# Public M&A

## in Ghana

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# Table of contents

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## Ghana

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## STRUCTURES AND APPLICABLE LAW

### Types of transaction

How may publicly listed businesses combine?

In Ghana, publicly listed companies undertake business combination through:

- acquisition of shares;
- creation of joint ventures;
- acquisition of business assets;
- merger of two or more companies into one of the existing companies;
- merger of two or more companies into a new entity set up for that purpose;
- amalgamation or arrangement with court approval;
- creation of new holding companies for existing entities; and
- acquisition of state-owned business entities or assets from the Ghana government under its divestiture programme in accordance with PNDC Law 326.

### Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The main laws and regulations governing business combinations and acquisitions of publicly listed companies are:

- the Companies Act 1963 (Act 179) as amended (the Companies Act), which is the primary legislation governing such business combinations and acquisitions in Ghana. The Companies Act provides for the manner in which such business combinations and acquisitions should be effected. It provides for combination of businesses by the sale of underlying assets in exchange for shares (share exchange), schemes of arrangement and amalgamation as modes of achieving business combinations for public companies incorporated in Ghana. These schemes, found in sections 230 and 231 of the Companies Act, are usually initiated on the basis of a shareholders' special resolution and consummated with or without court approval;
- the Securities Industry Act 2016 (Act 929) (the Securities Industry Law), the Securities and Exchange Commission Regulations 2003 (LI 1728), the Securities and Exchange Commission Takeovers and Mergers Code (the Takeovers Code), the Central Securities Depository Act 2007 (Act 733), and the Securities and Exchange Commission (SEC) Compliance Manual all serve to govern and regulate trading in securities in publicly listed companies. The Takeovers Code also provides the obligations and procedures to be complied with during M&A activity in this context. The Takeovers Code applies to:
- it is pertinent to note that in addition to the above laws, parties are also required to comply with the applicable provisions in the Companies Act.

Specific sectoral legislation also regulates such business combinations and acquisitions. These include:

- the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) (the Banking Act), which regulates the banking industry;
- the National Communications Authority Act 2008 (Act 769), the Electronic Communications Regulations, 2011 (LI 1991) and the Electronic Communications Act 2008 (Act 775), which regulate the telecommunications industry;
- the Insurance Act 2006 (Act 724), which regulates the insurance industry;
- the Minerals and Mining Act 2006 (Act 703), as amended, which regulates the minerals and mining industry;

- the Petroleum (Exploration and Production) Act 2016 (Act 919);
- the Fisheries Act 2002 (Act 625);
- the Petroleum (Local Content and Local Participation) Regulations, 2013 (LI 2204);
- the Energy Commission (Local Content and Local Participation) (Electricity Supply Industry) Regulations, 2017 (LI 2354); and
- the Ghana Investment Promotion Centre Act 2013 (Act 865).

## Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are structured by the parties by taking several factors (ranging from the flexibility of enforcement of transaction documents to tax implications) into consideration. There are no specific laws and regulations that apply to cross-border transactions, especially with respect to how they should be structured. However, all such transactions may be treated as foreign investment transactions.

Applicable laws and regulations that may affect such a transaction include the Foreign Exchange Act 2006 (Act 723) and the Ghana Investment Promotion Centre (GIPC) Act 2013 (Act 865).

The Foreign Exchange Act requires that any foreign currency or financing to be used for the acquisition must be effected through any of the authorised banks in Ghana.

The GIPC Act requires that all foreign investors register their investments with the Centre to ensure the free repatriation of profits, obtain automatic work permits and other benefits.

## Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Generally, commercial, trading and manufacturing concerns do not need any approvals. The relevant ministries such as trade and industry have their regulations but do not directly supervise activity in the way that the Minerals Commission or the Bank of Ghana have statutory supervisory functions in mining and banking respectively.

In the banking sector, the Bank of Ghana is the controlling agency during amalgamations and acquisitions. The Bank of Ghana is responsible for granting licences and approval for such activity.

Under the Banking Act, a three-month notice to, and the written approval of, the Bank of Ghana is required in any acquisition or sale of shares of more than 5 per cent. Further, the approval of the Bank of Ghana is required for existing shareholders who intend to increase their shareholding above any of the supervisory thresholds. Currently, the supervisory threshold has been set at 5, 10, 20, 30 and 74 per cent. In addition, under section 52 of the Banking Act, the Bank of Ghana must approve any agreement or arrangement that would lead to the sale, disposal or transfer of the whole or part of the business of a bank or a specialised deposit-taking institution or financial holding company; or the amalgamation or merger of a bank, specialised deposit-taking institution, financial holding company or with another bank or any other institution; or the restructuring of a bank, specialised deposit-taking institution or financial holding company.

Under Ghana's Insurance Act, a person who owns or holds a significant interest in an insurance business shall not sell, transfer, charge or otherwise dispose of the interest in the insurance business, or a part of the interest, except with prior written approval of the sector regulator, which is the National Insurance Commission.

In the mining industry, strict approval procedures are required by the law. Mergers and acquisitions by share transactions are tightly regulated. The acquisition of a stake in a mining company which vests in a person (alone or with an associate) control of more than 20 per cent of the voting power at any general meeting of a mining company or its holding company requires the approval of the sector minister. Section 14 of the Mining and Minerals Act 2006 (Act 703) provides that no mineral right or interest therein shall be transferred, assigned or dealt with in any other manner without the prior approval in writing of the sector minister.

Failure to meet notification requirements on acquiring any controlling interest in the mining industry constitutes an offence punishable by a fine or a term of imprisonment, or both.

Under the Fisheries Act, where a merger or an acquisition leads to the formation of a new company, a licence granted to a fishing vessel owned by the old company will not as a matter of course be transferred to the new company unless the permission of the Fisheries Commission has been obtained. There are also nationality restrictions that may affect the extent to which mergers and acquisitions are effected. For example, the owner of a local industrial or semi-industrial fishing vessel licensed under the act shall employ a master, officers and crew of whom no less than 75 per cent shall be Ghanaians.

The Petroleum (Exploration and Production) Act 2016 (Act 919) principally regulates the petroleum sector. For example, where the merger or acquisition results in the creation of a new company, the sector minister must be notified. In addition, any petroleum agreement cannot be assigned to the new company without the sector minister's consent. The consent of the minister is also required for the transfer of control of at least 5 per cent of the shares in a petroleum company. If the merger or acquisition leads to the company ceasing operations, the Ghana National Petroleum Corporation shall have the first option in the purchase of its assets.

Under the Renewable Energy Act, 2011 (Act 832), a person shall not engage in any commercial activity in the renewable energy sector without a licence granted by the Energy Commission. This licence is not transferable except with the consent of the Board of the Energy Commission.

Under the regulations of the National Communications Authority (NCA) (LI 1719), if the transfer of shares in a licensee company would result in a change of control of the company and also cause that company to breach licence terms relating to its ownership structure, then the NCA must approve such a transfer. However, if no change in control or no breach results from the transfer then a mere notification of the transfer to the NCA will be sufficient.

### Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Yes, the parties usually conclude on transaction agreements even for acquisitions of publicly listed companies. The transaction agreements involving business combinations and acquisitions of publicly listed companies are typically governed by Ghana law or any other law that the parties to the agreement voluntarily choose.

For banks, specialised deposit taking institutions and financial holding companies, the transaction agreements must be presented to the Bank of Ghana for approval prior to execution.

## FILINGS AND DISCLOSURE

### Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?



 

Generally, the filings and fees in connection with such business combinations or acquisitions largely depend on the nature of the transaction.

Where the transaction involves the merger or acquisition of shares, documents related to the transactions must be filed with the registrar of companies at the Registrar General's Department.

Publicly listed companies, companies are required to pay prescribed fees to the SEC for any filings to be made with the SEC or any statement required under the Takeovers Code, for any takeover, consolidation or merger offer.

Under the Companies Act, Ghanaian companies must file returns with the registrar of companies to record changes in directors and officers, changes in the authorised and issued share capital and other statutory matters, including an annual return of particulars of the company. The Companies Act places an obligation on all companies in Ghana to file shareholders' resolutions that make changes to their Regulations (the equivalent of the memorandum and articles of association in other jurisdictions) as a result of any business combination.

All the above-mentioned filings require payment of relatively nominal filing fees to the registrar of companies. Mergers or takeovers involving banks and financial institutions must be notified to the Bank of Ghana for approval under the Banking Act. No filing fees are payable.

Where the stated capital increases as a result of any business combination, a stamp duty at a rate of 0.5 per cent is paid on the increase in the stated capital of the combined business.

The transfer of shares in a company as a result of a business combination is exempt from all stamp duties. However, under section 66(2) of the Companies Act, every company that increases its stated capital must send particulars of the increase within 28 days to the registrar of companies for registration.

## Information to be disclosed

### What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

In all such business combinations or acquisitions, the companies involved are required to disclose certain information to their shareholders, the registrar of companies and the SEC if they are publicly listed companies. This information largely determines whether approval of a merger, acquisition or takeover would be granted by the SEC. The SEC is authorised by section 3 of the Securities Industry Law to 'review, approve and regulate takeovers, mergers, acquisitions and all forms of business combinations in accordance with any law or code of practice requiring it to do so'.

Under the Companies Act, the registrar of companies is empowered under section 279 to accept for registration every prospectus relating to an invitation to the public to acquire or dispose of shares in a public company. Section 275 of the Companies Act provides, inter alia, that within six months prior to the making of an invitation there should have been delivered to the registrar and registered by him or her, a prospectus relating to the shares complying, in all respects, with all relevant provisions of the Companies Act.

Section 276 of the Companies Act requires that a prospectus making an invitation to the public shall contain the details of the offer, a brief corporate history of the offeror, the offeror's shareholding structure and various professional reports relating to the offeror.

The SEC Regulations also provide that a prospectus or offer document issued in connection with or in respect of an offer or invitation to the public to acquire corporate securities shall be submitted to the SEC for examination and approval.

Issuers of prospectuses will have to ensure that the prospectus complies with the provisions of the Companies Act and the SEC Regulations.

According to the law, a person may not acquire more than 25 per cent of the voting rights of a listed company unless he or she notifies the GSE and fulfils the conditions of a takeover offer.

The board of directors of the offeree company upon receiving the offeror company's statement shall inform the SEC and the GSE. In addition, an announcement by press notice of the proposed takeover offer should be made within 24 hours of receipt of the offeror company's statement.

A press notice shall be made in at least two English-language daily newspapers of national circulation and shall include all material information contained in the offeror company's statement.

The takeover offer document shall state the following:

- whether the offer is conditional upon acceptance of the offer for a minimum number of issued voting shares of the offeree and, if so, the percentage;
- where the shares are to be acquired in whole or in part for cash, the period within which payment will be made and the method of such payment;
- where the shares are to be acquired through a share swap, the proportion of the share swap and the period within which the offeree's shareholders shall receive the new shares;
- whether the offeror is engaged in the same line of business as the offeree;
- whether the offer is conditional upon receiving approval under any law in Ghana or other regulatory approval outside Ghana where the transaction involves companies incorporated outside Ghana;
- whether the offer is conditional upon maintenance of a minimum percentage of shareholding by the general public to satisfy the continuing eligibility requirements for listing; and
- the circumstances that shall apply in the event that the conditions listed above are not fulfilled.

If during the takeover period a director of the offeree company is offered a job or position with the acquiring company, then that director is obliged to disclose and excuse him or herself from decision-making of the offeree company's board of directors.

Listed companies on the GSE must reveal to the exchange any information or transaction whose impact on the company's assets, financial position and business generally will cause substantial share price movements.

The information disclosure requirement does not depend on the type of structure used in the business combination or acquisition of a public company. In practice, the same structure - a trust structure - is used for the creation and issuing of securities to both the public and to private investors. The Listing Rules of the GSE also requires a prompt announcement to be made:

- upon a joint venture, merger, acquisition or takeover;
- a change in control of the business;
- when a tender offer is made for the securities of another entity;
- on a public or private sale of additional securities; and
- any acquisition of voting rights that results in the issuer becoming the holding issuer and is considered material by the board of directors.

Further, any person who purchases or sells shares in a listed company is required to inform the market when his or her holdings attain, exceed or fall below each 5 per cent threshold, starting from 10 per cent through 15 per cent and 20 per cent up to 50 per cent plus one share. The disclosure must be made not later than 48 hours after the transaction. The disclosure must show the size of the holding in terms of the percentage of the share capital and votes after the transaction and the number of shares purchased or sold should also be included.



 

### Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Generally, the Listing Rules requires every person who purchases or sells shares in a listed company to inform the market when his holdings attain or exceed 5 per cent threshold, starting from 10 per cent through 15 per cent (and 20 per cent up to 50 per cent plus one share). The disclosure must be made in a press release to the market not later than 48 hours after the transaction. This requirement is not affected if the company is a party to a business combination.

Further, according to the law, the purchase of a substantial amount of shares or the securing of control of a public company by acquiring the securities of those who control the public company shall give rise to a takeover bid. Thus, a person may not acquire more than 25 per cent of the voting rights of a listed company unless he or she notifies the GSE and fulfils the conditions of a takeover offer.

Pursuant to the Takeovers Code, where a person (or persons) acting in concert acquires or intends to acquire more than 30 per cent but less than 50 per cent of voting shares of a public company in any 12-month period; or acquires or intends to acquire 50 per cent or more of the voting shares of the public company; or acquires a company that holds effective control in the public company or, together with shares already held, will result in acquiring effective control of the public company, then that person shall be obliged to make a mandatory takeover offer of such public company and shall be required to comply with the takeover procedures set out in the Takeovers Code. Exemptions may, however, be granted by the SEC with respect to these rules where deemed applicable.

No person shall make an offer to acquire shares or voting rights of a public company which may entitle such person to exercise effective control in the target company without complying with the takeover procedures provided for in the Takeovers Code.

The Takeovers Code also provides that no person shall acquire effective control over a target company unless the person makes the same offer to all shareholders of the same class of such company in accordance with the Takeovers Code.

The mandatory takeover offer requirement may not apply to the following situations:

- any purchase of shares from unissued shares provided that the acquisition will not result in a 50 per cent or more ownership of shares by the purchaser;
- any purchase of shares from an increase in authorised share capital;
- acquiring of shares through inheritance;
- purchase in connection with foreclosure proceedings involving a duly constituted pledge or security arrangement where the acquisition is made by the debtor or creditor;
- purchases in connection with privatisation undertaken by the government of Ghana; and
- purchases in connection with liquidation or insolvency under court supervision.

## DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

### Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Under the Companies Act, directors stand in a fiduciary relationship towards the company and are obliged to observe the utmost good faith towards the company in any transaction with it or on its behalf. Directors owe a duty to the company to act at all times in the best interests of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed.

The Companies Act provides, in relevant part, that in considering whether a particular course of action or transaction is in the best interests of the company, a director may have regard to the interest of the employees and shareholders of the company. In addition, when the director is appointed as a representative of a class of shareholders, employees or creditors, the director may give special, but not exclusive, consideration to the interests of that class. The directors shall not exceed the powers conferred on them by the Companies Act or Regulations, except with the approval of an ordinary resolution of the company.

Where a takeover offer document has been sent to the board of directors of the offeree company, the board shall within 15 days of the receipt of the takeover document issue a statement to the holders of voting shares in the offeree company to which the takeover offer relates.

This statement shall indicate whether or not the board recommends to holders of the voting shares the acceptance of the takeover offers made by the offeror company. The offeree company's statement to the shareholders must contain all that is required or specified in the Takeovers Code.

It is the law that no director shall place himself in a conflict of interest where his or her fiduciary duty to the company conflicts with personal interests or duties to other persons.

Controlling shareholders do not have similar duties.

## Approval and appraisal rights

### What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Generally, acquisition transactions must be consented to by shareholders pursuant to the Companies Act.

For example, if the transaction involves a public company issuing new shares beyond what it is authorised to and beyond what may already have been approved by the company in a general meeting, the issuance must be approved at an extraordinary general meeting.

The Companies Act allows dissenting shareholders during a merger or acquisition to receive a fair value of their shares in cash.

In a business combination where one public company is liquidated, a liquidator can purchase the shares of dissenting shareholders. However, the price payable for the shares shall be determined by agreement or, in default of agreement, by a single arbitrator appointed by the president for the time being from the Institute of Chartered Accountants in Ghana.

The purchase money shall be paid before the public company is dissolved.

Dissenting or minority shareholders during a merger or acquisition can also apply to the court in order to receive a fair value for their shares.

The court may make an order and set what it thinks fit as a fair value for their shares. Before making an order, the court may refer the matter to the registrar of companies who shall appoint one or more competent reporters to investigate the fairness or otherwise of the offer and to report its findings to the court.

## COMPLETING THE TRANSACTION

### Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Although hostile transactions generally do not take place in Ghana, there is no legal impediment to making a hostile bid for public companies. However, there may be cases of a competing takeover offer where two or more entities have interests in the same public company target. In such an instance, the competing offeror shall serve a competing takeover offer document as required by the Takeovers Code. This must be done at least 10 days prior to the closure of the original offer period and this period shall also apply to revisions that may be made to the competing offer.

Any information given to any offeror, including particulars of shareholders shall be furnished equally and promptly on request to any other competing offeror who has made a competing offer in terms of the Takeovers Code.

### Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

There is no specific legislation in Ghana dealing with break-up or reserve break-up fees. Thus, nothing prevents the parties from providing for such fees in their agreements.

The Takeovers Code provides for cases of a competing takeover offer where two or more entities have interests in the same target. Under the Takeovers Code, withdrawal of a takeover offer may occur where: the offeree's shareholders have rejected the takeover offer; events occur rendering either the offeror or offeree or both incapable of fulfilling their obligations under the takeover offer; or a counter-offer is accepted by the offeree.

### Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Yes. The 1992 Constitution of Ghana gives the government of Ghana the responsibility to ensure that the nation's interests are always protected and promoted. As such, any business combinations that may affect the nation's security or may be deemed not to be in the nation's best interest would be blocked.

### Conditional offers

What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

In public takeovers, conditional offers may be made. The Takeovers Code states that the preliminary public announcement and offer document must stipulate the conditions applicable to the offer. For example, it must be clearly stated whether approval under any law in Ghana or other regulatory approval outside Ghana is required.



 

Further, the Companies Act does not expressly set out the conditions which are allowed with respect to plans or schemes of arrangements. However, according to the law, the scheme document must be approved by the court to be effective. The court has the power to approve the scheme or to prescribe such terms as it thinks fit as a condition of its confirmation, including a condition that any shareholder be given the rights to require the company to purchase their shares at a price to be fixed by the court or to be determined in a manner provided by the court.

Where the offer is conditional upon the acceptance of a minimum percentage of shares being received, the offer shall specify a date that is not more than 30 days from the date of service of the takeover offer or such later date as the SEC may allow on which the offeror can declare the offer to have become free from conditions.

From the reading of the law, it is presumed that the offeror would have the financial capability to complete the offer.

Also, the commencement of a tender offer or exchange offer for a public company can be subject to certain conditions set by the bidder in the offer document. The Takeovers Code does not place a restriction on the type of conditions that can be put in the offer document.

## Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The Takeovers Code requires the takeover offer document to state where shares are to be acquired in whole or in part for cash, the period within which payment will be made and the method of such payment.

The seller does not have any express obligation to assist in the buyer's financing. According to the Takeovers Code, the obligation of the seller during a transaction involves informing the relevant securities exchange (if it is a listed company) and the SEC, and making the required public announcement on receiving the buyer's bid.

## Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Companies Act provides for the compulsory acquisition of a minority shareholding if the acquirer has obtained at least 90 per cent in value of the shares of its target within four months of making the offer. The acquirer is mandated, within two months of achieving the 90 per cent, to send a notice to the shareholders who have not accepted the offer advising of its intention to acquire their shares.

The minority shareholders may apply to the court against the compulsory acquisition within two months of receiving notice. The court may prevent the acquirer from purchasing these shares or may set terms for such a purchase. However, if they do not apply to the court, the acquirer can compulsorily purchase the shares.

In addition, the Takeovers Code makes it clear that, where a takeover results in the offeror's acquiring 90 per cent or more of the offeree's voting shares, the offeror shall offer the remaining shareholders a consideration that is equal to the prevailing market price of the voting shares or the price offered to the other shareholders, whichever is higher. For listed companies, the prescribed minimum public float is set at 25 per cent. Therefore, the approval of the GSE and the SEC must be obtained to achieve a minority shareholder squeeze-out, which leads to a depletion of the public float.



 

### Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

An offeror must keep a takeover offer open for acceptance for a period of 30 days from the date the takeover offer document is first served in accordance with the Takeovers Code or such period as may be determined by the SEC.

An offer (period) shall be deemed to have lapsed:

- in the event of the non-fulfilment of any obligations by the offeror under the Takeovers Code;
- where all conditions to which the offer is subject are not fulfilled within 21 days of the first closing date of the offer or on the date the offer becomes unconditional as to acceptances; or
- upon the non-acceptance of the offer after the expiry of the offer period.

In the case of an offer that lapses in the event of non-fulfilment of any obligations by the offeror under the Takeovers Code, the offeror shall be prohibited from making any offer for the acquisition of shares of any listed company for a period of 12 months from the date of failure to fulfil the obligation.

Where an extension of an offer is allowed by the SEC, the offeror shall inform the shareholders of the target company of the next closing date by press announcement on the floor of the GSE (in the case of a listed company), in the electronic media and in at least two daily newspapers of national circulation.

## OTHER CONSIDERATIONS

### Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The Income Tax Act 2015 (Act 896) (ITA) replaced the Internal Revenue Act 2000 (Act 592) and all other laws inconsistent with the ITA.

Under the ITA, there is no separate capital gains and gift tax for companies involved in business combinations or acquisitions involving public companies. However, in lieu of these, unless exempt, gains from assets and liabilities realised by the seller are included in the chargeable income of the seller and taxed at their respective corporate income tax rate.

Gains arising from reorganisation, amalgamation or merger of a business are exempt from taxation where there is a continuity of underlying ownership in the assets of at least 50 per cent. Gains from the replacement of assets are also tax-exempt.

Special tax considerations may exist where the home country of a foreign party in such business combinations or acquisitions has in place a double taxation agreement with Ghana.

Further, under the ITA, gains from the realisation of securities of listed companies on the GSE are exempt from income tax up until 31 December 2021.

### Labour and employee benefits



 

### What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

The legislation governing labour and employee benefits is the Labour Act 2003 (Act 651) and the Labour Relations, 2007 (LI 1833).

According to the law, if employees lose their jobs as a result of a business combination or acquisition, or suffer any diminution in their terms and conditions of employment, the target company would have to make redundancy payments to the workers.

In determining whether a worker has suffered a diminution in the terms and conditions of employment, account is taken of the past service and accumulated benefits of the worker with the target company before the acquisition or merger.

Further, the combined entity is required under law to obtain the endorsement of the Chief Labour Officer for the transfer of employees upon a merger or business combination.

## Restructuring, bankruptcy or receivership

### What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The buyer should be prepared to take over the liabilities and obligations of the target public company. Apart from the usual due diligence required to assess the liabilities of the target company, the buyer must take into consideration any human resource agreements and policy of the public company, its tax standing, and investments where the target owns more than 5 per cent.

## Anti-corruption and sanctions

### What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

The Criminal Offences Act 1960 (Act 29) provides for sanctions for corruption in general. Under the Criminal Offences Act, both demand and supply sides of corruption are criminal. The sentence for a conviction for corruption under the Criminal Procedure Code 1960 (Act 30) is a prison term not exceeding 25 years.

Also, companies from the United States and the United Kingdom should ensure that they comply with the Foreign Corrupt Practices Act and the UK Bribery Act (2010).

# UPDATE AND TRENDS

## Key Developments

### What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?



 

In 2018, the Bank of Ghana (BoG) issued a directive to all commercial banks to recapitalise to meet the new minimum capital requirement of 400 million Ghana cedis. Pursuant to this directive, the BoG published Guidelines for undertaking M&As within the banking sector. The Guidelines provide the process and documents to be presented to the BoG for approval of business combinations.

The Competition Bill when passed into law, will represent the most significant regulatory framework for M&As in Ghana. The Bill is expected to be passed into law in the third quarter of 2019.

Clause 2 of the Bill, which sets out its objectives, provides in relevant part that the Competition Commission of Ghana (the Commission), when established, shall regulate mergers and acquisitions.

Clause 5 of the Bill sets out the functions of the Commission, which include regulating mergers and acquisitions in terms of approving (with or without modifications) or blocking them.

Part V of the Bill deals with mergers and acquisitions. Clause 32 empowers the Competition Commission to prohibit certain mergers and acquisitions, which, among other things, restrict free competition. Further, Clause 33 mandates companies to seek approval from the Commission for certain sectoral mergers and acquisitions.

There is currently a proposal to change the statutory framework governing M&As when the Competition Bill and Companies Bill are passed into law.

First, the proposed Competition Bill will result in a higher level of scrutiny from the Commission in respect of M&As. Under the Bill, one of the objectives of the Competition Commission of Ghana is to liaise with sector-specific regulators to ensure compliance with the Competition Law.

Second, in respect of the financial sector, following the Bank of Ghana Directive for recapitalisation, the regulator issued a directive for all banks, specialised deposit-taking institutions and financial holding companies seeking to undertake an acquisition or merger allocating to itself the power to approve or decline any acquisition or merger.

Third, under the proposed Companies Bill, the statutory framework for mergers and arrangements will not be significantly altered. However, there is a change from the term ‘arrangements and amalgamations’ under the Companies Act, to the use of ‘arrangements and mergers’ in the Companies Bill.

Further, clause 239 of the Companies Bill gives the SEC, when a merger or arrangement is proposed, the right to apply to the High Court for a meeting to be held between the classes of members or creditors proposing the merger or arrangement. This right was formerly restricted to members, creditors, the company or the liquidator.

Clause 361 of the Companies Bill now permits the Registrar of Companies to authorise arrangements, mergers, amalgamations and sale of undertakings to be effected electronically in the manner and through an electronic system approved by the Registrar.