Private M&A Comparative Guide

B&P ASSOCIATES

mondaq
Connecting knowledge & people

Article Author(s)

Adelaide Benneh Prempeh

Ghana

Contributing Editor

Will Summers

Contributing Editor

1.Deal structure

1. 1. How are private M&A transactions typically structured in your jurisdiction?

Ghana
B&P ASSOCIATES

The Companies Act, 2019 (Act 992) provides for the two main merger forms:

- merger by absorption, whereby the business, assets and liabilities of a transferee company are transferred to another existing company; and
- merger by formation, where a new company is formed to which the business, property and liabilities of two or more companies are transferred.

There are two principal structures of private M&As in Ghana:

- asset purchase, which involves one company acquiring assets, undertakings and sometimes certain liabilities of the target; and
- share purchase, which involves the acquisition of the shares of the target.

1. 2. What are the key differences and potential advantages and disadvantages of the various structures?

Ghana
B&P ASSOCIATES

Share purchase: In a share purchase, it is not necessary to identify all assets and liabilities of the target that will be included or excluded. This makes the process potentially less complex. There is also no need to register a change in title to assets such as land because the target company would maintain ownership.

The buyer acquires the company with the benefits of existing agreements of the company. However, it is important that the agreements and licences of the company are reviewed for change in ownership clauses.

Under the Stamp Duty Act, 2005 (Act 689), Schedule 1, p 17, share transfer agreements are exempt from stamp duty. However, stamp duty is payable on a conveyancing agreement under an asset purchase transaction (Section 12).

Despite the advantages, share purchase transactions have some disadvantages. For example:

- if the target's liabilities are extensive or there is a risk that it will be exposed to significant undisclosed or unknown liabilities, this will be disadvantageous for the buyer; and
- the buyer needs a significant number of the target's shareholders to agree to sell their shares, which may result in a protracted acquisition process.

Asset purchase: This process gives the buyer control over which assets and liabilities are acquired.

The principal disadvantage is the complexity involved in identifying the individual assets, rights and liabilities in the target business to be transferred to the buyer. The legal formalities to transfer title to the buyer may also be extensive; and it will be necessary to review the agreements affecting these assets and liabilities in respect of assignments of interests.

1. 3. What factors commonly influence the choice of transaction structure?

Ghana
B&P ASSOCIATES

Various concerns such as tax, commercial and legal considerations influence the choice of transaction structure. In some situations, an asset purchase may be the ideal option – for example, where:

- the target is a sole proprietorship or partnership;
- the target is a division or business unit of a company's larger business but is not a subsidiary; or
- the target is financially distressed or insolvent.

1. 4. What specific considerations should be borne in mind where the sale is structured as an auction process?

Ghana
B&P ASSOCIATES

In Ghana, the official liquidator of an insolvent target is permitted to sell the property and assets of the company by public auction. The properties of a business must be auctioned in accordance with the Auction Sales Act, 1989 (PNDCL 230) (as amended). The law requires the auctioneer to give at least seven days' notice to the district chief executive of the district of sale. The notice should state:

- the location and time of the auction; and
- the catalogue of sale items.

It must also be circulated in the district ahead of the auction.

2.Initial steps

2. 1. What agreements are typically entered into during the initial preparatory stage of a private M&A transaction?

Ghana
B&P ASSOCIATES

- Confidentiality agreement: This safeguards the information obtained through this process.
- Letter of intent: This sets out the terms of an acquisition agreed in principle between the parties. It is intended to be non-binding, except for specifically identified provisions relating to:
    - the exclusivity of the negotiations;
    - transaction costs; and

- governing law.

- Exclusivity arrangements: As prospective buyers usually need to invest a substantial amount of time and money in pursuing an acquisition, they may seek protection from rival buyers by seeking an exclusivity commitment from the seller.

2. 2. Which advisers and stakeholders are typically involved in the initial preparatory stage of a private M&A transaction?

Ghana
B&P ASSOCIATES

At the preparatory stage of the transaction, legal advisers, accountants, financial advisers and compliance analysts work with buyers and sellers. Directors and shareholders are crucial in kick-starting the process.

2. 3. Can the seller pay adviser costs or is this limited by rules against financial assistance or similar?

Ghana
B&P ASSOCIATES

Yes, the seller can pay the advisers' costs.

3.Due diligence

3. 1. What due diligence is typically conducted in private M&A transactions in your jurisdiction and how is it typically conducted?

Ghana
B&P ASSOCIATES

- Commercial (or business) due diligence: Commercial due diligence looks at broader issues such as:
  - the market in which the target operates;
  - its competitors;
  - the target's strengths and weaknesses;
  - key industry-specific issues affecting the target; and
  - operational matters such as production, sales and marketing, and research and development.

  Commercial due diligence aims to:
  - test the assumptions already made in the buyer's acquisition plan; and
  - identify the management action required by the buyer to take effective control of and reduce risk in the business once the deal has closed.
- Financial due diligence: Financial due diligence focuses on areas of the target's financial affairs that are material to the buyer's decision so that the buyer can assess:
  - the financial risks and opportunities of the deal; and
  - whether, given these risks and opportunities, the target will fit well into the buyer's strategy.

  Financial due diligence may also help to quantify:

- potential synergies;
- the best acquisition and financing structure; and
- the impact of the acquisition on the buyer's performance metrics.

- Legal due diligence: Legal due diligence focuses on establishing the key legal issues affecting the target business, including:
  - the legal obligations and liabilities that the buyer will potentially be acquiring; and
  - any legal risks inherent in the transaction.

  The key areas typically addressed in a legal due diligence review include:
  - the corporate structure of the target group;
  - the capacity of the seller;
  - historic corporate actions and transactions;
  - legal compliance and anti-bribery and corruption matters;
  - material litigation affecting the target;
  - title to the assets being acquired;
  - IP rights and IT issues;
  - employment and pensions matters; and
  - data protection.

3. 2. What key concerns and considerations should participants in private M&A transactions bear in mind in relation to due diligence?

Ghana
B&P ASSOCIATES

It is important to consider key areas such as:

- the financial history and position of the company;
- disputes;
- tax position;
- general compliance and licensing;
- corporate compliance;
- labour-related considerations;
- material contracts;
- property title; and
- intellectual property.

It is also important to recognise specific sector-related issues that may vary depending on the operations of the target.

3. 3. What kind of scope in relation to environmental, social and governance matters is typical in private M&A transactions?

Ghana
B&P ASSOCIATES

ESG diligence in transactions is a comparatively recent development and this is an area that continues to evolve as new approaches, best practices and technologies emerge.

There are three, often overlapping, approaches to ESG diligence in the context of private equity transactions:

- assessments undertaken by the internal team within the private equity house. These often use one of the various standardised methodologies to help integrate ESG into investment decisions and ensure that investor criteria are met by any proposals;
- dedicated ESG reports produced by external consultants, based on direct engagement with the target. These reports are more often provided by technical consultants who have expanded their traditional review of safety and environment matters to consider the wider risk management of the business and how, for example, issues such as employee welfare rather than just safety are managed by the target and its supply chain; and
- data-focused reports produced by search providers or analytics specialists based on publicly available information.

4.Corporate and regulatory approvals

4. 1. What kinds of corporate and regulatory approvals must be obtained for a private M&A transaction in your jurisdiction?

Ghana
B&P ASSOCIATES

Generally, an M&A must be filed with the Office of the Registrar of Companies. Additionally, if the target is in a regulated industry, the relevant regulators may need to approve a change of control or at least be notified of it.

Key industry regulators include:

- the Bank of Ghana (BoG);
- the National Insurance Commission (NIC);
- the National Communications Authority (NCA);
- the Minerals Commission;
- the Petroleum Commission; and
- the National Petroleum Authority.

4. 2. Do any foreign ownership restrictions apply in your jurisdiction?

Ghana
B&P ASSOCIATES

Foreign-owned companies must comply with minimum capital requirements to do business in Ghana. Where the sector of the target is regulated, the approval of the regulator may be required.

Furthermore, some sector-specific laws restrict the level of foreign ownership in companies, as follows:

- Banking: The BoG must approve any agreement or arrangement that would result in a change in the control of a bank or its holding company. Consequently, the sale, disposal or transfer of 10% or more of the capital or voting rights of the business of a bank, an amalgamation or merger of a bank with another bank or institution or restructuring of the bank requires the approval of the BoG.
- Petroleum: The Petroleum (Exploration and Production) Act, 2016 (Act 919) provides for the notification of the sector minister where a merger or acquisition would result in the creation of a new company. Written approval of the minister for energy or the Minerals Commission, is needed in a change in ownership of a contractor or subcontractor, respectively, where the acquiring company gains a controlling interest or at least a 5% shareholding in the contractor or subcontractor. If the M&A leads to the company ceasing operations, the Ghana National Petroleum Corporation has the first option in the purchase of its assets.
- Mining: The acquisition of a stake in a mining company which vests in a person (alone or with an associate(s)) control of more than 20% of the voting power in a mining company/its holding company needs the approval of the sector minister.
- Fisheries: Fishing crafts operating in Ghana's coastal waters and rivers in connection with any fishing activity must obtain a licence for their activities. These licences are not transferable without the permission of the Fisheries Commission. Consequently, where a merger or an acquisition leads to the formation of a new company, a licence granted to a fishing vessel cannot be transferred to the new company unless permission has been obtained.
- Telecommunication: The Electronic Communications Act, 2008 (Act 775) states that the NCA must approve the transfer of shares in a licensee company if the transfer would result in a change of control of that company and cause it to breach licence terms relating to its ownership structure.
- Insurance: In the insurance sector, the acquisition or sale of a significant interest in an insurance company requires the prior written approval of the NIC.

4. 3. What other key concerns and considerations should participants in private M&A transactions bear in mind in relation to consents and approvals?

Ghana
B&P ASSOCIATES

Some of the key regulatory issues relevant to private M&A transactions include:

- minimum capital requirements;
- tax rules regarding the realisation of assets;
- thin capitalisation rules;
- local participation rules;
- local content requirements; and
- a prohibition on equity investments in some sectors, such as:
    - retail pharmaceuticals; and
    - segments of the downstream oil and gas sector.

5.Transaction documents

5. 1. What documents are typically prepared for a private M&A transaction and who generally drafts them?

Ghana
B&P ASSOCIATES

Some of the main documents in a share purchase include:

- a share purchase agreement;
- shareholders and board resolutions;
- share transfer forms; and
- share certificates.

In an asset sale, the main document may be the sale and purchase agreement. Where the asset is a landed property, conveyance agreements are necessary.

The relevant documents are usually prepared by the legal advisers for the transaction.

5. 2. What key matters are covered in these documents?

Ghana
B&P ASSOCIATES

The key issues in the documents include:

- standard terms;
- the consideration payable;
- the shares or assets being transferred; and
- the nature of the interests, rights, restrictions and obligations of the parties.

5. 3. On what basis is it decided which law will govern the relevant transaction documents?

Ghana
B&P ASSOCIATES

The factors affecting the choice of governing law may include the following:

- Non-legal factors: A party may choose a particular governing law for a variety of non-legal reasons. These may include:
  - the familiarity of the market in which the transaction is being carried out with the governing law;
  - the availability of specialist lawyers within the relevant jurisdiction who can advise on the transaction; and
  - the convenience of choosing a governing law with which a party is familiar.
- Certainty and predictability of interpretation of the contract: Factors that may be taken into account in assessing certainty and predictability of interpretation include:
  - the stability of the jurisdiction of the governing law;

- the ability of the governing law to address complex concepts and structures that may be features of certain finance transactions;
- the selection of the courts of the same jurisdiction as the governing law, as these courts are likely to be the best interpreters of that law; and
- the familiarity of the governing law with established financial market practices and commercial requirements.

- Consistency between the governing law clause and the jurisdiction clause. Parties sometimes deem it convenient if the courts that are to determine disputes that may arise from the transaction are farmiliar with the governing law.

Ultimately, the parties enjoy the common law right of party autonomy and choice of law, with the power to choose the law that they intend will govern their transaction.

6.Representations and warranties

6. 1. What representations and warranties are typically included in the transaction documents and what do they typically cover?

Ghana
B&P ASSOCIATES

In M&A transactions, the parties provide representations and warranties which typically cover the following areas:

- the authority to sell;
- the accuracy of financial records and accounts and confirmation that they have been prepared in accordance with the applicable laws or international standards;
- the solvency of the seller;
- compliance with legal requirements and governmental authorisations and consents to enter into the transaction;
- the ownership of IP rights;
- assignable contracts;
- no litigation/legal proceedings;
- the fulfilment of all tax liabilities; and
- no material adverse changes.

6. 2. What are the typical circumstances in which the buyer may seek a specific indemnity in the transaction documentation?

Ghana
B&P ASSOCIATES

Buyers may seek specific indemnities for representations made on matters that could potentially affect the operation, running or value of the transaction. Indemnities in M&A transactions are typically backed by the promoter. Specific indemnities are most appropriate to cover specific risks which are of particular concern to the buyer. The indemnities may cover matters such as:

- the existence of any assets or liabilities;
- the title to any assets;
- the accuracy of any financial information;
- the legality of the transaction; and
- any restrictions on the transfer of ownership.

6. 3. What remedies are available in case of breach and what is the statutory timeframe for bringing a claim? How do these timeframes differ from the market standard position in your jurisdiction?

Ghana
B&P ASSOCIATES

In practice, the main remedy for a breach of a warranty in an acquisition agreement is damages. However, other remedies can be explicitly provided for in the contract and can include:

- the replacement of a defective asset;
- specific performance; or
- a refund.

Additionally, a warranty can limit or exclude certain types of damage claims; or a schedule of liquidated damages may be specified.

Normally, the acquisition agreement will expressly state the survival period for a warranty. In the absence of an express provision, the applicable sections of the relevant statute will apply to any claim made by either party.

In Ghana, the statutory period for bringing an action relating to contracts and torts is within six years of the cause of action accruing. This is stated in Section 4 of the Limitations Act, 1972 (NRCD 54). In practice, the timeframe for obtaining a court order for such matters is 18 to 24 months.

6. 4. What limitations to liability under the transaction documents (including for representations, warranties and specific indemnities) typically apply?

Ghana
B&P ASSOCIATES

Some of the limitations on liabilities that may be typically provided for include the following:

- *De minimis* amount: The *de minimis* amount specifies the minimum threshold that a single claim must exceed in order to become eligible for indemnification.
- Tipping basket: A tipping basket specifies the threshold that the aggregate amount of all claims must exceed before a party can bring any claim for indemnification. Once the threshold is exceeded, the indemnifying party will be liable for the entire amount of losses. Like the *de minimis* amount, baskets eliminate redress for relatively small claims.
- Deductible basket: A deductible basket specifies the threshold that the aggregate amount of all claims

must exceed before a party can bring any claim for indemnification. However, once the threshold is exceeded, the indemnifying party will be liable only for losses that exceed the threshold amount. For example, if there is a GHS 1 million deductible and a party brings a claim for GHS 3 million, the indemnifying party will be responsible only for that portion of the claim exceeding the GHS 1 million deductible (ie, GHS 2 million).

- Indemnity cap: An indemnity cap limits the amount that an indemnifying party may be required to pay. The cap amount is generally calculated as a percentage of the purchase price, but may also be a specified amount.
- Liability cap: The liability cap clause defines an upper limit to the amount – referred to as the maximum liability limit or cap – to which the vendor is liable. In cases of deliberate intent, the cap does not apply and the damage must be repaid in full.

6. 5. What are the trends observed in respect of buyers seeking to obtain warranty and indemnity insurance in your jurisdiction?

Ghana
B&P ASSOCIATES

Insurance companies do not typically provide warranty and indemnity insurance with respect to M&A transactions. There are no widespread instances of its use within the jurisdiction; however, it is possible for parties to consult with their preferred insurer to develop such products, since this is not expressly prohibited by law.

6. 6. What is the usual approach taken in your jurisdiction to ensure that a seller has sufficient substance to meet any claims by a buyer?

Ghana
B&P ASSOCIATES

A thorough due diligence investigation carried out on the seller may reveal the capacity of the seller to meet claims. However, some buyers may require the seller to take out indemnity insurance.

6. 7. Do sellers in your jurisdiction often include restrictive covenants in the transaction documents? What timeframes are generally thought to be enforceable?

Ghana
B&P ASSOCIATES

Non-compete covenants – also known as ‘restraint of trade covenants’ in Ghana – usually have a duration of between two and five years. The courts in Ghana will deem unconscionable any agreement that seeks to perpetually restrain a person or entity from trade.

6. 8. Where there is a gap between signing and closing, is it common to include conditions to closing, such as no material adverse change (MAC) and bring-down of warranties?

Ghana
B&P ASSOCIATES

Yes, it is typical to include such clauses to protect the interest of the buyer. In such cases, the agreement will include certain pre-closing covenants which may be in the interests of either party.

The seller may insist on certain clauses – for example, that the buyer agree to obtain all applicable governmental and third-party approvals and consents. It may also include requirements for the buyer to secure financing for the purchase price.

There are other common positive and restrictive covenants for the seller, such as the following:

- The seller will continue to operate the business in the ordinary course – no significant actions will be taken without the buyer's prior consent;
- The seller promises to notify the buyer if any events might cause a material adverse change for the target, its business or its assets; and
- The seller agrees to provide the buyer with reasonable access to the business. This may include the seller's premises, personnel and assets to assist the buyer in conducting due diligence on the target.

6. 9. What other conditions precedent are typically included in the transaction documents?

Ghana
B&P ASSOCIATES

Conditions precedent that are typically included in M&A transaction documents include the following:

- Internal approvals for the M&A transaction: Parties may be required to provide evidence of approvals authorising the execution, delivery and performance of the sale and purchase agreement. Where the transaction constitutes a major transaction under the Companies Act, 2019 (Act 992), a special resolution may be required.
- Written approval from the competent authorities: In regulated industries – including the mining, petroleum, banking and insurance industries – the prior notification/consent of the relevant regulators may be required for M&A transactions. For any M&A transaction where the buyer is a foreign investor, a company may be obliged to register with the Ghana Investment Promotion Center in order to operate the business with foreign participation.
- Tax clearance from the Ghana Revenue Authority and confirmation that there exists no financial obligations to any third parties: The seller commits that:
    - it is not hiding any tax obligations and/or financial obligations besides what is included in the sale and purchase agreement; and
    - as the case may be, it will pay any pending tax obligations and/or financial obligations before the buyer makes payment.
- Social Security and National Insurance Trust clearance. This is a confirmation that the company is

compliant in relation to its pension payments and obligations to the Social Security and National Insurance Trust.

7.Financing

7. 1. What types of consideration are typically offered in private M&A transactions in your jurisdiction?

Ghana
B&P ASSOCIATES

- Cash, which is the most common type of consideration offered in M&A transactions;
- Shares;
- Capital equipment; and
- Landed property.

7. 2. What are the key differences and potential advantages and disadvantages of the various types of consideration?

Ghana
B&P ASSOCIATES

The primary advantage of cash consideration is that the purchase price is certain. Additionally, the seller disposes of the target in exchange for cash and does not concern itself with anything else that affects the combined company after the sale or whether the company achieves its synergy.

The preference for cash consideration may also cause purchasers to take on additional liability by borrowing in order to fund the deal. There may also be reduced earnings as a result of tax deductions. Furthermore, cash consideration leads to a decrease in a company's liquid assets or cash reserves as a result of financing the transaction.

Equity considerations remove the burden of loan repayment. Under equity consideration, the seller continues to hold shares in the company, thereby assuming all risks in and potential

7. 3. What factors commonly influence the choice of consideration?

Ghana
B&P ASSOCIATES

Factors that influence the choice of consideration include:

- tax implications;
- regulatory requirements;
- prevailing market conditions; and
- business strategy.

7. 4. How is the price mechanism typically agreed between the seller and the buyer? Is a locked-box structure or completion accounts structure more common?

Ghana
B&P ASSOCIATES

The locked-box structure is more commonly resorted to in practice. This is largely due to the filing process and pre-merger approvals required. However, there are instances in which the completion accounts structure may be resorted to. This structure is particularly useful in transactions with strict timelines.

7. 5. Is the price typically paid in full on closing or are deferred payment arrangements common?

Ghana
B&P ASSOCIATES

Deferred consideration may be desirable from the buyer's perspective. This is so because the buyer need not have the full purchase amount ready to be paid upon completion. This arrangement eases the buyer's cash-flow position.

Payment arrangements vary from case to case, as these are contingent on the parties' agreement.

7. 6. Where a deferred payment/earn-out payment is used, what typical protections are sought by sellers (eg, post-completion veto rights)?

Ghana
B&P ASSOCIATES

One potential solution or protection is for the seller to:

- secure the deferred consideration against an asset of the target; or
- obtain a guarantee from a third party which may have the capacity to make the payments required.

7. 7. Do any rules on financial assistance apply in your jurisdiction, and what are their implications for private M&A transactions?

Ghana
B&P ASSOCIATES

A company is generally prohibited from providing financial assistance, whether directly or indirectly, for the subscription or purchase of its own shares or the shares of its holding company.

Additionally, the provision of financial assistance is generally restricted in specific industries, including the banking and insurance industries.

In the banking industry, a bank or specialised deposit-taking institution must not issue shares that are paid for by funds borrowed from that bank or specialised deposit-taking institution. Thus, such an institution cannot provide financial assistance for the purpose of:

- the purchase of its own shares; or
- the financing of an M&A transaction to which it is a party.

Additionally, in the insurance industry, restrictions are imposed on the purchase of shares and the advancement of loans which may have an impact on the provision of financial assistance in M&A transactions. Hence, the prior approval of the regulator is mandatory when entering into such a transaction.

With respect to a company that conducts business within a regulated industry, there may be an outright prohibition of financial assistance to a party in M&A transactions; and in other cases, approval may be needed from the industry-specific regulator. Such approvals or consents are usually at the discretion of the regulator(s).

7. 8. What other key concerns and considerations should participants in private M&A transactions bear in mind from a financing perspective?

Ghana
B&P ASSOCIATES

- Selecting a source of financing: The parties may need to consider carefully their sources of financing (ie, debt or equity).
- The risks associated with the financing: There are a number of risks associated with M&A financing, including the risk of:
    - a default in payment of the consideration;
    - changes in interest rates;
    - a decrease in valuation of the target; and
    - changes in the target's financial performance.
- The terms of the financing for the M&A transaction: These include:
    - the interest rate;
    - the repayment schedule; and
    - any covenants or restrictions that the lender may impose.
- The impact of the transaction on the buyer's financials: The acquisition may increase the buyer's debt load and debt-to-equity ratio. This will make it more difficult for the buyer to borrow money in the future and could also impact its credit rating. The buyer should thus carefully consider the impact of the acquisition on its financial health before making a decision to proceed.
- The valuation of the target: The buyer should ensure that it is paying a fair price for the target by:
    - conducting due diligence; and
    - performing a valuation of the shares being offered by the seller.
- The tax implications of the preferred financing structure: The type of financing chosen will have tax implications for both the acquirer and the target.

8.Deal process

8. 1. How does the deal process typically unfold? What are the key milestones?

Ghana
B&P ASSOCIATES

The deal process starts with the conclusion of a special resolution by the parties. Following this, the merger proposal is prepared for approval. The merger agreement will also be prepared and signed, laying out the binding terms for the transaction.

It is important for the parties to:

- obtain the necessary approvals from relevant regulators, where required; and
- file the relevant documents with the Office of the Registrar of Companies (ORC).

Upon completion of the process, a merger certificate will be issued to the merged entity.

8. 2. What documents are typically signed on closing? How does this typically take place?

Ghana
B&P ASSOCIATES

The following documents are required by the ORC to procure a merger certificate:

- the merger proposal;
- a certificate signed by the directors of each transferor company stating that the merger has been approved in accordance with Act 992 and the constitution of the company;
- a certificate signed by the directors or proposed directors of the transferee company stating that no creditor will be prejudiced if the creditor claims to asset value ratio of the transferee company is greater than the creditor claims to asset value ratio of the transferor company;
- consent letters of the new directors and secretary of the merged entity; and
- a report regarding the fairness of the merger issued by an insolvency practitioner.

8. 3. In case of a share deal, what is the process for transferring title to shares to the buyer?

Ghana
B&P ASSOCIATES

In the case of a share purchase transaction, it is primarily important to confirm that there are no restrictions on the transfer of shares set out in the constitution of the company. Resolutions must be passed approving the transaction. Following this:

- the value of the shares must be determined by the parties;
- the share purchase agreement or deed of transfer must be prepared;
- the share certificate must be issued; and
- the relevant changes must be filed.

8. 4. Post-closing, can the seller and/or its advisers be held liable for misleading statements, misrepresentation, omissions or similar?

Ghana
B&P ASSOCIATES

Yes, if misleading statements, misrepresentation or omissions are made by the seller in the course of the transaction and the buyer relies on these statements to its detriment, the buyer may seek remedies pursuant to the merger agreement.

8. 5. What are the typical post-closing steps that need to be taken into consideration?

Ghana
B&P ASSOCIATES

Post-closing, it is imperative that the required notices be provided to the relevant regulatory and governmental agencies of the change in structure and particulars.

9.Competition

9. 1. What competition rules apply to private M&A transactions in your jurisdiction?

Ghana
B&P ASSOCIATES

Ghana has no comprehensive competition legislation; rather, a number of laws have been passed which have an impact on competition and certain sector-specific laws contain provisions akin to competition laws.

An example is the Protection Against Unfair Competition Act, 2000 (Act 589). Under this Act, activities that cause confusion with respect to another person's enterprise or its activities, damage another person's goodwill or reputation or mislead the public are prohibited.

Act 589 does not extend sufficiently far, insofar as there are no provisions that:

- prohibit:
    - anti-competitive agreements;
    - abuse of a dominant position;
    - merger control;
    - cartels and price fixing; or
- aim to protect consumer interests.

In the absence of a competition legal framework, there is no competition authority to regulate competition in compliance with competition laws in Ghana. Thus, there are no mandatory requirements for relevant approvals and notifications from the sector regulator for private M&A transactions in Ghana.

9. 2. What key concerns and considerations should participants in private M&A transactions bear in mind from a competition perspective?

Ghana
B&P ASSOCIATES

Although Act 589 may not entirely speak to issues relating to private M&A transactions, participants must pay attention to sector-specific laws that contain provisions akin to competition laws in Ghana. Examples include the following:

- The National Petroleum Authority Act prohibits an agreement between or combination of companies in the downstream petroleum industry if it leads to the establishment of a monopoly over a particular product or market in the downstream petroleum industry.
- Section 52 of the Insurance Act, 2021 (Act 1061) provides that a party cannot become a significant owner in an insurance company without the prior written approval of the National Insurance Commission (NIC). An application for approval must be made by the licensed insurer or reinsurer concerned on behalf of the person that intends to acquire the shares. An insurer cannot, without the prior written approval of the NIC, issue or allot any shares or acquiesce in any other reorganisation of its share capital if it results in a person:
    - acquiring a significant interest in the insurance business; or
    - increasing or decreasing the size of its interest.
- Section 34 of the Banking Act, 2004 provides that a person cannot acquire, directly or indirectly, shares in a bank that, together with that person's existing direct or indirect holdings, constitute a significant shareholding. Furthermore, a person with a significant shareholding in a bank cannot sell or dispose of shares in that bank to any other person (by sale or disposal) which causes it to cease having a significant shareholding unless:
    - the Bank of Ghana (BoG) is notified within three months of acquisition or disposal; and
    - the bank obtains prior approval in writing from the BoG.

10.Employment

10. 1. What employee consultation rules apply to private M&A transactions in your jurisdiction?

Ghana
B&P ASSOCIATES

The Labour Act, 2003 (Act 651) and its accompanying regulations govern employment-related matters in Ghana. Under the act, employees have the freedom to form or join a trade union of their choice to promote and protect their economic and social interests. This is a constitutional right guaranteed by Article 21(1)(e) of the 1992 Constitution.

Under Section 65(1) of the Labour Act, where an employer contemplates the introduction of major changes in production, programme, organisation, structure or technology of a business that are likely to entail terminations of employment of workers, the employer must consult the trade union concerned on measures to be taken:

- to avert or minimise the termination; and
- to mitigate the adverse effects of any terminations on the workers concerned, such as finding alternative employment.

In practice, M&As are most likely to introduce major changes to the structure, organisation or programme of an entity. If an employer anticipates that these major changes may result in some employees losing their jobs, it must consult the trade union. The consultation, however, does not deal with the substance of the M&A transaction, but rather with the measures to be taken to minimise the termination and mitigate the adverse effects of any terminations on the workers concerned.

Where a transaction involves a sale or transfer of shares and some of the employees act in a dual capacity as shareholders or directors, they will necessarily be consulted during the transaction process. As shareholders, they can exercise the right of first refusal, which can have an impact on the M&A transaction. As directors, their vote on a matter counts by the passing of a resolution.

10. 2. What transfer rules apply to private M&A transactions in your jurisdiction?

Ghana
B&P ASSOCIATES

It is not set in stone that the employees of an acquired entity will automatically be transferred to the acquiring entity or, in the case of a merger, that the employees of the parties to the transaction will be retained as employees of the merged entity. Section 65(1) of the Labour Act acknowledges that during a merger or acquisition, employees may lose their jobs.

Whether an employee will be transferred or retained depends on:

- the terms of the existing employment contract; and
- the terms of the transaction.

To uphold the concept of party autonomy, the new entity which is the product of the M&A transaction must enter into new employment contracts with the employees of the transacting entities. These new employment contracts must spell out the terms and conditions that will govern the new employment relationship that will exist following an agreement between the parties.

Where there is an assignment of an employment contract as a result of a private M&A transaction, the consent of the employee or worker is required for such an agreement to be effective pursuant to Regulation 30(1) of the Labour Regulations, 2007 (LI 1833).

Where there is no retention or where the employees do not consent, the employees will be entitled to receive compensation in the form of redundancy pay under Section 65(2) of the Labour Act.

10. 3. What other protections do employees enjoy in the case of a private M&A transaction in your jurisdiction?

Ghana
B&P ASSOCIATES

The Labour Act protects employees and their rights during private M&A transactions.

Under Section 65(2) of the Labour Act, employees are to be paid compensation known as 'redundancy pay' if:

- the company closes down or undergoes an arrangement or amalgamation;
- the closedown, arrangement or amalgamation causes a severance of the legal employment relationship that existed immediately before the closedown, arrangement or amalgamation; and
- as a result of and in addition to the severance, the employee becomes unemployed or suffers any diminution in the terms and conditions of employment.

Also, employees are entitled to enjoy their leave entitlement with full pay in any calendar year of continuous service. Any change in ownership or management of the business cannot be a basis for the interruption of continuous service and employees will continue to enjoy their leave benefits pursuant to Section 21 of the Labour Act.

The rights of employees to have their contracts of employment assigned is subject to their consent pursuant to Regulation 30(1) of the Labour Regulations, 2007 (LI 1833).

10. 4. What is the impact of a private M&A transaction on any pension scheme of the seller?

Ghana
B&P ASSOCIATES

Pension schemes in Ghana are governed by the National Pensions Act, 2008 (Act 766). They consist of a three-tier contributory scheme:

- a mandatory basic national social security scheme;
- a mandatory fully funded and privately managed occupational pension scheme; and
- a voluntary fully funded and privately managed provident fund and personal pension scheme.

In the case of the outright acquisition of an entity by the buyer, the seller's obligation to make regular contributions to the Social Security and National Insurance Trust (SSNIT) on behalf of its employees under Act 766 will be relinquished after the employment relationship between the employees and the seller is terminated Act 766 defines an 'employer' as:

- the owner of an establishment or the person that has the ultimate control over the affairs of an establishment; and
- with which the worker has entered into a contract of service or apprenticeship and which is responsible for the payment of his or her salary.

Therefore, where the buyer has acquired the seller, the seller is no longer an employer of the employees.

Where the buyer retains the employees of the seller with their consent, the buyer – as the new employer – is required by law to have a pension scheme for its employees. As such, the buyer may choose either:

- to maintain the exact scheme of the seller; or

- to adopt it with slight variations.

Regardless of this, an employer, per the pension scheme, must:

- ensure that all employees are registered under the scheme; and
- make regular contributions on behalf of the workers to SSNIT.

An employer must submit contribution reports by the end of the month, whether contributions are remitted to SSNIT or not; failing which a penalty of 3% per month will be imposed on unpaid contributions.

10. 5. What considerations should be made to ensure there are no concerns over the potential misclassification of employee status for any employee, worker, director, contractor or consultant of the target?

Ghana
B&P ASSOCIATES

The primary duty of the buyer is to ensure that there are no concerns over the potential misclassification of employee status for any employee, worker, director, contractor or consultant of the target. It does so by conducting due diligence on the target. This will involve a review of all employment contracts and company policies and manuals *vis-à-vis* the applicable labour laws of Ghana. This will help to ensure that the classifications (eg, employee, independent contractor, consultant) are appropriate based on:

- the nature of the work; and
- the definitions within the applicable laws.

Considerations as to the length of continuous employment and the nature of instruction and control that the employer has over the employee are extremely relevant irrespective of whatever classification has been given to the employee in the employment contract. For example, per Section 75 of the Labour Act, a temporary worker who is employed by the same employer for a continuous period of six months or more must be treated as a permanent worker.

10. 6. What other key concerns and considerations should participants in private M&A transactions bear in mind from an employment perspective?

Ghana
B&P ASSOCIATES

Participants in private M&A transactions should pay attention to the Labour Act and its provisions to ensure that their activities comply with the law.

They should also review their activities to comply with any sector-specific laws relating to employment. For example, Section 52(1) of the Minerals and Mining Act, 2006 (Act 703) provides that a person cannot become a controller of a mining company (ie, a person that, along with an associate or associates, can exercise or control the exercise of more than 20% of the voting power at any general meeting of the mining company or of another company of which it is a subsidiary), unless it has served notice on the minister of mines of its intention to become a controller.

Further, depending on the nationality of the prospective buyers or the company being merged, the Ghana Investment Promotion Center (GIPC) Act, 2013 (Act 865) limits foreign participation in certain areas of business with the exception of export trading. Section 27 of the GIPC Act prohibits foreign participation in:

- the sale of goods or provision of services in a market, petty trading or hawking or selling of goods in a stall at any place;
- the operation of a taxi or car hire service in an enterprise that has a fleet of fewer than 25 vehicles;
- the operation of a beauty salon or barbershop;
- the printing of recharge scratch cards for the use of subscribers of telecommunications services;
- the production of exercise books and other basic stationery;
- the retail of finished pharmaceutical products;
- the production, supply and retail of sachet water; and
- all aspects of pool betting business and lotteries, except football pool.

11.Data protection

11. 1. What key data protection rules apply to private M&A transactions in your jurisdiction?

Ghana
B&P ASSOCIATES

In Ghana, the Data Protection Act, 2012 (Act 843) was enacted to protect personal data and privacy by regulating the collection, use and storage of personal data. It applies to all organisations that process personal data. The Data Protection Commission is the regulatory body responsible for enforcing the act.

Stakeholders in M&A transactions that disclose any information containing personal data must comply with Act 843. Companies must protect the data of third parties such as suppliers and customers.

In Ghana, businesses must adhere to key elements to protect customer data, relating to:

- informed consent;
- data minimality; and
- data security measures.

An important consideration is the need for explicit informed consent from customers to collect and process personal data. Data minimality involves the practice of collecting only the data which is necessary for a specific purpose, in order to limit the amount of data that is stored and thus reduce the risk of a data breach or cyberattack. Data security measures are critical in protecting customer data.

Personal data may only be processed:

- lawfully;
- in good faith; and
- in a proportionate manner.

The relevant test remains whether the other party needs to know the information at a particular stage of the transaction.

Parties can execute non-disclosure agreements to protect trade secrets, IP rights and sensitive information which are worth protecting from disclosure.

Under Section 92 of the Evidence Act, 1975, any confidential information can be disclosed pursuant to a court order. Where there is a breach, an injunction can be sought to stop republication. The injunctive relief may be obtained in addition to the award of damages by a court.

11. 2. What other key concerns and considerations should participants in private M&A transactions bear in mind from a data protection perspective?

Ghana
B&P ASSOCIATES

Participants should:

- identify and assess potential data protection risks and liabilities; and
- ensure that the transaction documents include appropriate data protection representation, warranties and indemnities.

Additionally, it may be necessary to consider the transfer of personal data between jurisdictions and implement appropriate data security measures.

12.Environment

12. 1. Who bears liability for the clean-up of contaminated sites? How is liability apportioned as between the buyer and the seller in case of private M&A transactions?

Ghana
B&P ASSOCIATES

There is a constitutional duty to protect and safeguard the environment under Article 41(k) of the Constitution of Ghana, 1992.

The primary legislation on the protection of the environment in Ghana is the Environmental Protection Agency (EPA) Act, 1994 (Act 490), which imposes liability for environmental contamination on undertakings or entities, with the EPA as the regulatory body.

Pursuant to Section 13(1) of the act, the EPA will serve an enforcement notice on the person responsible for a business where the activities of the business pose a serious threat to the environment or public health. The notice requires the person responsible to take certain steps to prevent or stop the activities. Non-compliance attracts a fine of up to GHS 3,000 and, in default, a term of imprisonment not exceeding one year; or both a fine and imprisonment (Section 13).

In accordance with the concept of party autonomy, the parties to the M&A transaction usually spell out their individual obligations in respect of ensuring that contaminated sites are cleared up, barring the imposition of those duties on either party by any statute. Where there are no expressly stated obligations, it is usually the party that may incur a greater liability for contamination that has the greater burden of cleaning up the contaminated sites.

For instance, within the upstream petroleum sector, pursuant to Sections 83 and 84 of the Petroleum (Exploration and Production) Act of 2016, a licensee or contractor is strictly liable for any pollution damage caused by or resulting from petroleum activities. Further, where the pollution damage was caused by unauthorised activity, the person that conducted the petroleum activity and any other person that took part in the petroleum activity and knew or ought to have known that the activity was conducted without authorisation will be strictly liable.

12. 2. What other key concerns and considerations should participants in private M&A transactions bear in mind from an environmental perspective?

Ghana
B&P ASSOCIATES

Where the M&A transaction may have adverse environmental implications, the participants must acquire a permit before they commence their activities per the Environmental Assessment Regulations, 1999 (LI 652) as amended.

A person cannot undertake some businesses in sectors such as agriculture, mining, manufacturing, wholesale trade, accommodation and food and beverages without an environmental permit. A permit can only be issued following an environmental impact assessment.

Consideration should also be given to:

- the potential basis for revocation or suspension of an environmental permit; and
- the duties of permit holders – for example, the submission of an annual environmental report to the EPA every 12 months.

The EPA should be informed if:

- the M&A transaction will result in the creation of a new company; or
- the transferor company has acquired all the relevant permits and reports.

Additionally, participants must take note of the various sector-specific laws of the industries within which they operate to confirm whether there is a need to acquire any specific environmental permits before they commence their activities. For example, for participants in the mining sector, the holder of a mineral right must obtain the necessary approvals and permits from the Forestry Commission and the EPA for the protection of natural resources, public health and the environment prior to undertaking activities or operations under a mineral right in accordance with Section 18 of the Minerals and Mining Act, 2006.

Again, participants can also:

- assess the target's environmental compliance and liabilities;
- evaluate the potential environmental risks and liabilities associated with the transaction; and
- incorporate environmental representations and warranties into the transaction document.

13.Tax

13. 1. What taxes are payable on private M&A transactions in your jurisdiction? Do any exemptions apply?

Ghana
B&P ASSOCIATES

The Income Tax Act, 2015 (Act 896) (as amended) regulates Ghana's tax regime. The tax treatment of the realisation of assets as a result of a change in ownership of an entity through sale, acquisition, merger, amalgamation or reorganisation is provided for under Sections 38(2), 47 and 62 of Act 896.

For an outright sale or acquisition, any realisation that results from the transaction is subject to tax. Where a gain or profit is made, the amount realised will be added to the income and taxed appropriately. However, if there is a loss, the quantum of the loss may be carried forward.

In the case of a merger, a gain on the realisation of an asset that accrues to, or is derived by, a company will be either exempt from or subject to tax depending on the ownership of the asset. The gain is:

- exempt from tax where there is a continuity of at least 50% of the underlying ownership in the asset; and
- subject to tax where there is a continuity of less than 50% of underlying ownership in the asset.

A realisation of assets and liabilities is deemed to have taken place where, within three years, there is a change in the share structure of an entity by more than 50% under Section 62 of Act 896. Tax laws relating to the disposal of assets and liabilities will then apply.

In a transaction which involves the transfer of shares, the company is exempt from stamp duty. However, Schedule 1 of the Stamp Duty Act imposes specific stamp duty rates on the conveyance or transfer of the sale of property.

Where the chargeable income of an individual includes a gain from the realisation of an investment asset not charged elsewhere, the individual can elect that the gain from the realisation of the investment asset be taxed at 15%, as outlined in paragraph 3(a) of the First Schedule to the Income Tax Act.

13. 2. What other strategies are available to participants in a private M&A transaction to minimise their tax exposure?

Ghana
B&P ASSOCIATES

At all times in a private M&A transaction, tax consequences will be triggered if the underlying ownership is altered by more than 50%. This is a pointer for structuring deals to avoid paying taxes on the realisation event.

13. 3. Is tax consolidation of corporate groups permitted in your jurisdiction? Can group companies transfer losses between each other for tax purposes?

Ghana
B&P ASSOCIATES

Currently, there are no tax consolidation provisions in Ghana's tax regime. Each company is a separate legal entity under Ghanaian law and as such is categorised and taxed differently.

13. 4. What other key concerns and considerations should participants in private M&A transactions bear in mind from a tax perspective?

Ghana
B&P ASSOCIATES

Under Section 47 of the Income Tax Act, the gains on the realisation of an asset accruing to or derived by a company arising from the amalgamation, reorganisation or merger of a company are exempt from tax where there is continuity of at least 50% of the underlying ownership in the asset. This is a pointer for structuring deals to avoid paying taxes on the realisation event.

14.Trends and predictions

14. 1. How would you describe the current M&A landscape and prevailing trends in your jurisdiction? What significant deals took place in the last 12 months?

Ghana
B&P ASSOCIATES

Due to the current economic crisis, it is anticipated that companies may be compelled to restructure to avoid financial distress and meet the existing sector minimum capital requirements.

Local participation requirements are also increasingly being introduced in heavily regulated sectors and the evolving requirements may compel businesses to explore M&As and other forms of strategic structuring.

The establishment of the African Continental Free Trade Area may also affect the M&A arena, as it opens up local businesses to cross-border partnerships of various forms.

14. 2. Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Ghana
B&P ASSOCIATES

The International Monetary Fund, as part of its proposals to boost the Ghanaian economy, has recommended M&As between banks and non-bank financial institutions, which may be an indication of potential M&A deals in the future. This proposal is aimed at:

- consolidating the financial sector; and
- assisting in the recapitalisation of banks.

15.Tips and traps

15. 1. What are your top tips for the smooth closing of private M&A transactions and what potential sticking points would you highlight?

Ghana
B&P ASSOCIATES

- When conducting due diligence, it is important that participants in private M&A transactions consider key areas. It is also important to recognise specific sector-related issues that may vary depending on the operations of the target.
- A foreign company seeking to do business in Ghana may acquire an equity stake in an existing company. However, it may need to comply with the minimum capitalisation requirements. If the industry or sector in which the existing company operates is regulated, the approval of the sector regulator may also be required. Furthermore, a number of sector-specific laws restrict the level of foreign ownership in companies engaged in business in those specific sectors.
- Ghana does not have a comprehensive competition regime or a centralised competition authority that regulates competition in compliance with competition laws in Ghana. This notwithstanding, there are sector-specific laws that contain provisions akin to competition laws in Ghana.
- Participants in private M&A transactions should pay attention to the labour laws to ensure that their activities are compliant. Further, they should always review their activities to ensure compliance with sector-specific laws on employment.

Co-Authored by Bessy Agyeiwaa Crentsil, Christian Odame Konadu and Priscilla Wepia Ametame.

mondaq

Connecting knowledge & people

Bristol | Essex | New York | Sydney

t: +44 (0) 20 8544 8300
e: enquiries@mondaq.com