

## Guideline:

### Myanmar FDI and M&A Guideline Questionnaire: (RCEP Jurisdictions-Myanmar)

#### 1. Foreign Direct Investment (Greenfield investment)

- 1.1. What are the principal laws and regulations applicable to FDI in your jurisdiction? Are there special rules for certain foreign investors, including state-owned enterprises (SOEs)?

DMS: The legislation governing the direct investment regime includes Myanmar Investment Law 2016 (MIL), Myanmar Investment Rules 2017 (MIR) and Myanmar Companies Law 2017 (MCL), which include provisions related to both foreign investments as well as domestic investments.

- 1.2. Are there any governmental and regulatory approvals required for FDI? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?

DMS: Yes, the government and regulatory approvals are sector specific. Generally, governmental and regulatory approvals that are required for FDI include the following:

- (i) Company registration with the Directorate of Investment and Company Administration (DICA). The processing time for registration of a private company can be completed within a few hours provided that the requisite information and documents are in order;
- (ii) MIC permit is required for business activities that (a) are essential to National strategy (e.g. energy, infrastructure, extraction of nature resources etc.); (b) involve large capital intensive investment (i.e. value exceeds USD 100 million); (c) have large impact on environment and local community (e.g. mining, business located in protected areas etc.); (d) use state-owned land and buildings; and (e) others as required by the Government. The MIC permit is granted on a case-by-case basis depending on the nature and size of the investment. At a minimum, an applicant should expect a period of four (4) to six (6) months to obtain an MIC permit;
- (iii) MIC endorsement may be obtained so as to enter into a long-term lease exceeding one year and enjoy applicable tax incentives. Coincidentally, MIC endorsement may take the same period of time as MIC permit, although, this was not the intent of the legislature under the MIL; and

- (iv) Particular licences are required to undertake certain activities, for example, import/export, domestic trading (retail or wholesale), telecom, construction, operating chemical or related substance business, transit, transportation with pipelines of petroleum and petroleum products etc. The licenses will be granted on a case-by-case basis depending on nature of the business activities.

1.3. Are there any industry sector controls on foreign investment?

DMS: Notification 15/2017 (Negative List) of the Myanmar Investment Commission (MIC) set out the restricted business activities which may only be carried out by:

- (i) the Union (businesses which relate to national security, natural conservation, electronic power system etc.) ;
- (ii) Myanmar citizens/entities (e.g. developing and refining small or medial scale mineral, prospecting, exploration and production of jade/gem stones) ;
- (iii) joint ventures between foreign investors and local citizens/entities (e.g. local tour services, manufacturing and domestic distribution of chemicals, purified drinking water); or
- (iv) investors with approval from relevant ministries (e.g. wholesale and retail businesses require approval from the Ministry of Commerce).

1.4. Are there any government free carry interest requirements on special industry sector?

DMS: As far as we aware, there is no mandatory Government participation and/or free carry interest requirement and such terms are negotiated by the government authorities on a case-to-case basis. In particular, we have seen government free carry provisions in the upstream oil & gas sector.

1.5. Are there any localization requirements (e.g. minimum ratio of local employees, minimum ratio of local procurement) for FDI in your jurisdiction?

DMS: There is no minimum ratio of local employees or requirement on local procurement. Though there is no specific legislation, but the government may have such requirements in PPP documentation on a case-to-case basis.

Please note, for business activities that must be undertaken in the form of joint venture with a local entity/citizen, the local partner shall hold no less than 20 percent direct shareholding or interest in the joint venture company.

1.6. Are there any exchange control restrictions in terms of remittance of capital, profits and dividends?

DMS: Yes, foreign exchange is governed by Foreign Exchange Management Law 2012 (FEML) and the Foreign Exchange Management Regulation 2014 (FEMR) and is regulated by the Central Bank of Myanmar (CBM).

Generally, foreign currency transactions are classified into two types:

- (i) current account transactions – remittance for trading, interest of loans and net income from investments, repayment of loans or depreciation of direct investments and family expenses; and
- (ii) capital account transactions – all other transactions which are not current account transactions.

Under the FEML and the FEMR, there is no restriction on current account transactions while the capital account transactions will be scrutinized by CBM. Repatriation of capital, profits and dividends fall under the category of capital account transactions and therefore may only be made after submitting the relevant supporting documents to the authorized dealer banks (e.g. capital was brought into Myanmar from abroad for investment.)

- 1.7. What are the most common types of corporate legal entities established for FDI? For each type of corporate legal entities, please introduce the internal corporate governance structure. What types of corporate legal entities are recommended for partially or wholly foreign owned corporate legal entities?

DMS:

The most common business vehicle used in Myanmar is private company limited by shares<sup>1</sup> and overseas corporation<sup>2</sup>.

- (a) Private companies limited by shares may be formed by way of a:
  - (i) 100 percent foreign owned company – companies incorporated in Myanmar but with 100 percent foreign ownership; or
  - (ii) joint venture company – companies incorporated in Myanmar between a foreign investor and a Myanmar entity/ individual (including state-owned entities).
- (b) An overseas corporation, previously known as branch office and representative office, may be registered by foreign companies (typically oil and gas companies, airlines, foreign banks and insurance companies).

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<sup>1</sup> Private company is a type of company as opposed to public company (i.e. Myanmar listed company).

<sup>2</sup> Overseas corporation is defined under the MCL as “a body corporate that is incorporated outside the Union.”

- 1.8. What is the procedure of registration and incorporation of foreign-owned companies?

DMS: Company registration can be made electronically via the Myanmar Companies Online (MyCO) platform, which was established under the MCL and is administered by DICA.

- 1.9. What are the documents and materials that the foreign investors need to prepare for that purpose? Is notarization or certification required?

DMS: Notarization is required for the translated copy of documents, in particular registration documents for overseas corporation. Pursuant to the MCL, foreign investors must submit the evidence of incorporation of the overseas corporation and a copy of the company constitution, and, if it's not in Myanmar language, a Myanmar language translation of such documents and a summary statement in the English language duly certified by a director in that behalf shall be filed.

- 1.10. How long does it normally take to complete the entire registration and incorporation process?

DMS: Please refer to our answers under 1.2 above.

## 2. M&A laws and regulations & regulatory approvals

- 2.1. What are the principal laws and regulations applicable to M&A transactions in relation to listed and private company in your jurisdiction? What are the major issues dealt with in such laws and regulations?

DMS:

- (i) There is no particular legislation governing M&A transactions. Generally, M&A transactions must comply with MIL, MIR and MCL which laid out *inter alia*, investment permit, corporate approval and acquisition mechanisms (refer to 3.1 below).
- (ii) Where it relates to public (listed) companies, the M&A transactions must also comply with the following:
  - (a) the Securities and Exchange Law 2013 (SEL) and Securities and Exchange Rules 2015 (SER) which regulates, security license, listing and dealing activities;
  - (b) Instruction No. 1/2019 of the Securities and Exchange Commission of Myanmar (SECM) allowing foreigners

(individuals/entities) to acquire up to 35 percent shares in Myanmar companies listed on Yangon Stock Exchanges (YSX); and

- (c) Instruction No. 1/2020 of the SECM allowing foreigner participation in daily share trading of listed companies on YSX.

- 2.2. Are there any foreign investment review required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

DMS: Subject to the Negative List, there is no particular government screening process.

In this regard, please note foreign company” is defined under the MCL as “a company incorporated in the Union in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five percent.” In other words, a company registered in Myanmar with less than 35 percent of foreign shareholding will be deemed as a “local Myanmar company”. Prior to that, any number of shares held by a foreign company in a local entity changed the status of the local entity to a foreign entity. This becomes particularly relevant when a foreign investor decides to enter into a joint venture with a local company. As long as the local company holds 65 percent or more of the shares, the restructured company is able to hold its status as a Myanmar company. Having said so, the application of this 35 percent rule is still developing, in particular, with respect to land. Transfer of Immoveable Property Law Restriction Law 1987 prohibits foreigners from holding any land ownership, regardless of percentage of foreign shareholding.

- 2.3. Are there any merger control required in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

DMS: The Competition Law 2015 and Competition Rules 2017 are the primary legislation governing this field. Under the law, no business shall, through merger, acquisition or joint-venture or other arrangement, (a) raise the dominance over market significantly within a certain period and (b) lessen competition, which would result in its market share in excessive of the threshold of the Myanmar Competition Commission (Commission). However, these legislations do not specify the trigger threshold.

The Competition Rules set out the process for filing of complaints, whistleblowing and investigations for infringements. Complaints are to be filed with the Commission or Secretariat and the Secretariat shall screen the complaints and report to the Commission on their reliability within seven days of receipt.

- 2.4. Are there any other governmental and regulatory approvals required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?

DMS: Please refer to our answers under 2.1 and 2.2 above.

### 3. M&A in relation to listed company

DMS: Please note that the capital market of Myanmar is still evolving and foreigners are only allowed to trade on YSX since 2020 subject to the foreign shareholding limit of 35 percent in public companies. As of the date of this Questionnaire, only seven (7) companies are listed on YSX.

- 3.1. What are the principle methods of acquisition?

DMS: In addition to the usual way of acquisition of business and equity in a private company, under the MCL, acquisition can also be made through the following mechanisms:

- (i) Scheme of arrangement (ss287 and 289) – a compromise between a company and its members made for purposes of or in connection with a scheme for the reconstruction of a company or the amalgamation of any two or more companies. The members representing three-fourths in value must vote for the arrangement. The court's sanction is need for the transferor company to transfer the whole or part of the undertaking or the property to the transferee company; and
- (ii) Contractual offer/takeover (s291) – where a contract involving transfer of shares in a public company has been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company will be entitled and bound to acquire shares from dissenting shareholder(s) on the same term as approved by other shareholders, with prior notice.

- 3.2. In what circumstances (if any) is a mandatory bid obligation incurred?

DMS: The law is silent in this regard.

- 3.3. Is there a minimum price at which the offer must be made?

DMS: To prevent too much volatility of stock prices, YSX sets daily price limit for all stocks of listed companies.

An upper and a lower limit price of the day is decided based on a level of a base price under the table stipulated in the Enforcement Regulations for Trading

Business Regulations. A base price, in general, is the last matching price of a previous working day.

In case where a base price is MMK 35,000, an upper limit price becomes MMK 40,000 (MMK +5,000) and a lower limit price becomes MMK 30,000 (MMK - 5,000).

3.4. How can the function of the board of directors of the target impact a proposed acquisition?

DMS: Directors of a public company, or of a subsidiary of a public company, or, if so provided in its constitution of a private company, shall not, except with the consent of the company in general meeting, sell or dispose of the main undertaking of the company (s162 of the MCL).

3.5. What key documentation is needed in the acquisition?

DMS: Pursuant to the YSX Trading Procedure Guideline for foreigners, foreign investors are required to open a securities account with a licensed security company in Myanmar. The requisite documents for corporate investors include:

- (i) Company registration certificate
- (ii) BOD resolution (or) its equivalent letter to resolve to open securities account at any of securities companies
- (iii) List of directors including name, address and their ID
- (iv) List of major shareholders and their ID
- (v) (Major shareholder means one who owns more than ten (10) percent share of respective applicant corporate)
- (vi) Authorization letter to appoint that respective trading person and their ID (two (2) trading persons can be registered at most)
- (vii) Copy of company constitution

Where block trade (exceeding 10,000 shares) is concerned, buyers and sellers may negotiate the terms and conditions prior to sending a block trade application to the stock exchange. In such case, a share purchase agreement may be relevant here. Having said that, so far as we are aware, acquisition of shares in a listed company by foreign investors though the block trade mechanism has not been tested.

3.6. Do acquisition documents require pre-approval by any regulatory body prior to publication?

DMS: There is no statutory requirement, however, if the business objectives of the target company involve any particular license including MIC permit, the prior

approval must be obtained from the relevant authorities.

#### **4. M&A in relation to private company**

- 4.1. Are there any special rules in relation to the transferring of a business (compare with the simple share or asset acquisition)?

DMS: No particular rules in this regard. Having said that, when the business requires a license(s), the prior approval must be obtained from the relevant authority before acquisition of the business.

- 4.2. Do labor unit, works councils and other stakeholders (other than the vendors of the target) play a role in M&A?

DMS: Pursuant to the Standard Employment Contract Template (SECT), redundancy is legally permissible provided that the employer first coordinates with the labor organization of the employees or in the absence of a labor organization, the Workplace Coordinating Committee.

- 4.3. What are the minority shareholder principle rights given by law?

DMS: Division 19 of the MCL provides the actions that may be taken by minority shareholders in case of oppression, including:

- (i) Apply to court for winding up the company;
- (ii) Apply to court for an order for buying out shares of minority shareholders;
- (iii) Apply to court to restrain a person from engaging in specified conduct or from doing a specified act, or request a person to do a specified act; and
- (iv) bring a derivative action on behalf of the company with leave of the Court.

For purposes of this division, “oppression” means the conduct of a company’s affairs, an actual or proposed act or omission by or on behalf of a company, or a resolution, or a proposed resolution, of members or a class of members of a company is either:

- (a) contrary to the interests of the members as a whole; or
- (b) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

#### **Conclusion**

Myanmar plays an important role in China “One-Belt, One-Road” Initiative, and has been a popular market for Chinese investors in South-Asia region. As a result, its political and economic reforms have been rapid and significant, paving the way for



foreign investments into the country. After the declaration of the state of emergency in accordance with the constitution and also due to the pandemic it has certainly triggered the need for extra caution and due-diligence in particular on aspects related to foreign investments and the Myanmar economy. As such, it would be prudent to solicit legal advice on any projects or commercial arrangements and conduct due diligence on local partners or traders before entering into any commercial arrangements and injecting any funds. Having said that, we understand that the change of government does not change the official position on FDIs and the government has been putting effort in encouraging foreign investors to resume their operations. In order to encourage and facilitate cross-border trading with China, CMB issued a directive allowing importers and exporters to open Chinese yuan account in the designated banks and use Chinese Yuan/Myanmar kyat as payment method. We hope to see a growth in FDI and M&A transactions in the near future. At this juncture, it is strongly recommended that the situation be monitored closely.

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