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BANKS UNDER THE SPOTLIGHT

WHAT DOES THIS SAY ABOUT THE REGULATORY LANDSCAPE

AUGUST 2017

On Monday, 14th August, 2017, the Bank of Ghana ("BoG") issued an announcement confirming that it had approved a Purchase and Assumption transaction whereby GCB Bank Limited ("GCB") would take over all deposits and selected assets of UT Bank and Capital Bank. The banking licences of UT Bank and Capital Bank were revoked under section 123 of the Banks and Specialised Deposit- Taking Institutions Act, 2016 (Act 930 or the "new Banking Act")[1] and their respective logos immediately removed.

The reason for this? Per the Bank of Ghana's press statement, "this action was due to severe impairment of their capital."

What good can come of this?

The collapse of banks in a jurisdiction can lead to stronger banking supervision/ regulation. For example, the aftermath of the 2008 banking and financial crises in the United Kingdom (UK) resulted in a raft of reforms in the UK's banking sector. Various measures were introduced to make the financial system more stable and secure, including an increase in capital adequacy requirements (to 5 times the amount required pre-financial crisis), increased vetting of board members of banks and a restructuring of the regulatory system.

Although the collapse of UT Bank and Capital Bank is hardly on the scale of the UK's financial crisis, we expect that this (together with unconfirmed reports that several other banks may also be in jeopardy) is an indication that BoG is cracking its regulatory whip. Indeed, the new Banking Act provides the Regulator with the requisite tools for action. These tools include the following:

Pre-requisites for obtaining a licence:

Under Act 930, an applicant who wishes to apply for a licence to operate as a bank or a specialized

deposit-taking institution ("SDI") must meet new stringent requirements including the provision of a statutory declaration for directors / key management / key shareholders deposing to any convictions, bankruptcies, disqualifications, managerial involvement in insolvent or liquidated entities. It is worth noting that these depositions are not restricted to events in Ghana. As such, a director who has been involved in a managerial capacity in an insolvent bank in, say, Isle of Man, must disclose this to the BoG.

Capital and Reserves:

Banks must still maintain a minimum Capital Adequacy Ratio of ten (10) per cent; however, as was the case with the previous banking Act, the BoG has the authority to prescribe different ratios for different banks, etc having regard to the risk and vulnerability of the financial system, a discretion which may now be used if the BoG believes a particular bank's trading activity warrants a higher capital reserves requirement.

Act 930 cracks the whip further when it comes to the issue of dividends. Under Act 930, amongst others, a bank or SDI must ensure that it has made the required transfers to its "Reserve Fund"2 and has satisfied its obligations under the Ghana Deposit Protection Act, 2016 (Act 931) before it can declare a dividend; thereby ensuring that capital is maintained for the protection of consumers.

Other measures on Ownership and Control and BoG's powers of Supervision and Control:

Section 57 of the new Banking Act contains an infamous whistle-blowing provision whereby a director of a bank or SDI has a positive obligation to be a "snitch", as it were, if the director has sufficient reason to believe that certain adverse events have occurred or are likely to occur at the bank or SDI which may, amongst others, have a material adverse effect on it. A director who fails to alert the authorities may find himself/herself being deemed as not fit and proper by the BoG. Such a director may also find himself/herself subject to a financial penalty under Act 930.

Conclusion

The Bank of Ghana undoubtedly has power under Act 930 to stress test and monitor the financial wellbeing of banks. One only needs to look at the stricter eligibility requirements for licence applications, restrictions on dividend declarations, the very bold whistle-blowing provisions and the increased supervisory powers of the BoG under sections 91 -106 of Act 930 to come to this conclusion. In situations such as the UT Bank and Capital Bank collapse, however, a banking regulator performs a fine balancing act where consumer interests are balanced against other broader macro-economic objectives. With some Ghanaian banks having evolved from being micro- finance to savings and loans companies with relatively less robust risk management processes, and with an increased bank appetite for swaps and futures following the recognition of derivatives in the new Securities Industry Act, 2016 (Act 929), the financial landscape is likely to change in future. It remains to be seen whether this increased vigilance and decisive action on the part of the Regulator will continue. Indications to date are that BoG means business.

[1] Act 930 repealed the previous Banking Act, 2004 (Act 673) and the Banking (Amendment) Act 2007 (Act 738)

[2] The Reserve Fund is required to be established and maintained by each bank and specialized deposit-taking institution (SDI) and on an annual basis a specified proportion of the profits of the bank or SDI must be transferred into the Reserve Fund.

* JLD & MB Legal Consultancy is a top-tier corporate and commercial law firm with extensive experience advising global and local clients on some of Ghana's most high profile transactions. We provide innovative and solution-oriented advisory services across several practice groups and have received international recognition for our lawyers and our work in a number of sectors including Oil, Gas and Petroleum, Energy and Natural Resources, Banking and Finance, Capital Markets and Mergers and Acquisitions.

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