

Mergers & Acquisitions

In 59 jurisdictions worldwide

Contributing editor
Alan M Klein



2015

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Mergers & Acquisitions 2015

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Published by
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First published 1999
Sixteenth edition
ISSN 1471-1230

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Ghana

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1 Types of transaction

How may businesses combine?

In Ghana, business combination takes various forms, namely:

- 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.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations are:

- the Companies Act 1963 (Act 179) (the Companies Act) is the primary legislation governing business combinations in Ghana. The Companies Act provides for the manner in which business combinations should be effected. It provides for schemes of arrangement and amalgamation as the modes of achieving business combinations for 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 Law 1993 (PNDC 333), the Securities and Exchange Commission Regulations 2003 (LI 1728), the Securities Industry (Amendment) Act 2000 (Act 590) and the Securities Exchange Commission (SEC) Compliance Manual all serve to govern and regulate trading in securities in publicly listed companies;
- the Takeovers and Mergers Code (the Takeover Code), which became effective from October 2008, also provides for the obligations and procedures to be complied with during M&A activity. The Takeover Code applies to:
 - all takeovers and mergers where the target company is a public company;
 - all takeovers and mergers between or among public companies, whether listed or unlisted on the Ghana Stock Exchange (GSE);
- also, publicly listed companies on the GSE may carry out M&A transactions under the GSE's Rules on Takeovers and Mergers (the GSE Rules); and
- 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 business combinations. These include:

- the Banking Act 2004 (Act 673) as amended, which regulates the banking industry;
- the National Communications Authority Act 2008 (Act 769) and the Regulations 2003 (LI 1719), which regulate the telecommunications industry;

- the Insurance Act 2006 (Act 724), which regulates the insurance industry;
- the Minerals and Mining Act 2006 (Act 703), which regulates the minerals and mining industry;
- the Petroleum (Exploration and Production) Law (PNDC 84);
- the Fisheries Act 2002 (Act 625);
- Petroleum (Local Content and Local Participation) Regulations, 2013 (LI 2204); and
- the Ghana Investment Promotion Centre Act 2013 (Act 865).

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements are typically governed by Ghana law or any other law that the parties to the agreement voluntarily choose.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Generally, the filings and fees in connection with business combinations 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.

For 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 Takeover 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 memorandum and articles of association 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 is paid on the increases 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.

5 Information to be disclosed

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

In all business combinations, 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 9 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 offer document 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, in accordance with section 279 of the Companies Act, a prospectus relating to the offer complying 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 registrar's power to register offer documents for publicly listed companies under section 279 of the Companies Act has now been assigned to the SEC.

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 company unless he 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 transactions whose impact on the company's assets, financial position and business generally will cause substantial share price movements.

6 Disclosure of substantial shareholdings

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

According to the law the purchase of a substantial amount of shares or the securing of control of a company by acquiring the securities of those who control the 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 notifies the GSE and fulfils the conditions of a takeover offer.

Pursuant to the Takeover 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 Takeover 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 Takeover Code.

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

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

- 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.

7 Duties of directors and controlling shareholders

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

Under the Companies Act, directors stand in a fiduciary relationship towards the company and the directors 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 the 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 employees and shareholders. 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 after 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 Takeover Code.

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

Controlling shareholders do not have similar duties.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

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

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

Private companies that are not subject to specific statutory control may have the requirement for shareholders approval prescribed in the regulations of the company.

Dissenting shareholders during a merger or acquisition can receive a fair value of their shares in cash under the Companies Act.

In a business combination where one 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 of the Institute of Chartered Accountants in Ghana.

The purchase money shall be paid before the 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.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Although hostile transactions generally do not take place in Ghana, there is no legal impediment to making a hostile bid. However, there may be cases of a competing takeover offer where two or more entities have interests in the same target. In such an instance, the competing offeror shall serve a competing takeover offer document as required by the Takeover 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 Takeover Code.

10 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 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 Takeover Code provides for cases of a competing takeover offer where two or more entities have interests in the same target. Under the Takeover 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.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, 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 which may affect the nation's security or may be deemed not to be in the nation's best interest would be blocked.

Other ways business combinations may be restricted or influenced by government agencies are as follows:

- the Bank of Ghana may disapprove of share transfer if:
- the transferee may exercise influence to the detriment of the bank;
- the sale of shares by a person with controlling interest in the bank could be detrimental to the bank; or
- the Bank of Ghana has reason to believe that the transaction will be detrimental to the bank; and
- in the mining sector, the minister may restrict a person from becoming a controller of a mining company in Ghana if it would prejudice the public interest.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In public takeovers, the Takeover 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.

Where the offer is conditional upon the acceptance of a minimum percentage of shares being received, the offer shall specify a date which 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.

13 Financing

If a buyer needs to obtain financing for a transaction, 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 Takeover 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 Takeover 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.

14 Minority squeeze-out

May minority stockholders 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 after 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 such 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 Takeover 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.

15 Cross-border transactions

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

There are no specific laws and regulations that apply to cross-border transactions. 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) 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 expatriation of profits, obtain automatic work permits and other benefits.

16 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?

An offeror must keep a takeover offer open for acceptances for a period of 30 days from the date the takeover offer document is first served in accordance with the Takeover 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 Takeover Code; or
- 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 which lapses in the event of non-fulfilment of any obligations by the offeror under the Takeover 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.

17 Sector-specific rules

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

Generally, commercial, trading and manufacturing concerns do not need any general 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 more than 10 per cent of shares in a bank. In addition, under section 36 of the act, the Bank of Ghana must approve any agreement or arrangement that would result in a change in the control of a bank or its holding company; or that would lead to the sale, disposal or transfer of the whole or part of the business of a bank; or the amalgamation or merger of a bank with another bank or institution; or the restructuring of a bank.

In the mining industry, strict approval procedures are required by the law. Mergers and acquisitions by share transactions are tightly regulated. 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 2002 (Act 625), any fishing craft operating in Ghana's coastal waters and rivers in connection with any fishing activity must be licensed. Pursuant to the Fisheries Act, licences granted under the act are not transferable to another person without the permission of the Fisheries Commission.

Thus, 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) Law 1984 principally regulates the petroleum sector. For example, where the merger or acquisition results in the creation of a new company, 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 regulations of the National Communications Authority (NCA) (LI 1719), if the transfers 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.

18 Tax issues

What are the basic tax issues involved in business combinations?

Under section 95 of the Internal Revenue Act 2000 (Act 592) as amended, the consideration received or receivable by a person from the realisation of a chargeable asset is subject to capital gains tax (currently 15 per cent).

A chargeable asset is defined under section 97(a)(1)(ii) of the Internal Revenue Act to include business and business assets, including goodwill of a permanent establishment situated in Ghana. A person who owns a chargeable asset is treated as realising the asset where that person parts with ownership of the asset including where the asset is sold, exchanged, surrendered or distributed.

However, section 101 of the Internal Revenue Act exempts capital gains accruing to or derived by a company arising out of a merger, amalgamation or reorganisation of the company where there is a continuity of underlying ownership in the asset of at least 25 per cent. Therefore, to the extent that a company takes over 100 per cent of the assets of another, it would be exempt from capital gains tax.

Gift tax is payable by a person on the total value of taxable gifts received by that person by way of gift within a year of assessment. A gift with respect to the receipt of a taxable gift means a receipt without consideration or for inadequate consideration.

Taxable gifts include business and business assets. Thus if a company's assets are transferred to another for no consideration (as a gift) then the merged company must pay a gift tax within 30 days of receipt.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The legislation governing labour and employee benefits is the Labour Act 2003 (Act 651).

According to the law, if the employees lose their jobs as a result of the business combination 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.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations 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 company. Apart from the usual due diligence required to assess the liabilities of the target company, there are no special considerations.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

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 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).



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Mergers & Acquisitions
ISSN 1471-1230



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