

World Competition (Antitrust) Day 2017

Theme

Mergers and Acquisitions in the absence of Competition Law

What are Mergers & Acquisitions?

Mergers and acquisitions (M&A) are defined as the consolidation of companies. Differentiating the two terms, **Mergers** is the combination of two companies to form one, while **Acquisitions** is one company taken over by the other. The reasoning behind M&A generally given is that two separate companies together create more value compared to one standing alone. The key principle behind M&A is that $2+2=5$ and that there is always synergistic value created by the joining or merger of two companies. The synergy value can be seen through either the revenues (higher revenues), expenses (lowering of expenses) or the cost of capital (lowering of overall cost of capital).

M&A allows for financial synergy through the lower cost of capital, improving the company's performance and accelerating growth, economies of scale, diversification for higher growth products or markets and as well as increasing market share and positioning giving broader market access. It allows for strategic realignment and technological change, tax considerations and diversification of risk.



Types of Mergers and Acquisitions:

A merger or amalgamation may take two forms: merger through absorption or merger through consolidation. Mergers can also be classified into three types from an economic perspective, depending on the business combinations - whether the companies are in the same industry or not, a horizontal merger (two firms in the same industry), a vertical merger (two companies at different production stages or value chains) and a conglomerate merger (unrelated industries). From a legal perspective, there are different types of mergers, like short form mergers, statutory mergers, subsidiary mergers and mergers of equals.¹

Ghana has seen the emergence of merger and acquisitions (M&A) activities happen in a host of principal sectors of the economy, ranging from pharmaceuticals and telecoms to oil and gas and manufacturing, finance and the mining industries. Mobil Oil was acquired by Total Petroleum Ghana Limited. Kumasi Brewery Limited and Ghana Brewery Limited merged into a new company called Ghana Breweries Limited, which later merged with Guinness Ghana Limited to form Guinness Ghana Breweries Limited. Ghana Telecom was acquired by Vodafone whilst Scancom Areeba was taken over by MTN. The telecom regulator recently approved the merger between Tigo and Airtel.

M&A transactions in the financial sector include the acquisition of Merchant Bank by Fortis to create Universal Merchant Bank and the Republic Bank takeover of HFC Bank, as well as the GCB take-over of UTB and Capital Bank under a Purchase and Assumption transaction.

In a move to strengthen the financial sector, the Bank of Ghana's new capital requirement, which is to increase to GHC 400 million, will result in some banks merging with others to be able to meet the new requirement while others will be able to raise capital from the stock market.²

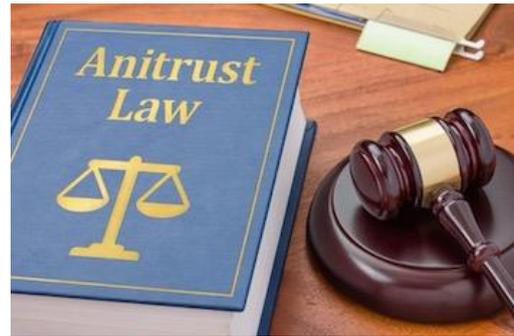
¹ <http://www.edupristine.com/blog/mergers-acquisitions>

² <http://www.goodmanamcllc.com/2017/04/ghanas-mergers-acquisitions-report-2017.html>



Competition (Antitrust) Law

Competition is a fundamental tenet of well-functioning markets and encourages companies to provide consumers with the products and services they want. It results in lower prices for goods and services, better service quality, wider choice for consumers, stimulation of innovation and, more importantly, efficiency in the allocation of resources.



The objective of a functional competition regime is to promote competition, contribute towards increased efficiency and curb anti-competitive practices in the market. Anti-competitive practices including cartels, abusive monopolies, predatory pricing, collusive tendering, exclusive market sharing agreements, bid rigging etc. which have negative effects on both consumers and producers.³ Certainly, a well-enforced competition regime reduces uncertainty for businesses and is an important element of promoting private sector development.⁴

Competition law is designed to stop anti-competitive business practices by firms and unnecessary government intervention in the market. Competition law looks at **1. Anti-competitive agreement meant to lessen competition in the market, 2. Abuse of dominance position, 3. Regulation of mergers and acquisitions to prevent tactics to gain excessive dominance in a market, 4. promotion of competition culture through advocacy.**

Ghana is yet to have a functional competition policy and law. The closest we have is the **Protection Against Unfair Competition Act, 2000 (Act 589)**. Under Act 589, commercial behavior, such as causing confusion with respect to another person's enterprise or its activities, damaging another person's goodwill or reputation and misleading the public, were outlawed. Act 589 does not address the full dimension of competition law.⁵

Mergers and Acquisition without Competition Law

Many mergers are good for competition and consumers because they allow firms to operate more efficiently. But some mergers change market dynamics in ways that can lead to higher prices, fewer or lower-quality goods or services, or less innovation.

Competition/Antitrust law prohibits mergers and acquisitions when the effect may be to substantially lessen competition, or to tend to create a monopoly. The key question the Competition Commission asks is whether the proposed merger is likely to create or enhance market power or facilitate its exercise. The greatest antitrust concern arises with proposed mergers between direct competitors (horizontal mergers).⁶ The Antitrust Division of the US Department of Justice on many occasions has gone to court to block mergers, which can impact or lessen competition in the marketplace. Some of the merger deals that have been blocked included AT&T and T Mobile, United Airlines and US Airways, Staples and Office Depot, General Electric and Honeywell, Pfizer and Allergan, and Halliburton and Baker Hughes. The Obama administration alone blocked 17 merger transactions worth \$404 billion.⁷

³ <https://www.graphic.com.gh/features/opinion/competition-issues-in-public-procurements.html>

⁴ <https://www.modernghana.com/news/573442/1/functional-competition-regime-a-key-element-for-pr.html>

⁵ <http://www.cuts-ccier.org/7Up4/pdf/PCP-Ghana.pdf>

⁶ <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers>

⁷ <https://www.ft.com/content/7608d102-177c-11e6-b197-a4af20d5575e>

Why World Competition Day?

On December 5, 1980, the UN adopted the international standard for competition laws under what is called the UN Set on Competition Policy – hence the call by INCSOC to recognise this date as **World Competition Day**. Ghana has been attempting since the early 1990s to have a functional competition law to regulate the conduct of the market. Diminished interest by the private sector accounts for one of the reasons of the slow pace. As the world marks World Competition Day 2017, CUTS is joining the clarion call urging the government through the Ministry of Trade and Industry to work fervently to get the draft law before Parliament.

Aim of the policy dialogue

CUTS Policy Dialogue will bring together high-profile officials from the Ministry of Trade and Industry (MOTI), Finance, Bank of Ghana, Security and Exchange Commission, telecom operators, regulators, banking institutions, law firms, National Communication Authority, Association of Ghana Industries (AGI), Institute for Statistical, Social and Economic Research (ISSER), Attorney General Department, donor agencies, economists, trade experts, CSOs, etc.

This policy dialogue will focus on the following issues:

1. Competition in general i.e. the need for an effective competition law in Ghana
2. Mergers and acquisitions in the absence of competition law
3. What should regulators look for before approving merger and acquisitions transactions?
4. What are the various options available to regulators in a M& A request?
5. How do we ensure that the marketplace becomes more competitive for everyone?

Date:	Tuesday 5 th December, 2017
Time:	10:00am-1:30pm
Venue:	Coconut Grove Hotel, Accra
Guest Speaker:	Honourable Allan Kyerematen, Minister for Trade and Industry
Chairman:	Professor Justice Samuel Kofi Date Bah, a Retired Justice of the Supreme Court of Ghana and also the Board Chair for CUTS Ghana

PARTNER



MEDIA PARTNER

