Myanmar’s New Competition Law: 
A Pitbull or a Paper Tiger?

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Myanmar’s commercial landscape, which until recently was rife with state sponsored monopolies, heads into a new phase as the President signed the Competition Law 2015 into force on 24 February 2015 (2015 Pyidaungsu Hluttaw Law No 9) (the “Act”). The objective of the Act, similar to other competition laws from different jurisdictions, is the protection of public interest from monopolistic acts, speculation in goods or services, control of unfair competition, prevention of abuse of dominant position and economic concentration which weakens competition.

In this client briefing note we share our first impressions of the new Act, a legal game change which seems poised to shake up the practice of some major market players.

The Myanmar Act is in large part based on Vietnam’s 2004 Competition Law

There is no denying that some parts of the Act are copies from a similar earlier competition legislation enacted in Vietnam, notably the Law on Competition No. 27-2004-QH11 which entered into force per 1 January 2005 (“Vietnam Competition Law”). Basically, the Act has trimmed down the Vietnam Competition Law by eliminating most articles on proceedings and workings of the bodies created by the Act. There are also many other differences, though.

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Following the Vietnam example is not a bad thing. The Vietnam Competition Law drafting process was a careful exercise which took 4 years, with the IMF, the World Bank and UNCTAD heavily weighing in (Tran Anh Son, The Progress of Drafting Competition Law, http://www.jftc.go.jp/eacpf/05/). Criticism has at times been raised in connection with the enforcement of competition rules in Vietnam, and many possible improvements have been suggested, but the Vietnam Competition Law was universally heralded as an important step forwards.

As mentioned, the comparison with Vietnam only goes so far. There are important differences with the Vietnam Competition law, notably with regard to penalties and a number of rather fundamental concepts.

**Which actions are targeted by the Act?**

The Act broadly classifies 4 types of behavior which can be violations:

1. Acts restricting competition;
2. Acts leading to monopolies;
3. Unfair competitive acts; and
4. Business combinations such as mergers which to push for market dominance.

Under the Act, such violations are sanctioned in one way or another. The Act creates two new bodies to receive complaints, make enquiries and impose sanctions on any violations, a process which is discussed in more detail below.

**Does the Act apply to SOEs and to the Government itself?**

Not all the provisions of the Act apply to the same persons. The “acts restricting competition” apply to all “persons”, while unfair competitive acts and monopolistic acts are addressed only to “entrepreneurs”. “Enterprise” means any of the enterprises engaged in production, distribution, purchase, sale, import, export or exchange of goods or provision of services, while “Entrepreneur” is defined as “a person who operates a business of any kind and this expression includes an organization that does the same”.

The Act stops short of stating explicitly that SOEs are within its scope. Still, there can be little doubt about that, as SOEs is definitely “engaged in a business”. The Vietnam Competition Law does state explicitly that SOEs must also comply with its provisions.

What is more, the Vietnam Competition Law states explicitly that state administration bodies may not hinder competition in the market, or at least not through certain acts such as forcing an enterprise to sell goods, discriminate between enterprises or impose business combinations. In fact, all “practices which hinder the lawful business activities of enterprises” are prohibited (s. 6 Vietnam Competition Law). This provision was not copied into Myanmar’s Act.

**What are “acts restricting competition” in Myanmar?**

“Acts restricting competition” means constraining or hampering of competition of economic activities in the market. The Act provides in a list of acts which are deemed to restrict competition.

The fixing of product price in consultation with other market players features prominently on this list. For example, the Competition Commission of India has imposed hefty fines on cement manufacturers when it deduced from parallel pricing that their trade association was instrumental in bringing about minimum price levels (*Builders Association of India v Cement Manufacturers’ Association & Ors, Case No. 29/2010*).

Furthermore, bid rigging is rendered illegal under the Act. In Vietnam it appeared, for example, in connection with bids for the Van Lam-Son Hai II Road Construction Project that all bids submitted were in fact connected with one and the same company, to make it appear as if the tender was competitive (*CUTS & CIEM, Competition Scenario, p. 29*).

Another example from Vietnam is the ongoing competition investigations against a foreign owned cinema operator. Four Vietnam cinema operators claimed that the foreign owned company, which also imports and distributes foreign films to other cinemas, is abusing its market dominance by charging other cinemas excessive flat fees for the right to show the foreign films (VCA Annual Report 2013).

Preventing the sharing of certain resources is also illegal, such as a boycott organized by a group of
film makers in the Indian case FICCI-Multiplex Association of India v United Producers/Distributors Forum & Ors, Case No. 01/2009.

The Act also cites restricting the production of goods, market penetration, technological development and investment.

**Some restrictive agreements can be allowed**

The Commission may exempt restrictive agreements “if they are aimed at reducing production costs and benefit consumers” in 6 situations, identical to the exceptions in Vietnam:
1. Reshape organizational structure and business model of a business so as to improve its efficiency;
2. Enhance technology and technological advances for the improvement of the quality of goods and services;
3. Enhance technical standards and quality of different products;
4. Standardize operation of enterprise, distribution of goods and payments for them, irrespective of their prices and related information;
5. Promote competitiveness of small and medium sized enterprises; and
6. Promote competitiveness of enterprises of Myanmar in the international market.

It is also interesting to note that, which the act talks about agreements restricting trade, fails to distinguish between horizontal or vertical agreements or per se anti-competitive agreements and not per se anti-competitive agreements. Interestingly, the Act provide authority to the Commissions (formed under the Act) to exempt certain agreements for a definite period, with intention of lowering cost of living or citizens of Myanmar, which may give scope for arbitrary decisions.

**Can you demand that distributors and vendors not work with your competitors?**

A typical situation which raises anti-competition issues, and one which often occurs in practice, is when an enterprise with a strong position in the market demands from its distributors or even vendors that they may not work with its competitors. For example, in a competition case in Thailand involving a company manufacturing Honda motorcycles. The claim was that the company forced its distributors to sell only Honda motorcycles through various measures including withholding spare parts. The Thai Competition Commission found that the company’s acts were in violation of Thailand’s Competition Act 1999.

**Time to start being careful with non-compete clauses in Myanmar**

Almost by definition, non-compete agreements potentially fall within the scope of s. 13 b) of the Act “persons concluding agreements which restrict completion in the market”, one type of “acts restricting competition”. In EU law it is mostly assumed that non-compete agreements between competitors are a violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU), as recently demonstrated in the Telefónica/Portugal Telecom case, but the EU Commission accepts that they may be necessary and acceptable in take-overs or joint ventures (Commission Notice on restrictions directly related and necessary to concentrations (2005/C56/03). Many jurisdictions will want to investigate the circumstances of the non-compete, such as the Federal Antimonopoly Service in Russia (Guidelines on the Procedure and Technique of Analysis of Joint Venture Agreements Containing Non-Compete Clauses, dated 18 July 2013)

Myanmar already has a long tradition in curbing restraint of trade. The Myanmar Contract Act of 1872, which essentially came into existence as the India Contract Act, provides in s.27 for a wide-reaching restriction on the restraint of trade in contracts:

“27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.” S.27 appears in the chapter of the Myanmar Contract Act entitled “void agreements”.

The Myanmar Contract Act features one exception to the s.27 provision, which relates to the sale of a business. It reads as follows:

“Exception 1 - One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits
appear to the Court reasonable, regard being had to the nature of the business.” On its face, the exception is rather limited. Only the sale of a business is envisaged, not the start of a new business by two or more persons who promise not to compete separately with the business they carry on together.

**Does it matter if the enterprise has a “dominant market position”?**

The Act has diverged from the Vietnam Competition Law with respect to “restrictive acts”. In Vietnam, a number of acts are only prohibited if the enterprise has a market share of at least 30%. For example, agreements fixing a price or refusing to share access to certain resources is only prohibited if the enterprise committing these acts has the sufficient market share. The reasoning behind it, obviously, is that a small market operator would not be able anyway to block a competitor.

In Myanmar this is not the case, at least not until the Commission intervenes with more detailed definitions of “market” under the Act. It may be that the fundamental approach has been altered from the Vietnam example. That is to say, Myanmar has made “abuse of dominant market position” a separate “restrictive act” in and of itself.

That also means that there is no requirement of a market share for the other restrictive acts as the Act stands at this point in time. For example, price fixing by any enterprises, even those with a very small market share, would be a violation of the Act.

**No concept of “relevant market” in Myanmar?**

The term “market” has been defined as a place where goods and services traded. However, the definition of market is not expressively restricted to Myanmar (section 2 (m) of the Act). Predominantly, from the reading of the Act it seems that the Act also fails to make distinction between “relevant product market and relevant geographical market”, which is a distinction found across many often legal systems. The non-distinction of market into relevant product market and geographical market may create some hurdle for investigating bodies under the Act to established dominance in particular, say a producer may not be dominant in Myanmar but due to its dominance in the relevant product market worldwide, is able to abuse it and create appreciable adverse effect in Myanmar.

**Tough penalties for restrictive acts**

The penalties provided for “acts restricting competition” in Myanmar are hefty. Violations are punished with imprisonment up to 3 years and/or a fine up to 15 Million MMK (approximately 15,000 US$).

By comparison, in Vietnam the same violation cannot lead to imprisonment, but the fine might be much higher (up to 10% of the revenue of the enterprises which are party to the restrictive acts, s. 118 Vietnam Competition Law).

**Myanmar enterprises with prices which are too low or too high may be making abuse of their market position**

One type of illegal unfair competitive acts is the abuse of a dominant market position (which can also be a competitive restrictive act). In following of Vietnam, a list is provided of such acts in s. 27 of the Act, which includes selling below cost price and imposing conditions on other enterprises. Unfortunately, the Act does not define “dominant position” or “abuse”.

It may be interesting to note that some of the provisions as mentioned here are also covered under the Consumer Protection Law of Myanmar.

The prices used by enterprises in Myanmar may be an issue for the Act in two ways: the prices might be too high (“exploitative”, taking advantage of customers) or they may be too low (“exclusionary”, preventing competitors from getting in at all). In both situations, there may be an abuse of market position.

In the landmark United Brands case in the EU, the European Commission referred to the high prices of the Chiquita bananas as “excessive in relation to the economic value of the product supplied” (United Brands v Commission of the European Communities Court of Justice of the European Communities, Case 27/76 [1978] ECR 207). The Court did not uphold this point of the Commission’s claim for lack of data).
In Thailand, the competition authorities started proceedings against a television broadcasting company, which was created by the merger of the only two suppliers on that market, for possibly hiking its prices after the merger (OECD, Thailand’s Competition Policy, 2008).

Using different prices when supplying other enterprises may also be a problem. The Act states that “discrimination against or in favor of enterprises” constitutes an illegal “unfair competitive act” s. 17 g) of the Act. The European Union (‘EU’) (under Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’) and the Robinson-Patman Act in the United States and held that for prices/conditions to be discriminatory, two conditions need to be met: (i) dissimilar treatment to equivalent transactions; and (ii) harm or likely harm to competition.

**Contract terms which are entirely one-sided**

Internationally, competition regulators have held that an unbalanced contract can be an abuse of a dominant market position, such as India’s famous penalties imposed on the Board of Control for Cricket in India (Surinder Singh Barmi v. Board for Cricket Control in India 08.02.201, later reversed on appeal). The authorities found that the Board of Control had an overwhelming power compared to their contract parties.

The Indian competition authorities also found the contract terms which allowed a low cost carrier to split up families over two or more flights to be an unfair trade practice.

**Enterprises making the sale of one product conditional on the sale of another**

Some enterprises with a strong position in the market for one product, for example the manufacturer of a popular beer, may require distributors to buy other products from the same supplier, such as soft drinks. This “tying” is often found to be an unfair competitive practice, based on the enterprise’s dominant market position.

In a well-known case in the EU, the European Commission found that Microsoft’s tying of Windows Media Player (WMP) by refusing to give customers the option of acquiring PC OS without also acquiring the WMP, meant that the market for media players was closed to competitors (Case COMP/C-3/37.792 Microsoft [2007] L 32/23).

**Confidentiality clauses might “bite” under the Competition Law**

In following of Vietnam, obtaining and using “trade secrets” has been included as an act of unfair competition in certain circumstances. The Act provides that accessing protected business secrets, using them, obtaining the information through abusing of confidence, is illegal. Accessing protected secrets from state-owned organizations and using that for business purposes is also mentioned specifically.

This is good news, or perhaps bad news, for parties enforcing confidentiality clauses or Non-Disclosure Agreements (NDA). As damage or loss is often hard to demonstrate, it may be difficult to enforce NDAs in reality. The Act now offers a whole new avenue for an aggrieved party, lodging a complaint with the Competition Commission.

**Joint ventures may be illegal if they create extreme market dominance or weaken competition**

Under the Act, certain mergers, consolidations, acquisitions, joint ventures and any other method that may be specified by the Commission might be stopped if they would lead to market dominance to an extremely high level.

In addition, the Act basically prohibits a sort of combination which leads to a weakened competitiveness where there are just a few actors on a market. The provisions under this chapter also prohibit any collaboration in any form, which may increase their market share beyond a threshold to be prescribed by the Commission (in Vietnam this was set at 50%). However there is no threshold mentioned in the Act. Interestingly, s. 33 of the Act, however provides for exemption from the restriction places on any sort of collaboration, in a situation where the enterprises are SMEs, might go insolvent or for “the promotion of export, technology or innovation”.

Most competition laws provide in some sort of a procedure for enterprises to follow if they want to carry out a merger or a joint venture which might lead to dominance or extreme low competition. That is not the case in the Act, although it does
provide that the Commission has the authority to “determine forms, procedures and regulations required in the application for obtaining permission to collaborate with other enterprises” (s. 8 e) of the Act).

The Act does not exclude new entrants into Myanmar from its application. That is to say, a new joint venture between a foreign investor and an established enterprise may fall within its scope if it leads to, i.e. market dominance. The fact that market dominance has not yet been defined does not make this call easier.

Unlike in Vietnam, there is no notification requirement yet under the Act in Myanmar. However, parties would presumably prefer to receive comfort from the Commission beforehand rather than to see the deal undone afterwards.

This leaves us with quite a few questions. What is “extreme market dominance”? When is there “a market with just a few enterprises” in the sense of s. 31 b) of the Act? Unfortunately, this uncertainty is a real problem given the possible criminal sanction on an illegal business combination, which may amount up to 2 year prison and or 10 million MMK (approximately 10,000US$).

What are the different competition organizations in Myanmar and what do they do?

The Competition Law establishes two bodies to regulate and enforce the law. The Competition Commission is tasked with protecting the public interest, controlling unfair competition, preventing the abuse of dominant position of market power and controlling restrictive agreements and arrangements among enterprises The Enquiry Committee, formed by the Competition Commission, is responsible for investigating possible breaches of the law.

The Competition Commission’s primary responsibilities include:
- Working with international and regional organizations in regards to competition
- Forming working committees as needed and evaluate issues from said committees
- Determine regulations and procedures related to collaboration between enterprises or the restriction of competition
- Define monopolistic acts
- Issue notifications to restriction market share and or marketing activities if necessary
- Order inquiries and summon relevant persons to appear for questioning
- Detain evidence to be used in legal proceedings
- Review findings of the Enquiry Committee
- Advise the government in relation to competition in the marketplace

As per section 5 of the Act, the Commission is to be established with duties, amongst others, to determine the threshold of market shares, revenue, investment, no. of shares etc.; prescribe for procedure to apply for permission for collaboration; sit-over the adjudication of the findings of the Enquiry Committee, for Enquiry Committee, examine evidence; Issue notifications to restriction market share and or marketing activities if necessary, etc.

The Enquiry Committee is basically the investigating wing and a quasi-judicial body of the competition administration of the Myanmar Government. Which is basically against the settled principal of law viz. no one shall be a judge of his own cause”, since under section 34 of the Act Committee has power to punish the offender, based on its own finding. It has the following duties, amongst others, to ask for and examine evidence; subpoena witnesses to appear before it for questions; submit the matter with relevant authorities viz. Commission for taking action if some on fails to follow Committee’s order; submit its reports and findings before the Commission; for required working committee and set their duties etc.

The Enquiry Committee

- Request documents, examine documents and subpoena witnesses
- Submit matters to relevant authorities via the commission
- Examine evidence including the search of buildings or land
- Form Working Committees as needed and review findings
Based on its findings the Committee shall either, give warnings, fine, order for suspension or closure of the enterprises for a particular period of time etc. Further anyone dissatisfied with the order of the Committee can appeal before the Commission within a period of 60 days, which is the final adjudication authority under the Act. In addition to the provisions of levying fine on the persons in breach of the Act, the Act also provides punishment by way of imprisonment for such offenders, which may go up to 3 years. The Act also provide for filing of the civil suit by any aggrieved person against the person in breach of the Act and who has already been convicted under the provisions of the Act. This specific provision can be said to be against the settled principle of law viz. “double jeopardy” and “res judicata.”

What is a monopoly in Myanmar?

No definition can be found for the term “monopoly”. However Chapter 8 prescribes the restricted behavior that leads to a monopoly, specifically:

(a) control purchase prices, sale prices or charges for services;
(b) restrict provision of services or production of goods or restrict opportunities in purchasing or selling goods or directly or indirectly establish the conditions to be followed without fail by other entrepreneurs, with the intention of controlling prices;
(c) delay, scale down or limit, without reasonable cause, provision of services or purchase, distribution, transfer or import of goods or destroy or cause to be destroyed goods in order that supply is to be outstripped by demand;
(d) restrict area coverage where goods are to be traded and services are to be provided for the purpose of preventing other entrepreneurs from penetrating the market and controlling market shares;
(e) intervene in the operation of business by other entrepreneur unfairly.

The definitions of these terms under the Vietnam Competition Law are substantially similar to the regulations in Myanmar.

For example, the Law defines the “practices in restraint of competition” as practices which reduce, distort or hinder competition in the market, including practices being agreements in restraint of competition, abuse of dominant market position, abuse of monopoly position and economic concentration. Chapter 2 is dedicated to the control of such practices and defines clearly the prohibited agreements and its respective exceptions. Furthermore it describes which enterprises qualify as abusing its dominant market position and monopoly position and which practices are prohibited.

As with the law in Myanmar there is no specific definition on monopoly, other than the description under Article 11 and Article 12. In this regard an enterprise shall be deemed to be in a dominant market position if such enterprise has a market share of thirty (30) per cent or more in the relevant market or is capable of substantially restraining competition. Under Article 12 on the other hand an enterprise shall be deemed to be in a monopoly position if there are no enterprises competing in the goods and services in which such enterprise conducts business in the relevant market.

Are monopolies still allowed?

The Act does not abolish existing monopolies in Myanmar. It merely restricts any acts by enterprises which may lead to monopoly due to control of the prices; restricting provisions of services or production of goods or distribution which may establish condition to be followed by others in the market; (it may be noted that this specific provisions may become problematic for market leaders, who for better management may cut-down their production temporarily); delay or scale-down, without a cause provisions of services or distribution of goods.

Collaboration with manufacturers or distributors, or acquiring other enterprises may be undertaken, subject to other provisions of the Act.

Vietnam also provides special rules for state monopolies, but no such rules are found in the Act. The Act does not seem to be specifically addressed to the Government itself, for example when a Ministry takes a decision that creates a monopoly or restricts competition.
Entrepreneurs carrying out any of the above actions to create a monopoly may be convicted to up to 2 years prison and or fines up to 10 Million MMK (approximately 10,000 US$).

Who can start an anti-competition proceeding?

Subject to rules to be issued by the Commission, basically anyone with a legitimate interest can make a competition complaint to the Commission. In most countries consumers and competitors may lodge a complaint with the competition authorities. The Act does not address this issue yet, leaving it to the Commission to regulate.

The Commission may start proceedings under the law if it suspects a breach of law or if it receives a formal complaint regarding the market activity of a company. This enables an enterprise to initiate a complaint against another enterprise but does not guarantee proceedings will in fact take place.

The proceeding can be initiated under the Act, *suo moto* by the Committee or upon an application to that effect made by any aggrieved party before the Committee. However, basis the applicable the Committee may decide whether to initiate the proceeding or not.

Competitors or consumers can sue in a Myanmar court under the Act

A person such as a consumer or a company claiming to have suffered damage resulting from the unfair competitive acts by an enterprise can in certain circumstances initiate a legal proceeding separately from the administrative proceedings before the Commission. However, the Commission must approve initiating legal proceedings against any person under the Act. The Act states quite clearly that administrative sanctions do not impede with civil proceedings. The Act also states that an aggrieved party may file suit with a civil court to receive damages.

Civil courts may become involved in this process, among other ways, when the aggrieved party has exhausted the Commission’s appeal process. In this case the aggrieved party may file a civil suit in court.

The criminal courts keep jurisdiction for any acts that are also criminal violations.

Who will be most affected by Myanmar’s new Competition Law?

It will depend on the measures of enforcement whether the Act will be a pitull or a paper tiger. It took Vietnam more than 5 years to build out its administrative infrastructure. At this point in time, although the number of decisions is still quite low, the Vietnam Competition Authority has conducted 64 investigations for unfair competitive acts since 2005.

But even without knowing how aggressive Myanmar will enforce the new competition rules, it is fair to say that a wide range of enterprises will seriously be at risk of sanctions under the new Act.

Myanmar has never had legislation addressing anti-competitive behavior. Some practices and agreements which are targeted by the new Act are commonplace in the Myanmar market. In addition, a number of enterprises have ended up with dominant market positions as a result of many years of state-run economy. There is thus very likely quite a bit to do for the Commission.

A few recommendations:

1. **Myanmar enterprises holding a large market share should urgently review their horizontal and vertical agreements:** Enterprises that have a dominant position in Myanmar at this point in time, such as those in beverages, aviation, banking, telecommunications, utilities, and distribution may have to self-examine their practices very closely for compliance with the Act. Are distributors being pushed to reject agreements with competitors? Are competitors being hindered from using resources or infrastructure which could be shared? Are outlets being told not to deal with rival products? Are the terms concluded with business partners not as balanced as they should be? Are different prices and conditions used for supplies to different enterprises? Most of these issues even pose problems for enterprises that do not have a dominant market position. If your
prices are excessively high, this may very well be because of your market position, which can be assailed under the Act.

2. Trade associations must be extra careful: International experience shows that trade associations may often play a role in bringing about anti-competitive behavior such as coordinating price levels and organizing resources. Myanmar has a long and rich tradition of powerful trade associations, some of which may have to review their practices.

3. New players need to re-evaluate their pricing and market penetration strategies: New players in the market may also be hit with anti-competition complaints. Are products being offered at predatory low prices to gain market share? Are distributors being persuaded to breach their contracts with others? Are people being hired away to gain access to trade secrets? Or, much more innocently, are prices determined for the reselling of products in a manner which is not to the benefit of consumers or lessens competition?

4. Marketing and promotional campaigns require special attention: In many countries, advertisements and promotions are a major source of competition complaints. Campaigns are often examined with a fine comb by competitors to find possible violations under competition laws. Is anything being stated that might be a misrepresentation? Do some customers receive better conditions than others (illegal under s. 24 c) of the Act)?

5. Joint ventures: Foreign companies seeking to associate with well-established local partners will have to examine if the planned joint venture or acquisition might lead to excessive market concentration. This is in borderline cases not actually feasible until the Commission defines some key concepts as provided under the Act. This is not good news for some proposed major transactions.

6. Non-compete clauses should be re-examined in the light of the Act: As there are no guidelines (yet) with respect to which non-compete agreements are acceptable, and we can only rely on the exemptions to restrictive acts of s. 14 of the Act, extra caution is advised with respect to non-compete clauses in agreements. They might not only be void under the Contract Act, but also lead to sanctions in Myanmar’s competition framework.

7. Non-Disclosure Agreements: Anyone signing an NDA from time to time should take notice of the fact that an injured party now has an additional way of protecting his interests.

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