Corporate Restructuring in Nigeria: An Analysis of Rescue Mechanisms under the Companies and Allied Matter Act 2020.

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ABSTRACT

Corporate Restructuring may be described as the process of rearranging a Company's finance, operations and management to improve its efficiency, effectiveness and productivity. It ensures that a Company can regain its financial stability and viability. Corporate restructuring is also an action taken by a Company to significantly modify the financial and operational aspect of the Company, usually when the business is facing financial pressure. This Article aims to provide an understanding on the basic concepts and legal framework of Corporate Restructuring in Nigeria. There would be a critical review on government legislations and policies on Companies Rescue Mechanisms, comparism between the old and the new Companies and Allied Matter Act, a critical analysis of rescue mechanism in Nigeria such as internal, external, Company Voluntary Agreements with practical examples and recommendations would be provided to help the Tunubu Civilian Government Administration in Nigeria.

Keywords: Corporate Rescue, Management, Corporate Restructuring, Finance, Legislations and Policies

1.0 Introduction

Kigho- Oyolo M, in his book titled 'Principles and Practice of Nigerian Corporate Law and Management stated that Corporate Restructuring is therefore aimed at reorganising a business in order to improve efficiency and increasing profitability. With regards to the restructuring which took place in the banking sector, it would be recalled that on July 6 2004, the Central Bank of Nigeria (CBN) under its Governor, Professor Charles Soludo announced a 13 point reform anchored on a minimum shareholdings fund of Twenty Five Billion Naria (=N=25,000,000,000.00K) for Nigerian Banks with December 2005 as the compliance date. Also, in the case of the insurance industry, the reformation guidelines are hinged on a Two Billion Naria (=N=2,000,000,000.00K), Three Billion Naria (=N=3,000,000,000.00K) and Ten Billion Naria (10,000,000,000.00K) shareholders funds for life, general business and reinsurance companies respectively with the compliance date as February 2007.

This capitalisation is said to be against the prevailing levels of One Hundred and Fifty Million Naria (=N=150,000,000.00K), Two Hundred Million Naria (=N=200,000,000.00K) and Three Hundred and Fifty Million (=N=350,000,000.00K) respectively.[1]

The then Minister of Finance, Mrs Ngozi Okonjo Iweala while announcing the new level of capitalisation stated that the measure became imperative in view of the reform process in the financial services industry with the aim of increasing the capacity of local insurers and reinsurers to underwrite risks in the economy thereby increasing the contributions of the insurance sub-sector to the gross domestic product (GDP)[2].

Recently, on the 23rd of May 2024, the CBN announced a new guideline for minimum capital restructuring of all Bureau De Change (BDC). The Mandate is that Tier 1 BDCs have a minimum capital base of Two Billion Naria (=N=2,000,000,000.00K), while Tier 2 BDCs must have a minimum of Five Million Naria (=N=500,000,000.00K). Additionally, the application fee for Tier 1 license is set at One Million Naria (=N=1,000,000.00K) and Two Hundred and Fifty Thousand Naria (=N=250,000.00K) for a Tier 2 license[3].

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[1] Kigho- Oyolo M., "Principles and Practice of Nigerian Corporate Law and Management", (2009 Edition), 154-155.

[2] Kigho- Oyolo, 'Principles and Practice of Nigerian Corporate Law and Management' (n 1) 154

[3] Ayodeji Adegboyega, "CBN directs all BDCs to reapply for licenses", Premium Times. (Nigeria, 23 May 2024), < https://www.premiumtimesng.com/news/top-news/696792-cbn-directs-all-bdcs-to-reapply-for-licenses.html. > accessed 31 May 2024.

2.0 Definition of Concepts

Chris C. W, explained that there are a number of reasons why a company would want to restructure its outlook after incorporation. This may be as a result of the Company's buoyancy or because of a downward turn of its economic fortune. In the midst of challenges, a company which wishes to stay afloat, must design and embark on legally acceptable survival options, many of which are available under the Nigeria Corporate, Investment Law and Practice[4].

Thus, rather than fizzle out due to hash operating environment, stiff competition or difficult regulatory compliance, aiding companies avoid liquidation on adoption of various corporate restructuring options as a survival strategy. Similarly, the going concern companies desirous of expansion could also explore the corporate restructuring option to achieve greater corporate growth. Some involve internal arrangement between a company and its members or creditors, while others deal with the company and outsiders[5].

Eni E. A, while explaining Arrangement and Compromise in his book, provided an idea about Corporate Restructuring as follows: a Company is insolvent if it is unable to pay its debts as they become due. An insolvent company has insufficient current assets to satisfy the claims of all its creditors. In addition, a company may be practically insolvent even though it is still technically solvent. A company in distress may wish to reorganise its finances in other to attain an optimal capital structure which will allow it to carry on business in a more efficient manner, settle outstanding claims of creditors, retain valued employees and still have some leftover value for its shareholders[6].

Agbonika J. A. M, defined Corporate Reconstruction or Restructuring as a process of altering the status or position and the general outlook of a company with a view to positioning such company in such a way that it can meet certain commercial challenges or take some opportunities. Sometimes this may also be in response to government policy directives. This is considered to be more profitable and useful to carry on business in a different form or structure[7].

The learnered Professor of Law further explained that, a necessary condition before any court can sanction the scheme of reconstruction is that the company must comply with the provisions

[4] Chris C. W., "Introduction to Company Law and Practice", (2022 Edition).
[5] Chris C. W., 'Introduction to Company Law and Practice' (n 4).
[6] Eni E. A., "Business Law and Practice", (January 2021), 1455.
[7] Agbonika J. A. M., "Modern Nigerian Company Law", (2021), 519.

of the Act. Any reconstruction scheme must be for the interest of the company[8]. It has been cautioned by Per Lindley L. J in *Alabama, New Orleans, Texas and Pacific Junction Railway Co*[9] that:

> "... the Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting *bonafide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve it..."

In *ReAnglo- Continental Supply Co Ltd*[10], Ashbury J held that for liquidation and dissolution of proceeds of the company the court can sanction it if it is fair and reasonable. In Bisgood v Henderson's Transvall Estate Ltd, the Company in a General Meeting resolved to carry out a scheme whereby each fully paid £1 share was to be exchanged for £1 share in a new company, to be credited as paid up to an amount of 87 ½ pound. Under the scheme, the new shares of those dissented were to be sold enbloc for what they would fetch, and the proceeds distributed pro rata amongst them. The Company's Memorandum and Article purported to authorise such a transaction. It was held by the Court of Appeal division that it was ultra vires.

Where none of the Companies apply for Court order for separate meeting to be held by the Transferor and Transferee Company, a dissenting member or members may apply to Court for the scheme to be set aside[11]. Thus in *Re Hellenic & General Trust Ltd*[12], Hanbros Ltd, through a wholly owned subsidiary, held 53% of the ordinary shares of the Company Hellenic and General Trust Ltd. A scheme of arrangement was prepared under which Hambros would acquire all the ordinary shares for a cash consideration of £48 per share. At a meeting of ordinary members, over 80% approved the scheme. The National Bank of Greece, a minority shareholder holding 14% of the shares, opposed the scheme. Templemen J refused to sanction the scheme because interalia there should have been a separate class meeting of the ordinary members who were not wholly owned subsidiary of Hambros.

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[8] Agbonika, 'Modern Nigerian Company Law' (n 7) 519.
[9] Re Alabama, New Orleans, Texas and Pacific Junction Railway Co (1891) 1 Ch. 213; 60 L. J Ch 21; 64 L. T. 127 TLR.
[10] ReAnglo- Continental Supply Co. Ltd (1922) 2 Ch 723; 9 L. J. Ch 658.
[11] Agbonika, 'Modern Nigerian Company Law' (n 7) 520.
[12] Re Hellenic & General Trust Ltd (1976) 1 WLR 125; (1975) 3 AllER 382.

Adenike B, differentiated Corporate rescue from business rescue while explaining the concept of rescue mechanisms that, this is a sub-theme of insolvency law and a process by which a distressed company may be resuscitated or rejuvenated. The concept of rescue therefore is based on processes, mechanisms, and steps that are carried out as interventions necessary to avert the eventual failure of the company. There are two concepts available to rescue an insolvent company; business rescue and corporate rescue. Corporate Rescue is generally described as the process of enabling companies in financial difficulties to return to a state of viability and to prevent them from sliding into insolvency while Business rescue implies the termination of the old company, but the actual business and its activities will remain as a cohesive, productive unit under new ownership[13].

3.0 Comparism between Corporate Rescue Mechanisms in the old and new Companies and Allied Matter Act (CAMA)

The CAMA 1990 provided for rescue mechanisms such as Arrangement and Compromise under Section 539- 540[14], Arrangement on Sale under Section 538[15]. Before the enactment of the Federal Competition and Consumer Protection Act 2018, other rescue mechanisms included: Mergers and Acquisition under Section 120 (4) of the Investment and Security Act[16] 2007 and Rule 427 (1) of the Security and Exchange Commission 2013[17], Take Over under Section 117 and 131 of the Investment and Security Act 2007[18].

The New CAMA 2020 provided for additional mechanisms such as Arrangement and Compromise Under Section 710- 717[19], Netting Under Section 718- 721[20], Administration Under Section 728- 733[21] and Mergers Under Section 849[22]. Mergers was also Provided in Section 92 of the Federal Competition and Consumer Protection Act (FCCPA) 2018[23].

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[13] Adenike B.,' Navigating Company Insolvency: Rescue Mechanism and Legal Solutions', 2023, < https:// trustedadvisorslaw.com/navigating-company-insolvency-rescue-mechanisms-and-legal-solutions/. > Last accessed 1 June 2023.
[14] Companies and Allied Matter Act 1990, LFN 2004, Section 539- 540.
[15] ibid, Section 538.
[16] Investment and Security Act, LFN 2004, Section 120 (4).
[17] Security and Exchange Commission Rules 2013, Rule 427 (1).
[18] Investment and Security Act, LFN 2004, Section 117 and 131.
[19] Companies and Allied Matter Act 2020, LFN 2004, Section 710- 717.
[20] ibid, Section 718- 721.
[21] ibid, Section 728- 733.
[22] ibid, Section 849.
[23] Federal Competition and Consumer Protection Act 2018, Section 92.

4.0 Legal Framework, Policies and Regulatory Agencies for Corporate Rescue Mechanisms in Nigeria

The following are the laws guiding the legal framework of Corporate Rescue Practice in Nigeria:

The Constitution of the Federal Republic of Nigeria 1999 as amended

The Companies and Allied Matter Act 2020 as amended

The Federal Competition and Consumer Protection Act 2018

The Investment and Security Act 2007

The Security and Exchange Commission Rules 2017 as amended

Banks and Other Financial Institutions Act 2004

Central Bank of Nigeria Act 2007

Companies Income Tax Act 2004

Federal High Court Act 1991

Economic and Financial Crime Commission Act 2004

Companies Regulation 2021

Regulatory Agencies regulating corporate rescue practice in Nigeria are:

The Corporate Affairs Commission

The Central Bank of Nigeria

The Security and Exchange Commission

The Nigeria Stock Exchange

The Federal Competition and Consumer Protection Commission

The Federal Competition and Consumer Protection Commission Tribunal

The Investment and Security Tribunal

The Nigeria Immigration Service

The Federal High Court

The Asset Management Corporation of Nigeria

The Economic and Financial Crime Commission

The Federal Inland Revenue Commission

The National Insurance Commission

The Tax Appeal Tribunal

5.0 Types of Corporate Rescue Mechanisms in Nigeria

The concept of corporate rescue mechanism refers to the various procedures and mechanisms available to financially distressed companies to avoid liquidation and achieve recovery. These mechanisms aim to provide instruments for corporate survival and turnaround. They include formal legal procedures such as administration, company voluntary arrangements, and moratoriums, as well as informal mechanisms like sell-offs, management buyouts, debt for equity conversion, and debt restructuring arrangements. The rationale behind corporate rescue is to offer struggling companies the opportunity to continue operating and fulfil their obligations to creditors and stakeholders[24].

Akinola O. B, in his book divided corporate restructuring into internal options and external options. Internal Options are: Arrangement on Sale, Arrangement and Compromise while External Options are: Mergers, Takeover, Management Buy- out, Purchase and Assumption. The Learnerd Scholar further explained that in general, the expression reorganisation is often used when it is an internal arrangement by the company, while the term reconstruction involves more than one company and may take the form of merger or take- over[25].

According to Elgar online Publication, Corporate Rescue Mechanisms generally fall into two categories: informal and formal rescue strategies. Informal rescues, also referred to as 'private restructurings' or 'workouts', are a non-judicial process through which a distressed company and its significant creditors attempt to reach an agreement to restructure and adjust the company's debt obligations without court intervention. Formal rescues, on the other hand, involve the use of legal procedures designed under insolvency legislation where the compromises and arrangements for restructuring are made under the supervision of the court or a formal legal structure[26].

5.1 Arrangement and Compromise

The term compromise is very often used interchangeably with an arrangement, it has been stated that the terms are not synonymous. Compromise connotes an arrangement whereby a creditor or shareholder consents to relinquish some rights exercisable against the company. Where the liabilities of a company exceed its assets, it may consider an internal reorganisation of the

[24] Scispace, "What is the Concept of Corporate Rescue Mechanism?" < https://typeset.io/questions/what-is-the-concept-of-corporate-rescue-mechanism-4qy00n75if. > Accessed 1 June 2024.
[25] Akinola O. B., "Corporate Law Practice", (3rd Edition 2017) 259.
[26] Elgar Online, "Corporate Rescue: the orientation of Insolvency Law", (2016), < https://www.elgaronline.com/monochap/9781781007372/09_chapter1.xhtml. > Accessed 1 June 2024.

company or a scheme of arrangement with its creditors[27]. Section 710 of CAMA defined Arrangement as:

> "... any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected".

The Federal High Court in the case of Arrangement and Compromise, and Merger can order meetings between companies in settling issues on transfer of properties and liabilities in part or whole. The Court procedure is provided under CAMA 2020[28]. Creditors and Members of the Company can exercise their power to compromise in a meeting in which if the court deems it fair could become binding on the Company, Creditors or all class of Creditors, and all class of Members of the Company[29].

5.2 Arrangement on Sale

This is provided for under Section 714 and the procedure is summarised as follows:

The members in general meeting pass a special resolution for members, voluntary winding up and appoint a liquidator. Statutory declaration of solvency is made by the directors of the company certifying that the company is still financially viable and the liquidator gives effect to the resolution by convening a meeting of the shareholders or of the creditors or of the classes of either concerned to consider and approve the proposed scheme[30].

The most plausible interpretation of the objective of the arrangement on sale process is to settle outstanding debts by selling the whole or part of the assets to the creditor company, such that the business continues as a going concern in the creditor company (i.e. the transferor company). However, this is a process that can only be undertaken by solvent companies. This is because it can only be executed through a members' voluntary winding up of the transferor company. As earlier noted, a condition precedent to members' voluntary winding is a statutory declaration by the directors stating that the company are able to liquidate outstanding debts within 12 months. Thus, arrangement on sale is not a business rescue option, but an option for solvent companies

[27] Akinola, 'Corporate Law Practice' (n 25) 259.
[28] Companies and Allied Matter Act 2020, LFN 2004, Section 711 (1) - (7).
[29] ibid, Section 715 (1) - (6).
[30] ibid, Section 714 (1) - (7).

that wish to wind up its affairs and achieve better proceeds from the sale of its assets than would be possible by piecemeal sales in a winding up procedure[31].

5.3 Mergers and Acquisition

This is defined under the FCCPA 2018 as:

> "... when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking...[32]"

A merger is any amalgamation of the undertakings or any part of the undertakings or interests of two or more companies or the undertakings or part of the undertaking of one or more companies and one or more bodies corporate[33]. The CAMA also provides for merger of two or more associations with common aims and objectives[34].

Examples of mergers and acquisitions in the Nigerian banking sector include the acquisition of Intercontinental Bank by Access Bank in 2011, the merger between Unity Bank and Bank of Commerce and Development in 2015, and the acquisition of Mainstreet Bank by Skye Bank (now Polaris Bank) in 2014, also the merger of Access Bank and Diamond Bank in 2019.

5.3.1 Types of Mergers and Acquisition

In Nigeria, there are three types of Mergers. These are: Horizontal Merger, Vertical Merger and Conglomerate Merger. They are explained below.

Horizontal Merger: This is a merger between two or more businesses that are on the same market level because they manufacture similar products in the same geographic region. It is a merger of direct competitors also termed horizontal integration. Likewise, when a company grows through horizontal diversification, it expands into markets for products that it has not made before, but which are similar to its existing product range for instance a merger between Coca-Cola and Pepsi. Example of such in Nigeria in the 1980s include the mergers of Lever Brothers Nig Ltd and Lipton Nigeria Ltd. Also in October 2011, Nigerian Breweries acquired majority equity

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[31] Adiele, C. E.,' Developing a Corporate Insolvency Framework for Nigeria', 2020, Master of Laws Research Papers Repository, 9, < https://ir.lib.uwo.ca/llmp/9. > Last accessed 2 June 2024.
[32] Federal Competition and Consumer Protection Act 2018, Section 92 (1) (a).
[33] Akinola, 'Corporate Law Practice' (n 25) 266.
[34] Companies and Allied Matter Act 2020, LFN 2004, Section 849.

interests in Sona Systems Associates Business Management Limited, and Life Breweries Limited from Heineken N.V[35].

However, Banks that were acquired as a result of horizontal acquisition are Afribank Plc, which was acquired by Mainstreet Bank Ltd; Equatorial Trust Bank was acquired by Sterling Bank Plc; First Inland Bank was acquired by First City Monument Bank; Intercontinental Bank Plc was acquired by Access Bank Plc. Hence, according to the Central Bank of Nigeria (CBN), "Banks operating in the country are now sound, from a capital perspective following the exercise[36].

Vertical Merger: It is a merger between businesses occupying different levels of operation for the same product, such as between a manufacturer and a retailer; a merger of buyer and seller. For instance a manufacturer of computers might seek to purchase a producer of microchips or the acquisition of a retail gas station by the oil refining companies. It could also be a baking industry acquiring a flour mill industry. Reason for vertical mergers and acquisition is usually due to the wish to secure a steady source of supply for key materials or services[37].

An example of a real vertical merger is the 2002 transaction between eBay and PayPal. In an attempt to help eBay further purchases made on their online marketplace, they acquired PayPal to help their online users transfer money more easily.

Conglomerate Merger: Conglomerate merger is a merger between unrelated businesses that are neither competitive nor customers or suppliers of each other. It is simply a merger that is neither vertical nor horizontal. A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm. Conglomerates are group of companies that operate in widely diverse industries.[38]

There are two types of conglomerate mergers:

Pure Conglomerate Merger: This occurs when two companies from absolutely different fields join together. They don't have anything in common in terms of what they sell or who they sell to. They aim to diversify their portfolios and minimize risk by entering new markets or industries.

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[35] Omotayo A.,' An Overview of Mergers and Acquisitions under Nigerian Law', 2017, Unilag Law Review, Vol. 1, No. 1, < https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://unilaglawreview.org/james/wp-content/uploads/2017/06/omotayo-akinrinwa-an-overview-of-mergers-and-acquisitions-under-nigerian-law.pdf&ved=2ahUKEwj3n7S1-7yGAxV8UUEAHZGgAOIQFnoECBUQAQ&usg=AOvVaw1aGoak7SZWF0TbyderYleD. > Accessed 2 June 2024.

[36] Omotayo, 'An Overview of Mergers and Acquisitions under Nigerian Law' (n 35).

[37] ibid.

[38] Ideals,' The Complete guide for Conglomerate Mergers: Definition, benefits, examples', 2024, < https://www.idealsvdr.com/blog/conglomerate-mergers-examples/. > Accessed 2 June 2024.

These mergers can make the new company bigger, potentially leading to increased revenue streams and opportunities for growth.

Mixed Conglomerate Merger: This involves companies from different industries that still share something in common, like a customer base or distribution network. They aim to expand market reach, leverage shared resources, or capitalize on cross-selling opportunities[39].

Examples of Conglomerate Merger Deals around the world are as follows: Disney's acquisition of Pixar: Disney bought Pixar in 2006 for about $7.4 billion. At the time, Pixar was known for hits like "Toy Story" and "Finding Nemo." Disney wanted to boost its own animation division, which wasn't doing so well. One of the key factors driving the acquisition was Disney's desire to revitalize its animation division, which had struggled in the years leading up to the deal. Under the terms of the deal, Pixar co-founder Steve Jobs became Disney's largest individual shareholder, with approximately 7% of Disney's outstanding shares. Additionally, Pixar's creative team, led by John Lasseter and Ed Catmull, gained significant influence within Disney's animation division[40].

Amazon's acquisition of Whole Foods Market: In 2017, Amazon acquired Whole Foods Market for $13.7 billion, entering into the grocery retail sector. This merger enabled Amazon to combine its online expertise with Whole Foods' physical store network. By doing it, Amazon gained valuable data insights into consumer preferences and shopping behaviour, improving targeted marketing and personalized recommendations. The acquisition also provided Amazon with a platform to expand its grocery delivery services, offering customers greater convenience and choice. Additionally, it allowed Amazon to experiment with new retail formats, such as cashier less checkout. Together, this diversified Amazon's revenue streams and strengthened its competitive position in the retail industry[41].

Alphabet's acquisition of Nest: Another conglomerate merger example is Alphabet's acquisition of Nest in 2014 for $3.2 billion. Nest, known for its smart home devices like thermostats and smoke detectors, offered Alphabet an entry into the Internet of Things market. The acquisition aligned with Alphabet's strategy to diversify its portfolio beyond its core search and advertising businesses. Nest continued to operate as an independent entity under Alphabet's umbrella. The

[39] Ideals, 'The Complete guide for Conglomerate Mergers' (n 38).
[40] ibid.
[41] ibid.

deal enabled synergies between Nest's expertise in Smart home technology and Alphabet's resources in software and data analytics[42].

Salesforce's acquisition of Slack Technologies: In 2020, Salesforce, a leading cloud-based software company, announced its acquisition of Slack Technologies, a provider of workplace collaboration tools, for $27.7 billion. This merger aimed to combine Salesforce's customer relationship management (CRM) platform with Slack's messaging and productivity software, creating a comprehensive solution for remote work and digital collaboration. Upon completion, the acquisition positioned Salesforce as a leading provider of integrated cloud-based solutions for sales, marketing, customer service, and collaboration, enabling organizations to streamline workflows and improve communication[43].

Johnson & Johnson's Acquisition of Actelion: Another successful conglomerate merger, valued at $30 billion, occurred in 2017 between Johnson & Johnson and Actelion. Actelion, a Swiss biopharmaceutical leader, specialized in pulmonary arterial hypertension treatments. The deal granted Johnson & Johnson access to Actelion's innovative drug pipeline, particularly in PAH treatments, and expanded its global reach with Actelion's established presence in Europe. The merger enabled synergies, allowing Johnson & Johnson to speed up the development and distribution of novel therapies. Financially, the acquisition diversified Johnson & Johnson's revenue streams and enhanced its pharmaceutical standing[44].

5.3.2 Categories of Mergers by thresholds

Formally, Section 120 (4) of the Investment and Security Act and Rule 427 (1) of the Security and Exchange Commission Rules 2013 empowered the Security and Exchange Commission to prescribe the lower and upper threshold for mergers. They were Small Mergers below One Billion Naria, Intermediate Mergers between One Billion and Five Billion Naria, and Large Mergers above Five Billion Naria thresholds.[45]

The Federal Competition and Consumer Protection Act made some changes. Firstly, Section 93 (1) of the FCCPA empowers the Federal Competition and Consumer Protection Commission to approve Mergers of Companies[46] and Secondly, Section 92 (4) empowers the commission to

[42] ibid.
[43] ibid.
[44] ibid.
[45] Investment and Security Act 2007, Section 120 (4) and Security and Exchange Commission Rules 2013, Rule 427 (1).
[46] Federal Competition and Consumer Protection Act 2018, Section 93 (1).

determine the thresholds into small and large mergers with its thresholds stipulated by the Commission. The Section states as follows:

"...For the purposes of the is Act

a) a "small merger" means a merger with a value at or below the threshold stipulated by the Commission by regulations ; and
b) a "large merger" means a merger with a value above the threshold stipulated by the Commission by regulations"[47].

5.3.3 The role of the Central Bank of Nigeria (CBN) in merger and the banking sector

Section 7 (1) (c) of the Banks and Other Financial Institutes Act 1991 provides that except with the prior consent of the Governor of the CBN, no ban shall enter into an agreement or arrangement for the amalgamation or merger of the bank with any other person. A contravention of this provision is an offence punishable under Section 7 (3) with a fine.

5.3.4 Decided Court Cases on Merger

In *Re Lipton of Nigeria Ltd*[48], Lipton of Nigeria Ltd was merged with Lever Brothers Nigeria Ltd, *Re John Holt Investment Ltd and John Holt Ltd*[49] where the former was merged with the latter and in *Re Chesebrough Products Industries Ltd and Lever Brothers Nigeria Ltd*[50] where the former was again merged with the latter. The merger may also take the form of an amalgamation of two or more companies into another one formed for the purpose as in *Re Bendel Line Co Ltd* where the scheme for sanction was that Re Bendel line Co Ltd, Bendel Intra City Bus Service Ltd and trans- Kalife Ltd be amalgamated under a new company known as Bendel Transport Service Ltd.

6.0 Takeover

Section 117 of ISA defines Takeover as the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company[51]. Agbonika J. A. M, defined Takeover as the acquisition by one or more companies of all or part of the share capital and control of another, usually by buying all or a majority of its shares. It is also a transaction or series of transactions where by a company or companies acquire control over the

[47] Federal Competition and Consumer Protection Act 2018, Section 92 (4).
[48] Re Lipton of Nigeria Ltd Suit No: FHC/L/M21/81, 5th June 1985.
[49] Re John Holt Investment Ltd and John Holt Ltd Suit No: FHC/L/M68/87, 18th May 1987.
[50] Re Chesebrough Products Industries Ltd and Lever Brothers Nigeria Ltd Suit No: FHC/L/M49/88, 14th November 1988.
[51] Investment and Security Act 2007, Section 117

assets of a company, either directly or becoming the owner of those assets or indirectly by obtaining control of the management of the company. The arrangement is frequently effected by means of a takeover bid by one of the companies for the shares of the other, or of a takeover bid by a third company for the shares of both[52].

The Security and Exchange Commission and Regulation (SEC) 2013 provides for Take- Over Bid under Rule 445[53]. Section 117 of ISA defined Takeover Bid to mean a bid made for the purpose of a take- over[54]. Offers and Conditions for take- over are provided under Rule 446 of the Sec Rules 2013. Section 132 (2), 133 (1) - (4), 134 (1) - (8), 135 (1) - (6), 136, 138, 140 (1) - (6), 141- 148 0f the ISA 2007 provides for procedures for Take Over.

In Re Bugle Press Ltd[55], the Court of Appeal in England held that majority shareholders cannot purchase compulsorily the shares of remaining minority members who have not accepted the bid if the price was too low. In that case, the 10,000 pounds issue shares capital of Bugle Press Ltd was held as to 4,500, £1 shares each by Shaw and Jackson (the majority shareholders) and to the remaining 1,000 shares by Treby. The majority shareholders formed a 100 pound company, Jackson and Shaw (Holdings) Ltd, which they caused to make an offer, addressed to the shareholder in Bulge Press Ltd, to purchase their holdings at 10 pounds per share. After Shaw and Jackson had accepted this offer and treby had refused it on the ground that the price was too low, the offeror company gave Treby notice of its intention to purchase his holding compulsorily. The Court of Appeal, affirming Buckley J, exercising the discretion conferred by the Section, declared that the scheme was not binding on Treby.

On the duty of Directors of an Offeree Company to be honest towards their shareholders and possible remedies of dissenting minority shareholders who consider that the majority shareholders have been misled by the directors into accepting the Take- over bid offer, Brightman J in Gething v Kilner[56] held that:

> "I accept that Directors of an offeree company have a duty toward their own shareholders, which, in my view, clearly includes a duty to be honest and not to mislead. I also accept that a shareholder in an offeree company may be prejudiced if these co-shareholders are misled into accepting the offer. On the other hand, there may be many

[52] Agbonika J. A. M., "Modern Nigerian Company Law", (2021) 536.
[53] Security and Exchange Commission Rules 2013, Rule 445
[54] Investment and Security Act 2007, Section 117
[55] Re Bugle Press Ltd (1960) 3 WLR 1954.
[56] Gething v Kilner (1972) 1 WLR 337 at PP 441, 342

shareholders, not parties to this action, who ae perfectly satisfied with the offer and I see no sufficient reason why their contact should be placed in peril in the absence of bad faith on the part of the two boards or conduct to unreasonable as to approach bad faith."

6.1 Differences between Merger and Takeover

In a takeover, the direct or indirect control over the assets of the acquired company passes to the acquirer; in a merge the shareholding in the combined enterprise will be spread between the shareholders of the two companies. In the case of a takeover, the bid is frequently against the wishes of the management of the offeree company, in the case of a merger, the bid is generally by consent of the management of both companies[57].

Where a takeover bid is used for effecting a takeover, it may take the form of an offer to purchase shares for cash, or a share- for- share exchange, or of a combination of these two forms. However, where used for effecting a merger, it always takes the form of a share- for- share exchange offer, so that the accepting shareholders in the offeree company become shareholders in the offeror company. While in a merger, the whole undertaking of the acquired company is merged in the acquiring company, in a takeover, the target company remains separate and distinct but as a subsidiary of the acquiring company[58].

7.0 Administration

Gower and Davies explained the objectives of Administration under the Insolvency Act 1986 of England. The rescue goals of the revised administration procedure are three. Firstly, priority is given to that of rescuing the company as a going concern which is the objective which the administrator must pursue unless either he or she thinks it is not practicable to achieve it or that the second objective would better serve the creditor's needs. That second objective is achieving a better result for the company's creditors as a whole than would be likely if the company were wound up[59].

Thus, preservation of the company as a going concern, to the benefit, for example, of employees, is not required to be pursued where the creditors would be worse off as a result. The third objectives is realising property in order to make a distribution to one or more secured or preferential creditors, which is an objective the administrator may pursue only if it is not reasonably practicable to achieve the other two objectives and that goal is pursued in such a way

[57] Agbonika, 'Modern Nigerian Company Law' (n 52) 549.
[58] ibid.
[59] Grower and Davies, "Principles of Modern Company Law", (2003 7th Edition), 848.

that it will "not unnecessarily harm the interests of the other creditors of the company as a whole". Subject to the qualification implied where the administrator legitimately pursues the third objective, the administrator must act "in the interests of the company's creditors as a whole"[60].

Under the CAMA 2020, Chapter 18 covers on Administration. Administration under CAMA 2020 can be equated with resuscitating or rescuing the company or putting the company on a life support pending its revival or recovery form distress, the old CAMA 2004 laid down proper conditioned burial for a company under winding up. Section 443- 444 provides for appointment of an Administrator. The purpose for the appointment an Administrator is to rescue the company, the whole or any part of its undertaking, as a going concern, achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration, or realise property in order to make a distribution to one or more secured or preferential creditors[61].

In the exercise of his functions, the administrator of a company shall perform his functions in the interests of the Company's creditors as a whole and within 60 days of his appointment, prepare a detailed schedule of the Company's asset and submit a copy to the person by whom he was appointed[62].

8.0 Company Voluntary Arrangement (CVA)

CVA is provided under Section 434-442 of CAMA 2020. It is a process whereby the directors of a Company, an administrator or liquidator makes a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs under this scheme, a person is nominated (the nominee) to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation[63].

Where the nominee is not the liquidator or administrator of the company, he shall within 28 days (or such longer period as the court may allow) after he is given notice of the proposal for a voluntary arrangement, submit a report to the court stating whether, in his opinion, meeting of the company and of its creditors should be summoned to consider the proposal and if in his

[60] Grower and Davies, 'Principles of Modern Company Law' (n 59) 848
[61] Agbonika, 'Modern Nigerian Company Law' (n 7) 596- 597.
[62] Companies and Allied Matter Act 2020, LFN 2004, Section 444.
[63] Agbonika, 'Modern Nigerian Company Law' (n 7) 595.

opinion such meeting should be summoned, the nominee suggest the date, time and place for the meeting to be held[64].

On the other hand, where the nominee is the liquidator or administrator, he shall summon meetings of the Company and of its creditors to consider the proposal for such a time, date and place as he think fit. Only creditor (s) of the company of whose claim and address is known to the person summoning the meeting will be summoned to the creditors' meeting. The meeting summoned shall decide whether to approve the proposed voluntary arrangement with or without modifications.[65]

9.0 Netting

Section 718- 721 of CAMA 2020 introduced the concept of netting. For enforcement of Netting, Section 721 states that:

> "The provisions of a netting agreement is enforceable in accordance with their terms, including against an insolvent party, and, where applicable, against a guarantor or other person providing security for a party and shall not be stayed, avoided or otherwise limited by
>
> a) any action of the liquidator ;
> b) any other provision of law relating to bankruptcy, reorganisation, composition with creditors, receivership or any other insolvency proceeding an insolvent party may be subject to ; or
> c) any other provision of law that may be applicable to an insolvent party, subject to the conditions contained in the applicable netting agreement"[66].

Netting is a reconciliation and payment mechanism under which amounts owed between contracting parties are consolidated into a single, smaller payment from one party to another. Netting is used to denote contractual arrangements by which claims of different parties against each other are reduced to a single balance. Netting may be defined as a method of reducing credit and other risks of financial contracts by aggregating two or more obligations to achieve a reduced net obligation[67].

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[64] ibid, 595- 596.
[65] ibid, 596.
[66] Companies and Allied Matter Act 2020, LFN 2004, Section 721.
[67] Halimat O.,' Corporate Insolvency Regime in Nigeria: An Appraisal of the Innovations under the Companies and Allied Matter Act 2020, 2021, Volume 4, No. 2,Unilag Law Review, < https://www.google.com. > Last accessed 2 June 2024.

10.0 Management Buy- Out

A management buy-out is the acquisition of a business by its core management team, usually (but not always) in coordination with an external party such as a credited lender or Private Equity (PE) fund. The size of the buy-out can range considerably depending on the size and complexities of the business, but one aspect that all MBOs have in common is the core management team taking an equity stake in the business. Depending on the intentions of the current shareholder base, the buy-out will represent a controlling acquisition stake in the business, if not a full 100% acquisition[68].

The motivation for the buy-out typically arises from the owner/vendor looking to retire and wanting to provide the current management team an opportunity to take part in the future growth of the business. Common practice is to have the management team fund the buy-out with a portion of their own capital in order to ensure they are actively incentivized to grow the company. The amount management is required to invest is typically material enough to ensure their ongoing commitment to the success of the business[69].

Stakeholder motivations in a buy-out can be complex, but they tend to come down to one thing, value. Current shareholders want to be fairly compensated for their hard work over the years in helping to build the company, while management wants to ensure they purchase the business at a fair price to generate future value. The lenders, too, will expect to participate in this success in some form. These competing interests make buy-outs complex transaction processes; however, with clear communication and setting reasonable expectations, all parties can ensure a smooth transition[70].

11.0 Cherry Picking

This is akin to Purchase and Assumption but is differentiated by the fact that in this case, the purchasing company or investor is not taking up or purchasing all liabilities of the failing company but is allowed to inspect the books and assets or operations or business activities of the failing company with a view to picking out those aspects it could save by integrating into its own operations.

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[68] Deloitte, 'Anatomy of a Management buy- out: Common aliment and remedies when considering a private company buy- out". < https://www.google.com. > Accessed 4 June 2024.
[69] Deloitte, 'Anatomy of a Management buy- out' (n 67).
[70] ibid.

12.0 Summary, Conclusion and Recommendation

In Summary, Corporate Rescue helps to ensure that a company is a going concern. It prevents a company from dying or collapsing and it a mechanism used to protect the economy of Country. Many author and online scholars have different ideas as to the types or classification of rescue mechanisms. To some, rescue mechanisms are divided into formal and informal mechanisms while to others, it is divided into internal and external mechanisms.

The new CAMA 2020 as amended introduced additional rescue mechanisms which have now become legal and formal. Apart from Arrangement and compromise, and Arrangement on Sale, others include: Netting, Company Voluntary Arrangement, Mergers, and Administration which is similar to the United Kingdom rescue mechanism.

In conclusion, corporate or company rescue mechanism has its advantages such as: economic diversification, prevention of loss of foreign investment, protecting the assets, shareholders and creditors of the company, protection of skilled employees and securing competitive economic interest.

Recommendations

Between year December 2023 and May 2024, four multinationals have left the Nigerian economy. Examples of these multinationals are: Unilever Nigeria Plc, Glaxosmithkline Consumer Nigeria Plc, Sanofi Pharmaceuticals and Bolt foods. Reasons were due to high cost of production, high interest rate, hyper inflation of currency exchange rate and insecurity in the country. Also, Small scale and Medium scale industries have been affected. The following are hereby recommended for the Tunubu Government Administration:

Firstly, reduce overdependence on fossil fuel. The new government administration is under pressure from the International Community such as the United Nations (UN) and the Economic Community of West African States (ECOWAS) to reduce global temperature to 2^0C and 1.5^0C by 2030 under the Paris COP agreement. The Government should enforce policies through Ministries, Departments and Agencies (MDAs) that all Companies are to rely on renewable energy as a cheap source of power consumption. Examples of these renewable sources are: Wind, Solar, biomass, and geothermal sources. These policy directives would greatly reduce the cost of production and stabilise prices of goods and services.

Secondly, Merger and Acquisition, Administration, Company Voluntary Agreement are effective tools for Multination Companies. These Companies need not to wind up and relocate to other

countries. There could be merger of companies between multinationals and locals investors in other to boost shareholding investment and capital appreciation.

Additionally, most companies in Nigeria have problems with management of company properties. Proper Management of Assets such as tangible and intangible properties help to promote smooth implementation of rescue mechanisms provided under the CAMA 2020. An example is ensuring compliance with government regulation provided by the Security and Exchange Commission, Payment of relevant taxes to the Federal Inland Revenue Service Commission and the State Internal Revenue Service Commission, Obtaining State government approval on land properties from State authorities such as the Building control agencies and other agencies established for authorising sale of land and validation of land documents.

The CAMA 2020 does not impose on companies to use rescue mechanisms but Companies are advised to use these tools as a rescue plan to protect their assets and investment rather than voluntarily winding up their companies.

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