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Myanmar merger control (2015)

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A conversation with Nishant Choudhary, lawyer at regional law firm VDB—Loi, on key issues on merger control in Myanmar.

A conversation with a local expert—top questions

1. Have there been any recent developments regarding the Myanmar merger control regime and are any updates/developments expected in the coming year?

In general, the merger control regime in Myanmar is guided by the Competition Law 2015 (the Law). The Law provides for the establishment of a Commission consisting of a chair and intelligensias, formed of individuals with the rank of Union Minister, and other eligible people from relevant ministries/government departments. It may be noted that the relevant ministry or department has yet not been notified by the Government. Under section 8(f) of the Law (duties and power of Commission), the power to regulate any acquisition or merger is vested with the Commission, which shall set the threshold based on market share, revenue, investment, number of shares and assets derived such acquisition or merger. Please note that no such notification pertaining to the above mentioned threshold has been determined by the Government to date.

Section 30 of the Law defines the term collaboration as a merger, conglomeration, acquisition, joint venture and such other methods of collaboration as may be specified by the Commission. Further, section 31 prohibits any collaboration which results in market dominance (the level has not been defined) in a specific period and those which weaken the competitiveness of the market by creating a monopoly or oligopoly. Similarly, under section 32, no collaboration shall be allowed if the combined market share after such collaboration exceeds the prescribed threshold (threshold for market share has not been determined yet). However, under section 33 there is an exception in cases where collaboration yield or market share is small (ie where the enterprises remain in small and medium size category or where a market share threshold, which has not yet been determined but will capture of small and medium sized transactions, is met).

2. Under the Myanmar merger control law, is the control test the same as the EU concept of ‘decisive influence’? If not, how does it differ and what is the position in relation to ‘minority (non-controlling) shareholdings’?

Section 30 of the Law defines the term collaboration as a merger, conglomeration, acquisition, joint venture and such other methods of collaboration as may be specified by the Commission.

At present only the broader principles have been laid out in the Law, as the subordinate legislation is yet to be finalised. Therefore, it is not possible to detail the tests in relation to merger control. The market situation in the EU is different from an emerging market like Myanmar. We think that the conditions or prescriptions would be different in the case of Myanmar, considering the requirement of essential investments in sectors ranging from infrastructure to FMCG.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Yes, under section 30 of the Law, joint ventures are included under the definition of collaboration. Further the Law does not make any distinction between structural or non-structural cooperative joint ventures.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any ‘effects’ doctrine/policy if relevant)?

Currently, the rules relating to the thresholds have not been prescribed.

The law does not make a distinction between local-to-local, local-to-foreign or foreign-to-foreign transactions. We believe that even a foreign-to-foreign transaction which has an appreciable adverse effect on competition in Myanmar, or results in an act that affects or causes the interests of the State or the benefits and interests to which other businesses or consumers are entitled in the operation of businesses to be affected, would fall under the prohibitions imposed under the Law. Further section 8(a) of the Law provides the Commission with the power to collaborate with international or regional organisations or other countries on matters in relation to competition.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

In absence of the procedural conditions it would not be possible to state with precision what a party should keep in mind...
while compiling and calculating the turnovers for applying the jurisdictional threshold. However it can be presumed that principles like the following would still apply in case of Myanmar:

- whether the turnover is from Myanmar only or from sources outside Myanmar and what should be notified
- concepts of group test of resultant entity post acquisitions or amalgamations, ie whether the group’s turnover is from Myanmar only or from sources outside Myanmar and what should be notified etc.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

The Law is a substantive law and the procedures relating to it are yet to be finalised, therefore it is not possible to comment on this question. However, given the current practice in Myanmar, we believe that in all likelihood a reporting requirement (which may or may not require prior approval) will be put in place for transactions where the jurisdictional thresholds are met.

7. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Commission?

No rules have been finalised as yet. The Commission will create an enquiry committee, which will form the investigation wing of the Commission.

8. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

No rules have been finalised as yet.

9. Please comment on the penalties for failing to notify or suspend transactions pending clearance; and the Commission’s stance in terms of pursuing parties for failing to notify (or suspend closing) relevant transactions - commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law.

There are three forms of penalties prescribed in the Law:

- administrative action for breach of any order, directive or procedure (to be laid) under the Law—warning, fine and suspension or the closure of operation of the enterprise for a particular period
- criminal penalties—these range from imprisonment from three months to three years, depending on the crime the person has been convicted of, and
- pecuniary penalties—these range from a fine of MMK 100,000 (US$100) to MMK 15m (US$15,000).

From the reading of the Law it seems that penalties are pretty mild compared to other antitrust regimes, eg the USA, EU and India.

As the procedural aspects of the Law have not yet been determined, the Commission has no record in relation to imposing penalties.

10. Are there any other ‘stakeholders’ other than the Commission (for example, any ‘sector regulators’ who might have concurrent powers)?

No other stakeholders have been identified yet.

11. What (if any) are the other ‘hot’ merger control issues in Myanmar?

The regime is at a very nascent stage and its effects are not yet seen in the market.