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# OFFICE OF THE FINANCE MINISTER

## Memo

**TO:** H.E. THE PRESIDENT

**FROM:** HON. MINISTER

**DATE:** 30<sup>TH</sup> OCTOBER 2020

**SUBJECT: GOLD ROYALTIES MONETISATION TRANSACTION UNDER THE MINERALS INCOME INVESTMENT FUND ACT, 2018 (ACT 978) - RESPONSE TO OFFICE OF SPECIAL PROSECUTOR'S (OSP) REPORT TO THE PRESIDENT**

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1. I refer to the Report dated 16<sup>TH</sup> October 2020, from the OSP to H.E. The President, on the Analysis of Corruption and Anti-Corruption Assessment with regard to the Gold Royalties Monetisation transaction (the Transaction) on which I was copied.

2. I wish to respond to the Report as follows:

**A. Cabinet and Parliamentary Approvals for the Transaction**

1. Prior to initiating the Transaction, MoF ensured to undertake all the necessary pre-requisite action required by law, from the procurement of transaction advisors, to the submission of transaction documents to the AG and Parliament for their review, input and approval.

2. This Ministry believes that it has been transparent from the onset. Once Government had independently assessed the potential value of the Transaction to Ghana, and Cabinet had approved the policy to monetize future gold royalties to support current developmental projects, MoF included in the 2018 Budget and Economic Policy Statement, Government's intention to leverage the future wealth of Ghana's gold resources to support current developmental needs.

**B. Engagement of Transaction Advisor(s)**

1. As outlined below, MoF initiated the process of procuring and engaging a transaction advisor to guide the implementation of the policy in accordance with the *Public Procurement Act, 2003 (Act 663)*, as amended by the *Public Procurement Act, 2016 (Act 914)*.

2. With the approval of Public Procurement Authority (PPA), dated 16 November 2017, MoF initiated the engagement of a transaction advisor for the Transaction using the restricted tendering procurement process.

3. MoF shortlisted eight (8) reputable international financial firms, with the requisite expertise in advisory, capital markets and investment banking transactions, especially in the mining and natural resources sectors, and in Africa. The firms were:

1. JP Morgan
2. Goldman Sachs
3. IMARA Corporate Finance Limited (Pty) (Imara)
4. Citi Bank
5. Morgan Stanley
6. Barclays Bank



7. Standard Chartered Bank, and
  8. Rothschild & Co.
4. On the 22<sup>nd</sup> of December, 2017, MoF invited the firms directly by Request for Proposal (RFP), to tender for the transaction. Out of the eight shortlisted international firms, only two (2), being Imara and Morgan Stanley, responded by the deadline.
  5. The RFP had provided that collaborations with eligible Ghanaian firms with complementary capabilities would be favorably considered, and as such, Imara submitted its proposal with local partner Databank Financial Service Limited (Databank), and Morgan Stanley with Boulders Advisors, as its local partner.
  6. The stipulation in the RFP for bidding entities to collaborate with local firms or present a “consortium” to bid for contracts is not alien or offensive to procurement practice or the Procurement Act.
  7. Following an evaluation on 12/01/18, of the Technical Proposals submitted by the two sets of firms, by a duly constituted evaluation panel, Imara/Databank (Imara TA) emerged the winners.
  8. On 6/8/2018, on my instructions, Deputy Minister for Finance, Charles Adu Boahen, signed a Mandate Agreement with Imara TA to exclusively advise and assist Government on the Transaction, as Transaction Advisor (TA). Imara TA was required to oversee all necessary transaction advice for the Transaction including engaging various professionals and/or consultants to assist in the drafting of any agreements or Bills that needed to be passed, due diligence, and the setting up of any corporate entities or vehicles for the Transaction.
  9. Since Imara bid for the transaction as a partnership, it was not in our place to provide separate fee payment streams for Imara and Databank in the Mandate Agreement. Additionally, Imara, being the principal of the partnership with Databank, and being a foreign entity, was entitled, as is normal, to be paid for the services in foreign currency.
  10. An examination of the various transactions engaged in by Imara after the execution of the Mandate Agreement, shows a clear recognition that Imara is the principal partner in the consortium appointed as TAs. In fact in the Mandate Agreement, the retainer fee of \$15,000 per month over the duration of the Agreement (initially set as 12 months), is payable to Imara.
  11. In order for Imara TA to successfully provide the services for which it was engaged, it was necessary for Imara TA to be able to directly engage other external experts and qualified technical and other advisors, to support the successful implementation of the Transaction. Per the Mandate Agreement, all such engagements were to be with MoF approval, and as is the norm in such transactions, the sponsor of the transaction, MoF in this case, bears the cost of such engagements. As such, advisors would be engaged as and when necessary, it would not have been feasible to determine their fees upfront at the commencement of the transaction. All the roles were advisory in nature.
  12. Imara engaged professionals and service providers namely White & Case, BELA and ALA to advise the Transaction Advisors on legal issues. Imara further engaged Korn Ferry to advise the Transaction Advisors on HR and the recruitment of board members and senior management for ListCo. Buchanan Communications Limited to assist with Branding, Communications and PR, as

well as another firm, Ogier, to assist the Transaction Advisors with the incorporation of the ListCo in Jersey.

13. This is consistent with other transactions of this nature. For example with Eurobond transactions the Lead Managers are responsible for procuring the services of other service providers and professional service firms including lawyers, auditors, brokers and logistics amongst others even though the cost for such services are ultimately paid for by GoG.
14. Incorporating in Jersey, Channel Islands was to facilitate the listing of ListCo on the London Stock Exchange, one of the worlds most regulated markets and also in a tax efficient manner. It is important to note that 70% of the value of non-UK resident companies listed on the London Stock Exchange are incorporated in Jersey. UK listed companies incorporated in Jersey cannot be shrouded in secrecy. A listing on the LSE ensures that ListCo will be subject to the most regulated stock market in the world with the highest levels of corporate governance and reporting requirements and under the Financial Conduct Authority (FCA) of the UK and subject to the transparency rules of the LSE ie Transparency Directive (2004/109/EC). Companies listed on the LSE are required to comply with the UK listing rules and disclosure guidance and transparency rules.
15. Imara is a leading independent asset management and investment banking firm in sub-Saharan Africa with a reputation for providing quality financial advice to governments in Africa going back over 60 years with extensive experience in the natural resources sector in Africa. The Imara team has executed over 200 transactions in 12 African countries and has over \$550MM in fund under management. Mining sector transactions include project financing for the Geita Gold Mine in Tanzania owned by AngloGold Ashanti and the and the sale of the Govt of Zambia's shares in ZCCM. The IMara team is led by Mr Tom Gaffney, with over 30 years experience in providing transaction advisory services primarily to the mining sector. Previously he worked for Robert Fleming and CO and JP Morgan Chase. Tom has advised on deals such as the Secondary offer of Metall Mining for Anglo American and the merger of BHP and Billiton. He also advised the French government on the acquisition and divestiture of gold mining interests globally.
16. I co-founded Databank 30 years ago, which is now the leading investment bank in Ghana. Seven times winner of the Best Securities Brokerage Company in Ghana, Databank has been actively involved in virtually every initial public offering of state enterprises under all governments in the Fourth Republic. In 1994, Databank formerly advised the Rawlings administration during the liquidity crisis that threatened to cripple Ashanti Goldfields Company (now AngloGold Ashanti) and subsequent part sale of its interest in the Geita Mine in Tanzania. Databank had earlier served as a broker in the IPO of Ashanti Goldfields on the GSE in 1994. In 2007, Databank was co-Manager and dealer for the first ever Eurobond by a Ghanaian government, amounting to \$750m, Databank was also co-Manager in the 2014 Eurobond issue. In 2020, Databank was again part of the team that issued the highest ever tenure in Africa for a sovereign bond, the \$750m 41-year eurobond of February 2020. On the asset management side, Databank manages over \$1 billion for some 500,000 Ghanaians and a third of all mutual funds in Ghana. I resigned as Executive Chair of Databank in August 2012 and resigned from all Databank Boards in Feb 2014.
17. MoF lawfully appointed Imara TA for the transaction, in compliance with Act 921, Act 663 (as amended), and the Constitution of Ghana. There was no intention by any party to disregard and violate the laws of Ghana. MoF acted at all times, in good faith throughout the transaction.

### **C. Deputy Minister's authority to sign the Mandate Agreement**

1. Section 3 of *Public Financial Management Act, 2016 (Act 921)*, empowers the Minister for Finance to designate any other public officer, other than those named in the Section, to manage public funds and discharge their responsibilities in accordance with the Act.
2. Section 5(1)(c) and (d) of Act 921, empower the Minister to execute on behalf of Government, agreements in relation to matters of a financial nature and give directives and instructions necessary for the implementation of the provisions of the Act. Subsequently, Section 5(2) empowers the Minister to delegate any of his responsibilities outlined in Section 5(1) to the Chief Director, or a senior public officer in the Ministry, not below the rank of a Director. The Deputy Minister is such a senior officer, and therefore, qualifies to execute agreements of a financial nature on behalf of the Ministry, if the Minister so delegates the responsibility to him. In addition, Article 79 of the Constitution provides for the appointment of Deputy Ministers to assist a Minister in the performance of his functions.
3. The authority to execute public contracts in Ghana is set out in section 20 of the State Property and Contracts Act, 1960 (C.A.6), which stipulates thus:

*“Power to contract The Minister responsible for a subject or department, any other person authorized by the Minister, may execute a contract for and on behalf of the Republic on a matter falling within the Minister’s portfolio”.*

4. The duties of the Principal Spending Officer (PSO) of a public institution, (defined in Section 102 of Act 921, to include the Chief Director), are enumerated in Section 7 of Act 921, and are to oversee and manage the proper use of public resources. This includes authorizing the commitments of the institution within a ceiling set by the Minister.
5. Section 25(3) and (4) empower the PSO to commit the budget of a public entity, but not to a financial liability, including contingent liability, unless authorized to do so under the Act, its Regulations or directives issued thereunder. These functions are in line with the functions of a Chief Director enumerated in Section 20 of the Civil Service Act, 1993 (P.N.D.C.L. 327).
6. Commitment of the approved and duly appropriated funds of a public institution is managed in the Ghana Integrated Financial Management Information System (GIFMIS), under the oversight of the Chief Director. In this regard, the Deputy Minister cannot authorize a payment to any entity beyond what has been approved in GIFMIS under the direction and oversight of the Chief Director and the Minister. Thus, any payments or commitments to be made under the Mandate Agreement signed by the Deputy Minister could only lawfully be made in compliance with Act 921 and its Regulations. MoF, as overseer of public financial management under Act 921, did not deviate from this.

#### **D. Parliament approval for the Mandate Agreement pursuant to Article 181(5) of the Constitution**

1. Article 181(5) of the Constitution requires an international business or economic transaction with Government to be approved by Parliament in order to be valid. In the case of *Attorney General v. Balkan Energy* [2012], however, the Supreme Court emphasized that, an international business transaction within the meaning of Article 181(5), must by itself constitute an autonomous commercial transaction in a nature, which pertains to impact on the wealth and resources of Ghana. Further, the Court held that article 181(5) ought to be construed purposively to include only “major” international business or economic transactions to which Ghana was a party, and not transactions of ordinary commerce.

2. MoF did not seek parliamentary approval for the Mandate Agreement, because MoF considered the role of Imara TA to be advisory, with regards to the structuring and the drafting of agreements for the IPO of Agyapa on the London Stock Exchange, the main transaction whose agreements have all been submitted to Parliament for approval, and not to have economic impact anticipated by the Supreme Court in the Balkan Energy case. Similarly, MoF has not sought parliamentary approval for other international transaction advisory service agreements it has signed in the past, such as the engagement of international investment banks for Eurobond issuances, for example.

#### **E. The Governing Board of the Minerals Income Investment Fund**

1. Based on advice from the TA, and the fact that mineral royalties are deemed to be a tax that goes in the Consolidated Fund, MoF initiated the drafting of a Bill that would establish an independent, wholly-owned Government public fund, as an entity to oversee the implementation of the Transaction. In about August 2018, Parliament passed the *Minerals Income Investment Fund Act, 2018 (Act 978)*.
2. Act 978 established the Minerals Income Investment Fund (MIIF) to hold and manage the Republic's equity interests in mining companies, and receive and manage mineral royalties due to the Republic under a Mining Agreement. MIIF only receives minerals royalties due to Government, and not any of the royalties due to chiefs or others.
3. The Board of MIIF is constituted pursuant to Section 5 of Act 978, which provides statutory requirements for the make-up of the Board and states clearly that:

The governing body of the Fund is a Board consisting of

- (a) a chairperson;
- (b) the Chief Executive Officer of the Fund;
- (c) a representative each from the following Ministries not below the rank of a Director:
  - (i) Ministry of Finance; and
  - (ii) Ministry of Lands and Natural Resources;
- (d) three other persons nominated by the Minister;
- (e) the Commissioner for Domestic Tax Revenue Division of the Ghana Revenue Authority; and
- (f) a Deputy Governor of the Bank of Ghana nominated by the Governor of the Bank of Ghana
- (g) At least three of the members of the Board shall be women.

The members of the Board shall be appointed by the President in accordance with article 70 of the Constitution.

4. Additionally, Section 6 mandates that a member of the Board must be a person who qualifies for appointment as a director of a company incorporated under the Companies Act, 1963 (Act 179) (See Section 172 of the *Companies Act, 2019 (Act 992)*). A review of the Curricula Vitae of the Board Members shows persons of apparent established professional and technical backgrounds who are well qualified and suitable for the position.
5. It is noteworthy that, because of the financial and investor nature of MIIF, both the Bank of Ghana and the Securities Exchange Commission are regulators of MIIF, and consequently, Board members must meet the strict "fit and proper" test required by both regulators.
6. There is no justifiable reason for concluding that the current members of the MIIF Board will jeopardize their apparent professional integrity and reputations to engage in corrupt practices motivated by partisan considerations.

Submitted for your consideration.