



THE FUTURE OF M&A IN MYANMAR

Myanmar has continued its upward spiral in the sphere of foreign investments and mergers and acquisitions (“**M&A**”). Foreign investors have continued to look with keen interest towards Myanmar, drawn to its large population, abundance of natural resources, and strategic geographic location within one of the fastest growing economic regions in the world. Myanmar is poised to enter into a new era of unprecedented economic growth with the liberalization of several sectors, new legislation and more robust legal protections for enterprises and foreign investors.

Acutely conscious of the pivotal role that foreign investment is playing in Myanmar’s economic transformation, the government’s primary focus is to lay the foundation for a clear and compact legal and regulatory system which is able to cope with the anticipated increase in M&A activity. In this regard, the Myanmar authorities have brought laws into force which follow international best practice and that are commensurate with global norms. These include the Myanmar Companies Law, the Myanmar Investment Law, the Competition Law and the Securities and Exchange Law.

The Myanmar Companies Law 2017 (“**MCL**”) has replaced the Myanmar Companies Act 1914. It has modernized the company structure/registration process and has also removed or lowered some barriers to foreign investment. The MCL has distinguished between a “foreign company” and a “Myanmar company”, whereby a foreign company is defined as a company incorporated in Myanmar in which an overseas corporation or other foreign person (or a combination of them) owns or controls, directly or indirectly, an ownership interest of more than 35%.¹

Pursuant to enforcement of the MCL, the companies’ registrar has implemented the

Myanmar Companies Online (“**MyCO**”) platform, where the entire process starting from registration of a company to related corporate compliance is conducted online. Also, companies in Myanmar are permitted to have a tailor-made constitution setting out the rights of respective shareholders.

In addition to the MCL, the Myanmar Investment Law (“**MIL**”) and the Myanmar Investment Rules (“**MIR**”), have also liberalized the investment regime in Myanmar and levelled the playing field between foreign and local investors. The investments are eligible for an investment permit (“**MIC Permit**”) or an endorsement (“**Endorsement**”) under the MIL. Holders of an MIC Permit or Endorsement are further entitled to long term land leasehold rights and tax incentives depending on the investment. It is important to note that MIC approval will also be required for direct or indirect acquisition of a majority of shares or controlling interest in a company holding an MIC permit or Endorsement.

Notification No 15/2017 (List of Restricted Investment Activities) issued by the MIC lists the types of investments that are restricted for foreign investment, which require approval of a Myanmar government ministry or may only be made through a joint venture with a Myanmar company.²

COMPETITION REGULATIONS

The merger control/competition regime in Myanmar is guided by the Competition Law (“**CL**”) and the Competition Rules (“**CR**”).

The Myanmar Competition Commission (“**MCC**”) has been entrusted with the responsibility of regulating competition in the market, determining market share and controlling anti-competitive activities which create monopolization or abuse of dominant position.

¹ This relates only to the provisions under the MCL and does not impact the provisions of the Transfer of Immovable Property Restriction Act.

² Where the Myanmar company/individual should have at least 20% shareholding in the joint venture entity.

The CL states that *the power to regulate any acquisition or merger is vested with the MCC*, which will set the thresholds based on market share, revenue, investment, number of shares and assets driving such a merger or acquisition. However, to-date no notification on such thresholds has been issued by the MCC.

Collaboration as defined in the CL refers to “*a merger, conglomeration, acquisition, joint venture and such other methods of collaboration as may be specified by the MCC.*” However, it prohibits any collaboration which could result in market dominance in a specific period and those which weaken the competition in the market by creating a monopoly or oligopoly. Also, no collaboration will be allowed if the combined market share after such collaboration exceeds the prescribed threshold, which has not been notified yet.³

As much as merger thresholds are not specified in the CL or CR, the position in the telecom is a little different.⁴ In July 2013, the Ministry of Transport and Communications introduced new rules on competition which exclusively regulate mergers and acquisitions in the telecommunications sector (“**Telecommunications Competition Rules**”). The Telecommunication Competition Rules specify presumptions of ‘dominant position’ in the market where:

- a telecom licensee’s gross revenues in a specific telecommunications market exceed 50% of total gross revenues of all Licensees⁵ in that market (ex-post regulation); and
- a telecom licensee’s gross revenues in a specific telecommunications market exceed 30% of total gross revenues of all Licensees in that market (ex-ante regulation).

³ There is an exception in cases where collaboration yield or market share is small.

It further states that a transaction between competitors would be deemed likely to reduce free competition where, subsequent to the transaction, one or more of the following indicators is met:

- the three largest firms in the market have a combined market share of less than 80%, and the resulting entity’s market share is less than 40%; or
- the three largest firms in the market have a combined market share of 80% or more, and the resulting entity’s market share is less than 30%; or
- the resulting entity does not control more than one third of the radio spectrum assigned for the provision of specific services included in the relevant market.

However, the Telecommunications Competition Rules states that the PTD shall have exclusive jurisdiction to review anti-competitive conduct and agreements in the telecommunications sector, whereas the CL states that *notwithstanding any existing laws*, the matters relating to any provision contained in the CL must be carried out in accordance with the CL itself. Therefore, the contradictory nature of the two sets of laws points towards a lack of clarity or a systematic approach to the above.

Another point of confusion lies with regard to previous rulings or decisions of the PTD. We are unsure as to whether the ruling/decision of the PTD would have a binding effect upon the MCC. Alternatively, we are equally in the dark regarding decisions of the MCC and their impact on the PTD in making informed decisions in relation to competition-related aspects of the telecom sector.

Also, to create a competitive market for investors and analysts, the Securities and

⁴⁴ In the recent years, telecom sector has seen a lot of M&A activity in Myanmar.

⁵ Holder of Telecommunications License in Myanmar.

Exchange Law was passed in 2013 (“SEL”) and the Yangon Stock Exchange (“YSX”) was established in 2015. The detailed process and contents of a prospectus for the entire initial public offering (“IPO”) of companies is covered under the MCL. The SEL along with the Securities Exchange Rules (“SER”) prescribe necessary guidelines and prescriptions on the entire listing process. SECM under Notification No. 1/2019 has permitted foreign individuals and foreign firms to trade on the YSX. The expression “foreigner” refers to an individual person, who is neither a “Citizen”, “Associate Citizen” nor a “Naturalized Citizen” under the Myanmar Citizenship Law; and in the case of an organization, the company or organization can be incorporated under the existing laws of Myanmar or incorporated under any existing law of a foreign country outside Myanmar. The SECM is still to enact detailed rules for the aforementioned process.

Sector specific liberalization

Insurance Sector:

The Ministry of Planning and Finance (“MOPF”) via a Notification issued on 2 January 2019 permitted foreign investments in the insurance sector. The Financial Regulatory Department (“FRD”), under MOPF thereafter published an RFP for inviting foreign investments in the insurance sector in Myanmar.

The Expressions of Interest issued by the MOPF particularly specified that it will permit one local life/non-life insurer to partner exclusively with one foreign life/non-life/ composite insurer JV partner, and vice versa. Both the applicant and foreign JV partner (if identified) are permitted to respond to only one Invitation and to participate in only one EOI at any given time. Of particular importance is that the maximum permitted shareholding for foreign insurers in each JV is capped at 35%. Following this, in November 2019, the FRD awarded licenses to five foreign

insurers to operate their fully owned subsidiary and three life and three non-life joint ventures between foreign⁶ and local firms to operate in Myanmar.

Wholesale/Retail Sector:

The Ministry of Commerce (“MoC”) issued Notification No 25/2018, setting out the criteria for foreign and foreign-local JVs to conduct retail or wholesale business activities in Myanmar specifying the required capital requirements (both for wholesale and retail) and minimum floor area requirement for conducting retail business.

The MOC further issued the standard operating procedures and administrative requirements for applications to engage in retail or wholesale activities in Myanmar, and a list of priority goods which would be permitted for trading by foreign companies and foreign-local joint ventures. Following this, there has been significant interest in this development by the foreign entities given the size of the market and lack of refined trading companies.

Banking Sector:

Banking activities are regulated by the Central Bank of Myanmar (“CBM”) under the Financial Institutions Law (“FIL”). A foreign bank may only sell its business or acquire a local bank’s business (or a substantial part of either) with the CBM’s prior approval. In addition, prior CBM approval is required for acquisition (direct or indirect) of a ‘substantial interest’ in a bank (defined as 10% or more of the shares in, or the capacity to control the management of a bank).

Approval has been given to the subscription by IFC (approx. 5% shares) for shares in Yoma Bank, which is the only equity investment transaction having taken place to date. Thereafter, on 29 January 2019, the CBM issued a notification which permitted up to 35% foreign investment in local banks with its prior approval. This denotes

⁶ Where the foreign entity has up to 35% shareholding in the joint venture company.

the newest step in the ongoing liberalization of the banking sector since the first issuance by the CBM of a banking license to a foreign bank in 2015. Thirteen foreign banks have established branches in Myanmar as of June 2019. Initially, the foreign bank branches were permitted to offer only corporate and wholesale banking services to foreign-owned companies and Myanmar banks. However, under a recent directive on 8 November 2019, the CBM has permitted licensed foreign banks operating in Myanmar to lend to Myanmar companies as well.

M&A TRANSACTIONAL PERSPECTIVE IN MYANMAR

Acquisition of a company in Myanmar can be made through share purchase, business or asset transfers or schemes of arrangement. In the acquisition of shares, the restrictions applicable to foreign investment must be given due notice. Schemes of arrangement are allowed under the MCL, permitting the acquisition of a company where members vote through a special resolution (75% of the shareholders' vote) has been obtained, subject to court supervision.

In this regard, it is to be noted that hostile takeovers are unusual in Myanmar because there are only a handful of listed companies on the local stock exchange, and shares of private companies cannot be transferred without the approval and signature of transferors and the registration of the transfer by the company's board of directors.

As observed in most other jurisdictions, a thorough legal, tax and financial due diligence is usually conducted before entering into an M&A transaction in Myanmar. Public records are not well maintained (such as solvency records, court records and security records) and not available in public domain. The due diligence process could be very challenging for the buyer/acquirer

where reliance is placed primarily on disclosures by the seller, while due diligence on corporate documents, material contracts (including financing agreements), employment, real estate and applicable licenses can be achieved.

For share transfers (mergers or acquisitions), the MCL requires an executed share transfer agreement in the form specified by the company and the issuance of a new share certificates (in the name of the new shareholders) by the company. The MCL also requires the transaction to be registered in the company shareholders register, where notice of the transfer should be filed with the Directorate of Investment and Company Administration (“DICA”) through the MyCo account of the company within 21 days of such registration in the shareholders register as aforementioned.

An asset acquisition can be achieved through a sale and purchase agreement and ancillary documents, such as assignment agreements for certain rights, assets and existing contracts that are being transferred.

The transaction documents should be duly stamped in accordance with the Myanmar Stamp Act and the documents pertaining to immovable property should be registered with the Office of Registration of Deeds. Though the companies incorporated in Myanmar have the right to grant mortgage or charge over its assets, where such exercise of right by or on behalf of the mortgagee or chargee to realise the value of any property secured by the mortgage or charge will not be taken to breach, nor be restricted by the Transfer of Immovable Property Restriction act of 1987 (“TIPRA”), or under the provisions of any other applicable law having similar effect. However, it is pertinent to note that TIPRA as a general rule, prohibits any person⁷ from selling, buying, giving away, pawning, exchanging or transferring by any means immovable property to a foreigner or foreigner owned company. It further states that no foreigner or foreign owned company should acquire immovable property by

⁷ For avoidance of doubt, “person” refers to a Myanmar national.

way of purchase, gift, pawn, exchange or transfer in Myanmar.⁸ Also, the MCL states that the provisions pertaining to foreign companies under the MCL will not affect the operation of any provisions of TIPRA.

OUTLOOK AND POTENTIAL FOR M&A

While M&A activity is spread across different sectors and industries, recent years have seen prominent transactions in the manufacturing, power, real estate and telecoms sectors. Myanmar is heading towards a more open and liberalized economy. Democracy in itself has taken Myanmar a long way from where it was. What seemed as one of the most challenging frontier markets for investors, now looks more promising with all the recent reforms that have been pursued in Myanmar and the undeniable potential that the country continues to hold. There are many companies from all over the world that remain drawn to one of the world's last economic frontiers, and companies are sending in teams to perform market research, due diligence and to establish relationships with potential local partners. If prospective investors are able to identify and mitigate the risks through focused risk assessments, comprehensive due diligence and appropriate compliance measures, numerous opportunities still await.

The major deciding factor likely to influence mergers and acquisitions activity is the extent and manner of implementing the reforms as outlined earlier in this article. While the country has liberalized several sectors and is now open to foreign investment, the extent to which Myanmar can adapt and modernize its local practices and regulatory culture in implementing such reforms remains an open question.

Another challenge in this context is the extent to which the country can improve its infrastructure to support foreign investment. A final factor likely to affect foreign participation in mergers and acquisitions is Myanmar's overall reputation as a place to invest.

Myanmar has great potential for significant M&A activity and the door is open for investors to come and realize this potential. Legal and regulatory reforms are greater than ever before. However, what needs to be seen is the level of implementation that takes place and whether it will be sufficient to propel Myanmar on its (hoped for) continuing upward economic growth trajectory.

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⁸ TIPRA refers to "foreign owned company" as a company having even one foreign shareholder.