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Published in:
Chijioke Chris Ohuruogu(ed), The Law of Business Associations in Nigeria

Publication date:
2022

Document version:
Peer reviewed version

Link:
Link to publication in PEARL

Citation for published version (APA):
Okara, G., & Halliday, C. (2022). Company Reconstructions. In *Chijioke Chris Ohuruogu(ed), The Law of Business Associations in Nigeria* Princeton Publishing Company, Lagos. https://www.amazon.co.uk/LAW-BUSINESS-ASSOCIATIONS-NIGERIA-ebook/dp/B0BK35V25C

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Download date: 08. Oct. 2024

Chapter 22

Company Reconstructions

1 Introduction

The increase in competition in the commercial landscape, due in part to globalization and reduction of barriers to entry, has made growth imperative for companies that hope to survive.[1] Boards now demand for more top-line growth as a way to improve shareholders' value.[2] Although, growth may be achieved organically through product and service innovation, inorganic and external methods often present an ideal avenue for companies to achieve the desired growth levels. Company reconstructions occur in a company when there is a significant modification made on the debt, operations or

1. J. Onele, 'Law and Practice of Mergers and Acquisition in Nigeria' [2015] *SSRN Electronic Journal*, 1.
2. P. Protiviti, 'Guide to Mergers and Acquisitions' <https://www.protiviti.com/insights/guide-to-mergers-and-acquisitions-faq> accessed 27 August, 2020.

structure of a company. This modification to operation may involve cutting costs by combining departments, reassigning responsibilities, and disengaging some personnel. A company may modify its structure by reducing its size through sale of some assets. This may become necessary if the current situation in the company may lead to a collapse. In sum, company reconstruction may be designed purely to manage corporate debts, improve profitability and efficiency.[3]

Thus, in a fast-growing business world, companies have to strive to achieve quality and excellence in their fields of operation.[4] Accordingly, the profitable growth of a company can be achieved either internally or externally. The internal growth can be achieved either through the process of introducing or developing new products or by enlarging the capacity of existing products,[5] whereas, external growth can be attained through mergers and

3. H. Y. Bhadmus, *Bhadmus on Corporate Law Practice,* (4th edn, Enugu: Chenglo Limited 2018) 527.
4. P. Prakash and B. Balakrishna, 'Mergers and Acquisitions: Human and Cultural Issues' [2006] *SCMS Journal of Indian Management*, 29.
5. T. Malikarjunappa and P. Nayak, 'Why do Mergers and Acquisitions quite often Fail' [2007] 1[1] *AIMS International*, 53.

acquisition of existing business firms.[6] Fundamentally, it has been argued that the main focus of internal reconstruction is on survival, while external reconstruction may be used as a survival strategy; its focus may be on expansion or eliminating competition to increase profit.[7] Therefore, the option a company may adopt in reconstruction will depend on the reason for the reconstruction and the purpose it seeks to achieve.

Accordingly, this chapter seeks to accentuate on the need for reconstruction in lieu of liquidation. Furthermore, the company reconstruction mechanism of mergers shall be examined with specific reference to the: reasons why companies merge; the procedure for mergers in Nigeria, and the powers to regulate mergers in Nigeria. In the same vein, this chapter shall analyse the company reconstruction mechanisms of takeovers, acquisitions and leveraged buyouts. Similarly, this chapter shall evince the regulation/procedure for takeovers in Nigeria as well as the rule against monopolies/competition rules.

6. P. K. Gupta, 'Mergers and Acquisitions (M & A): The Strategic Concepts for the Nuptials of Corporate Sector' [2012] *Innovative Journal of Business and Management*, 60.
7. (n 3).

Submissively, this chapter shall terminate with a conclusion which underscores the importance of reconstruction in lieu of liquidation.

2 Reconstruction in lieu of Liquidation

Corporate reconstruction is a mechanism designed purely to manage corporate debts, improve profitability and efficiency in a company.[8] Considering the fact that a large debt burden can hinder corporate operations, where a company has unsustainable debt level, it may ask for the modification of all or some of the debts by consolidating the terms of the debt through debt restructuring with the creditors in order to make the payment less herculean.

Furthermore, reconstruction is an action taken by a company to significantly modify the financial and operational aspects of the company usually when the business is facing financial pressure. It therefore suffices to submit that it is a mode of invigorating an ailing company from its financial waterloo. It is upon this back drop that

8. J. Udoidem and I. Acha, 'Corporate Restructuring through Mergers and Acquisition; Experience from Nigeria' [2012] 13[3] *Journal of Economics and Sustainable Development*, 135-142.

it has been observed that company reconstruction is a deliberate, significant, and unusual alteration in the organization and operations of a business, commonly in times of financial or operational distress, typically accompanied by changes in ownership or finance, as when a company mergers two divisions, or sells off a business unit.[9] Accordingly, it has been opined that reconstruction may be financial or organizational in nature. It is 'financial' when reconstruction takes place due to a severe fall in the overall output of a company because of adverse economic conditions while it is 'organizational' where a reconstruction involves the change in the organizational structure of a company, such as reducing its level of hierarchy, redesigning the job positions, downsizing the employees and changing the reporting relationships.[10]

Conversely, liquidation is the process by which a company or part of a company is brought to an end, and the assets and property of the company redistributed. Liquidation is

9. J. C. Coates, 'Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice' [2014] 7 *Harvard J. M. Olin Center for Law, Economics and Business*, Harvard Law School Cambridge, 2.
10. Cleartax, 'Corporate Restructuring-Meaning, Types, and Characteristics' <https://cleartax.in/s/ corporate-restructuring> accessed 31 August, 2020.

sometimes referred to as winding up or dissolution, although dissolution technically refers to the last stage of liquidation. Fundamentally, reconstruction of a corporate entity is often of necessity when a company has grown to the point that its original structure can no longer efficiently manage the output and general interests of the company. Hence, corporate reconstruction generally refers to the process of redesigning one or more aspects of a company which may include the legal, ownership, and operational structures of a company.[11] It is upon this premise that reconstruction is usually adopted by an ailing artificial legal entity in lieu of liquidation which underscores the process of bringing a corporate entity to an end by distributing its assets to the creditors and shareholders based on the priority of their claims.[12]

It therefore suffices to state that the essence of corporate reconstruction includes the survival of economic hardship/

11. M. B. Anzaki, 'An Overview of Corporate Restructuring' <https://www.lawyerschronicle. com/an-overview-of-corporate-restructuring> accessed 31 August, 2020.
12. Companies and Allied Matters Act 2020, ss. 578-709; B. A. Garner (ed), *Black's Law Dictionary* (10th edn: West Publishing Company 2014) 1015; W. Kenton, 'Liquidation' <https://www.investopedia.com/terms/l/liquidation.asp> accessed 31 August, 2020.

financial trauma without losing the corporate identity of a company; elimination of superfluous shares/ securities which are no longer represented by a company's asset by negotiating with the company's creditors to accept money's worth and the reduction of fraud. Essentially, corporate reconstruction differs from ordinary business events in that it is more significant, disruptive of prior operations and strategy, and not part of ongoing or routine business activity.[13] Therefore, reconstruction keeps a corporate entity as a going concern while liquidation brings a company to a dead end, thus, the former is usually adopted in lieu of the latter by a distress company.

3 Mergers

Mergers connote the combination of two companies into one larger company for some economic or other strategic reasons.[14] Furthermore, mergers involve the combination of two or more companies in which the assets and liabilities of the selling firm(s) are absorbed by the buying firm. Although, the buying firm may be a considerably

13. (n 9), 2-3.
14. B. Fox and E. Fox, *Corporate Acquisitions and Mergers* (Matthew Bender & Co 2004) 1-5.

different organisation after the merger, it retains its originality.[15] Statutorily, mergers is an amalgamation of the undertaking or any part of the undertakings or interests of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.[16] Furthermore, it is imperative to state copiously that under the Federal Competition and Consumer Protection Act,[17] mergers occur 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.[18] More so, under the FCCPA 2018, mergers can take several shades namely: as a purchase or lease of the shares, interest or assets of the other undertaking in question, an amalgamation or combination with the undertaking in question or in form of a joint venture.[19]

15. A. Sherman and M. Hart, *Mergers & Acquisitions from A to Z* (2nd edn, AMACOM 2006) 11.
16. Investment and Securities Act 2007, s. 119 (1).
17. 2018.
18. (n 17), ss. 92 (1)(a).
19. *Ibid.*, ss. 92 (1)(b)(i)-(iii).

In a similar vein, mergers are business combinations which involve the fusion of two or more corporate entities into one, largely on equal terms.[20] It has been tersely reinstated *inter alia* that: 'merger entails the coming together of two or more firms to become one big firm'.[21] Flowing from a narrow perspective, mergers is the amalgamation of the undertakings of two or more banks whereby either; one of the merging banks absorbs the other bank(s) or, all the merging banks combine to form a new bank, and in both instances the rights and obligations of all the merging banks pass to the successor bank and the other banks are simultaneously dissolved.[22] It has been further stressed that a merger is a form of business combination whereby two or more companies join together to one; being voluntarily liquidated by having its interest taken over by the other and its shareholders becoming shareholders in the other enlarged surviving

20. N. C. S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers Ltd 2010) 615.
21. O. S. Muhammed, 'Legal and Procedural Tax Issues in Merger and Acquisition Exercise in the Nigerian Banking Sector' [2012] 4 [1] *Port Harcourt Law Journal*, 216.
22. CBN Revised Procedures Manual for the Processing of Applications for Bank Mergers/Take-Overs, para. 3.1.

company.[23] It is upon this stead that mergers have been argued to be different from acquisition. While 'mergers involves the combination of two businesses that leads toward a new business, acquisition on the other hand is the takeover or purchase of one business by other businesses'.[24] In line with this it has been concluded that the banks consolidation exercise of 2005 as supervised by the Central Bank of Nigeria yielded basket full of benefits in terms of improved banking environment and renewed customer confidence in the Nigerian Banking Industry.[25]

Mergers may also be categorised into horizontal, vertical and conglomerate mergers. Accordingly, horizontal mergers envisage mergers involving direct competitors. Illustratively, the merger of two or three commercial banks into one can be validly classified as a horizontal

23. T. Owokalade, 'Corporate Restructuring Post Consolidation Strategies and Challenges' [2006] 6 [3] *Journal of Chartered Secretary and Administration*, 27.
24. T. A. Odetayo, 'Empirical Analysis of the Impact of Post-Merger on Nigerian Banks Profitability' [2013] 4 [17] *Research Journal of Finance and Accounting*, 92.
25. P. E. Enyi, 'Banks Consolidation in Nigeria: A Synergistic Harvest' <http://eprints. covenantuniversity.edu.ng/111/1/Banks-Consolidation-In-Nigeria.pdf > accessed 3 September, 2020.

merger. Vertical Mergers are mergers involving firms in non-competitive relationships. Simply put differently, it emphasizes on an amalgam between complementary entities, for instance, a merger between a latex producing company and Michelin (Nigeria) Ltd. Conglomerate Mergers on the other hand are mergers involving companies in different industries.[26]

Importantly, mergers are classified under the FCCPA 2018 into two, namely: 'small' and 'large' mergers.[27] However, this is in contradistinction with the position under the ISA 2007 wherein mergers were classified into small, intermediate and large mergers.[28] Under the FCCPA 2018, a small merger means a merger with a value at or below the threshold stipulated by the FCCPC by regulations while a large merger means a merger with a value above the threshold stipulated by the FCCPC by regulations.[29] In order to give a better interpretation on the description of mergers under the FCCPA 2018, the FCCPC as part of its regulatory functions issued a 'Notice

26. (n 3), 541.
27. (n 17), s.92(4).
28. (n 16), s.120 (2); (n 3) 540.
29. (n 17), ss.92(4)(a)(b).

of Threshold for Merger Notification' with an effective date of 9th September, 2019.[30] The notice prescribes that the FCCPC shall be given notice of a merger before implementation if in the financial year preceding the merger the combined annual takeover of the acquiring undertaking and the target undertaking, into or from Nigeria equals or exceeds N1,000, 000, 000 (about US$3, 267,974); or the annual turnover of the undertaking, into or from Nigeria equals or exceeds N500, 000, 000 (about US$1, 633, 987).[31]

It therefore suffices to state that a merger with an annual turnover below the above threshold will constitute a small merger while those above the threshold would constitute a large merger under the FCCPA 2018.[32]

3.1 Why Companies Merge (Rationale for Mergers)

Essentially, there are plethora of reasons why companies merge. These reasons include the pursuit of growth strategy, the defence of hostile action from another

30. Aelex, 'Federal Competition and Consumer Protection Commission Notice of Threshold for Merger Notification' [2020] *Aelex January 2020*, 1.
31. (n 30).
32. (n 17), s. 92 (4).

would-be acquirer and financial opportunities.[33] However, the commonest reason is that the merger will result in substantial trade advantage or greater profits than the combined profits of the two companies working separately.[34] More generally, the essences why companies merge are as follows:

i) Market Expansion

Corporate managers are under constant pressure to demonstrate successful growth. This is particularly true when the company and the industry have achieved growth in the past. However, when the demand for an industry's products and services slows, it becomes more difficult to continue to grow. When this happens, managers often look to mergers to expand their market base.[35] It is generally believed that upon the completion of a merger the company will be absorbing a major competitor and thus increase its power by capturing increased market share which will enable it to set prices.[36] This spurred the

33. B. Coyle, *Mergers and Acquisitions* (Kent: CIB Publishing 2000) 7.
34. F. Ajogwu, *Mergers and Acquisition in Nigeria: Law and Practice* (2nd edn, Lagos: Centre for Commercial Law Development 2014) 13.
35. P. A. Gaughan, *Mergers, Acquisitions, and Corporate Restructurings* (4th edn, New Jersey: John Wiley &Sons Inc. 2007) 119.
36. *Ibid.* 15.

merger between United Bank for Africa and Standard Trust Bank Plc. It was observed that 'through the merger, the combined bank will be better able to compete with institutions within Nigeria, the Sub-Saharan Africa region and internationally, thereby increasing market share, surpassing the competition and consequently increasing gross revenue'.[37]

ii) Management Efficiency

In order not to make a company vulnerable to corporate raiders, an exercise of mergers as well as other company reconstruction mechanisms becomes quintessential. This is because mergers enliven unproductive directors, who may for the fear of losing their positions become more accountable, efficient and productive.[38]

iii) Maximisation of Shareholders Income

Mergers are most often embarked upon in the best interest of shareholders to maximize their returns on investment and concomitantly reduce the risks of capital

37. Letter from the Chairman of United Bank for Africa Plc dated May 18, 2005, in the Scheme of Merger between United Bank for Africa Plc and Standard Trust Bank Plc.
38. J. E. O. Abugu, *Company Securities: Law and Practice,* (2nd edn, Lagos: MIJ Professional Publishers 2014) 303-304.

loss. Thus, this makes the consent of shareholders of merging companies to become a desideratum.[39]

iv) Diversification

Diversification ensures that a steady stream of income and profitability crippled in some economic sectors are balanced by improved earnings in others. This is a major benefit of conglomerate mergers because conglomerate mergers involve the combination of two or more companies in different industries. Therefore, a company with a quick profit profile and a lethargic financial position in its scope of business may wish to reduce risks by merging.

v) Economies of Scale

It is a trite principle of economics that the size of a business could be an asset and therefore advantageous in relation to cost. It therefore logically follows that the combination of two or more companies horizontally or vertically may save costs through economies of scale; in the shades of production, warehousing, finance, administration, capital expenditure, research and

39. (n 16), s. 129.

development. In sum, mergers often reduce duplicate units or operations, lowers cost, thereby increasing profit.[40]

vi) Rescue

Merger and other business combinations are common options available to ailing companies and their shareholders when faced with the vicissitudes of existence.[41] Thus, in order to prevent a corporate entity from being besieged by corporate raiders in happenstances where the shareholders are unable or unwilling to inject funds to revamp the company; mergers and other business combinations serves as an apposite rescue option(s).[42]

vii) Competition

Another rationale for mergers and company reconstruction mechanisms in Nigeria is to reduce competition. Essentially, companies make take over the business of a competitor in order to reduce competition in

40. (n 28), 14.
41. D. G. Baird, 'The Uneasy Case for Corporate Reorganization' [1986] 15 *Journal of Legal Studies*, 127-129; T. H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press: 1986) 64.
42. S. E. Etukakpan, 'Business Rescue and Continuity of Employment: Analysing Policy through the Lens Theory' [2011] 3, *Company Lawyer*, 4; Abugu (n38) 303.

a particular market sector.[43] Although, this may give rise to monopoly, the effect on consumers may not necessarily be adverse depending on the prior state of business affairs.

3.2 The Procedure for Mergers in Nigeria

This sub-heading seeks to underscore the procedures for implementing small and large mergers under the FCCPA 2018. For the sake of clarity, the instant sub-heading has been sub-divided into the notification and approval of small and larger mergers respectively.

1 *Notification and Approval of Small Mergers*

Fundamentally, the participants to a small merger do not need to notify the FCCPC, unless the FCCPC specifically requests that they do within six months of the conclusion of the deal.[44] Nonetheless, where a notification is made by participants to a small merger, such notification will be published within five (5) business days after the receipt by the FCCPC.[45] Similarly, a party to such merger may take no further

43. A. Asuzu, 'Mergers, Acquisitions and Takeovers in Nigeria: the Guiding Philosophy, Laws, Regulations and Practice' [1997] 2 [2] *Modus International Law and Business Quarterly*, 21.
44. (n 17), ss.95(1)-(3).
45. *Ibid.*, s. 95(4).

steps to implement the merger until the merger has been approved by the FCCPC with or without conditions.[46]

It is a trite statutory procedure that within 20 business days or an extension to 40 business days after the participants to a small merger has fulfilled the notification requirement, the FCCPC will issue a report in the prescribed form approving the merger; approving the merger subject to any conditions; prohibiting implementation of the merger, if has not been implemented; or declaring the merger to be prohibited.[47] Nonetheless, it is imperative to state that where an extension is made, an extension notice shall be issued by the FCCPC to the participants.[48]

Thus, where upon the expiration of the 20 business days, the FCCPC does not issue a notice of extension or upon the expiration of the notice of extension period, the FCCPC does not issue a report, the merger will be deemed to have been approved.[49]

46. *Ibid.*, s. 95 (5).
47. *Ibid.*, s.95 (6).
48. *Ibid.*, s. 95 (6)(a).
49. *Ibid.*, s. 95 (7).

2 *Notification and Approval of Large Mergers*

Conversely, in the case of a large merger, a party is statutorily required to notify the FCCPC of the merger in the prescribed manner;[50] of which same shall be published by the FCCPC within five business days of its receipt.[51]Accordingly, the parties to a large merger are required not to implement same unless approved, with or without conditions by the FCCPC,[52] where done otherwise, such action will be deemed void.[53] Hence, where an undertaking implements a large merger without the appropriate approvals, such undertaking(s) commits an offence and is liable on conviction to a fine not exceeding 10% of turnover of the undertaking in the business year preceding the date of the commission of the offence or such other percentage as the court may determine having regard to the circumstances of the case.[54]

Furthermore, the FCCPC is empowered by law to issue a report in the prescribed form approving the merger;

50. *Ibid.,* s. 96 (1)(3).
51. *Ibid.,* s. 96 (2).
52. *Ibid.,* s. 96 (4).
53. (n 17), s. 96 (3)(5)(6).
54. *Ibid.,* s. 96 (7).

or approving the merger subject to any conditions; or prohibiting implementation of the merger within 60 business days or an extension to 120 business days after the participants to a large merger has fulfilled the notification requirement.[55] However, where upon the expiration of the 60 business days, the FCCPC does not issue a notice of extension or upon the expiration of the notice of extension period, the FCCPC does not issue a report, the merger will be deemed to have been approved subject to the powers of the FCCPC to revoke mergers.[56] This therefore brings to fore that fact that the FCCPC may revoke its decision to approve or conditionally approve a small or large merger if: the decision was based on an incorrect information; the approval was obtained by deceit; the parties fail to implement the merger within 12 months after the approval was granted or the undertaking has breached an obligation attached to the decision of the FCCPC's approving the merger.[57] The FCCPC is required to publish a notice of any decision and the reasons for

55. *Ibid.*, s. 97 (1)(a)(b).
56. *Ibid.*, ss. 97 (2); 99.
57. *Ibid.*, s. 99(1)(a)(b)(c)(d).

same in the Federal government gazette;[58] although, in the case of a large merger, such publication must be made in at least two national newspapers.[59]

Going forward, it is imperative to state that when approving a small or large merger, the FCCPC just like the hitherto power of the SEC,[60] shall consider certain factors such as: the issues of competition; technological efficiency and the substantial public interest of the merger or proposed merger.[61] These factors shall be illuminated *seriatim*:

i) Competition

Essentially, in the process of granting or refusing a merger or proposed merger the FCCPC is empowered with the wherewithal to determine whether or not the merger is likely to substantially prevent or lessen competition and this is done by assessing certain factors which includes the: actual and potential level of import competition in the market; ease of entry into the market; level and

58. *Ibid.*, s. 95 (8).
59. *Ibid.*, s. 97 (3).
60. (n 16), s. 121 (1)(2)(3)(4)(5); Abugu (n38) 309.
61. (n 17), s. 94(1)(2)(3)(4).

trends of concentration; degree of countervailing power in the market, removal of effective competitor, dynamic characteristics of the market, nature and extent of vertical integration in the market, likelihood of the merger or proposed merger to fail and the likelihood to result in the removal of an effective competitor.[62]

ii) Technological Efficiency/ Substantial Public Interest

In a similar vein, where it appears that the merger is likely to substantially prevent or lessen competition, the FCCPC is permitted by law to determine whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than, and off-set, or is likely to result from the merger, and would not likely be obtained if the merger is prevented and whether the merger can or cannot be justified on substantial public interest grounds.[63] This is done by assessing factors, such as: the likelihood of the merger or proposed merger to

62. *Ibid.*, s. 94 (1) (a) and (2).
63. *Ibid.*, s.94 (1)(b)(c).

> result in any technological efficiency or other precompetitive advantage which will be greater than, and offset, the effects of any prevention or lessening of competition while allowing consumers a fair share of the resulting benefit and other justifications based on substantial public interest grounds, such as the effect of the merger or proposed merger on: a particular industrial sector or region, employment, the competitive abilities of national industries in international markets and competitive viability of small and medium scale enterprises.[64]

It is however pertinent to state that the powers of the SEC as provided in *section* 121 (1)(d) of the ISA 2007 is still preserved under the exclusive regulatory functions of the SEC. Therefore, it suffices to submit that the retention of *section* 121 (1)(d) of the ISA, empowers the SEC to still ensure compliance with mergers, acquisitions and takeover provisions of public companies in Nigeria, specifically as it relates to determining whether all shareholders are fairly, equitably and similarly treated

64 (n17), s. 94 (3)(4).

and given sufficient information regarding the merger or proposed merger.[65] In other words, the SEC is empowered to determine the fairness and equitability of a merger or proposed merger of public companies in Nigeria despite the creation of the FCCPC under the FCCPA 2018.

In sum, upon notification of a merger or proposed merger, the FCCPC is required by law to proceed with a two-step assessment.[66] The first step determines whether or not the merger is likely to substantially prevent or lessen competition otherwise known as the 'failing firm defence'.[67] The second step applies only when the merger is likely to substantially prevent or lessen competition, upon which the FCCPC shall consider certain factors as provided in *section* 94(1)(b)(c) of the FCCPA 2018.

65. D. Ogedengbe, 'An Appraisal of the Extant Legal Framework for Mergers and Acquisitions in Nigeria' [2019] *Aelex Article Series,* 1.
66. A. Balogun and Others, 'COVID-19: Implications for Mergers between Competitors' [2020] *Olaniwun Ajayi* April 2020, 3.
67. (n 66).

3.3 Powers to Regulate Mergers in Nigeria

Owing to the enactment of the FCCPA 2018, the FCCPC,[68] acts as the competition regulator empowered to prevent and punish anti-competitive practices, regulate mergers and acquisitions, protect regulated industries in every sector and location in Nigeria.[69] Thus, this gives rise to the trite assertion that the SEC regulatory oversight function in relation to mergers and acquisition in Nigeria as provided under the ISA 2007 has been tacitly stripped by the establishment of the FCCPC under the FCCPA 2018.[70] Also the FCCPA 2018 mandated the FCCPC to the exclusion of the SEC to set, publish and gazette thresholds applicable to all mergers and combinations, regardless of the size of the transaction.[71] Similarly, the

68. (n 17), s. 39.
69. C. E. Halliday and E. Ogbonna, 'Appraisal of the Legality and Efficacy of the SEC and FCCPC's Joint Advisory on Mergers and Acquisitions under the FCCP Act' [2019] 6 *Journal of Commercial and Property Law*, 31, 35; A. A. Idigbe and others 'Nigeria: Merger Control 2020' <https:iclg.com/practice-areas/merger-control-laws-and-regulations/Nigeria> accessed 3 September, 2020.
70. (n 17), s. 165 (1).
71. *Ibid.*, ss. 93-106; Merger Review (Amended) Regulations 2021, regs. 1-3; Deloitte Nigeria, 'Nigeria: Mergers and Acquisitions now under the Joint Purview of Sec and FCCPC…Till Further Notice' <http://www.modaq.com/Nigeria/x/809996/

FCCPC is empowered to direct any of its officers to investigate a merger, and may require any person or undertaking to provide information in respect of the merger.[72]

In addition, the FCCPC is empowered to revoke merger already approved where: the approval decision was based on incorrect information; obtained by deceit; the parties fail to implement the mergers within 12 months after the approval was granted; or an undertaking concerned has breached an obligation attached to the decision of the FCCPC.[73] Furthermore, the FCCPC is at liberty to hear from persons whom in its opinion will be able to assist in making a determination in respect of a merger notification.[74] This is usually done through public or private hearings.[75]

Securities/Mergers+and+acquistion+now+undeer+the+joint+purview+of+SEC+Aand+FCCPCtill+further+notice > accessed 3 September, 2020.

72. (n 17), s. 98; Merger Review (Amended) Regulations 2021, reg.2 (6).
73. *Ibid.*, s. 99 (1)(a)(b)(c)(d)(2).
74. *Ibid.*, s. 101 (1).
75. *Ibid.*, s. 101(2).

In a similar vein, the FCCPT as established under Part VII, *sections* 39 to 58 of the FCCPA 2018 is empowered to adjudicate over conducts prohibited under the FCCPA 2018 and exercise the jurisdiction, powers and authority conferred on it under the FCCPA 2018 and any other enactment.[76] Although the decision of the FCCPC are both administrative and quasi-judicial, appeals from any decision of the FCCPC lies to the FCCPT by way of judicial review.[77] Therefore, a party aggrieved by the decision(s) of the FCCPC may file an application for review before FCCPT and where the decision relates to that of the FCCPT, to the Court of Appeal.[78]

The FCCPT is also permitted under the FCCPA 2018 to exercise any of the powers which ought to have been exercised by the FCCPC in the course of implementation of the subject matter before it.[79] However, the FCCPC may direct any of its officers to investigate a merger, and may

76. *Ibid.*, s. 39 (2); Merger Review (Amended) Regulations 2021.
77. (n 17), s. 47 (1)(a)(b).
78 (n17)., s. 103.
79. *Ibid.*, ss. 47 (1)(a)(b), 42.

require any person or undertaking to provide information in respect of the merger.[80]

Similarly, the FCCPT is empowered to impose administrative penalties only for prohibited practices under the FCCPA 2018 or the contravention of, or failure to comply with an interim order of the FCCPT.[81] Such administrative penalty imposed shall not exceed 10% of the undertaking's annual take over in Nigeria and its export from Nigeria during the preceding financial year.[82] It thus ensures transparency in the administration of justice as parties to the proceedings and other members of the public are subject to the rule of confidentiality and access to the record of proceedings of the FCCPT.[83] Hence, the FCCPT's orders, ruling, awards and decisions are binding on the parties,[84] and it is empowered to register its decisions with the FHC for the purpose of enforcement.[85]

80. *Ibid.*, s. 98.
81. *Ibid.*, s. 51(1)(a)(b).
82. *Ibid.*, s. 51(2).
83. *Ibid.*, s. 53.
84. *Ibid.*, s. 54(a).
85. *Ibid.*, s. 54(b).

Conversely, the powers of the Minister of Trade with respect to mergers in Nigeria are evidently provided in *section* 100 of the FCCPA 2018. The Minister of Trade is entitled to make representations on any public interest ground to the FCCPC with respect to any merger under consideration.[86] In the same vein, the FCCPC is required by law to treat the representations made by the Minister of Trade with 'special regard' subject to the overriding objectives of the FCCPA 2018 in arriving at the decision on merger notification.[87] Additionally, the Minister may participate as an observer in any merger proceeding before the FCCPC in a prescribed manner.[88]

Nonetheless, the FCCPC may revoke its own decision to approve or conditionally approve a small or large merger if the decision was based on incorrect information for which a party to the merger is responsible;[89] the approval was obtained by deceit;[90] the parties fail to implement the merger within 12 months after the approval was

86. *Ibid.*, s. 100 (1).
87. (n 17), s. 100 (2).
88. *Ibid.*, s. 100 (3).
89. *Ibid.*, s. 99 (1)(a).
90. *Ibid.*, s. 99 (1)(b).

granted;[91] or an undertaking concerned has breached an obligation attached to the decision of the FCCPC approving the merger.[92] It is worthy of note to state that the ground relating to the revoking of a merger where the parties fail to implement the merger within 12 months after the approval was granted[93] is an innovative provision of the FCCPA 2018, thereby expanding the grounds for revoking a merger by the regulatory body from three to four grounds.[94] In the same vein, where the FCCPC revokes its decision approving a merger, it may prohibit that merger even though any time limit set out under the relevant provision of Part XII of the FCCPA 2018 may have elapsed and the merger was approved on account of the failure of the FCCPC to reach a decision within the period prescribed under the FCCPA 2018.[95]

4 Takeovers

Takeovers is a reorganization process involving the acquisition of all of the shares of one or more banks

91. *Ibid.*, s. 99 (1)(c).
92. *Ibid.*, s. 99 (1)(d).
93. *Ibid.*, s. 99 (1)(c).
94. *Ibid.*, s. 99(1)(a)(b)(c)(d); (n 16), s. 127(1)(a)(b)(c).
95. *Ibid.*, s. 99 (2).

(target bank(s) by another bank (acquiring bank), and the acquiring bank takes over the rights and obligations of the target bank(s). For the consolidation exercise, after the takeover, the legal status of the acquiring bank remains unchanged, and the acquired bank(s) shall cease to exist as a bank.[96]

Takeover consists of an offer from an acquirer made generally to the shareholders of the target company to acquire their shares for a consideration which may be cash or securities of the offeror or a mixture of both.[97] Accordingly, flowing from a conscientious glean of the FCCPA 2018, it is self-evident that takeover as a business combination is not covered under the Act. It is therefore conventional wisdom to place reliance on the provisions of the ISA 2007 and the SEC Rules 2013 (as amended 2015), respectively. Accordingly, take over as a business combination in Nigeria arises where a person or group of persons acquire(s) or wishes to acquire a minimum of 30% shares in a public quoted company with the intention of

96. (n 22), para.3.2.

97. P. L. Davies and S. Worthington, *Gower's Principles of Modern Company Law* (10th edn, London: Sweet & Maxwell 2016) 917.

taking over control of that company.[98] It is imperative to state that this differs from 'acquisition' which relates to relates to the purchase of 'less than' 30% of the shares or undertaking of another company. Thus, take-overs and acquisitions are in some instances assumed to be same and treated as same restructuring scheme. This is probably because acquisition was not treated as a distinct restructuring scheme in the ISA 2007 neither has the FCCPA 2018 treated it as one but as a variant of merger[99] or takes over.[100] However, this is no more the case as acquisition is now regulated[101] differently and take over is distinctly regulated.[102] It has been observed that Financial restructuring via takeover generally implies the acquisition of a certain block of equity share capital of a firm which enables the acquirer to exercise control over the affairs of the company.[103]

98. (n 16), ss. 117; 131; Securities and Exchange Commission Rules (as amended), r.445; J. O. Orojo, *Company Law and Practice in Nigeria*, (5th edn, London: LexisNexis Butterworths Tolley 2008) 350.
99. (n 35), 10.
100. *Ibid.*, 9.
101. (n 69), 31.
102. SEC Rules (n98), rr. 433-444; Orojo, (n 98) 350-357.
103. S. B. Gupta, 'Mergers and Takeovers of Companies/ Financial Restructuring', <http://www.yourarticlelibrary.com/financial-

4.1 Acquisition

An acquisition is the purchase of one organization by another, such that the acquirer maintains control over the acquired firm.[104] Similarly, the term 'acquisition' has been stated to have a definite definition other than merger. Hence, it was defined as the purchase of one company by another with neither the shareholders nor directors of the purchased companies retaining any continuing interest in the enlarged company.[105] Fundamentally, it has been succinctly asserted *inter alia* that: 'acquisition is the takeover or purchase of a small firm by a big firm which are both pursuing similar motives.[106] Again, acquisition may be defined as an act of acquiring effective control over asset or management of a company by another company without any combination of businesses or

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management/financial-restructuring/mergers-and-takeovers-of-companies-financial-restructuring/71974 > accessed 31 August, 2020.

104. U.U. Boniface, 'Relevance of Mergers and Acquisition on Financial Performance of Deposit Money Banks: Evidence from Nigerian Banking Industry' [2015] 6[4] *IOSR Journal of Economics and Finance*, 69.

105. Banwo & Ighodalo, 'Tax Considerations for Mergers & Acquisitions' <www.banwo-ighodalo.com/resources/tax-considerations-in-mergers&acqui=sitions.pdf> accessed 3 September, 2020.

106. J. Okpanachi, Comparative Analysis of the Impact of Mergers and Acquisitions on Financial Efficiency of Banks in Nigeria, [2011] 3 [1] *Journal of Accounting and Taxation*, 48.

companies. Hence, it is also a process of taking a controlling interest in a business.[107]

Acquisition has been described as a business combination in which one completely swallows the other(s) under the leadership of a single management.[108] Hence it is of great importance to state that acquisition can be friendly or hostile. In the case of a friendly acquisition, the target is willing to be acquired. Hence, viewing the acquisition as an opportunity to develop into new areas and use the resources offered by the acquirer, whereas in happenstances of hostile acquisition, the target is usually opposed to the acquisition. It is upon this backdrop that hostile acquisitions are sometimes referred to as hostile takeovers.[109]

Acquisition is defined as the takeover by one company of sufficient shares in another company to give the acquiring

107. (n 96), 25.

108. A. O. Umoren, and F. O. Olokoyo, 'Merger and Acquisition in Nigeria: Analysis of Performance, Pre-and-Post Consolidation, [2007] 1[1] *Lagos Journal of Banking Finance & Economic Issues,* 1-16.

109. Gaughan (n 34) 236-240

company control over that of the other company.[110] Nonetheless, acquisition can be loosely used to describe merger or takeover but technically it relates to any acquisition of less than 30% of the shares or undertaking of another company but if the acquiring company is to acquire between 30% and 50% of the shares of another company, it becomes a takeover.[111] The procedure for acquisition is distinctly provided in the SEC Rules.[112]

4.2 Leveraged Buyouts (LBO)

Leverage buyout is a form of company reconstruction where a company is acquired using debt as the main source of consideration. This ilk of reconstruction typically occurs when a private equity firm borrows as much as they can from a variety of lenders and fund the balance with their own equity.[113] When managers rely mainly on borrowed capital to finance the deal, it may also be referred to as a leveraged buyout.[114]

110. SEC Rules (n98) r. 421; (n 3), 556.
111. (n 16), s. 131; (n 3), 556.
112 SEC Rules (n98) rr. 433-444.
113. Corporate Finance Institute, 'Leveraged Byout (LBO)' <corporatefinanceinstitute. com/resources/knowledge/finance/leveraged-byout-lbo/> accessed 31 August, 2020.
114. (n 35), 285.

In the same vein, it has been contended that leveraged buyouts involve an investor, financial sponsors or private equity firms making large acquisitions without committing all the capital required for the acquisition. To do this, a financial sponsor will raise acquisition debt which is ultimately secured upon the acquisition target and also look to the cash flows of the acquisition target to make interest and principal payments. Acquisition debt in a leveraged buyout is therefore usually non-recourse to the financial sponsor and to the equity fund that the financial sponsor manages.[115] Therefore in a LBO, transaction's financial structure is particularly attractive to a fund's limited partners, allowing them the benefits of leverage but greatly limiting the degree of recourse of that leverage.[116]

In sum, leverage buyouts involve a form of company reconstruction where the management of the company

115. (n 35) 10.
116. (n 106).

does the acquisition by means of debt, using the assets of the company as collateral for the loan.[117]

4.3 Regulation/Procedure for Takeovers in Nigeria

Take overs involve the acquisition of sufficient shares by one corporate body in another, in other to give the acquiring company control over that other. Nonetheless, the appropriate yardstick for determining what amounts to 'sufficient shares' should be a minimum of 30% shares in the target company. Fundamentally, for a take-over to be effectively done there must be a take-over bid.[118] Although, the ISA 2007 which remains one of the most potent regulatory framework for takeovers in Nigeria did not explicit define what a take-over bid entails rather it was described as: 'a bid made for the purpose of a takeover as provided in *section* 132 of the Act'.[119] Nonetheless, a 'bid' is denotatively expressed as a 'buyer's offer to pay a specified price for something that may or may not be for sale'.[120] Thus, it logically follows that a 'takeover bid' is an offer made by an acquiring company

117 Ajogwu (n34) 136, 529.

118. (n 16), ss. 117; 132; Orojo (n 90) 351.

119. (n 16), s. 117; Orojo (n 90) 351-355.

120. Garner (n 12), 183.

to purchase sufficient shares in another company. Essentially, a takeover bid must be made by an acquiring company or through their agent which must be a registered capital market operator[121] to the shareholders of the target company.[122] Where a takeover bid is made by a corporate body, a resolution of the directors approving the bid must accompany the bid.[123] Same must be signed by at least one director and the company's secretary.[124] A takeover bid is deemed to be dated as of the date on which the bid is dispatched or if such bid is dispatched on more than one date, on the latest date on which such a bid is dispatched. Similarly, a bid dispatched by post is deemed dated as of the date on which it is posted.[125]

Furthermore, a bid being an invitation under a take-over bid must be incorporated in a document that states: the full names and addresses of the offeror; the addresses

121. SEC Rules (n98) r.178 (1); (n 16), ss. 13 (g), 38 (1) (2), 315; *SEC* v *Osindero Oni & Lasebikan* [2009] 5 NWLR (pt. 1134) 377; *SEC* v *Kasunmu* [2009] 10 NWLR (pt. 1150) 509; *Okeke* v *SEC* [2013] 2 CLRN 41.

122. (n 3) 556-557.

123. ISA 2007 (n 16), s.137 (1).

124. SEC Rules (n98) r. 445 (2).

125. ISA (n 16), s. 132(2).

should be a street address and post office box (if any) where the offeror is a corporate body, the name and current head office address and a statement of the date at which the approval of the directors of the company was given;[126] the maximum number and offer particulars of the shares the company proposed to be acquired during the period specified in the invitation to bid;[127] the price and other terms on which those shares are proposed to be acquired;[128] the number and offer particulars of the shares in the offeree company to which: the offeror; or any company in the same group of companies as the offerors is or are entitled immediately before the date of the take-over bid;[129] if applicable the following matters where a bid under a take-over bid is for all the shares of a class in an offeree company, the offeror, if he so intends, shall state in the bid that he intends to invoke the right under the ISA 2007, to acquire the shares of shareholders of the offeree company who do not accept the bid and that the shareholder is entitled to dissent and to demand the fair value of the shares; or state in the bid if the

126. SEC Rules (n98) r. 446(1)(a).
127. *Ibid.*, r. 446(1)(b).
128. *Ibid.*, r. 446(1)(c).
129. *Ibid.*, r. 446(1)(d).

offeror intends to purchase shares in the offeree company in the market during the period of time within which shares may be deposited pursuant to the bid;[130] and set out such other matters as may be prescribed by regulation from time to time.[131]

In the same stead, a bid being also an offer under a take-over must be incorporated in a document which states or specifies the matter referred to in paragraphs (a) to (d) of *Rule* 446(1) of the SEC Rules;[132] specify the number and other particulars of the shares in the offeree company proposed to be acquired during the period specified in the offer;[133] specify the price and offer terms of the offer in respect of those shares;[134] sets out how and by what date the obligations of the offeror are to be satisfied;[135] sets out all other particulars of the offer;[136] states, if applicable, matters specified in paragraph (e) of *Rule* 446(1) of the

130. SEC Rules (n98) r. 446(1)(e).
131. *Ibid.*, r. 446(1)(f).
132. *Ibid*, r. 446(2)(a).
133. *Ibid.*, r. 446(2)(b).
134. *Ibid.*, r. 446(2)(c).
135. *Ibid.*, r. 446(2)(d).
136. *Ibid.*, r. 446(2)(e).

SEC Rules;[137] and specify such other matters as may be prescribed by regulation from time to time.[138]

Fundamentally, no person or two or more persons jointly or in concert shall make takeover bid unless an authority to proceed with the takeover bid has been granted by the SEC.[139] The application for authority to proceed must state the: name and other particulars of the person making the bid; particulars of the proposed bid with supporting documents in compliance with the provisions of the ISA 2007 and the SEC Rules; and any other information or documents that may be required by the SEC from time to time.[140] Most importantly, the authority to proceed with the bid remains in force for 3 months. Although, an application for renewal of authority to proceed with the bid must be made within 14 days prior to the expiration of the original authority and such renewal can only be for a maximum period of 3 months.[141]

137. *Ibid.,* r. 446(2)(f).

138. *Ibid.,* r. 446(2)(g).

139. ISA 2007 (n 16), s.134(1); SEC Rules (n98), r. 447(1)(a)(b)

140. *Ibid,* s.134(2); *Ibid.,* r. 447(1)(c).

141. *Ibid,* s. 134(8); *Ibid,* r. 447(2).

Accordingly, the documents to be filed to the SEC with a takeover bid are a letter of application; two copies of the information memorandum (where applicable); a letter of "No objection" from relevant regulatory body (where applicable); a copy of shareholders and board resolutions of the offeror certified by the company secretary approving the takeover (where applicable); a copy of the certificate of incorporation certified by the company secretary; copies of the memorandum and article of association of the offeror certified by the Corporate Affairs Commission; and copies of letters from the offeror appointing their financial adviser to the transaction.[142] Upon the filing of the requisite documents to the SEC, a copy of any bid proposed or dispatched under the takeover bid as signed by or on behalf of such persons must be registered with the SEC.[143] where the commission is not satisfied, it would deny the bid registration and inform the applicant accordingly, and the applicant may within 30 days after the notice appeal against the refusal to register the bid to the Investments and Security

142. SEC Rules (n98) r.447 (3).

143. ISA 2007 (n 16), s.135(1); *Ibid.*, r. 448(3)(4);

Tribunal.[144] Similarly, upon conclusion of the offer, the offeror shall file with the SEC, within seven (7) working days of the conclusion of the offer, stating the: schedule of target company shareholders who accepted the offer containing the volume and value of the respective shares; and the evidence of settlement of consideration.[145] Most importantly, the SEC is mandated to carry out a post-takeover inspection not less than three (3) months after registration of the bid.[146]

It is worthy to state that a takeover bid cannot be made in any case where a bid is dispatched to fewer than twenty shareholders or such other number as may be prescribed by the SEC, in order to purchase shares by way of separate agreements, provided that a takeover bid will be made in any case where a bid is dispatched to such number of shareholders holding in the aggregate a total of 51 percent of the issued and paid up shares of the company; to purchase shares in a company which has fewer than twenty or such other number as may be

144. ISA 2007 (n 16), s.135(3).

145. SEC Rules (n98) r.448 (6).

146. *Ibid.*, r. 448(7).

prescribed in the regulations; two or more persons who are joint shareholders being counted as one shareholder or in circumstances where the shares to be acquired under a bid are shares in a private company.[147]

Flowing from above, it is abundantly evident that despite the enactment of the FCCPA 2018, the regulatory frameworks for takeovers in Nigeria remains the Investment and Securities Act 2007[148] alongside the Securities and Exchange Commission Rules (as amended),[149] while the Securities and Exchange Commission is the regulatory body for takeovers in Nigeria.[150]

5. Rule against Monopolies /Competition Rules

Rule against Monopolies /Competition Rules, which is also referred to as anti-trust law is a body of rules that are designed to protect trade and commerce from restraints, monopolies, price-fixing and price discrimination.[151]

147. ISA 2007 (n 16), s. 133(3)(4).
148. *Ibid.*, ss. 131-151.
149. SEC Rules (n98) rr.445-448.
150. ISA 2007 (n 16), s. 13(p).
151. Garner (n 35) 111.

Standard economic theory argues that competition rules promotes welfare because it guarantees a certain level of competition and thus enhances the functioning of market mechanisms.[152] Markets work better if there is a considerable number of suppliers and consumers, which gives market participants a choice. If the number of market actors is too small, the functioning of the market is restrained, which leads to a loss in economic efficiency. Also, prices are usually higher in markets with restrained competition than they would be in situations of full competition.[153] However, as a company can extract high profit when in monopoly, it has a strong incentive to invest in the fight for the monopolies existence once established.[154]

Furthermore, it has been argued that competition rules lead to increased unemployment and endangers incumbent industries and enterprises. Since competition

152. N. Peterson, *Anti-Trust Law and the Promotion of Democracy and Economic Growth* (Bonn: Max Planck Institute for Research on Collective Goods, 2011), 3.

153. A. C. Harberger, 'The Measurement of Waste' [1964] 54 *American Economic Review*, 58-76.

154. G. Tullock, 'The Welfare Costs of Tariffs, Monopolies and Theft' [1967] 5 *Western Economic Review*, 224-232.

expels inefficient enterprises from the market, bankruptcy and unemployment would most likely occur.[155] However, it is imperative to state that competition rules increase national economic welfare by implementing competition policy.[156] Also, it ensures that goods and services are provided o consumers at a lower price and at a good quality, thus, increasing production and consumption levels. Where competition rules are fair and encourage fair business trading, companies will be encouraged to innovate. Innovation has concomitant effects, forcing reconstruction upon some sectors that have become complacent and less competitive.

Anti-competition practices are also referred to as unfair trade practices.[157] These practices are those that directly disadvantage the consumer, such as; misleading claims and advertising, conditional selling, excessive pricing,

155. ISA 2007 (n 150).

156. United Nations' Conference on Trade and Development (UNCTAD), *The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects* (New York and Geneva: United Nations, 2008) 46.

157. *Ibid.*

discriminatory pricing and other misrepresentations.[158] In a society without competition rules or rules against monopolies, anti-competitive practices will prevail. Such practices restrict competition and deteriorate consumer welfare by creating entry barriers, cartels, abuse of dominance and price increases, which results inefficiency and innovative concerns.[159]

It is upon this backdrop that the FCCPA 2018, which currently stands as the all-encompassing regulatory framework for the protection of consumers' rights in Nigeria strongly prohibits monopolies;[160] abuse of dominance;[161] cartels;[162] and restrictive agreements.[163]

158. Y. Okojie and L. Ikuomola, 'The Role of Competition and Anti-Trust Law in Nigeria's Economic Development' in B. Ajibade and Others (eds), *A Review of Contemporary Legal Trends in Nigerian Law* (London: LexisNexis, 2017), 430.

159. (n 156); S. J. Evenett and F. Jenny, 'An Inventory of Allegations of Anti-Competitive Practices in Sub-Saharan Africa' (delivered at the Center for Regulation and Competition 3rd International Conference held in Cape Town, South Africa, 7-9 September, 2004).

160. FCCPA 2018 (n 17), ss.76-88; 94.

161. *Ibid.*, ss.70-75.

162. *Ibid.*, ss.107 and 109.

163. *Ibid.*, ss. 59-69.

6 Conclusion

Company reconstruction is the process of altering the status, composition, and general outlook of a company with commercial challenges and opportunities. Company reconstruction may take the shade of internal or external reconstruction. It is internal when the reconstruction mechanism rotates within perimeters of the company whereas it is external when the mechanism adopted involves third parties outside the operations of the company. Imperatively, the concept of company reconstruction is mostly adopted by artificial legal entities in lieu of liquidation due to the proclivity of the former (company reconstruction) to keep an entity as a going concern and the attendant protection of consumers' interest and that of employees and the government at large.

Accordingly, the notable company reconstruction mechanisms in Nigeria includes among others: mergers, acquisition, takeovers, leveraged buyouts; management buyout, arrangement and compromise and so on. Therefore, in order to prevent monopolies and concomitantly ensure competition among companies,

competition rules become a desideratum. Hence, it is submitted that the FCCPA 2018 heralds the Federal Government's commitment and determination to create an enabling environment for competition, creativity and robust innovations.

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