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# Doing Business In...

**Ghana**

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N. Dowuona & Company

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# 2020

# GHANA

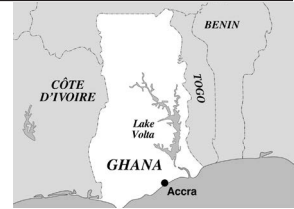
## Law and Practice

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## 1. Legal System

### 1.1 Legal System and Judicial Order

Ghana is a common law jurisdiction. The 1992 constitution is the supreme law of the land. Other sources of law include parliamentary enactments, subsidiary legislation, common law and customary law. The constitution establishes the Judiciary, which is comprised of the superior courts and the lower courts and tribunals created by Parliament. The superior courts consist of the supreme court, the courts of appeal, the high courts and the regional tribunals. The lower courts include the circuit courts and district courts.

The supreme court is the highest court and the final court of appeal in Ghana. It has supervisory jurisdiction over all courts and adjudicating bodies, and may issue orders and directions to enforce its supervisory power. It also has exclusive original jurisdiction over the interpretation and enforcement of the constitution, as well as the review of legislative and executive actions. The decisions of the supreme court on questions of law are binding on all other courts. The court of appeal has jurisdiction to hear and determine appeals from judgments or orders of the high court, regional tribunals and circuit courts. The decisions of the court of appeal are binding on itself, the high court and all lower courts.

The high court has supervisory jurisdiction over the lower courts and adjudicating bodies, and its decisions are binding on them. There are courts of general jurisdiction as well as divisions of the high court, including the commercial, human rights, land, industrial (labour), economic/financial, divorce and matrimonial, probate and administration and criminal divisions that have jurisdiction over matters arising in relation to their specialty areas. The regional tribunals are now mostly defunct but they have the status of the high court.

The circuit and district courts exercise both civil matters below GHS20,000 and criminal jurisdiction in relation to summary offences and matters punishable by a fine of less than GHS6,000 or two years in prison.

## 2. Restrictions to Foreign Investments

### 2.1 Approval of Foreign Investments

All enterprises in which foreign participation is permitted in Ghana are required to register with the Ghana Investment Promotion Centre (the GIPC) and to satisfy certain minimum capital requirements before commencing operations. In wholly foreign owned enterprises, a minimum equity investment of USD500,000 in cash and/or capital goods is required. For enterprises in which there is foreign and Ghanaian participation, the

foreign investor must make a minimum equity investment of USD200,000 in cash and/or capital goods, and the Ghanaian must hold at least a 10% equity stake. Where the enterprise is to undertake trading activities, a minimum equity investment of USD1,000,000 in cash or capital goods is required, and the enterprise must employ at least 20 skilled Ghanaians. These minimum capital requirements do not apply to portfolio investments (investments in companies listed on the Ghana Stock Exchange), nor to enterprises set up solely for export trading and manufacturing.

In addition to the above, certain industries have specific local content and participation rules, which may require regulatory approval. For instance, in the upstream petroleum sector, the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I 2204) require a minimum of 5% equity participation of an indigenous Ghanaian company in order to obtain a petroleum licence or enter into a petroleum agreement. Similarly, in the power sector, the Energy Commission (Local Content and Local Participation) Electricity Supply Industry Regulations, 2017 (L.I 2354) require foreign investors seeking to operate in wholesale power supply and renewable energy activities to maintain an initial local equity participation of at least 15%, which must be increased gradually to at least 51% within a period of ten years. In the payment systems and services industry, a minimum 30% equity participation by a Ghanaian citizen is required.

### 2.2 Procedure and Sanctions in the Event of Non-compliance

Enterprises with foreign investors that wish to register with the GIPC are required to submit an application to the GIPC, together with specified supporting documents and confirmation of satisfaction of the applicable minimum capital requirement. Upon the payment of a prescribed fee, the GIPC will proceed to process the application and register the company within five working days if it is satisfied that all relevant documents for registration are in order and that the minimum foreign equity has been invested by the foreign shareholders in the company. A company with foreign investors that commences operations without first registering with the GIPC commits an offence and is liable on summary conviction to a fine of between GHS6,000 and GHS12,000, with an additional fine of between GHS300 and GHS600 for each day the offence continues.

The procedure for obtaining a licence from relevant regulators generally involves the submission of a completed application and prescribed supporting documents, including evidence of satisfaction of any relevant local participation requirement. Timelines for processing licence applications vary and depend on the specific sector. Foreign investors who fail to obtain the relevant licences before commencing operations in regulated

industries may be subject to fines and penalties imposed under applicable legislation.

### **2.3 Commitments Required from Foreign Investors**

Other than the minimum foreign capital requirement and the employment requirements for trading enterprises, the GIPC does not typically require any other specific commitments from foreign investors, nor compliance with any special conditions, but it does have some latitude to do so. In certain sectors, such as power, oil and gas and telecommunications, foreign investors must commit to hire a certain number of Ghanaian nationals and to enter into a joint venture with a Ghanaian national.

### **2.4 Right to Appeal**

Foreign investors who are dissatisfied with the decision of the GIPC not to register a company may appeal to the board of the GIPC within 60 days of being notified of the GIPC's decision. A three-member committee must be set up by the GIPC board within seven days of receiving the appeal, to review and make a recommendation on the matter to the GIPC board within 21 days of the notice of appeal being received. Based on the recommendation, the board may affirm, vary or revoke the earlier decision, and persons dissatisfied with the decision of the board may apply to the high court for judicial review of the Board's decision.

With respect to decisions of regulators in specific industries, generally, dissatisfied applicants may appeal a decision refusing authorisation or licensing through the relevant review or adjudicatory body of the regulator. The Constitution of Ghana grants further recourse to persons aggrieved by the wrongful decisions of administrative bodies and officials to seek redress in court or other tribunals. Additionally, where there is a bilateral investment treaty in place involving Ghana and the home state of a dissatisfied foreign applicant, the applicant may have recourse to an arbitration tribunal specified under the applicable treaty, if the decision to refuse to license or register the applicant falls within the scope of such treaty.

## **3. Corporate Vehicles**

### **3.1 Most Common Forms of Legal Entities**

The most common types of corporate vehicle in Ghana are private and public companies limited by shares, unlimited companies and companies limited by guarantee. Private companies limited by shares restrict the transferability of their shares, are prohibited from making public invitations for the acquisition of their shares, and limit the total number of their members and debenture holders to 50. The minimum share capital of a wholly owned Ghanaian company is GHS500. Where there is foreign

participation in the company, the minimum capital requirements stated in **2.1 Approval of Foreign Investments** should be met. Shareholder liability is limited to the unpaid amount (if any) on the shares owned in the company. The company may have one or more shareholders, but a minimum of two duly qualified directors (one of whom must be ordinarily resident in Ghana) must be appointed to manage and administer the company's affairs. In addition, the company is required to have a qualified secretary and an auditor appointed by the directors. Management of the company is delegated to the board of directors. The board delegates the day-to-day running of the company to management. Limited companies may also be public, with the main difference being that a public company may have more than 50 shareholders.

A company limited by guarantee is the vehicle most commonly used for non-profits. The liability of the members of a company limited by guarantee is limited to the amount that the members undertake to guarantee, and such companies are prohibited from carrying on business for the purpose of making profit. The governance structures of companies limited by guarantee are similar to companies limited by shares.

Foreign companies may operate in Ghana through a branch, registration office, factory, mine or other fixed place of business, subject to certain sector specific limitations, by registering as an external company instead of incorporating a local subsidiary. External companies must appoint a local manager resident in Ghana to administer their affairs.

Companies unlimited by shares do not limit the liability of shareholders. Like a company limited by shares, such companies are required to have at least two qualified directors, a secretary and an auditor, and may also be private or public. This type of vehicle is typically used by professional service companies, whose professional rules prevent them from operating through an entity whose liability is limited in any form.

### **3.2 Incorporation Process**

To incorporate a company limited by shares, the promoters must complete and submit incorporation forms setting out particulars of the company, including information on the directors, shareholders, beneficial owners, secretary and auditors, and capital details and the proposed constitution (where applicable) of the company. Once the Registrar is satisfied that all the information contained in the application forms and the supporting documents are in order, a certificate of incorporation is typically issued within ten working days. The processes for incorporating a company limited by guarantee and an unlimited company are similar to the process for incorporating a company limited by shares.

The registration of an external company may be completed by submitting the prescribed forms to the Registrar, setting out the relevant details of the foreign company and its established place of business in Ghana. These forms must be accompanied by notarised supporting documents and the payment of the prescribed fees. Once the application is filed, a certificate of registration will generally be issued by the Registrar within ten working days, barring any eventualities.

### **3.3 Ongoing Reporting and Disclosure Obligations**

Private companies are required to file annual returns and other periodic returns with the Companies Registry within a specified period or after the occurrence of certain specified events. Typically, changes to a company's registered constitution, board of directors, objects/business, shareholding and issued share capital, beneficial ownership, company secretary or auditors must be reported by the company in the prescribed form and filed with the Companies Registry within 28 days. Annual returns stating the position of the company as at the date of the return and confirming the current particulars of the company, including information on its authorised activities, directors and secretary, subsidiaries, shareholding and beneficial ownership structure, must be filed at the Companies Registry within 36 days of distributing the company's financial statements to its members and debenture holders. Regulators in certain sectors also impose reporting obligations on licensed entities.

### **3.4 Management Structures**

The most common governance structure in Ghana is the single-tier board of directors, made up of qualified executive and non-executive directors who collectively manage the activities of the company. The constitution of a company may stipulate a minimum or maximum number of directors, subject to the statutory minimum of two directors (or three, in the case of a public company whose directors are appointed by way of cumulative voting), with at least one director being ordinarily resident in Ghana. Under the rules of the Ghana Stock Exchange, non-executive directors must constitute at least 50% of the board of a listed company, out of which at least two or approximately 25% must be independent directors.

Industry-specific legislation and regulations may also specify additional requirements regarding the skills and qualifications of board members, as well as the representation of non-executive or independent directors on the board. In respect of public companies, the Corporate Governance Code of the Securities and Exchange Commission recommends a board of directors composed of eight to 16 members and a balanced representation of executive and non-executive directors, of which at least one third is independent. The Bank of Ghana's Corporate Governance Directive requires the board of regulated financial institu-

tions to have a minimum of five and a maximum of 13 members, the majority of whom should be non-executive directors who are ordinarily resident in Ghana. In addition, 30% of the board must be composed of Ghanaian citizens resident in Ghana, and at least 30% of these boards must also be independent directors.

### **3.5 Directors', Officers' and Shareholders' Liability**

Under the Companies Act, directors are required to act in the company's best interests in accordance with the powers conferred on them. To the extent that the directors and officers meet this obligation, they are generally not liable for the liabilities of the company. However, where directors exceed their powers or exercise them for a different purpose, they are personally liable to compensate the company or any person for any loss suffered as a result of their failure, act or omission. Additionally, they must account to the company for any profits made from transactions involving such breach of duty. Directors and officers may also be held liable for the liabilities of the company in certain circumstances.

Under the Companies Act, a director or officer can be held personally liable for the company's omissions and made to pay a fine to the Registrar or compensation to affected persons in certain cases, including where there is a breach in the minimum number of directors, trading for profit in a company limited by guarantee, failure to notify debenture holders secured by a floating charge of a resolution to change the company's objects or business, failure to comply with the Registrar's instructions to change its name, failure to deliver particulars of shares for registration, failure to keep proper accounting records, carrying on business with no members, payment of dividends in contravention of the distribution test or default in delivering any change in particulars to the Registrar. There are similar provisions in sector-specific legislation and under fiscal legislation, pursuant to which liability may be imputed on directors and officers of the company for acts done on behalf of the company. Under Ghanaian law it is possible to pierce the corporate veil in exceptional circumstances, typically involving fraud.

## **4. Employment Law**

### **4.1 Nature of Applicable Regulations**

Employment relations in Ghana are governed by laws, case law and contracts – collective bargaining agreements and employment agreements.

### **4.2 Characteristics of Employment Contracts**

Under the Labour Act, employment contracts for workers engaged on an intermittent basis for a period of less than six months can be concluded verbally, but contracts of employment for six months or more are required to be written. Written

employment contracts must set out the rights and obligations of the parties. The employment contract of a person with a disability must include additional information on the particulars of the job, transport facilities and any special privileges accorded the person.

### 4.3 Working Time

The maximum number of working hours is eight hours a day or 40 hours a week, unless otherwise provided for by law. The Labour Act gives the employer the right to prescribe longer or shorter hours a day on one or more days in the week, provided that it does not exceed a total of 40 hours a week. The Chief Labour Officer may also determine shorter hours of work for manual labourers and work likely to be injurious to the employee's health. Task workers and domestic workers in private homes are excluded from having to comply with the maximum working hours. The overtime pay rates are fixed by the employer and agreed by the parties.

### 4.4 Termination of Employment Contracts

Contracts of employment may be terminated by agreement, for convenience upon notice, for cause or in connection with a redundancy exercise. There is no "at-will" employment in Ghana as exists in other jurisdictions. Unless the terms of an employment contract permit the parties to terminate the contract for convenience, the contract may only be terminated upon sufficient grounds, such as redundancy, ill-treatment, sexual harassment, sickness, accident, legal restrictions, incompetence, lack of qualification or proven misconduct. Upon termination, the employer is required to pay the worker any remuneration earned, deferred pay, compensation in respect of sickness or accident and, in the case of foreign employees, repatriation expenses for the worker and accompanying family members.

An employer who anticipates major changes in the production, programme, organisation, structure or technology of its business undertaking that is likely to result in terminations of employment, must notify the Chief Labour Officer and the relevant trade union in writing three months in advance, indicating the reasons for and the timing of the terminations, and the category and number of workers likely to be affected. The employer must also consult with the trade union on measures to avert or mitigate the adverse effects of any terminations. Employees who become unemployed as a result of a redundancy exercise or who suffer any diminution in their conditions of employment as a result of a business closing down or undergoing an arrangement or amalgamation are entitled to redundancy pay. The amount and terms of redundancy pay are subject to negotiation between the employer and the trade union concerned, which may refer any disputes to the Labour Commission for final resolution. However, workers on probation or serving a qualifying period

of employment, casual workers and workers employed for a specified period of work are not entitled to redundancy pay.

### 4.5 Employee Representations

There is no general requirement for employees to be represented, informed or consulted by management, except where an employer intends to implement a redundancy exercise, which must then comply with the requirements described in **4.4 Termination of Employment Contracts**. However, a collective agreement may provide that an employer must notify or consult a trade union on specified matters relating to employees.

## 5. Tax Law

### 5.1 Taxes Applicable to Employees/Employers

Employees are subject to tax on a graduated scale ranging from 0% to 30%, depending on the employee's level of income. Employees are taxed on benefits-in-kind that may accrue to them as a result of their employment, including accommodation, vehicle and fuel provided to the employee by the employer. Under the Pay As You Earn (PAYE) system, employers are required to deduct the applicable income taxes from the salaries of employees and pay the tax to the revenue authorities. Employers are required to make compulsory contributions of 13% of the basic salary of each employee to the mandatory national pension scheme. The employer is also mandated to deduct 5.5% of an employee's basic salary for contribution to the mandatory national pension schemes.

### 5.2 Taxes Applicable to Businesses

Companies doing business in Ghana are subject to both direct and indirect taxes. Corporate income tax is payable by resident and non-resident companies on their chargeable income for a year of assessment. A company is resident in Ghana for tax purposes if it is incorporated in Ghana, or if its management and control are exercised in Ghana at any time during the relevant period of assessment. A non-resident company that does not have a Ghanaian permanent establishment is subject to tax in Ghana only to the extent that the income has a source in Ghana. Resident companies are subject to tax on their worldwide income. Non-resident companies that operate through a permanent establishment or branch in Ghana are taxed at the same rates as Ghanaian resident companies on any income connected to that Ghanaian permanent establishment, irrespective of the source of the income.

The general rate of corporate tax is 25%. Companies operating in specific industries may be taxed at varied rates, depending on the industry in which they operate. For instance, hotels are taxed at a reduced rate of 22%, whereas mining companies and upstream petroleum companies pay tax at a rate of 35% on prof-

its from their mining or petroleum operations. Companies may also enjoy a reduced tax rate, depending on the type of business that they engage in and their location in the country.

Gains derived from the realisation of an asset are included in the assessable income of the company and taxed at the applicable corporate income tax rate. Shareholders of a company are also liable to tax separately from the company. Dividends are payable out of post-tax profits and are subject to a withholding tax of 8%. Repatriated profits of the Ghanaian permanent establishment of a non-resident company are treated in the same way as dividends, and are subject to withholding tax at a rate of 8%. Interest payments are also subject to 8% withholding tax. Companies must withhold on payments for goods and services made to both resident and non-resident persons, and remit this to the revenue authority within a specified period. Supplies of goods, works and services to non-resident persons are subject to withholding at a rate of 20%. Supplies of goods, works and services to resident persons are subject to withholding at a rate of 3%, 5% and 7.5% respectively.

Other applicable taxes include Value Added Tax (VAT) of 12.5%, National Health Insurance Levy (NHIL) of 2.5% and Ghana Education Trust Fund (GET Fund) Levy of 2.5%, which are payable by companies on the value of goods and services supplied to other persons or imported into Ghana. Customs and excise duties, communication service tax and stamp duties are also applicable.

### 5.3 Available Tax Credits/Incentives

A resident person may claim a foreign tax credit for a year of assessment for any income tax paid by that person to a foreign country in respect of its assessable foreign income for the year. Foreign tax credits may not exceed the average rate of the Ghanaian income tax of the person as applied to its assessable foreign income. Furthermore, any foreign tax credit shall be calculated separately for each year of assessment and separately for each specific type of income – ie, separate calculations for income from business, employment or investment. A person may elect to relinquish a foreign tax credit and claim a deduction for the amount of tax paid to the foreign country.

Tax credits may also be issued by the Ghana Revenue Authority to a person in respect of excess tax paid for any year of assessment. Claims in respect of excess tax paid by a person must be made within three years of the later of (i) the date of payment; (ii) the event giving rise to the payment of the excess tax; or (iii) the date on which a tax return in respect of the payment was filed by the person. Tax credits are also available for any taxes paid by instalment or withholding during a year of assessment, when filing a tax return at the end of that year.

A company is permitted to offset the aggregate VAT paid on certain goods and services that it acquires and uses in supplying goods or services to end-users (input VAT) against the VAT collected on supplies made by the company (output VAT), and is only required to pay the excess of the output VAT over the input VAT. The NHIL and GET Fund Levy, however, are not deductible as input taxes, and companies are not permitted to offset any amounts expended by them in providing goods and services against the NHIL and GET Fund Levy collected by them.

Under the Income Tax Act, 2015 (Act 896), the following tax concessions exist for companies operating in the country:

- an enterprise granted a licence under the Free Zones Act, 1995 (Act 504) enjoys a 100% tax holiday on profits for the first ten years from the date of commencement of operation. After the concessionary period, a free zones licensed company is subject to tax at a reduced rate of 15%;
- companies engaged in the waste processing business enjoy a 1% tax concession for a period of seven years;
- the income of a qualifying venture capital financing company is subject to tax at a rate of 1% for a period of ten years;
- companies engaged in various forms of agricultural businesses, such as the farming of tree crops, cash crops, livestock and agri-processing business conducted wholly in Ghana, enjoy a 1% tax concession for periods varying from five to ten years; and
- in calculating the income of a company from business in a year of assessment, companies may be entitled to an additional deduction of between 10% and 50% of salaries paid to new graduates employed by the company (depending on the number of new graduates employed during the year of assessment).

Special tax rates may apply under any double taxation treaty entered into by Ghana and the home state of a foreign investor. Additional tax incentives may also be negotiated for strategic projects on a case-by-case basis.

### 5.4 Tax Consolidation

Tax consolidation for group companies is not permitted, and companies are required to calculate and assess their income and tax liabilities as separate entities. Group accounts may, however, be prepared on a consolidated basis for accounting purposes.

### 5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules are applicable in Ghana. Where a resident entity that is not a financial institution, and in which 50% or more of the underlying ownership or control is held by an exempt person, either alone or together with an associate, has

a debt-to-equity ratio in excess of 3:1 at any time during a basis period, a deduction is disallowed for interest paid or foreign currency exchange loss incurred by that entity during that period on that part of the debt that exceeds the 3:1 ratio, being a portion of the interest or loss otherwise deductible.

## 5.6 Transfer Pricing

Under Ghanaian transfer pricing regulations, transactions between persons who are in a controlled relationship must be conducted using the arm's length standard. A holding company and a subsidiary, or two subsidiaries of the same holding company, are deemed to be in a controlled relationship, and thus required to transact using the arm's length standard. A transaction is conducted at arm's length if the terms of the transaction do not differ from the terms of a comparable transaction between independent persons. Hence, the arm's length standard requires persons in a controlled relationship to quantify, characterise, apportion and allocate amounts to be included in or deducted from income to reflect an arrangement that would have been made between independent persons. The applicable transfer pricing methods include the cost-plus method, the resale price method, the comparable uncontrolled price method, and the transactional profit split method.

## 5.7 Anti-evasion Rules

Anti-evasion rules are applicable in Ghana. For purposes of determining a tax liability, the Commissioner-General is mandated to re-characterise or disregard an arrangement that is entered into or carried out as part of a tax avoidance scheme, if it is fictitious or does not have a substantial economic effect, or if its form does not reflect its substance. Tax avoidance is defined to include an arrangement whose main purpose is to avoid or reduce tax liability.

## 6. Competition Law

### 6.1 Merger Control Notification

Mergers and acquisitions are not generally subject to merger control notification, except in the telecommunications and banking sectors. In the telecommunications sector, the regulator must be notified of proposed mergers and acquisitions, and has broad discretion to review the potential anti-competitive effects of any proposed merger or acquisition. The regulator has the discretion to review the impact on revenue or market share, or any other criteria. In the banking, mining and upstream petroleum sectors, the written approval of relevant regulators is required prior to the transfer of significant interests in a regulated entity. The regulators in these sectors take various factors into consideration.

### 6.2 Merger Control Procedure

The main steps for merger notifications include the submission of an application letter or prescribed forms and relevant documents to the regulator, the review of the application by the regulator (including due diligence on the companies), and communication of the regulator's decision to the applicant. Timing across the various sectors varies between three and six months after the receipt of all relevant documents by the regulator.

### 6.3 Cartels

There are sector-specific rules that prohibit anti-competitive practices by regulated entities. In the downstream petroleum sector, for instance, the formation of cartels is prohibited and non-compliance with the law involves a potential term of imprisonment of up to ten years or a fine of up to GHS60,000, or both. Any agreement, combination of or concerted action by refiners, importers or dealers or their agents to fix prices, restrict outputs, divide markets by either product or area and/or allocate markets by either product or area is deemed an act of cartelisation, which is prohibited and punishable by law.

### 6.4 Abuse of Dominant Position

There are no rules of general application governing conduct and economic dependency. In the telecommunications sector, the sector regulator may classify a network operator or service provider as being dominant or as having significant market power if – individually or jointly with others – it enjoys a position of economic strength that enables it to operate independently of competitors and users, to an appreciable extent. To promote fair competition, the regulator may regulate the setting, review and approval of prices, cross-subsidies and other anti-competitive behaviour.

## 7. Intellectual Property

### 7.1 Patents

The Patents Act, 2003 (Act 657) defines a patent as the title granted to protect an invention. An invention could be a product or process. To be eligible for a patent, the invention must be new, involve an inventive step and be industrially applicable. Certain inventions are excluded from patent protection in Ghana, such as mathematical methods, discoveries, scientific theories and inventions against public order or morality. A patent gives the inventor exclusive protection rights for 20 years from the filing date of the application. To maintain the patent, the inventor is required to pay annual renewal fees in advance to the Registrar, starting a year after the patent application filing date. Failure to pay the annual fee after a six-month grace period will cause the patent to lapse.



The registration process involves filing the patent application with the Registrar-General's Department, together with payment of the prescribed fees. Upon receipt of the completed application and all supporting documents, the Registrar reviews the application and provides its decision within two years of the commencement of the review or within such reasonable time as the Registrar may determine. Where the Registrar is satisfied that an application meets the patentability requirements under the Patents Act, it shall grant the patent to the applicant, publish a reference of the grant in the Industrial and Commercial Bulletin and issue a certificate and a copy of the patent to the applicant.

A patent right may be assigned by the owner or transferred by succession. Any person who exploits the patented invention without the owner's consent infringes the patent and commits an offence punishable by a fine of GHS24,000 or a prison term not exceeding two years. The owner of the patent has the right to initiate an action against anyone who infringes the patent or perform acts that may lead to infringement of the patent. The remedies granted in a civil suit include an injunction order to prevent infringement or an imminent infringement, an award of damages and/or any other relief the court deems fit for the protection of the patent owner.

## 7.2 Trade Marks

The Trade Marks Act, 2004 (Act 664), as amended, defines a trade mark as a sign or combination of signs that differentiates the goods or services of one business from those of another. A trade mark may consist of words, personal names, designs, letters, colours, numerals, shapes, holograms, sounds or a combination of them, as well as slogans that are not long enough to be protected by copyright. Trade names, marks contrary to public order or morality and identical marks likely to mislead or confuse the public/trade circles are not registerable as trade marks.

A registered trade mark is valid for a period of ten years from the application filing date, and may be renewed for consecutive periods of ten years each upon payment of the prescribed renewal fee. The registration process for a trade mark is largely similar to that of a patent, as described above in **7.1 Patents**.

In addition to filing a complaint with the Registrar and other agencies, the registered trade mark owner has the right to initiate legal proceedings against anyone who infringes a registered trade mark by using it without his consent, or who performs any acts likely to cause infringement. Such persons can be held criminally liable and subjected to a fine of up to GHS6,000 or a term of imprisonment not exceeding three years, or both.

## 7.3 Industrial Design

The Industrial Designs Act, 2003 (Act 660) defines an industrial design as any material (whether or not associated with lines or colours), or a textile design whose components or form give a special appearance to an industrial or handicraft product and can represent a pattern for that product. In order for an industrial design to be registrable, it must be significantly different from known designs or combinations of known design features, and must not be contrary to public order or morality. A registered industrial design is valid for five years from the filing date of the application, and subject to renewal for two consecutive five-year periods upon payment of a prescribed renewal fee.

Industrial designs are registered with the Registrar-General's Department and involve similar registration processes as set out under **7.1 Patents**. Registration confers on the owner the exclusive right to use the industrial design, so the exploitation of the design without the owner's consent constitutes an infringement, which entitles the owner to seek both criminal and civil remedies.

## 7.4 Copyright

Copyright is defined under the Copyright Act, 2005 (Act 690) as amended by Act 788 as the exclusive right and protection conferred on authors for creating works including literary, artistic, musical, audio-visual, choreographic and derivative works, sound recordings and computer software/programs. In order to be eligible for copyright protection in Ghana, the work must be original in character, fixed in a tangible medium of expression capable of being reproduced or communicated, and either created by a Ghanaian citizen/resident or published in Ghana. Certain international treaties ratified by Ghana – such as the Berne Convention for the Protection of Literary and Artistic Works and the World Intellectual Property Organization (WIPO) Copyright Treaty – also place certain obligations on Ghana to grant protection to some foreign works. Ideas, concepts, procedures, methods or similar things are excluded from copyright protection.

The Copyright Act recognises and protects both economic and moral rights in eligible works. The moral rights in a work exist in perpetuity and continue to vest in an author even after the transfer of the economic rights. The duration of economic rights protection varies depending on the type of work. For literary works by a single author, the term is the life of the author and 70 years after the author's death. Where the work is jointly authored, it expires 70 years after the death of the last surviving author. For corporate authorship or anonymous works, the term is 70 years from the date of first publication or making, whichever is later. For audio-visual works, the duration is 70 years from the date of the making of the work or its first publication, or the date the work was first made public (with the consent of the author),

whichever is latest. The term for sound recordings is 70 years after the year of publication or the year of fixation if the sound recording has not been published.

In Ghana, eligible works for copyright are automatically protected the moment they are created, so copyright registration is voluntary. However, it is advisable to register to keep records of works and to establish evidence of ownership and authentication of intellectual property. An author of a work, an authorised agent or a producer/publisher of a work on behalf of the author may submit a completed application to the Copyright Office for registration together with two copies of the work and the prescribed fee. Within two weeks of receiving the completed application, the Copyright Administrator will determine whether the work is registrable or not. If it is registrable, a certificate of registration will be issued to the applicant within 30 days. Registration is not subject to renewal or the payment of additional fees.

Copyright enforcement may be through civil action, criminal prosecution and/or mediation. Copyright infringement is offence punishable by a fine of GHS6,000 to GHS12,000 or a prison term of three years, or both. In addition to the fine or imprisonment term imposed, a court may order the offender to pay the author any profits earned from the infringement, and order the forfeiture and disposal of any device or material used in the infringement as well as any copies made. In addition to criminal prosecution, relief may also be sought in civil proceedings for an order of injunction to prevent the infringement or its continuation, for damages for any loss sustained, for an order requiring customs authorities to detain and release to the author imported goods or goods ready for export, and for an order for the inspection or removal of copyright infringing materials.

## 7.5 Others

As noted in 7.4 **Copyright**, the Copyright Act offers protection to authors of eligible computer software or programs, as well as databases or compilations of data/material in machine-readable form or otherwise. The Protection against Unfair Competition Act, 2000 (Act 589) affords protection for both registered and unregistered intellectual property rights owners. The Act provides protection against unfair competition, which includes the disclosure, acquisition or use by any person of trade secrets without the consent of the rightful owner, as well as acts in the course of industrial or commercial activities that cause or are likely to cause confusion with respect to another's enterprise, activities, products or services offered. Persons who have been or are likely to be subjected to unfair competition have recourse to the courts for an order of injunction to prevent such acts, an award of damages as compensation or any other appropriate remedy.

Parties to a contract may also include restraint of trade clauses that seek to protect the owner of trade secrets, technical know-how and proprietary information. The courts in Ghana will typically enforce such restraint clauses if they are reasonably necessary to protect the proprietary rights of the owner and are not contrary to public policy. The Paris Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), to which Ghana is a signatory, also confer protection against unfair competition, including trade secret violations and other intellectual property rights.

## 8. Data Protection

### 8.1 Applicable Regulations

The principal legislation applicable to data protection in Ghana is the Data Protection Act, 2012 (Act 843), which establishes the Data Protection Commission. Under the Data Protection Act, personal data must be processed in a lawful and reasonable manner without infringing the privacy rights of the data subject. Processing includes the collection, organisation, use, disclosure, alteration, destruction or dissemination of data. The Act requires data controllers (ie, persons who determine the purposes and the manner in which personal data is processed) to register with the Data Protection Commission and to adopt technical and organisational measures to prevent loss, damage, unauthorised destruction, unlawful access to or unauthorised processing of personal data. Where they collect personal data, they must do so for specific, explicitly defined and lawful purposes, and notify the subject of the purpose. Data processors who process data on behalf of data controllers are only permitted to do so with the prior knowledge of the data controller, and must treat personal data that comes into their possession as confidential. They may, however, disclose data if required to do so by law, or in the course of the discharge of a duty.

There is other industry-specific legislation, particularly in the telecommunications and financial services sectors, that imposes data protection obligations on regulated entities.

### 8.2 Geographical Scope

The provisions of the Data Protection Act do not apply to data that originates externally and merely transits through Ghana. However, the Act does apply where a foreign data controller uses equipment or a data processor carrying on business in Ghana to process the data, or where processing is in respect of information that originates partly or wholly from Ghana. Therefore, where a foreign company targets Ghanaian customers and uses information partly from Ghana or a data processor in Ghana, such data will be subject to the data protection rules specified above. In processing personal data of foreign data subjects in Ghana, the Data Protection Act requires that data controllers or

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processors do so in compliance with the data protection legislation of the foreign jurisdiction of the subject where the personal data originated from.

### **8.3 Role and Authority of the Data Protection**

#### **Agency**

The Data Protection Commission is the agency in charge of implementing and enforcing data protection rules in Ghana. The Commission has the power to issue an enforcement notice where it is satisfied that a data controller has contravened or is contravening any of the data protection rules or principles, or any provision of the Data Protection Act. The enforcement notice may require the data controller to take or refrain from taking certain specified steps, including processing any personal data for any purpose, or the correction, erasure or destruction of personal data within the time stated in the notice. Furthermore, persons affected by the processing of any personal data may

on their own behalf or on behalf of another person request the Commission to make an assessment as to whether the processing is in compliance with the provisions of the Data Protection Act. Where the Commission finds that the processing is inconsistent with the provisions of the Data Protection Act, it shall issue an information notice to the data controller specifying the contravention and give the data controller notice to cease processing personal information. Failure to comply with an enforcement or information notice is an offence punishable by payment of a fine of GHS1,800 or imprisonment for a year, or both.

The Commission may also authorise an officer to perform functions for the purpose of enforcing the data protection rules under the Act. An officer so appointed shall have the powers to inspect and search any premises at any reasonable time to ensure compliance with the Act.

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**N. Dowuona & Company** is a dynamic legal and strategic advisory firm that focuses on corporate and commercial, property and construction, energy and infrastructure, banking and finance, and dispute resolution. The team of creative and dedicated professionals has excellent local and international experience in law and business. In the nine years since the firm's inception, it has earned a reputation for being very responsive and efficient at providing the highest quality legal services in the market. The firm's senior lawyers together have more than 40 years of experience in law and business, and are regularly

instructed by the top local and international companies and international law firms to act in major domestic and cross-border transactions. The team routinely advises clients on large and complex in-bound investment and divestment transactions, corporate acquisitions, and joint ventures between large local corporates and multinational companies. It also advises clients on corporate governance matters, intellectual property licensing issues, tax and regulatory matters, and provides a range of employment law advisory services.

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# GHANA LAW AND PRACTICE

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