Myanmar's New Competition Law: An Important First Step in the Right Direction

Authored by:
David Fruitman
Regional Competition Counsel/Senior Advisor
david.fruitman@dfdl.com

On February 24, 2015, Myanmar enacted its competition law (The Pyidaungsu Hluttaw Law No. 9 /2015) ("**Competition Law**"). The Competition Law will come into force at a time determined by the President and is currently awaiting the expiry of the statutory 90-day waiting period within which the Myanmar government is to introduce rules and regulations to implement the Competition Law ("**Rules**").

The Competition Law sets a foundation for creation of a regulatory body with investigative and adjudicative powers, addresses the three standard pillars of competition law (agreements that restrain competition, abuse of dominance and mergers) as well unfair trade practices ("**UTP**"), establishes a comprehensive penalty regime with the potential for private damages, conviction of senior managers and a leniency policy.

Below we summarize the key provisions of the Competition Law and identify some areas which will we believe will need to be clarified in the Rules in order to most effectively implement Myanmar's competition policy.

ASEAN BACKGROUND

Pursuant to Article 41 of the ASEAN Economic Community Blueprint ("**AEC Blueprint**"), the ASEAN Member Countries ("**AMCs**") agreed to, among other things, endeavour to introduce competition policy by 2015. Competition policy is not defined in the AEC Blueprint; however a discussion of its meaning can be found on the website of the ASEAN Experts Group on Competition:

> *"Competition policy can be broadly defined as a governmental policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets. Competition policy basically covers:*
>
> *a. Set of policies that promote competition in local and national markets, such as introducing an enhanced trade policy, eliminating restrictive trade practices, favouring market entry and exit, reducing unnecessary governmental interventions and putting greater reliance on market forces; and*
>
> *b. Competition law which comprises of legislation, judicial decisions and regulations aimed at preventing anti-competitive business practices, abuse of dominance and anti-competitive mergers."*

This reflects a common conception of competition policy as incorporating both more general government policies that relate to competition as well as a comprehensive general competition law. It is thus somewhat surprising that the AMCs have, with one exception, interpreted Article 41 as requiring

the implementation of a comprehensive competition law by 2015, despite this not being explicit in the AEC Blueprint.

Prior to February 24th, 2015, each of Indonesia, Malaysia, Singapore, Thailand and Vietnam had implemented general competition laws with varying degrees of effectiveness; whereas the Philippines has instead pursued a different strategy of promoting competition policy without such a law. The remaining AMCs (Brunei, Cambodia, Laos and Myanmar) were known to be working to enact their respective comprehensive competition laws.

On February 24th, Myanmar leapt into the competition law arena and joined the estimated 127 jurisdictions with a competition law[1] and, in so doing, increased the pressure on the remaining AMCs who have not yet taken the step of having a competition law enacted. It is interesting to note that prior to the enactment of the Competition Law, Myanmar arguably already had a general competition law as its 1947 Constitution states that "*private monopolist organizations, such as cartels, syndicates and trusts formed for the purpose of dictating prices or for monopolizing the market or otherwise calculated to injure the interests of the national economy, are forbidden*." While it is our understanding that this provision has never been implemented in practice, it has also not been repealed by succeeding constitutional documents and is therefore still arguably in force.

While it is commendable that Myanmar has taken this essential first step of enacting competition legislation, it will take some time before the effectiveness of the Competition Law and its implementation can be assessed and, as discussed below, this will depend, in part, on the Rules and the decisions of the regulatory authority.

WHAT THE COMPETITION LAW DOES

The Competition Law covers four main substantive areas:

a. Acts Controlling Competition;
b. Monopolizing Markets;
c. Mergers; and
d. UTP.

In addition, the Competition Law outlines its aims and general principles, sets the foundation for the regulatory authority responsible for implementing the Competition Law, establishes a private cause of action, sets penalty levels for infringements and outlines some procedural measures such as a right of appeal and a leniency policy. In other words, the Competition Law introduces the basic framework of a sophisticated competition regime; although with significant details to be provided by the Rules and the regulatory authority.

WHO IS COVERED BY THE COMPETITION LAW

The Competition Law does not have a specific provision stating to whom it applies; in contrast to similar legislation in Vietnam (which applies to "Enterprises") and Thailand (which provides for types of entities to whom the law does not apply). Rather than a general statement of the Competition Law's

[1] Estimated as of October 2013 in the International Cooperation in Competition Law Enforcement report presented at the Meeting of OECD Council at Ministerial Level, 6-7 May, 2014.

application, each substantive prohibition in the Competition Law states the type of entity to which it applies:

- the Section 13 prohibitions apply to any person;
- the monopolization (Section 15) and UTP prohibitions (Sections 18-29) apply to Business Persons; and
- the merger provisions apply to Enterprises.

The Competition Law defines two principal types of entities in Sections 2(i) and (j) respectively:

> **Economic Enterprise** means *any enterprises engaged in any activity of production, distribution, purchasing, selling, importing, exporting and exchanging as well as any service enterprises;* and
>
> **Business person** means *a person who engages in any economic enterprise or service enterprise. In this expression, organizations engaging in economic activities as well as rendering services shall also be included*.

While not explicit, it appears, based on the statutory language, that State-Owned Enterprises will be regulated under the Competition Law as they arguably fall within these definitions if they are engaged in any of the described activities; however it appears that business or trade associations may not be addressed under the Competition Law. Regardless of any further clarification that may be provided in the Rules, it will be interesting to note how Section 8(b) will be applied and the impact it will have on the application of the Competition Law as it provides the regulatory authority with the power to establish exemptions for "*essential businesses, small and medium scale businesses for the interests of the country*."

WHAT IS THE REGULATORY AUTHORITY ESTABLISHED UNDER THE COMPETITION LAW

The principal regulatory authority under the Competition Law will be the Competition Commission; with specific functions to be carried out by various committees and, in particular, an Investigation Committee which will be established to investigate conduct that may infringe the Competition Law.

While Section 7 states that the Competition Commission will be independent, very little other information is provided in the Competition Law with respect to the composition or size of the Competition Commission or what qualifications the government will require for its members. The Competition Commission is granted a broad range of powers which include:

(a) creating exemptions to the Competition Law for essential industries and SMEs;
(b) setting thresholds to determine when a proposed merger will be deemed uncompetitive;
(c) setting thresholds to determine when a business will be deemed to be monopolizing;
(d) instructing businesses to reduce their market share to a prescribed amount when the Competition Commission determines that its market share harms competition;
(e) limiting the market shares and prohibiting sales promotions of a business deemed to be monopolizing; and
(f) arranging exemptions from punishment for those who admit their wrongdoing at court.

Of particular note are items (d) and (e), as they appear to be broad powers granted to the Competition Commission outside of the scope of the substantive prohibitions discussed below. We hope that further guidance will be provided in the Rules in relation to these powers.

The Investigation Committee is created pursuant to Section 9 of the Competition Law with 5 to 9 members (which suggests that the Commission itself must have at least 5 members) with each member having experience and knowledge in the subject of economic, legal, commerce, agriculture or accountancy. In Section 11(c), the Competition Law addresses the potential bias of the Investigation Committee by prohibiting Investigation Committee members from investigating industries to which they are related. The Committee's powers include:

(a) interrogating witnesses and examining documentary evidence; and
(b) entering premises for the purpose of conducting any investigation or searching.

WHAT IS THE GEOGRAPHIC SCOPE OF THE COMPETITION LAW

This is an area where we expect the Rules to provide further clarification as the Competition Law does not include express guidance on its geographic jurisdiction. It is therefore not clear whether the Competition Law will apply to entities or conduct outside of Myanmar or whether an effects or implementation test will be used to determine jurisdiction. In contrast, the competition laws of Malaysia and Singapore each expressly incorporate actions within their jurisdiction that may take place outside of their respective countries where there such actions have an effect within the relevant country.

WHAT IS THE RELEVANT MARKET

The Competition Law defines "Market" in Section 2(m) as "*any location where transaction between the seller and the buyer is carried out*" and "Market Share" in Section 2(n) as the "*percentage or ratio of goods sold or services by the business person out of the total amount of market sale*." Competition analysis normally refers to a defined relevant market which includes both a relevant product market and a relevant geographic market. In traditional analysis, this market definition is often the basis of the determination of market share, market power and the scope and effect of relevant conduct.

As "market" is an important aspect of the Competition Law's prohibitions, we do not expect that it will remain limited to this narrow geographic definition. We anticipate that the Rules will implement a more comprehensive interpretation of "market" as well as provide guidance on the methodology of how a relevant market will be determined. As examples, we note the extensive treatment of relevant market in Vietnam's competition law and accompanying regulations and the definition of market in the Malaysian competition law which expressly incorporates both geographic and product dimensions.

WHAT IS AN UNDERTAKING TO CONTROL COMPETITION

This term is defined broadly in Section 2 as "*the performance of reducing or preventing the competition among businesses occurred in the market. In this term, agreements controlling the competition, abusing of dominant position in the market and monopolizing individually or collectively shall also be included*". However, this term is also used to identify Chapter VII of the Competition Law which contains Sections 13 and 14. The use of this heading for these sections creates additional uncertainty in how Section 13 will be implemented. As drafted, the Section 13 prohibitions cover a broad range of activities including:

a. Fixing prices (although the included language "by compromise" suggests that only actions through an agreement are addressed);
b. Agreeing to control or limit competition;
c. Abusing a dominant position;
d. Acting to control or limit a market;
e. Controlling or prohibiting access to a market or resources;
f. Limiting or controlling investment, manufacturing, market acquisition, technology or research; and
g. Bid-rigging.

Unfortunately, significant guidance will be required to interpret this section as there does not appear to be any distinction between:

- horizontal and vertical activities;
- unilateral and joint/collusive conduct; or
- *Per se* (fixing prices) and potentially Rule of Reason (abuse of dominant position) conduct.

If the definition of undertaking to control competition is meant to inform the interpretation of Section 13, this suggests that Section 13 should be broadly interpreted as other relevant chapter headings are very specific – the Chapter VIII heading refers to monopolizations, the Chapter IX heading to UTP and the Chapter X heading to mergers. Arguably if Section 13 was meant to be narrowly interpreted, the Chapter VII heading would have been drafted in an equally specific and narrow manner (*e.g.* "Anti-Competitive Agreements").

While it seems reasonable to consider that Section 13 is meant to focus on collusive conduct given the context of the remaining prohibitions and the reference in Section 14 to agreements that restrict competition, specific guidance in this regard is required. Additionally, guidance as to whether market share or effects thresholds will be applied in respect to the conduct will also enhance understanding of the relevant prohibitions.

Based solely on the statutory language, it appears that exclusive distribution agreements, geographic sales restrictions and even some joint ventures might all be prohibited *per se* under Section 13 regardless of whether they would be prohibited under more directly applicable sections of the Competition Law. As a further example of required clarification, it will be necessary to distinguish between the prohibitions under Section 13, Section 15 and Section 27 in relation to abuse of market power given the differences in potential imprisonment terms and the potential exemption available under Section 14. One potential distinction may be whether the impugned conduct is unilateral or joint. Alternatively, Section 13 may only apply where there is an agreement to abuse dominance; whereas Section 15 may apply to unilateral and concerted joint abuses. Although this framework does not address a basis to distinguish the Section 27 prohibition on unfair abuses.

Given that the penalty for infringement of Section 13 includes potential imprisonment, we look forward to further guidance being provided to determine the scope of the Section 13 prohibitions as well as details with respect to the specific nature of the conduct prohibited so that entities will be able to determine if their conduct is problematic. If the example of Vietnam's competition law is considered, while the law refers explicitly to prohibition of enumerated types of agreements and the accompanying

regulations provide significant detail in their interpretation; there is still no express indication of whether vertical agreements are incorporated in the relevant provisions and this issue has only been addressed through statements of the regulatory authority.

ARE THERE ANY EXEMPTIONS TO THE SECTION 13 PROHIBITIONS

Under Section 14, the Competition Commission shall grant an exemption for a specified period for any agreements which would otherwise be prohibited, if the agreements work to the benefit of consumers by:

a. Increasing efficiency;
b. Developing technology;
c. Developing technology standards or increase quality of products;
d. Relating to issues of operations, distribution or payment that do not relate to price;
e. Promoting competitiveness of SMEs; and
f. Promoting the competitiveness of Myanmar businesses internationally.

As the Competition Commission has been granted the power to determine the necessary forms, procedures and regulations for the application of an approval to limit competition, we expect that some form of notification or approval process will be implemented to permit exemptions to be issued under Section 14. We hope that further guidance will also be provided as to how these standards will be applied with respect to a given anti-competitive agreement (e.g. will any increase in efficiency be sufficient or will such efficiencies be required to outweigh the anti-competitive impacts in order for an exemption to be granted?). In addition, we hope that the Rules will clarify if Section 14 only acts to provide exceptions in relation to conduct prohibited under Section 13 or if it provides a potential exemption to any agreements otherwise prohibited under the Competition Law.

HOW IS MONOPOLIZATION DEALT WITH UNDER THE COMPETION LAW

Section 15 of the Competition Law prohibits monopolizing markets by a business person through:

a. Controlling prices of goods or services;
b. Limiting the availability of a good or service with the aim of controlling prices;
c. Reducing the availability of a good or service without appropriate reasons or lowering the quality of a good to reduce market demand;
d. Controlling or restrict the geographic market for sales to prevent entry and control market share; and
e. Interfering in another business' operations in an unfair manner.

With the statutory reference to "a business person", it is not clear whether Section 15 applies to only unilateral conduct or whether joint conduct is also addressed. While it is not clear how "monopolization" of a market will be interpreted, we expect that this will focus on traditional abuse of dominance analysis as the Competition Commission has the power to determine the market share, sale volume, capital, number of shares and the amount of assets which are considered to be monopolizing. At this stage, it is not clear how the Competition Commission will apply and implement the Section 15 prohibitions including issues such as whether some form of substantial lessening of competition test will be applied. To that effect, we note that some form of threshold effects or objectives are expressly

contemplated in regards to certain of the prohibited conduct (*e.g.* "without appropriate reasons", "aim of controlling prices", "in an unfair manner"). Finally, guidance is required on the distinctions in treatment of abuse of market power in Sections 13, 15 and the UTP prohibitions in Chapter IX. These types of issues will greatly impact the implementation of the Competition Law and we therefore anticipate that they will be addressed in the Rules. An additional potential concern with leaving thresholds for later determination by the Competition Commission is illustrated by Thailand's example where the abuse of dominance thresholds were not introduced until approximately 8 years after its competition law was enacted, leaving Thailand's abuse of dominance regime effectively unimplemented during this period.

While there does not appear to be an express exemption contemplated for the Section 15 prohibitions, Section 16, which is the only other section in Chapter VIII, states that the Competition Commission can approve coordination among businesses (perhaps suggesting that joint abusive conduct is addressed within Section 15) or acquisitions in order to sustain a business or create a new business. As this broad power addresses both anti-competitive agreements and mergers, it is hoped that the Rules will provide further guidance with respect to the implementation of Section 16 including the application process for such an approval.

IS THERE A MERGER REGIME

The Competition Law provides for a merger regime although a number of issues are left for later determination. Section 30 defines mergers to include: affiliations, amalgamations, acquisitions, joint ventures, and mergers by other means prescribed by the Competition Commission. The Competition Law then prohibits mergers where:

a. the merger is intended to lead to excessive domination of the market;
b. the merger will reduce competition in a market with few competitors; or
c. the resulting market share exceeds the thresholds prescribed by the Competition Commission.

However, Section 33 permits an otherwise prohibited merger where:

a. the resulting enterprise remains a SME;
b. one of the merging parties was, or was likely to become, bankrupt; or
c. the merger promotes exports or development of technology, systems or innovation.

The Competition Commission has been granted the power to both:

a. determine the necessary forms, procedures and regulations for the application of an approval of a merger; and
b. determine the market share, sale volume, capital, number of shares and the amount of assets which may affect the fair competition due to a partial or full acquisition or merger.

Given likely concerns with issues such as jurisdiction, industrial policy, availability of market data, relevant market definition, and concerns raised by thin markets and SOEs, it will be interesting to see how the merger regime develops and we expect significant additional details to be provided in the

Rules. Vietnam provides an example of how these types of issues may impact on the implementation of a merger regime. Another useful comparative is Thailand where the 1999 legislation provided for a merger notification and approval scheme, but determination of relevant merger thresholds (similar to those noted in item b above) were left for determination by the regulatory authority. To date, no relevant thresholds have been prescribed and the merger regime remains effectively unimplemented in Thailand. In further contrast, in Malaysia, there is no merger control regime and in Singapore, the merger notification regime is voluntary.

UTP

The majority of the substantive sections of the Competition Law deal with UTP which should not be a surprise given the example provided by Vietnam, where UTP enforcement has been the most effective aspect of its competition law regime to date. Section 17 of the Competition Law defines unfair competition to include:

a. Misleading customers;
b. Disclosing business secrets and information;
c. Intimidating other businesses;
d. Damaging other businesses' reputations;
e. Interfering with the activities of other businesses;
f. Advertisements and sales promotions that constitute unfair competition;
g. Discrimination against other businesses;
h. Selling lower than production cost and landed cost;
i. Abuse of business power and encourage violations of a business' contracts with a third party; and
j. Any act prescribed as such by the Commission.

Sections 18-28 of the Competition Law elaborate on the enumerated conduct by providing more specific prohibitions in relation to each defined form of UTP. In addition, section 29 prohibits businesses from importing goods in an unfair manner or selling such goods at below market prices.

Given the breadth of certain of the UTP prohibitions and the apparent overlap with other prohibitions under the Competition Law, we hope that the Rules and the Competition Commission will provide more comprehensive guidance as many activities that appear prohibited may be pro-competitive or at least neutral when practiced in appropriate circumstances. For example, while Section 37 appears to focus the prohibition on selling below production or landed costs to situations where there is an intention to reduce competition, guidance is required on how costs will be calculated (*e.g.* average, marginal, total, etc.) as well as whether any justifications (*e.g.* temporary loss leader, out dated merchandize, excessive inventory, matching competitors, etc.) will be permitted.

WHAT ARE THE PENALTIES UNDER THE COMPETITION LAW

The Competition Law contemplates both administrative and criminal penalties. With respect to the former, the Competition Commission is entitled to warn, impose prescribed fines or temporarily or permanently close a business where there has been a breach of the Competition Commission's

restrictions, stipulations, directives and regulations. Where a prescribed fine is not paid, it may be collected as an arrear of land revenue.

Other penalties are set out in Chapter XI as follows:

(a) for a violation of Sections 13 (undertakings to control competition), 23 (false advertising), 24 (unfair promotional activities) or 29 (importing through unfair means): imprisonment of up to 3 years, a fine of up to 15 million Kyat or both;
(b) for a violation of Sections 15 (monopolizing a market), 19 (disclosing business secrets), 22 (disturbing other businesses), 26 (selling below costs), 27 (abusing market power unfairly), 31 (prohibited mergers) or 32 (mergers above the prescribed market share): imprisonment of up to 2 years, fine of up to 10 million Kyat or both;
(c) for violations of sections 18 (misleading consumers), 20 (intimidating businesses), 21 (disseminating false information), 25 (discrimination) or 28 (enticing breach of contract): imprisonment of up to one year, a fine of up to 5 million Kyat or both;
(d) for failure to submit documents or appear as a witness without sufficient cause: imprisonment for up to 3 months or a fine of up to 100,000 Kyat.

Of particular note, individuals directing a business may be convicted along with the relevant business unless such person can prove the offense was committed despite his/her intentions and due diligence to prevent such offense.

IS THERE PRIVATE ENFORCEMENT

While no independent right for private enforcement appears to be contemplated under the Competition Law, there is provision for civil actions for damages against any person convicted under the Competition Law.

IS THERE A LENIENCY POLICY

While not expressly described in the Competition Law, it is clear that some form of leniency policy is contemplated as the Competition Commission has the power to work with courts and law offices to provide relief from penalties for those who confess to breaches of Section 13. There is also a power referenced under Section 8(p) to provide relief for parties who confess that does not appear to be limited to Section 13. As a leniency policy is generally accepted as one of the most powerful tools for the detection of anti-competitive agreements, we anticipate additional details on the implementation of these leniency powers to be provided.

IS THERE A RIGHT OF APPEAL

There is a right to a final appeal from an order or judgment of the Investigation Committee or another Committee to the Competition Commission within 60 days. It is unclear how this will work in practice as the Investigation Committee does not appear to have the right to make orders or judgments, but instead, has powers to investigate and then report on its findings to the Competition Commission. In contrast, Section 8(d) provides the Competition Commission with the power to make decisions in respect to matters raised by committees or working bodies. Hopefully this right of appeal will be addressed in the Rules to ensure that it is effective.

WHAT DO YOU HAVE TO KNOW

- The Competition Law is not currently in force, but it provides the basic framework of a comprehensive competition policy in Myanmar;
- The Competition Law prohibits certain anti-competitive acts, abuses of dominance, mergers and UTP;
- There is a significant amount of detail and guidance required from the forthcoming Rules and the Competition Commission in order to ensure that the Competition Law is effectively implemented and that its provisions are properly understood;
- The Competition Law may change the way Myanmar businesses conduct themselves with a broad framework of prohibited anti-competitive conduct and UTP;
- Businesses should start early to audit their conduct to determine potentially prohibited activities so that they are ready when the Competition Law comes into effect;
- A leniency policy, when implemented, changes the risk dynamics of participating in anti-competitive agreements and businesses will have to take this into consideration before entering into or continuing to participate in any such agreement;
- The Competition Law will have teeth – there are strong penalties (*e.g.* imprisonment of directing minds) that are potentially applicable.