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Also featured:

DEAL: Myanmar non-recourse financing first explained pg 14

Milbank and VDB Loi represent pan asia majestic eagle limited in first ever non-recourse, cross-border financing in Myanmar pg 14
VDB Loi in Myanmar

VDB Loi Myanmar, a leading Myanmar legal and tax advisory firm, employs over 40 lawyers and advisors in Yangon and it’s fully operational office in Nay Pyi Taw. The firm is a leader in foreign investment, M&A, telecommunications, energy, taxation, and real estate/infrastructure. Our experience includes a multibillion dollar telecom investment, the Thilawa Special Economic Zone, Hanthawaddy International Airport, the privatization of 3 SOEs, a US$400M mixed-use real estate development and assistance to 3 of the oil and gas supermajors.


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Partners

Jean Loi is widely recognized as one of the regions most experienced professional advisors with a CPA background. She was formerly a partner with PricewaterhouseCoopers in Southeast Asia. As the managing partner of VDB Loi, Jean has extensive experience with licensing, energy, power, property and consumer product projects. Her Myanmar tax experience is unsurpassed. She lives in Yangon.

Edwin Vanderbruggen is VDB Loi’s partner responsible for Myanmar. Formerly with Loyens & Loeff and a partner at DFDL, Edwin lives full-time in Yangon, where he leads a team of approximately 40 lawyers and advisors. He has advised three of the “supermajors” on their oil and gas projects in Myanmar, advised on the structuring of the Thilawa SEZ and the construction of a 500MW power plant, assisted a number of multinational telecoms in relation to Myanmar’s recent tender, and currently acts for one of the licensed telecom operators on the licensing of a multibillion telecommunications network.

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look for signage on the right directing
you to our office

Offices in the region

Emerging markets are special.
So, we rethought the law firm.
After a rather long wait, the Post and Telecommunications Department (PTD) of the Ministry of Communications and Information Technology (MCIT) has just issued the first of several Telecommunications Rules under the 2013. The Licensing Rules are issued first, which means that companies can now submit their applications for a telecom license. The Licensing Rules (Notification No.16/2014, 14 October 2014) provide for 4 types of telecom licenses, notably the Network Facilities Service (Individual) License (NFS (I) license), the Network Service License (NS license), the Application Service License (AS license) and the Network Facilities Service (Class) License (NFS(C) license). The application form for each type of license is posted on the MCIT website and can be used to prepare and submit an application as of from this moment.

Which license should you apply for?

Each license enables the licensee to carry out activities covered thereunder. The scope of activities allowed under the four types of licenses does not overlap each other. This means the telecommunication industry players are required to cooperate, unless one obtains more than one of these licenses from the PTD. A company is not explicitly prohibited by the Licensing Rules to hold more than one license, but in practice this may be subject to the anti-monopoly review on a case by case basis.

Generally speaking, only NFS (I) licenses or NFS(C) licenses allow the licensee to own telecommunication facilities and infrastructure. In contrast, NS licensees and AS licensees are explicitly excluded from owning such facilities or infrastructure. NFS (C) licensees provide passive telecommunication network infrastructure to NFS (I) licensees, which further provide NS licensees and AS licensees with network facilities and infrastructure, or transmission capacity.
The detailed scope of activities under the four licenses is elaborated as the table below.

<table>
<thead>
<tr>
<th>LICENSE</th>
<th>NFS-I</th>
<th>NS</th>
<th>NFS-C</th>
<th>AS</th>
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</thead>
<tbody>
<tr>
<td>Purpose/authorized activities</td>
<td>Provide any public or private telecommunications services (international or national) to the public and/or other licensees</td>
<td>Lease transmission capacity from NFS-I licensee and/or other licensee to provide telecommunications services (international or national) to end users and/or other licensees</td>
<td>Construct, maintain and lease passive infrastructure to an NFS-I and/or construct, deploy and maintain a telecommunications network solely for the self-provision of telecommunications</td>
<td>Provide telecommunications applications services without the need for a subscriber number, such as Internet Service Provider (ISP)</td>
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<td></td>
<td>Construct, maintain and operate a network</td>
<td>Provide all services authorized by NS and AS licenses</td>
<td>NFS-C licensees cannot provide interconnection with networks, whether public or private; or closed user group telecommunications services that are offered to any person</td>
<td>Lease transmission capacity directly from an NFS-I licensee and/or other licensee in order to provide public and private telecommunications services on a national basis to end users and/or to another licensee</td>
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<td></td>
<td>Lease all or part of a network to another licensee</td>
<td>NS licensees cannot construct, maintain or operate networks, except for switches, routers and processing equipment needed for the licensed services</td>
<td>AS licensees cannot construct, maintain or operate networks, except for switches, routers and processing equipment needed for the licensed services</td>
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</tr>
<tr>
<td></td>
<td>An NFS-I licensee is licensed to perform all NS, NFS-C and AS activities</td>
<td></td>
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</tbody>
</table>

| Examples of activities | Construct, maintain, operate, and provide telecommunications services over: | Resale of wireline connectivity services | Deploy and maintain passive network infrastructure for civil engineering and non-electronic elements, including but not limited to: | Public payphone services |
| | Terrestrial fixed line transmission facilities | Resale of terrestrial wireline connectivity services | Towers | Public payphone services |
| | Terrestrial radio transmission facilities | International and domestic network transport and switching services | Masts | Audiotext hosting services provided on an opt-in basis |
| | Mobile base station facilities | | Ducts | Directory services |
| | Submarine cable facilities | Resale of International Gateway Services | Trenches | ISP services |
| | International Gateway Services facilities | | Poles | Public access center services |
| | Satellite earth station facilities | | Dark fiber | Messaging services |
| | Other Myanmar-based satellite facilities that can transmit telecommunications services | | | Private line voice and/or data services (including leasing Wide Area Network capacity to third parties) |
| | | | | Value-added services |

How long will it take to receive the license?

Based on the Licensing Rules, in terms of application of NFS (I) licenses and NS licenses, the PTD is obligated to release its decision within 60 days insofar as the applicant’s documents are complete. This 60 days period shall be recalculated as of the date when additional information is required by the PTD. The PTD may extend this 60 days review period at its sole discretion while notice of the extension and reasons will be given to the applicant in advance. There is no identical guaranteed review period for NFS (C) license application or AS license application.

However, in practice we expect longer delays. This is the first time that a license application can be submitted, and there are a lot of companies that will submit at the same time. It is reasonable to expect that the process will be congested for some time to come.

What do you need to apply?

The application form posted by PTD lists which information and documents must be provided as part of an application for a telecom license. These common documents for the four types of license are:

1. A cover letter;
2. The completed Application Form: to be filled with particulars of the Applicant, e.g. particulars of directors, foreign shareholders;
3. Additional responses: only applies if there is not enough space in the Application Form;
4. Company registration certificate: according to the Form the Applicant must be an established company under the MCPA; and
5. MOA and AOA of the Applicant.

Additionally, the applicant for NFS(C) licenses needs to attach a certificate of paid up capital (at least 25,000,000 MMK), and the applicant for NFS licenses needs to attach a certificate of paid up capital (at least 100,000,000 MMK) as well as its technical plan.

The applicant of NFS (I) licenses has more onerous burden. In addition to the common documents, it needs to further provide the following materials:

- Technical plan: shall state detailed description of any proposed network infrastructure, such as a diagram of the network infrastructure and technologies to be owned and etc.
- Business plan: including proposed business operation plans, business strategies, details of any preliminary agreements with licensees and vendors and etc.
- Certificate of paid-up capital: at least 100,000,000 MMK.
- Financing plan: sources of funding and amounts from each source such as loans and lines of credit, timeframe for receiving funds, repayment terms for loans, facilities, letters of intent, guarantor letters and other documents demonstrating access to financing and etc.
- Audited accounts: audited P/L, FP, cash flow statements and auditor’s reports for the last THREE years; or the same documents of any entity holding 15% and above interest in the applicant.

How can a company apply if it is not yet established?

The application form was prepared on the basis of the situation where an existing company applies for a license. For example, a company which is already active in telecommunications in Myanmar can apply for a telecom license under the transition rules of the Licensing Rules. Or, a company that carries on another type of business may want to extend its scope of activity and applies for a telecom license to the PTD. In many cases, however, the company will not yet exist. In fact, the company will only be setup if the license is awarded by the PTD. This is the case for two reasons. Firstly, the shareholders may see little point in setting up a company if the company cannot receive the necessary permissions to conduct the business it was intended for. Secondly, more importantly perhaps, in practice in Myanmar the Company Registration Office will refuse to establish a company with a business objective requiring a license from PTD unless with the permission from the PTD. So, you basically need the license before you can setup the company to apply for the license.

By the same token, an applicant which has not yet been established does not, of course, have audited financial statements for three years.

How can this be resolved? Ideally, the application form would have foreseen this issue. Nevertheless, the Licensing Rules or the Telecommunication Law do not mean to exclude applicants in these rather common circumstances. Therefore, depending on the circumstances, we believe that an applicant is allowed to submit an application based on a company which is in process of incorporation. However, in certain cases, our advice is to go ahead with company incorporation first. So, there is no set answer for this.

Likewise, the parent should in our view be allowed to submit financial statements for three year as required in the Form.

What happens in case the direct parent is a foreign, recently established special purpose company, as is often the case in relation to investment in Myanmar? The prevailing practice to date of other Ministries has been to accept the documentation of the ultimate parent company in such a situation. The documents requirement of three years of financial statements is common in Myanmar, practically the standard. It is almost never interpreted strictly in the sense that if the investor uses an intermediary company with less than three years track record, such investor is excluded. It is mostly meant as a guideline, as a document that the authorities would prefer to have if it is available. Or, authorities do want the three year track record but they do not particularly care that the investor uses an intermediary company as long as the group, in substance, does have the required experience and documentation.

Do you need a local partner to get a telecom license?

Notification 49/2014 and its predecessor Notification 1/2013, together with the Schedules to the Foreign Investment Rules, determine for which activity a foreign investor would need a local joint venture partner. None of the so-called restricted activity refers to telecommunication services per se. There is some peripheral business activity which might resort under other restrictions such as reselling sim-cards, or performing financial services. But strictly with reference to the telecom licenses that are now available in Myanmar, there is no legal requirement for a local partner.

The “business plan” and “financial plan” should be made on MIC standard

For NFS (I) telecom licenses, a detailed business plan and financing plan are among the key requirements for application. In our view, applicants would do well to read this requirement to mean a business plan and a financing plan which is in accordance with MIC standards and practices. This makes perfect sense for applicants that in any case consider submitting their project to the MIC. Why make two plans? What would happen in case there are differences between the two plans? In any event, the MIC Proposal is also shared by the MIC with the PTD for projects that require a telecom license, so it would be inadvisable to use plans which are not identical.
Can a company with a telecom license apply for an MIC Permit?

Assuming for a moment that the application for a telecom license is indeed granted, does this automatically mean that the company will normally be allowed to apply for an MIC Permit? The two issues are actually not connected. There is no provision in the Telecommunications Law, the FIL or the FIL Rules to guarantee a successful applicant of a telecom license of an MIC Permit. In fact, there are no hard and fast written rules on the conditions to qualify for an MIC Permit. In practice, the MIC will weigh the merits of a proposal as a whole, but capital expenditure and investment cost usually play an important role. To date, the only telecom companies that have received an MIC Permit are the operators, tower and fiber companies, and certain network service companies. Based on Notification 49/2014 service activities which can be undertaken by citizens except in case of high capital investment, employment, technology, can no longer benefit from income tax incentives.

Logically speaking, we think that operators and service providers which invest in equipment and infrastructure will normally be considered a good candidate for an MIC Permit.

What comes first? The telecom license or the MIC Permit?

In a case where a business activity can only be undertaken with the permission of another Ministry, the MIC will not take the proposal to a vote until such permission is obtained, or at least until the relevant Ministry has confirmed it has no objection to the MIC Permit being issued. Our recommendation is to submit the application for a telecom license and the MIC Proposal (should the company indeed apply for an MIC Permit) at the same time. This can be jointly done with the application to register the company if that has not already been done. Little can be gained from trying to do one after another anyway, but the PTD will have to approve before the MIC can finalize the process.
FINANCING TELECOM NETWORK INFRASTRUCTURE IN MYANMAR

While at least three mobile network operators roll out their networks, a number of tower and fiber companies are reaching out to commercial lenders, mezzanine finance providers and development financial institutions for their financing needs. A number of deals have already been announced. Central in such financing transactions, which are among the first ever international commercial lending deals with security on Myanmar assets, are the network assets.

What are some of the typical land use right issues of tower companies and fiber companies?

In most places, telecommunications network assets and infrastructure is still in course of being deployed. It is fair to say that the regulatory framework of land use for network assets by foreign invested companies has not yet caught up with the needs of the operators. Although the Foreign Investment Law and the Telecommunications Act both provide in rules on land use, the implementation of these and existing land laws continues to cause delays and uncertainty. These are some of the issues we often encounter:

- The permission for the use of rural land will in nearly all cases require the authorization of local authorities. Leases are being signed with local land right holders, and it is in practice in our experience possible for tower companies and fiber companies in most cases to obtain local approvals (at village level) for the use of the site. It is sometimes unclear whether the particular authority that has supplied the approval in fact has that authority. For example, certain type of Village Land is destined for use by the village community, and it is unclear if the right of the person who signed the lease with the tower company falls into that category.

- In reality, we have seen very few leases processed by MAI to date. In practice, the Myanmar Investment Commission (MIC) is unable to approve leases on farmland or agriculture land without the approval of the MAI. This means that one of the key requirements of the FIL, notably the approval by the Myanmar Investment Commission (MIC) of any lease granted to a foreign invested company, is subject to delays.

- With respect to the national authorities which administer farmland and agriculture land, which is in practice the most frequent type of land outside of urban areas, we have lobbied the President’s Office, the Myanmar Investment Commission and the Ministry of Agriculture and Irrigation to argue that use of a small portion of farmland or agriculture land does not require a change of use under the Farmland Act. We lost that argument, and as a result approval from the Ministry of Agriculture and Irrigation (MAI) (which in reality oversees the National farmland Management Committee) is required for any lease of farmland or agriculture land.

- In many areas, the lessors do not have the required land title documentation yet to evidence their rights to the land. This is particularly the case with land under the Farmland Act, which provides in Farmer Certificates, which are essentially the land title for the lessor. These Farmer Certificates are issued on an area per area basis, and many areas have not been serviced yet. So, whether this is an issue depends on the geographical area which the tower company covers.
Can tower companies and fiber companies obtain construction permits?

Construction permits for towers and fiber are still problematic in many areas in Myanmar. In practice, less than 200 actual construction permits have been issued based on our information from MCD, YCDC and the Ministry of Construction. Most notably because in several regions there is no way to obtain a construction permit for a tower or the concept of a construction permit does not exist. We note that PTD, as the principal regulator, is reviewing prospective infrastructure sites.

In Myanmar, the laws and regulations governing the permit for the construction of a building vary in function of the type of land as per its relevant land law. Only the major cities with Development Committees (CDC) have a clear legal basis for the authority to permit an actual construction permit (rather than a general use permit – see below) as in s.9 (t) CDC Law “granting permission for construction of private buildings within the Development Committee boundary limit and supervision thereof”. Only the CDCs have to some extent an actual process, an inspection, an evaluation. In practice, YCDC Notification 9/99 is the only comprehensive one in its kind currently in existence.

Outside the CDC areas, the only rule is that in very general sense, some type of permission for the use must be obtained from local regulators, not for the construction of the building in and of itself. These are the main types of land which are relevant for tower companies and fiber companies, and their respective rules on construction permits:

• With respect to “farmland” (and “garden land”), the Farmland Act and its implementing Rules do not provide in the permitting of a construction as such, but rather the use of such farmland for a building with a certain purpose. s.17 (f) Farmland Act of 2012 includes in the duties and authority of the Central Farmland Management Committee “to […] scrutinize and approve the submission of the Region or State Farmland Management Committee in respect of using the farmland to be required for a school, health center, hospital, clinic, library, market, cemetery or other buildings to develop the social life of the rural population”. s.80 d) of the Farmland Rules provides that, for such “other use” it suffices that “the project is sanctioned by the relevant ministry and its funds are likely to be available”.

• With respect to “village land” the general principle exists with respect to buildings that are used as residences under s.17 of the Village Act of 1908 which states that “a person who is not a resident of a village-tract shall not build any house, hut or enclosure, or take up his residence in the village-tract without the permission of the village committee”. Most tower companies have already obtained this village committee approval in each case where it intends to use village land.

• With respect to “vacant, fallow or virgin land”, again, there is no actual construction permit provided in the relevant law, but rather a permission for a certain use only. s.10 (d) of the Vacant Fallow Virgin Land Act (VFVLA) provides that “The Central committee shall permit the following land area of Vacant, Fallow and Virgin Lands in relation to […] Government allowable other purposes in line with law shall be permitted with the agreement and coordination with the Union Government of the relevant Ministry”. In addition, s. 12. states that “The Central Committee shall permit the right to use land in a case where application is made by Investors who have been permitted in accordance with Foreign Investment Law. Most tower companies and one fiber company already have both such permissions.
To the best of our knowledge, only few construction permits have been issued for rooftops or towers in urban areas, with significant differences from one city to another. In Mandalay we have noted significant progress, at least compared to Yangon.

For fiber companies, the problem is compounded by the fact that the authorities disagree whether facilities and stations accessory to fiber requires a construction permit.

Can a tower company create a mortgage on its immovable assets?

A foreign owned company in Myanmar is not ipso facto excluded from creating a mortgage on a tower site, including to the benefit of a foreign lender, but such requires the permission of the MIC and the Central Bank of Myanmar (CBM). This permission is currently in process for the first time.

Myanmar law recognizes six types of mortgages on immovable property, namely the simple, conditional sale, usufructuary, English, deposit of title deeds and the anomalous mortgage. Most of these are not used in current Myanmar practice. The “simple” mortgage seems to us most in line with international practice.

These are some issues we often encounter in connection with deployment of infrastructure:

- **Approval by the MIC:** A complicating factor is that foreigners are not allowed to “acquire immovable property by way of purchase, gift, mortgage, exchange or transfer” without special Government permission, which is granted by the Myanmar Investment Commission (MIC) after recommendation by the CBM.

- **Definition of “immovable property”:** One of the more comprehensive definitions of “immovable property” used in Myanmar law is found in the Registration Act: “immovable property” includes lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass”. There is some conflicting case law of the Myanmar courts with respect to the characterization of plant and installations as immovable property, but the definition of the Registration Act is often held to be determinative.

  The Government has taken the informal position in a Stamp Duty case that fiber constitutes an immovable property in the sense of the Registration Act.

- **Leased land can in theory be mortgaged in Myanmar:** Foreign invested borrowers would normally have a 50-year extendable lease, it is in practice important to know that a leased property can indeed be the subject of a mortgage under Myanmar law. In fact, unless the lease agreement provides otherwise a lessor can by law mortgage his interest in the immovable property. However, in practice nearly all leases, particularly leases of Government land state that the lessee is not entitled to transfer or mortgage his interest without the express permission of the lessor.

  The authorities have indicated that they will soon start with such registration, but without any fixed time frame.

- **Enforcement:** Security on any type of mortgage or fixed charge on immovable property can, as a matter of law, be enforced without the intervention of a court, subject to a number of conditions and restrictions. Most importantly, the mortgage deed must state the right of the mortgagee or chargee to foreclose without court intervention. In addition, a default must have occurred and have been notified to the mortgagor. Furthermore, the self-enforcement depends on the location of the immovable property in question. A mortgagee may foreclose on immovable property situated in certain designated towns without intervention of the court (nearly all towns feature on the list). In other cases, if the mortgage money has become due without payment or deposit, the mortgagee may file a suit for foreclosure with the court.

- **Can the land (and thus the buildings) be mortgaged at all?** A major issue in actual cases is whether the land right holder has the right to mortgage this particular type of land under the land law that corresponds with the land in question. The right to mortgage a property depends of the provisions of one of a dozen land laws. For example the Vacant, Fallow and Virgin Land Act provides that cabinet permission is required to create a mortgage on land that resorts under this category. Needless to say that the due diligence should focus on this issue as early as possible.

- **Perfection:** The perfection of most types of mortgages on immovable property in Myanmar requires besides a registration of the charge with the corporate authorities, an additional registration with the Deed Registration Office. Although the laws and regulations to perfect a mortgage on immovable property may exist, these rules are largely untested in practice. At present, we are working with the authorities to arrange for the registration of the first long term leases and secured interests.

- **Stamp Duty:** A stamp duty of 1.5% applies to most mortgages of immovable property, but a 3% rate applies in case there is possession by the lender.
Fixed and floating charge on the rights and assets of a Myanmar company

Myanmar law recognizes fixed charges on a specific fixed-asset or class of fixed assets to repay a loan. Under the Myanmar Companies Act, a fixed asset can be created on (at least) immovable property, uncalled share capital, book debts, movable property and stock in trade. A floating charge can under Myanmar law be created on “the undertaking or property of the company”. It has a defined value which takes effect over a range of property but not over any specific property until the occurrence of a future event, typically a default by the chargor.

- **Approvals by MIC is always necessary, even if unrelated to immovable property:** It is unclear in the law whether the approval of the MIC is needed to create a fixed and floating charge. However, the MIC has recently advised that the entire package must be submitted for their approval.

- **Perfection:** Most charges need to be registered by the chargor with the Company Registration Office. We have successfully completed this procedure. It takes about 10 days in our experience, provided the CRO does not require any prior approvals from other Government agencies. In case the borrower has an MIC Permit, the MIC must first approve the registration of the charge.

- **Enforcement:** As a matter of law, the chargee of a fixed and floating charge can appoint a receiver to enforce his rights over the secured assets. As is the case in English law, creditors with a fixed charge have a higher rank than those with a floating charge in a winding-up situation.

- **Stamp Duty:** The stamp duty rates for loan instruments themselves and for security agreements range between a nominal fee to 1.5% or 3% on the secured amount depending on the specific definitions and categories in the Stamp Duty Act. For loan instruments, these include “bond”, “mortgage deed”, “promissory note”, “bill of exchange”, “marketable debenture”; and “memorandum of agreement”. For security agreements, the most relevant categories are “mortgage deed” (including a mortgage of movables), “pledge” and “mortgage by deposit of title deeds”.

How can the shares of a Myanmar company be pledged?

A shareholder can under Myanmar law provide a guarantee to a lender and create a hypothecation or a pledge (assuming constructive possession can be assumed) on its shares in the company/seller. In practice, two layers of share pledges will often be called for, because sellers will frequently have a foreign holding company (more often than not in Singapore) which owns the shares in the Myanmar project company. It should be noted that enforcement, i.e. the transfer of the charged shares, will require approval from the foreign investment regulator, the MIC.

The legal title to a share is in Myanmar law transferred by the notation in the shareholder register by the board of directors. Under Myanmar corporate law, the directors have the right to refuse the transfer of shares from one shareholder to another in a number of circumstances.

Which authorities are involved for obtaining approvals and registrations for a security package?

By way of a quick overview of required approvals, permits and registrations, please refer to the below list:

- **MIC:** Security package, foreign exchange flows, assignment of shares (if any)
- **Ministry of Communications and Information Technology (MCIT):** MIC may request the recommendation from MCIT as this concerns a licensed activity
- **Central Bank of Myanmar/Ministry of Finance:** Foreign exchange flows
- **Company Registration Office:** Mortgage, fixed and floating charge (note: the register does not yet exist)
- **Land owner (likely a Government agency, state or region; approvals are needed at local and at Union level):** Approval of the mortgage
- **Attorney General Office:** May be asked to opine on the security documents
- **Deed Registration Office:** Mortgage, fixed charge on the leased land and buildings
- **Internal Revenue Department (state and region offices):** Payment of stamp duty

Charge on an onshore bank account

Although possible in theory, in practice Myanmar local banks are not accustomed to charges on bank account and likely refuse to acknowledge a charge without blocking the bank account altogether. Foreign banks are not yet allowed to operate, although this is expected to change in 2015.
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| **1 Purpose/authorized activities** | • Provide any public or private telecommunications services (international or national) to the public and/or other licensees  
• Construct, maintain and operate a network  
• Lease all or part of a network to another licensee  
• An NFS-I licensee is licensed to perform all NS, NFS-C and AS activities | • Lease transmission capacity from NFS-I licensee and/or other licensee to provide telecommunications services (international or national) to end users and/or other licensees  
• Provide all services authorized by NS and AS licenses  
• NS licensees cannot construct, maintain or operate networks, except for switches, routers and processing equipment needed for the licensed services | • Construct, maintain and lease passive infrastructure to an NFS-I and/or construct, deploy and maintain a telecommunications network solely for the self-provision of telecommunications  
• NFS-C licensees cannot provide interconnection with networks, whether public or private; or closed user group telecommunications services that are offered to any person | • Provide telecommunications application services without the need for a subscriber number, such as Internet Service Provider (ISP)  
• Lease transmission capacity directly from an NFS-I licensee and/or other licensee in order to provide public and private telecommunications service on a national basis to end users and/or to another licensee  
• AS licensees cannot construct, maintain or operate networks, except for switches, routers and processing equipment needed for the licensed services |

| **2 Examples of activities** | Construct, maintain, operate, and provide telecommunications services over:  
• Terrestrial fixed line transmission facilities  
• Terrestrial radio transmission facilities  
• Mobile base station facilities  
• Submarine cable facilities  
• International Gateway Services facilities  
• Satellite earth station facilities  
• Other Myanmar-based satellite facilities that can transmit telecommunications services | Provision of the following telecommunications services:  
• Resale of wireline connectivity services  
• Resale of terrestrial wireline connectivity services  
• International and domestic network transport and switching services  
• Resale of International Gateway Services | Deploy and maintain passive network infrastructure for civil engineering and non-electronic elements, including but not limited to:  
• Towers  
• Masts  
• Ducts  
• Trenches  
• Poles  
• Dark fiber | Provision of the following telecommunications services:  
• Public payphone services  
• Public switched data services  
• Audiotext hosting services provided on an opt-in basis  
• Directory services  
• ISP services  
• Public access center services  
• Messaging services  
• Private line voice and/or data services (including leasing Wide Area Network capacity to third parties)  
• Value-added services |

| **3 Application procedure** | Procedures for both NFS-I and NS are the same: A company must:  
• Complete the MCIT’s standard application form, providing all required information  
• Apply under the license category relevant to its intended activities  
• Submit the application to the Posts and Telecommunications Department (PTD)  
• Pay the application fee set by the MCIT, unless exempted under the Rules  
  - NFS-I application fee: 10,000,000 Kyats  
  - NS application fee: 5,000,000 Kyats | Procedures for both NFS-C and AS are the same: A company must:  
• Complete a standard registration form providing all required information  
• Apply under the license category relevant to its intended activities  
• Submit the registration form to the PTD  
• Pay a registration fee of 2,500,000 Kyats, unless exempted under the Rules  
**NOTE:** The MCIT will publish the standard application form on its website and will indicate the information that must be provided in the application |
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<tr>
<td>4</td>
<td>Application incomplete or inaccurate</td>
<td>- If the PTD/ MCIT thinks the information in the application is incomplete or inaccurate, it will give notice in writing and the applicant may amend and re-submit the application</td>
<td>- Failure to respond within <strong>30 days</strong> may result in rejection of the application</td>
<td></td>
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<tr>
<td>5</td>
<td>Timeframe for review and decision</td>
<td>- Approval or denial of application within <strong>60 days</strong>&lt;br&gt; - If the applicant is foreign or it is for International Gateway&lt;br&gt; - Services, then review period is <strong>90 days</strong></td>
<td>- Approval or denial of application within <strong>30 days</strong>&lt;br&gt; - If the applicant is foreign or it is for International Gateway Services, then review period is <strong>60 days</strong></td>
<td></td>
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<tr>
<td>6</td>
<td>Delays in review &amp; decision on license</td>
<td>If review exceeds <strong>60 days</strong>, the applicant will receive written notice explaining the delay and giving the expected review completion date</td>
<td>If review exceeds <strong>30 days</strong>, the applicant will receive written notice explaining the delay and giving the expected review completion date</td>
<td></td>
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<tr>
<td>7</td>
<td>Application approved</td>
<td>If the application is approved, the applicant must pay the applicable fees set by the PTD</td>
<td></td>
<td></td>
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<tr>
<td>8</td>
<td>Application denied</td>
<td>- If denied, the PTD must provide objectively justifiable reasons in writing&lt;br&gt; - The applicant may reapply but must submit a new application and pay a new application fee</td>
<td></td>
<td></td>
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<tr>
<td>9</td>
<td>Qualification requirements</td>
<td>Not specified in the Proposed Licensing Rules</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>License period</td>
<td><strong>15 years</strong>&lt;br&gt;No indication in the Proposed Licensing Rules whether this period is extendable; See license renewal (#13)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>New or additional services</td>
<td>- A written request must be sent to the PTD and approval obtained for offering additional networks or services to end users or other licensees under the existing license&lt;br&gt; - The request must describe the proposed additional services and show that the licensee can meet any additional related conditions or obligations&lt;br&gt; - The licensee must pay a fee equal to half of the application fee&lt;br&gt;  - NFS-I fee: 5,000,000 Kyats&lt;br&gt;  - NS fee: 2,500,000 Kyats&lt;br&gt; - The PTD will notify the licensee of its decision within <strong>30 days</strong>&lt;br&gt; - Upon approval, the PTD will update the existing license</td>
<td>- A written request must be sent to the PTD and approval obtained for offering additional networks or services to end users or other licensees under the existing license&lt;br&gt; - The request must describe the proposed additional services and show that the licensee can meet any additional related conditions or obligations&lt;br&gt; - The licensee must pay a fee of 1,250,000 Kyats&lt;br&gt; - The licensee may begin engaging in the additional activities permitted within the scope of its existing license upon submission of the notification&lt;br&gt; - The PTD will notify the licensee of its decision within <strong>30 days</strong>&lt;br&gt; - Upon approval, the PTD will update the existing license&lt;br&gt; - If the request is denied, the PTD must give specific reasons and allow the licensee to re-apply. The licensee is not allowed to provide the additional services until approved to do so.</td>
<td>- The PTD will notify the licensee of its decision within <strong>30 days</strong>&lt;br&gt; - Upon approval, the PTD will update the existing license&lt;br&gt; - If the request is denied, the licensee must cease the new activities. The PTD must give specific reasons for the denial and allow the licensee to re-apply.</td>
</tr>
</tbody>
</table>
### License Renewal

- **A request for renewal** shall be made no more than **24 months** and no less than **12 months** prior to the license expiry date.
- A request for renewal will be reviewed on the same or substantially similar terms and for the same duration of the initial license period.
- If the request is refused, the PTD will provide written notice stating the reasons for refusal and provide a reasonable opportunity to remedy.
- Written notice of the decision will be provided within **6 months** of receiving the application to renew.

### Spectrum Licenses

- An NFS-I license does not guarantee access to spectrum resources.
- Companies must submit a separate application for a spectrum license to the PTD.
- An NS license does not permit a licensee to use scarce spectrum resources assigned by the PTD.
- A licensee can only use unassigned spectrum resources, such as a spectrum in “unlicensed” frequency bands.
- An AS license permits a licensee to use spectrum resources that are not assigned by the MCIT, such as a spectrum in “unlicensed” frequency bands.

### Allocation for Numbers

- Separate application process from NFS-I application.
- Must apply pursuant to the Numbering Rules.

### Telecommunications Equipment Licensing

- **The MCIT will issue a standard registration form**, which indicates the information to be provided.
- The applicant must complete the registration form.
- A registration fee of 5,000 Kyats must be paid.
- If the PTD or MCIT thinks that the information in the application is incomplete or inaccurate, it will inform the applicant in writing and the applicant may amend and re-submit the application.
- In such a case, the applicant must amend and re-submit its application within 30 days of receipt of written notice.
- Failure to respond within 30 days may result in rejection of the application.
- **Anyone meeting the qualification criteria set out in the registration form shall receive a license.**

**NOTE:**
- The MCIT will set forth in a schedule the list of equipment that requires a license.
- Public consultation will then be done, which will include proposed terms and conditions and duration of license.
- A license will generally be required where there is a high likelihood of harmful interference and/or a license is in the interests of national security and the public.

### Timeframe for Review and Decision

- The PTD will review the registration form within 30 days of receipt of a completed and accurate registration form.
- The PTD will issue a license if the registration is approved.
- If the registration is denied, the PTD must provide objectively justifiable reasons in writing.
- The applicant may reapply but must submit a new form and pay a new registration fee.

### Equipment that Requires a License

- Satellite equipment (e.g., satellite telephones).
- Radar equipment and devices.
- HF radio equipment.

*(This information in this table is based on the proposed licensing rules)*
Taking security

Earlier this year Vanderbruggen completed the first registration of a secured interest in Myanmar assets for a foreign loan. While the country lacks a registry of debentures and secured interests, he believes he has perfected security in Myanmar by including a register of the security into the existing Directorate of Investment and Company Administration (DICA) paper-based system.

But he believes that this deal was more complex because of the assets registered. “I expect to see more deals but believe that others will be different from this one,” he said.

This financing was harder than others because this was for a tower company with 1,250 assets, and taking security of all of them is not easy, he added. In comparison a power plant would require taking security over just one asset.

But Vanderbruggen warned that there are still challenges registering security. “It’s something we’re still very much discovering,” he said. “Mortgages on land – particularly the rights on leased land – haven’t yet been explored.”

And although the banks took a view on the legal risk, other lawyers in Myanmar aren’t certain that this arrangement is valid.

What’s next

Enforcement may be the next step forward for Myanmar. Vanderbruggen warned that it’s early to tell whether Myanmar courts will recognize and enforce foreign arbitral awards.

But other challenges to projects remain. Land rights remain an important issue. Vanderbruggen predicted that a number of other projects that are in the pipeline for financing may become easier because there are fewer land issues.

“It’s no secret that land rights and reform will be a concern for many years to come,” he said.

“The legal status of 70% of the country’s land is in transition following the Farmland Act of 2012.”

In the meantime investors and lenders may need to accept these risks. It is important for banks in Myanmar to realize that it’s still early days, and we are guided by what’s actually feasible in Myanmar rather than what the laws say, said Vanderbruggen.

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VDB LOI AND TMT IN MYANMAR

VDB Loi has been exceptionally successful with its representation of clients in the Telecommunications, Media and Technology (TMT) sphere. TMT is a core sector of the firm in Myanmar.

**Highlights of our experience in TMT:**

- Acted for 5 of the 12 prequalified bidders in the 2013 telecom tender
- Acting as local counsel to Ooredoo on its multibillion dollar greenfield telecommunications investment in Myanmar
- Assisting a number of passive network infrastructure providers including tower companies, with their licensing and advised on fiber deals
- Spearheaded proposed regulatory reform for passive network infrastructure in negotiations with the Government
- Assisting several EU, US and Asian multinational technology providers with their licensing
- Providing technical assistance to the Post and Telecommunications Department of the Ministry of Communications and Information Technology

**Our Services:**

**Operating licenses, business licenses**

VDB Loi is very often asked by clients in the TMT sphere to advise on and assist with securing all required approvals from the various regulators or Ministries to carry out a business activity. In practice, even if no specific licensing system exists, investment proposals need to be supported by the Ministry or Ministries that have authority over this activity. If this communication between the various Government departments is not properly supported by the investor's local advisor, there is the possibility of significant delays. Our service includes advising clients on the policy and practices of the relevant Ministry or Ministries, providing advice on their expectations based on earlier projects, establishing contact, and assisting with securing the required approvals, permits and licenses.

VDB Loi's foreign investment practice is without comparison. In order to meet clients' needs for a flexible, highly responsive team with interdisciplinary skills, we have formed core teams with foreign lawyers, financial specialists and local attorneys. Time is of the essence in Myanmar deals. To ensure an efficient licensing process, our partners personally drive the effort, from advising on the investment structure to less glamorous but equally crucial tasks such as document collection.

**Investment licensing**

Obtaining an investment permit from the Myanmar Investment Commission (MIC) for the project company is a crucial step in the investment process, and a major specialty of VDB Loi. The preparation and application process is often underestimated by investors. Service providers in Myanmar use quite different approaches and fee structures in relation to obtaining an MIC Permit.

Our firm's approach is to provide not just high-level advice on the process, but to actually prepare the voluminous financial portion of the application ourselves in addition to the legal sections. Of course, this is only possible with an interdisciplinary team that comprises accountants and financial specialists (overseen by a partner with a CPA and Big Four background), as well as lawyers:

We drive and monitor the document collection process with precision and unparalleled responsiveness: Our deep understanding of the small but often very important details of the process allows us to be clearer in our communications with the client, and to eliminate unnecessary costs and time.

We actually complete the investment proposal and, more importantly, the financial projections that are required to be added to the proposal:

The financial projections and analysis is the area where clients lose a lot of time if they are not properly assisted by an advisor who has a deep understanding of the particular requirements and expectations of the MIC. Our team, not the client, will have the labor-intensive task of preparing the investment proposal and its annexes, based on the client’s business plans or budgets.

Lodging the proposal with the MIC: We will lodge the investment proposal dossier with the MIC on your behalf.

Following up the proposal and project presentation: We will liaise with the authorities in order to obtain the MIC Permit. This usually requires us to provide additional information to the authorities upon their request before they accept or agree to pass on the proposal internally.

Very often face-to-face meetings and an actual project presentation will be required. We will conduct such meetings (with or without your representatives), assist in preparing the presentation (for example pointing out where to put emphasis, based on our prior experience with the MIC), and assist you at the time of the presentation (or make it on your behalf if you are unable to attend).

Our approach results in significant time and cost savings for prospective investors.

**Corporate and tax structure advisory**

We will analyze your project and advise you on its legal and tax merits from a Myanmar law perspective, covering:

- Foreign ownership restrictions
- Shareholding structure options
- Required operating permits
- Capitalization
- Financing and security
- Profit extraction
- Foreign exchange issues
- Importation
- Land lease rights
- Tax structure

**Regulatory compliance**

Our clients in the TMT sector seek our guidance with respect to a wide range of regulatory and compliance issues. Our team assists with detailed advice and information, and with liaising with regulators.

We have experience with:

- Tariff approvals for telecommunications services
- Interconnection regulations
- Safety compliance for movie theatres
- Environmental regulatory compliance
- Industrial safety regulations
- Import and export regulations for TMT equipment
- Construction permits for passive network infrastructure