial loss and such other losses or government, private individuals or organisations;

Collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous with those of the commission concerning (i) the identification, determination of the whereabouts and activities of persons suspected of being involved in economic and financial crimes (ii) the movement of proceeds or properties derived from the commission of economic and financial and other related crimes (iii) the exchange of personnel or other experts (iv) the establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved; (v) maintaining data, statistics, records and reports on persons, organisations, proceeds, properties, documents or other items or assets involved in economic and financial crimes; (vi) undertaking research and similar works with a view to determining the manifestation, extent, magnitude and effects of economic and financial crimes and advising on appropriate intervention measures for combating same;

Dealing with matters connected with extradition, deportation and mutual legal or other assistance between Nigeria and any other country involving economic and financial crimes;

The collection of all reports relating to suspicious financial transaction, analyse and disseminate to all relevant government agencies;

Taking charge of, supervising, controlling, co-ordinating all the responsibilities, functions and activities relating to current investigation and prosecution of all offences connected with or relating to economic and financial crimes;

The co-ordination of all existing, economic and financial crimes investigating units in Nigeria;

(o) Maintaining a liaison with the office of the Attorney-General of the Federation, the Nigerian Custom Service, the Immigration and Prison Service Board, Central Bank of Nigerian the Nigerian Deposit Insurance Corporation, the National Drug Law Enforcement Agency, all government security and law enforcement agencies and such other financial supervisor institutions involved in the eradication of economic and financial crimes;

(p) Carrying out and sustaining rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria; and

(q) Carrying out such other activities as are necessary or expedient for the full discharge of all or any of the functions conferred on it under the Act.

These functions are quite stout which entails investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam among others. We submit that most of the functions as itemised above were performed by other security agencies i.e police even before the establishment of this body. In other words, the functions as enumerated above are a duplication of other agencies. Our position in this regard has judicial blessings in the case of *Dodo v EFCC*[16] when the court held that the EFCC and the ICPC enjoy the status of the powers vested in the Police which encompass the duty to examine a complaint or petition, investigate and prosecute if necessary. In the same breath, the court held that by virtue of section 5(1) of the ICPC Act subject to the provisions of the Act, an officer of the commission when investigating or prosecuting a case of corruption shall have all processes and immunities of a police office under the Police Act and any other law conferring powers on the police or empowering and protecting law enforcement agents[17]. It will not be out of place for the agencies to collapse into the Nigeria Police Force since they perform similar functions. The police deserve professional re-engineering and re-orientation to redeem their image for efficacy.

Pursuant to enabling law which empowered the EFCC to deal with matters connected with extradition, deportation and mutual legal or other assistance between Nigeria and any other country involving economic and financial crimes[18], the President has signed a mutual legal and other assistance between Nigeria and other countries recently.

Some of the functions accorded the EFCC by the extant law have a resultant effect of overlap. For instance, the EFCC as an agency is mandated to carry out and sustain rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria. This work wonder what will become of an agency such as National Orientation Agency (NOA) which is saddle with the responsibility of

[16] [2013] 1 NWLR (Pt. 1336) 470
[17] Op. Cit @ ratio 26.
[18] Section 6(k) Ibid

communicating government policy, staying abreast of public opinion and promoting patriotism, national unity, and development of Nigeria society[19] with its popular slogan 'Do the right thing: transform Nigeria'. This specific function should be left for NOA. Moreover, this can serve as an unnecessary distraction to EFCC due to the sensitive nature of their task. NOA is the body statutorily mandated to propagate the need to eschew all vices in public life including corruption[20] etc.

Further on the overlapping nature of its functions EFCC staff involved in the enforcement of the provisions of the Act shall have the same powers, authorities and privileges including power to bear arms as given by law to members of the Nigerian Police[21]. It is submitted that if the staff EFCC are to be accorded same powers, authorities and privileges including bearing arms as given to the police it is better if the police are empowered to perform the functions it is already performing within the Commission.

1.3.2 Special Powers of the Commission

The commission is conferred with special power to cause investigations to be conducted as to whether any person, corporate body or organisation has committed an offence under the Act or other law relating to economic and financial crimes[22]. It is our humble view that this special powers conferred on the EFCC are similar to that of the police in terms of investigation and even prosecution. In addition, the investigative staffs of the EFCC are police officers who are specially trained for the purpose. The enabling law of the EFCC provides that the Chairman of the Commission shall be a serving or retired member of any government security or law enforcement agency not below the rank of Assistant-Commissioner of Police or equivalent. Even from the wordings of the law express mention was made of the police and most if not all the chairmen of the EFCC have been police officers either serving or retired. The Police Act ought to have been amended to enlarge its functions with specific units e.g. Mobile Police Force, SARS etc instead of this agency.

It can also 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[23].The determination of a person's lifestyle and extent of properties has given the commission enormous power which can likely be abused. Is there a laid down yardstick for measuring the extent of a person's lifestyle and source of income or whether there is any index for determining the income.

As beautiful as the law is on the justification of a person's lifestyle and properties which is aimed at curbing corruption but being left to the whims and caprices of the

[19] www.noa.gov.ng Assessed on 10th August, 2017.
[20] Section 3(1)(i) National Orientation Agency Act, Cap. N , Laws of the Federation of Nigeria, 2004
[21] Section 8(5) of the Economic and Financial Crimes Commission (Establishment, etc) Act, Laws of the Federation of Nigeria, 2004.
[22] Section 7(1)(a) Ibid.
[23] Section 7(1)(b) Ibid.

Commission it can be exploited. To this end, the courts have made effort to curtail the excesses by insisting that they carry out their functions within the ambit of the law wherein it was held in the case of Chairman, *EFCC v Littlechild [2016]* 3 NWLR (Pt. 1498) 72 thus:

> The Economic and Financial Crimes Commission and its officials are statutorily empowered to arrest anybody upon reasonable suspicion of having committed any financial crime as prescribed in section 7 of the EFCC Act, 2004. However, in the instant case, having premised and relied on a petition as their defence to the arrest and detention of the 1st respondent, it behoves the appellants, that is the Chairman of EFCC and other officials, to satisfy court that their act was done within the ambit of the law given that the fundamental rights of every citizen of Nigeria and even strangers under the umbrella of the sovereign protection of Nigeria is jealously preserved and guaranteed by the 1999 Constitution.

Under the special powers granted to EFCC, the commission is the co-ordinating agency for the enforcement of the provisions of (a) the Money Laundering Act, 2004, 2003 No. 7, 1995 No. 13; (b) the Advance Fee Fraud and Other Related Offences Act, 1995; (c) the failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act, as amended; (d) the Banks and Other Financial Institutions Act, 1991, as amended; (e) the Miscellaneous Offences Act; and (f) any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code[24]. It should be noted that the Police equally carries out investigation and prosecution of some these laws such as contained in the Advance Fee Fraud Act. With these vested responsibilities on the EFCC, it is our submission that it will be overwhelmed and consequently result to inefficiency.

1.4 Offences under the EFCC Act

1.4.1 Offences Relating to Financial Malpractices

It is an offence for any person who being an officer of a bank or other financial institution or designated non-financial institution fails or neglects to secure compliance with the provision of the Act or fails to secure authenticity of any statement submitted pursuant to the provisions of the Act and shall be liable on conviction to a term not exceeding five years or to a fine of five hundred thousand naira or both such imprisonment and fine[25]. We applaud this innovation as captured in the law for covering the financial institutions which are not limited to banks but also include any group of

[24] Section 7(2) Ibid

[25] Section 14(1) Ibid.

persons whether corporate or incorporate. This is hinged on the fact that most illicit activities in the form of corrupt practices are carried out with the aid of private organisations.

1.4.2 Offences in Relation to Terrorism

A person who wilfully provides or collects by any means, directly or indirectly, any money from any other person with intent that the money shall be used or is in the knowledge that the money shall be used by any act of terrorism, commits an offence and is liable on conviction to imprisonment for life[26]. As good as this section might seem the requirement for proof of knowledge that the money so provided was for the use of terrorism shall be a herculean task.

Any person who commits or attempts to commit a terrorist act or participates in or facilitates the commission of a terrorist act, commits an offence under the Act and shall be liable on conviction to imprisonment for life[27].

Mere act of making funds available for the purposes of any related act of terrorism would amount to an offence. Any person who makes funds, financial assets or economic resources or financial or other related services available for use of any other person to commit or attempt to commit, facilitate or participate in the commission of a terrorist act is liable on conviction imprisonment for life[28].

1.4.3 Offences relating to false information

It is also an offence for any person to give false information in any material particular in the discharge of his duty to a public officer or any person who is to take decision or do any other act in relation thereto. Upon conviction the person shall be liable to imprisonment for a term not less than two years and not more than five years. Where the person is a public officer the penalty shall not be less than three years and not more than five years imprisonment[29].

The Act provides that without prejudice to the provisions of any other enactment, any regulatory agency or body in the financial sector shall in the exercise of its functions, liaise with the Commission to investigate and monitor the commission of economic and financial crimes[30]. These researchers think that the power granted the Commission in this respect is excessive. The provision implies that other regulatory financial institutions cannot *suomotu* investigate and monitor similar offences without recourse to the Commission. Another issue for concern under the Act with regards to this provision is that it does not provide for punishment for failure to comply with it.

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[26] Section 15(1) Ibid
[27] Section 15(2) Ibid
[28] Section 15(3) Ibid
[29] Section 16 Ibid
[30] Section 16(3) Ibid

1.4.4 Retention of Proceeds of a Criminal Conduct

Whenever a person who whether by concealment, removal from jurisdiction, transfers to nominees or otherwise retains the control of the proceeds of an economic or financial crime on behalf of another person knowing that the proceeds are as a result of criminal conduct by the principal or knowing that any property in whole or in part, directly or indirectly representing another person's proceeds of an economic or financial crime, acquires or uses that property or has possession of it, commits an offence and is liable on conviction to imprisonment for a term not less than three years or to a fine equivalent to 100 percent of the value of the proceeds of the economic or financial crime or both such imprisonment and fine[31]. This position of the law was reaffirmed in the case of ***Kalu v F.R.N*** (2016) 9 NWLR (Pt. 1516) 1. Pp. 21-22, paras H-D. In this case, following a petition bordering on abuse of office, corruption and money laundering lodged against the appellant by some indigenes of Abia State, the EFCC set in motion an investigation with regards to the petition. The investigation revealed that while the appellant was the Governor of Abia State, funds running into some billions of naira in various bank drafts in favour of the appellant through the 3rd respondent which was his company. it was also discovered that that the appellant awarded State Government contracts to companies in which he had interest and further that the contractors to whom contracts were awarded by the appellant, as the Governor, lodged several bank drafts in the 3rd respondent's account as gratifications. It was held that it amounts to the retention of proceeds of criminal conduct.

The challenge with this stipulation in this section is the issue of knowledge or knowing whether the proceeds are as a result of criminal conduct. *Mens rea* is basic to establishing the actual guilt of somebody alleged to have committed a crime. In other words, the proof of *mens rea* would not be easy for the prosecution particularly establishing prior intention to commit a criminal act, with the knowledge that the act is a crime.

1.4.5 Offences in Relation to Economic and Financial Crimes and Penalties

Where a person engages in the acquisition, possession or use of property knowing at the time of its acquisition, possession or use that such property was derived from any offence under the Act commits an offence[32].

It is an offence under the Act where a person engages in the management, organisation or financing of any of the offences or engages in the conversion or transfer of property knowing that such property is derived from any offence under it[33].

[31] Section 17 Ibid
[32] Section 18(1)(a) Ibid
[33] Section 18(1)(a) Ibid

Where a person engages in the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property knowing that such property is derived from any offence under the Act commits an offence[34].

In the event that any of the above is committed by a person such a person shall be liable on conviction to imprisonment for a term not less than two years and shall not exceed three years[35].

1.4.6 Forfeiture of Property

A person convicted of an offence under the Act shall forfeit to the Federal Government all the assets and properties which may or are the subject of an interim order of the Court after an attachment by the Commission[36]. Any asset or property confiscated, or derived from any proceeds the person obtained, directly or indirectly, as a result of such offence not already disclosed in the Assets Declaration Form and any of the person's property or instrumentalities used in any manner to commit or facilitate the commission of such offence not already disclosed in the Declaration of Assets Form shall be forfeited to the Federal Government. Proceed of crime has been defined as any property derived or obtained, directly or indirectly, through the commission of an offence under the Act[37].

The law is succinctly clear that all the properties of a person convicted of an offence under the Act and shown to be derived or acquired from such economic or financial crime and already the subject of an interim order shall be forfeited to the Federal Government[38].

Assets and properties acquired in other countries via the proceeds of any illicit or corrupt practices or activities can be forfeited to the federation account. The law is to the effect that once it is established that any convicted person has assets or properties in a foreign country acquired as a result of economic or financial crime the assets or properties subject to any treaty or arrangement with such foreign country, shall be forfeited to the Federal Government. In this instance, forfeiture shall be made through the office of the Attorney-General of the Federation which shall ensure that the forfeited assets or properties are effectively transferred and vested in the Federal Government[39]. This provision is laudable in that it would curtail the excesses of money laundering practices.

Passports are equally considered properties that can be forfeited to the Federal Government. This section is aimed at. ensuring easy access or availability of the Defendant and/or Accused person in the event of conviction to enable him serve his

[34] Section 18(1)(d) Ibid
[35] Section 18(2) Ibid
[36] Section 20 (1) Ibid
[37] Section 20(3) Ibid
[38] Section 21 Ibid
[39] Section 22(1) and (2) Ibid

terms. That is, it would ensure that the Defendant and/or Accused person does not escape from justice. The section provides that the passport of any person convicted of an offence under the Act shall be forfeited to the Federal Government and shall not be returned to that person till he has served any sentence imposed or unless or until the President directs otherwise after the grant of a pardon or on the exercise of the prerogative of the mercy under the Constitution of the Federal Republic of Nigeria, 1999[40]. Should a person convicted of financial and economic crime be granted pardon or prerogative of mercy? In as much as right to grant pardon or prerogative of mercy by the President is constitutional would it serve any economic benefit to grant same without serving the requisite sentence. If allowed to serve the terms it will deter others with similar intention.

Whenever there are properties which are acquired via illicit means such properties can be forfeited to the Account of the Federal Government. The property whether real or personal, which represents the gross receipts a person obtains directly as a result of the violation of the Act or which is traceable to such gross receipts and within Nigeria which represents the proceeds of an offence under the laws of a foreign country within whose jurisdiction such offence or activity would be punishable by imprisonment for a term exceeding one year and which would be punishable by imprisonment under the Act if such act or activity occurred within Nigeria is subject to forfeiture to the Federal Government and no other property rights shall exist on it[41].

The following shall also be subject to forfeiture under the Act and no proprietary right shall exist in them all means of conveyance, including aircraft, vehicles, or vessels which are used or are intended for use to transport or in any manner, to facilitate the transportation, sale, receipt, possession or concealment of economic or financial crime. All books, records, research materials and data used or intended to be used in violation of any provision of the Act, all monies, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for any illegal act or in violation of this Act or all proceeds traceable to such an exchange, and all monies, negotiable instruments and securities used or intended to be used to facilitate any violation of this Act. Equally, all real property, including any right, title and interest (including any leasehold interest) in the whole or any piece or parcel of land and any improvements or appurtenances which is used or intended to be used in any manner or part to commit, or facilitate the commission of an offence under this Act[42]. The exceptions to these are that no means of conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under this section unless the owner or other person in charge of such means of conveyance was a consenting party or privy to a violation of the Act.[43]

[40]Section 23 Ibid.
[41] Section 24 Ibid
[42] Section 25 Ibid
[43] Section 25 (a)(i)(ii) and (iii) Ibid

As to whether bank account qualifies as assets, the court held in the case of *Dangabar v F.R.N (supra)* that where a bank account and money in the account belong to the accused person charged under section 28 of the Economic and Financial Crimes Commission (Establishment etc) Act, 2004 the account and the money, qualify as assets.

1.4.7 Seizure of property

Where any property is subject to forfeiture as prescribed under the Act may be seized by EFCC. The circumstances wherein the property may be seized include where the seizure is incidental to an arrest or search or in the case of property liable to forfeiture upon process issued by the Court following an application made by the Commission in accordance with the prescribed rules.

The property is often placed under seal or removes it to a place designated by the Commission whenever property is seized under any of the provisions of the Act. All properties taken or detained shall be deemed to be in the custody of the Commission, subject only to an order of a court[44].

Where a person is arrested for committing an offence under the Act, such person shall make full disclosure of all his assets and properties by completing the Declaration of Assets Form. It is expected that the completed Declaration of Assets Form shall be investigated by EFCC[45].

It is an offence for any person who knowingly fails to make full disclosure of his assets and liabilities or knowingly makes a declaration that is false or fails, neglects or refuses to make a declaration or furnishes any information required, in the Declaration of Assets Form and is liable on conviction to imprisonment for a term not exceeding five years[46]. It was held in the case of *F.R.N. v Igbinedion*[47] that the ingredients of the offence of failure to declare assets under section 27(3) of the Economic and Financial Crimes Commission Act are (a) the accused must have filled the assets declaration form, (b) the accused must have failed to make full disclosure of its assets and liability in Assets Declaration Form and (c) the failure must be intentional or premeditated. In this case, the respondent was tried and convicted of a one count charge of failure to declare his interest in account with Guaranty Trust Bank.

Whenever the assets and properties of any person arrested under this Act are attached the Commission shall apply to the Court for an interimforfeitureorder[48].

Where a person is arrested for an offence under the Act the Commission has the power to immediately trace and attach all the assets and properties of the person acquired

[44] Section 26 Ibid
[45] Section 27(1) Ibid
[46] Section 27(2) Ibid
[47] [2015] NWLR (Pt. 1444) 475
[48] Section 27(4) Ibid

as a result of such economic or financial crime and shall thereafter cause to be obtained an interim attachment order from the Court[49].

1.4.8 Interim forfeiture order[50]

The forfeiture orders which the court grants at the point or after arrest is an interim order. Where the assets or properties of any person arrested for an offence under the Act has been seized or any assets or property has been seized by the Commission under the Act, the Commission shall cause an *ex parte* application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is *prima facie* evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

The conundrum that needs to be attended to squarely at this stage is whether section 28 and 29 of the EFCC Act are inconsistent with the provisions of sections 36 and 44 of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended) . It is our submission that if the provisions of sections 28 and 29 of the EFCC Act are complied with it is not inconsistent to sections 36 and 44 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended). This position had secured judicial blessing in the case of *Dangabar v. F.R.N*(infra) where the court held that by virtue of sections 26, 27, 28, 29 and 30 of the EFCC Act, 2004 an interim order for the preservation of assets is obtainable immediately after commencement of the investigation and to last till final determination of the criminal charge that may be initiated against the accused person.

1.4.9 Final Order and Disposal of Forfeited Property

Where a person is convicted of an offence under the Act, the Commission or any authorised officer shall apply to the Court for the order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtained as a result of the crime subject to an interim order under the Act[51].

Where the court grants the final order of forfeiture a copy of every final order forfeiting the asset and property of a person convicted under the Act shall be forwarded to the Commission[52]. Upon receipt of a final order the Secretary to the Commission shall take steps to dispose of the property concerned by sale or otherwise and where the property is sold, the proceeds thereof shall be paid into the Consolidated Revenue Fund of the Federation. According to Waziri[53], in cases of official corruption and theft of Government funds, the proceeds of the crime are remitted to the office of the Accountant General of the Federation of Nigeria or that of the applicable State Government, as

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[49] Section 28 Ibid
[50] Section 29 Ibid
[51] Section 30 Ibid
[52] Section 31 Ibid
[53] Farida Waziri, The Economic and Financial Crimes Commission's (EFCC'S) Critical Role in Growing the Economy, Paper Presented to the Nigeria-British Chamber of Commerce, on 7th May, 2011. See https://www.proshareng.com Accessed on 20th August, 2017.

required by public service rules. Where the victim is a private entity, the proceeds of the crime are given to such private entity.

In the area of convictions, the Commission has secured over 600 convictions. An analysis of the pattern of convictions shows that the bulk of them have come from areas of Advance Fee Fraud and allied offences arising there from. There have been high profile convictions involving politically exposed persons such as Tafa Balogun, Diepriye Alamiyeiseigha, Bode George, Cecillia Ibru and Lucky Igbinedion among others[54].

Where any part of the property included in final order is a money in a bank account or in the possession of any person, the Commission shall cause a copy of the order to be produced and served on the manager or any person in control of the head office or branch of the bank concerned and the manager or person shall forthwith pay over the money to the Commission. TheCommission shall, in turn, pay the money received into the Consolidated Revenue Fund of the Federation.The Attorney-General of the Federation may make rules or regulations for the disposal or sale of any property or assets forfeited pursuant to the Act.

It is observed that the law should have mandated the banks or any financial institutions where the money of the convicted person which is subject of final forfeiture be paid directly to the consolidated revenue fund of the federation. This in hinged on the fact that the consolidated revenue fund is a known account and it would also avoid being tempered with.

1.4.10 Offences in relation to forfeiture orders

Where any person who without due authorisation by the Commission deals with, sells or otherwise disposes of any property or asset which is the subject of an attachment, interim order or final order commits on offence and shall be liable on conviction to imprisonment for a term of five years without the option of fine[55].

It is also an offence for any manager or person in control of the head office or branch of a bank, other financial institution or designated non-financial institution who fails to pay over tothe Commission upon the production to him of a final order and shall be liable on conviction to imprisonment for a term of not less than one year and not more than three years, without the option of a fine.

1.4.11 Consequences of an Acquittal in Respect of Assets and Properties

Where any person whose properties were forfeited to the Federal Government as a result of an arrest, search or order of court shall be released to the owner in the event of his acquittal. It is to the effect that where a person is discharged or acquitted by a court of an offence under the Act the Court may make an order of revocation or confirmation as the case may be of an interim order whichever order is considered just, appropriate or reasonable in the circumstances.

[54] Ibid.
[55] Section 32 Ibid

The property may be attached where a discharge is merely given on technical grounds. Where an interim order is revoked by a court all assets and properties of the person concerned shall be released to him by the Commission[56].

The terminology, revocation or confirmation, used in this section is likely to mislead. Instead the term set aside ought to have been used for an interim order of forfeiture.

In consonance with the provisions of the Act the Court has held in the case of *Dangabar v F.R.N* (*infra*) that by virtue of sections 30 and 33 of the EFCC Act, 2004, where a person is convicted of an offence under the Act, the Commission or any authorised officer shall apply to the court for an order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtained as a result of the crime subject to an interim order under the Act. On the other hand, where the accused is discharged and acquitted by a court of the offence charged, the court is empowered to revoke the interim order of attachment.

1.4.12 Freezing Orders on Banks or other Financial Institutions

The law clothe the Chairman or any authorised officer to freeze the account of a person where it is satisfied that the money in his account is made through the commission of an offence under the Act[57]. The Chairman is equally granted power to freeze accounts if the suspected offence is committed under any of the following enactments enumerated in Act[58].

The law makes it mandatory that before an account can be freeze EFCC must apply to the Court *ex parte* for power to issue an order as specified in Form B of the Schedule to the Act. After obtaining the order from the court it shall be addressed to the manager of the bank or any person in control of the financial institution or designated non-financial where the account is or believed by him to be or the head office of the bank, other financial institution or designated non-financial institution to freeze the account. It was held in the case of *Dangabar v F.R.N*[59] that by virtue of section 34 of the EFCC Act, 2004, it is only when an *ex parte* order has been made by the court that the Chairman of the EFCC will issue an order specified in the schedule B of the Act addressed to the manager of the Bank or any person in control of the account to freeze the account.

Upon being armed with the order theChairman of the Commission, or any of his authorised officer may direct the bank, other financial institution or designated non-financial institution to supply any information and produce books and documents relating to the account to stop all outward payment, operations or transactions (including any bill

[56] Section 33(1)(2) and (3) Ibid
[57] Section 34 Ibid
[58] Section 7(2) Ibid
[59] [2014] 12 NWLR (Pt. 1422) 580

of exchange) in respect of the account of the person[60]. In other words, once the bank or the financial institution in question is served with the order and the requisite Form B any further transactions on the account must stop.

It is made mandatory by virtue of the law that the manager or any other person in control of the financial institution shall take necessary steps to comply with the requirements of the order made[61].

It is the humble view of this research that the legal regalia that sanction the Chairman or any of his authorised persons to approach the court with an *ex parte* application for freezing of an account on suspicion that the money is acquired via commission of an offence under the Act or any other law are excessive. This can easily be abused by the Chairman.

The section as couched by the draftsmen is capable of resulting to unnecessary disputes among agencies of government and even the constitution. The section provides that notwithstanding anything contained in any other enactment or law the Chairman or any of his authorised persons can freeze an account on the grounds of mere suspicion. The courts have frown at this provision where conviction has not been secured against the person.

On whether economic and financial crimes commission can deprive person suspected of committing crime his property without been found guilty by court, the court have held in the case of *Chidolue v EFCC*[62] that the Economic and Financial Crimes Commission derives its powers from the Act establishing it. It has no power under the Constitution to deprive a person suspected of committing a crime of his property when such a person has not been found guilty by a court of competent jurisdiction. The facts of this case is that the Appellant by way of originating summons instituted an action at the Federal High Court, Abuja against the Respondent seeking, *inter alia* a declaration that the Respondent's forfeiture of his Standard Chartered Bank Cheque No. 00052310 for the sum of One Hundred Million Naira (₦100,000,000) was a violation of his right to property guaranteed under section 44 of the Constitution and therefore void.

On whether bank account of a person not arrested can be frozen. It has equally been held in the case of *Dangabar v F.R.N*(Supra) that by virtue of section 34 (1) and (2) of the Economic and Financial Crimes Commission (Establishment etc.) Act, 2004, the account of a person may be frozen even when he is not arrested and made a party to criminal proceedings.

Important to note is that this could lead to indiscriminate freezing of accounts without justifiable grounds. It was demonstrated recently when the EFCC frozen the bank account of His Excellency, Ayodele Fayose, the Governor of Ekiti State with Zenith

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[60] Section 34(2) Ibid
[61] Section 34(3) Ibid
[62] [2012] 5 NWLR (Part 1292 160)

bank. Albeit, in that case the Governor approached the court and his account was eventually defreeze.

1.5 Power of *Nulle Prosecui*Over EFCC

Recently, there was an inter agency conflict between the office of the Attorney General of the Federation and the Chairman of the Economic and Financial Crimes Commission. The crisis started when the Attorney General of the Federation requested that some of the High Profile case files be forwarded to it. The Chairman of the EFCC resisted and refused to submit same to the AGF. The Attorney-General, Malami, is said to have accused the EFCC boss of violating section 10(1) of the Economic and Financial Crimes Commission (Enforcement) Regulations 2010. The regulation mandates the EFCC to forward the outcome of investigations along with its recommendations to the AGF in cases of complaints that are 'serious or complex'[63]. A case is considered "serious or complex" if it has significant international dimension or involves money or assets of a value exceeding Fifty Million Naira (N50,000,000) or requires special knowledge of financial, commercial, fiscal or regulatory matters such as the operations of the markets, banking systems, trusts or tax regimes.

It is our humble opinion that the Chairman of EFCC was unnecessarily resistant to the request despite the fact that the Act subjects his power to the AGF. The section provide thus:

> Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under the Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence[64].

The wording of the section clearly shows that the power to compound an offence is subject to power of the Attorney-General of the Federation. The operative word in the above section empowering the Chairman of the Commission to compound an offence is 'may' which in itself is not mandatory.

It is pertinent to note that before an offence can be compounded, the following elements must be present – (a) an agreement not to prosecute; (b) knowledge of the actual

[63] www.vanguardngr.com/2017/08/agf-malami-magu-head-showdown-high-profile-cases/ Accessed on 20th August, 2017.

[64] Section 14(2) Ibid

commission of crime; and (c) receipt of some consideration. The three elements must be established conjunctively[65].

The above has found judicial blessings in the case of *Chidolue v EFCC (supra)* where it was held that by virtue of section 13(2) of the Economic and Financial Crimes Commission (Establishment) Act 2004, without prejudice to section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in court of law), the Commission may compound any offence punishable under the Act by accepting such sums of money as it thinks fit, not exceeding the maximum fine to which that person would have been liable if he had been convicted. According to Chukkol[66], this is just an attempt by the Act to introduce the American concept and practice of plea bargaining.

With the nature of the authority conferred on the EFCC to compound offences,what would be the status of the accused person? Would he be acquitted of the offence or be referred to as an ex-convict? Is this not a leeway for aiding corruptionafter compounding an offence?These queries are raised in view of the decision of the court that compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. See the case of *Chidolue v EFCC* (*Supra*).

In the same vein, on import of section 13(2) of the EFCC (Establishment etc) Act, 2004 the court held that by virtue of section 13 (2) of the EFCC (Establishment) Act, 2004, the amount liable to be accepted by the commission shall be such amount a person convicted should have paid as fine. This is clearly the import of the section. See the case of *Chidolue v EFCC* (*Supra*). If the Act and the judgment of the court is anything to go by what would happen to an accused person/defendant whose offence has no option of fine in its punishment? How can such an offence be compounded? For instance, the provision of section 15[67] stipulates that upon the conviction of a person on the offence of terrorism it will attract life imprisonment.

The courts that are granted exclusive jurisdiction to try offenders under the Act are the Federal High Court and State High Court including FCT High Court. Notwithstanding anything to the contrary in any other enactment the courts have the power impose the penalties as contained in the Act.[68]

1.6 Conclusion

Conclusively, it is pertinent to point out that the EFCC has fairly recorded remarkable achievements despite series of shortfalls and criticism of its functions. In its

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[65] *Chidolue v EFCC (Supra)*
[66] Kharisu Sufiyan Chukkol, The Law of Crimes in Nigeria, Ahmadu Bello University Press Limited, Zaria, 2010 Page 504.
[67] EFCC (Establishment) Act, Cap. E, Laws of the Federation of Nigeria, 2004.
[68] Section 19 Ibid.

attempt to combat economic and financial crimes in Nigeria, the EFCC has been able to carry out both investigation and prosecution of politically high profile cases. Another critical challenge faced by the EFCC in performing its functions is its inability to prosecute some executive political office holders due to immunity as encapsulated in the Constitution.[69] Considering the functions of the EFCC which are closely related to that of the police it is also imperative to harmonise them for efficacy and to avoid duplication of functions and responsibilities.

It is therefore observed that the EFCC Act, 2004 did not make provision for what would be the status of the accused person and/or defendant in the event that the offences are compounded.Forfeited money in the account of convicted person is paid to EFCC before remitting it to the Consolidated Revenue Fund of the Federation. The EFCC Act, 2004 makes provision for compounding of offences. This will serve as a leeway for corruption and it would defeat the essence of punishment which is deterrence since the amount liable to be accepted by the commission shall be such amount a person convicted should have paid as fine.It is further observed that the EFCC is statutorily saddled with the responsibility of carrying out and sustaining rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria despite the existence of National Orientation Agency.

Flowing from the above, it is recommended that the EFCC Act, 2004 should be amended to incorporate adequate provision on the status of an Accused person whose offences are compounded. The forfeited money in the account of convicted person should be paid to the Consolidated Revenue Fund of the Federation being a known account instead of paying into the EFCC account before remitting same. The EFCC Act, 2004 should be amended to ensure that before compounding of offences the money acquired via illicit means should be recovered first even before the fine. This will ensconce the very essence of punishment which is deterrence. The responsibility of carrying out and sustaining rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria should left for National Orientation Agency by amending the Economic and Financial Crimes Commission.

[69] Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended), Cap C23, Laws of the Federation of Nigeria, 2004.