

 BENTSI-ENCHILL  
LE TSA & ANKOMAH

# Merger Control Guide

*in collaboration with Lex Mundi*

**This guide covers key issues such as the applicable merger regulations and agencies in Ghana, filing requirements, and sanctions for filing incomplete notifications.**

**The guide also provides an overview of the merger review process and the relevant thresholds for merger notifications.**

**Is there a regulatory regime applicable to mergers and similar transactions?**

Yes. Generally, the Companies Act applies to mergers and similar transactions undertaken by any company incorporated or registered in Ghana.

In addition, sector-specific regulatory regimes apply to mergers and similar transactions in Ghana.

**Identify the applicable national regulatory agency/agencies.**

As indicated above, the regulatory regime for mergers in Ghana is sector specific. The following regulators regulate specific sectors:

(a) the Office of the Registrar of Companies (ORC) is authorised to register and enforce the provisions of a document containing the relevant terms of the merger involving a company incorporated or registered in Ghana;

(b) the Securities and Exchange Commission (SEC) is authorised to review, approve and regulate takeovers, mergers, acquisitions and forms of business involving public companies;

(c) regarding insurance companies, the National Insurance Commission (NIC) is authorised to approve mergers;

(d) financial institutions, electronic money issuers and payment service providers intending to undertake mergers are required to obtain the approval of the Bank of Ghana;

(e) mergers involving communications entities must be approved by the National Communication Authority (NCA);

(f) the terms of mergers involving mineral rights holders, are required to be approved by the Minister for Lands and Natural Resources;

(g) mergers involving contractors and subcontractors (in relation to petroleum agreements) are required to be approved by the Minister for Energy and Petroleum and the Petroleum Commission; and

(h) a change in control in a company holding a mining lease is required to be approved by the Minister for Lands and Natural Resources.

**Is there a supranational regulatory agency (e.g., the European Commission) that has, or may have exclusive competence? If so, indicate.**

No.

## **Are there merger filing requirements? If so, where are they set out?**

Yes, section 245 of the Companies Act requires companies to file, relevant documents in respect of mergers, with the ORC for registration. Additionally, the regulated entities listed in our response to question (2) above are required to submit details of mergers to the respective regulators prior to implementing a merger

The requirements for prior approval are set out in section 3(h) of the Securities Industry Act 2016 (Act 930), section 85(1)(c) of the Insurance Act 2021 (Act 1061), section 52(1)(b) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930), section 20(1) of the Non-Bank Financial Institutions Act 2008 (Act 774), section 34 of the Development Finance Institutions Act 2020 (Act 1032), section 39(2) of the Payment Systems and Services Act 2019 (Act 987), section 52 of the Minerals and Mining Act 2006 (Act 703) and regulation 4 of the Electronic Communications Regulations, 2011 (LI 1991).

## **What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions.)**

The following types of merger transactions are caught by the Companies Act and the laws listed in question (3) above:

- (a) mergers by absorption (where there is a transfer of the undertaking, properties and liabilities of one or more companies to another existing company);
- (b) mergers by the formation of a new company (under which the undertaking, property and liabilities of two or more companies are to be transferred to a new company and the consideration for the transfer will be shares in the transferee company to be received by a member of the transferor company with or without any cash payment to that member); and
- (c) where the transfer of ownership interests in a company (within specific sectors) results in a change in control as defined by the applicable law/regulator for the relevant sector.

## **Is notification required for minority investments?**

Yes. Minority investments that meet the stipulated thresholds for change in shareholding or control requirements for applicable regulated entities are required to be notified to the relevant regulators.

## **Are foreign-to-foreign transactions captured by the merger control regime, and is there a local effects test?**

No. Generally, foreign-to-foreign mergers are not required to be notified. However, where such merger results in a change in control of a regulated local subsidiary to which a mandatory notification applies, such resultant change in control must be notified.

## **What are the relevant thresholds for notification?**

The thresholds are as follows:

(a) for banks, specialised deposit-taking institutions or financial holding companies, the thresholds are 5%, 10%, 20%, 25%, 30%, 50% or 75% percent of equity;

(b) for public companies, the threshold is 30% or more of the voting shares of a company;

(c) for mining companies, the threshold is 20% of the voting power at any general meeting of the mining company or its subsidiary; and

(d) for contractors and subcontractors in relation to petroleum agreements, the threshold is 5% or more shares of the contractor or subcontractor

## **Is the filing voluntary or mandatory?**

It is mandatory.

## **Provide the time in which a filing must be made.**

There is no general timeline for filing or submission of notifications or approval applications.

Under the SEC Code on Mergers and Takeovers, notice must be given to SEC, within 24 hours after the resolution of the board of the company to acquire the target company.

## **Is there an automatic waiting period? If so, please specify.**

Generally, the length of time required for the process is not prescribed by statute and differs across each sector. The regulatory response is typically conditioned to commence from the date on which the regulator receives complete information.



For instance, the Bank of Ghana is required to communicate its decision to applicants in writing within 3 months (in the case of provisional approval) and within 6 months (in the case of final approval) after receipt of complete information. Under the Companies Act, the Registrar of Companies must register the merger proposal and issue the certificate of merger within 7 days of receipt of the complete documentation. The Minister of Lands and Natural Resources is required to respond within 2 months after being notified. No transaction intended to give effect to the proposed merger can be completed prior to this.

### **What are the form and content of the initial filing?**

Regarding filing at the ORC, the merging companies will complete a form provided by the ORC (requiring details of the merger) and submit it to the ORC

Regarding filing with the relevant regulator, typically, the merging companies must make a written application to the relevant regulator and attach the specific documentation required by each regulator.

### **Are filing fees required?**

Yes, sector specific filing fees may apply.

### **Please provide an overview of the merger review process. Are there time limits within which the regulatory agency must act? Can they be shortened by the parties or be extended by the regulatory agency?**

The merger review process is subject to the internal processes of each regulator. Typically, the factors to be considered include the financial and technical resources of the merging entities, the capacity of the merged entity to carry out the relevant regulated activities, the impact on the labour force of the merging entities and the stated commercial objectives to be achieved by the merger.

In reviewing applications for merger approval, the Bank of Ghana considers non-competition factors such as the financial and managerial resources and future prospects of the existing and proposed institution, or the surviving or acquiring institutions, the convenience and needs of the community to be served, the risk to the stability of the banking or financial system, compliance with applicable law and regulatory guidelines, and the effectiveness of the existing bank or specialised deposit-taking institution involved in the proposed transaction in combating money laundering and terrorist financing activities. Time limits generally depend on the completeness of information provided

## **What is the substantive test for clearance?**

There is no general substantive test or competition or antitrust law. Generally, the relevant regulators have a statutory discretion to determine the factors to be considered when approving merger applications. Competition-related factors have only been explicitly stated in specified instances, such as in relation to electronic communications service providers and network operators (where the National Communication Authority (**NCA**) is required to promote competition) and banks and other specialised deposit-taking institutions (where the Bank of Ghana is authorised to reject any merger or amalgamation transaction that may substantially lessen competition, unless the needs of the community to be served by the proposed transaction outweigh its anticompetitive effects).

## **What decisions can the agency make in relation to a notified merger (e.g. approval, approval with conditions or prohibition)?**

The sector specific regulators may request for additional information for assessment, approve the merger application with or without conditions or refuse to grant approval for the merger application.

## **Can parties proactively offer commitments to the agency to remedy identified competition concerns?**

Yes, the parties may offer commitments to the relevant regulator for consideration. However, a regulator is under no obligation to accept such commitment.

## **Describe the sanctions for not filing or filing an incorrect/incomplete notification.**

For regulated entities, failure to notify/ seek the approval of the regulator may result in sanctions, such as the imposition of administrative fines and the annulment of the merger transactions. For instance:

- (a) under the SEC Code on Takeovers and Mergers, the SEC may nullify the purchase of shares through a takeover, consolidation or merger;
- (b) under the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930), the Bank of Ghana is entitled to:
  - (i) annul the transfer, merger, amalgamation or reconstruction;
  - (ii) prohibit the exercise of voting rights in respect of the shares;
  - (iii) prohibit the payment of dividends in respect of the shares; or
  - (iv) prohibit the issuance of bonus shares or rights issuance in respect of the shares; and

(c) under the Electronic Communications Regulations 2011 (LI 1991), the National Communication Authority is entitled to impose a pecuniary administrative penalty on the licensee.

**Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger.**

Same sanctions as above.

**Can the agency review and/or challenge mergers that are not notifiable?**

Yes. In the case of regulated entities, the relevant regulators may still review and/or challenge mergers, under their supervisory powers, if they have concerns about the transaction (such as its effect on competition and the impact on consumers)

**Describe the procedures if the agency wants to challenge an unnotified transaction.**

There is no general procedure and this would depend on the specific circumstances. The challenge may be in the form of written notice or directives or remedial measures pursuant to an examination/investigation into the operations of the entities involved.

**Describe, briefly, your assessment of the regulatory agency's current attitudes/activities, including enforcement trends and recent developments.**

Generally, the relevant regulators are known to strictly enforce their regulatory powers in respect of mergers. For instance, the Bank of Ghana and the SEC exercised their enforcement powers when they annulled the purported takeover of Agricultural Development Bank Limited, a public company and a licensed bank in 2018 for, among others, failure to seek the prior approval of the Bank of Ghana and SEC.

**Other important/ notable information.**

We understand that a Competition and Fair Trade Practices Bill is being drafted. However, no timelines have been provided for when Parliament will consider this bill. We also understand that a Consumer Protection Bill (which will establish the Consumer Protection Authority to regulate and coordinate all consumer activities and to protect consumers from unfair trading, unfair commercial practices, abusive contracts and one-sided contracts) is being drafted. No timelines have been indicated for this process as well.



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