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COMMENTARY

# Recent Developments in Myanmar's New Telecommunications Law

With the adoption of Myanmar's new Telecommunications Law ("Telecoms Law") last year and the two incumbent operator licenses awarded, the country's telecommunications industry is evolving at a rapid pace. In order to give full effect to the new law, Myanmar is about to adopt new implementing rules. This *Commentary* summarizes the most recent developments that may be of interest to prospective foreign investors and the key provisions of these long-awaited rules implementing the new Telecoms Law,[1] which covers areas such as licensing, access and interconnection, numbering and spectrum, and competition.

On balance, this new regulatory framework largely meets or exceeds international standards and is expected to provide considerable opportunities for growth and foreign investment in a liberalized Myanmar telecoms sector.[2] However, there remain obstacles for international companies in Myanmar, which need careful consideration.

## Recent Developments

Recent developments include the following:

**Privatization**

Japan's KDDI is reportedly close to signing a deal that would result in its taking over the management of the state-owned telecoms network, the Myanmar Posts and Telecommunications ("MPT"). This deal will help the government meet one of the new telecoms law's main goals by separating the government (and its telecoms regulator) from the incumbent telecoms network. Earlier this year, MPT switched on roaming with foreign networks for the first time, including a roaming peering agreement with Orange, enabling roaming with 64 networks in 33 countries.

**Licenses**

Telenor, the Norwegian telecoms group, and Ooredoo, formerly Q-Tel based in Qatar, which have been awarded the first two licenses to commence providing telecoms in Myanmar, have started implementation of their plans to roll out networks and services in Myanmar. With the enactment of the implementing rules, the expectation is that further licenses will be awarded soon.

**Network Roll-Out**

Ericsson has announced that it has been awarded a five-year contract for multivendor managed services to support Telenor's mobile network rollout in Myanmar. Late last year, Telenor also entered into a framework agreement with Ericsson to supply radio-access network and associated services for a significant portion of Telenor's network in the country. Flexenclosure reported that it has won a large order from Apollo Towers for its hybrid power supplies to be deployed at base stations across Myanmar. Apollo Towers has in turn been selected by Telenor Myanmar to build and manage telecom towers in preparation for the network's rollout across the country. Nokia Solutions and Networks ("NSN") said that it has been selected by Ooredoo to supply its core and radio infrastructure for its 3G network in Myanmar. NSN has opened two new offices in Yangon, the former capital of Myanmar.

**Universal Service and Funding**

The World Bank has offered $31.5 million for a project aimed at reforming the telecoms sector in Myanmar. The goal is to expand the country's quality mobile phone access and affordable communications. This project will also help develop and pilot a universal service strategy to ensure the expansion of service to remote communities.

Against this background, the status and key provisions of the long-awaited rules implementing the new telecoms law are summarized below.

## Status of the Implementing Rules

According to the legal unit of the Ministry of Communications and Information Technology ("MCIT"), the Rules for Licensing have been finalized and submitted to the Cabinet for its review; we expect those rules to be released to the public shortly. MCIT has also received comments on the Interconnection and Competition Rules from the Attorney General's Office and is internally discussing next steps. MCIT reports that it will shortly submit the Rules for Numbering and Spectrum to the Attorney General's Office. The discussion below is based on the latest available version of the final Licensing Rules and drafts of the other Implementing Rules.

**The Licensing Rules**

The Licensing Rules set out a framework for telecoms licensing with the specific aim of encouraging entry by foreign investors in Myanmar. There are four categories of licenses available depending on the type of service to be provided:

- Network Facilities Service (Individual) License, which permits the licensee to engage in all types of telecoms activities and would arguably apply to fixed or mobile telecoms operators.
- Network Facilities Service (Class) License, which permits the licensee to engage in a more limited number of telecoms activities, including tower leasing and self-provision of telecoms services, and would probably apply to tower companies and any business users of voice-over-the-internet services.
- Network Service License, which permits the licensee to provide telecoms services and would arguably apply to telecoms services resellers.
- Application Service License, which permits the licensee to lease transmission capacity directly from telecoms providers and resellers.

Providers of telecoms equipment and holders of spectrum usage rights may also need separate Telecommunications Equipment Licenses and Spectrum Licenses, respectively.

The provision of telecoms without a license is a punishable offense. Each applicant must determine the appropriate license category and apply through a standard form requiring the provision of certain information on the applicant's suitability for that license category as well as the payment of an application fee. Once awarded, licenses will normally last for 15 years subject to an annual management fee, and, after that, they may be renewed subject to a renewal fee. Licenses may be modified at the request, or with the consent, of the licensees and may be transferrable subject to the prior approval of the Post and Telecommunications Department of the Ministry of Communications and Information Technology ("Telecoms Dept.").

Licensees must comply with certain minimum transparency requirements when dealing with end users—e.g., they must provide customers with accurate and readily accessible information relating to call charges. In addition, specific conditions apply to dominant licensees with respect to access, interconnection, and pricing (*see* "Access and Interconnection Rules," below).

The Telecoms Dept. has significant enforcement powers to ensure that all licensees comply with the relevant licensing conditions, including the imposition of penalties of up to 5 percent of the licensee's relevant turnover and, in cases of serious and repeated contraventions, the suspension or termination of the license.

**The Access and Interconnection Rules**

The Access and Interconnection Rules set out the procedure for entering into, or resolving disputes regarding, agreements between licensees relating to access and interconnection. These agreements cover not only physical interconnection of networks but also other types of network access such as roaming, leased lines, and infrastructure sharing.

In line with international standards, rules on access and interconnection[3] are asymmetrical. While all licensees are required to negotiate with each other's access and interconnection agreements in good faith, licensees with significant market power are also required to:

- Provide access and interconnection on reasonable request;
- Not discriminate unduly;
- Publish information so as to ensure transparency;
- Publish a reference offer for access and interconnection;
- Include or change certain terms and conditions in a reference offer;
- Maintain accounting separation;
- Observe price controls, cost orientation of tariffs, and cost accounting rules; and
- Accept any additional condition if justified by exceptional circumstances and approved by the Telecoms Dept.

A licensee is presumed to hold significant market power where its market share meets or exceeds 30 percent, although this presumption may be rebutted.

Such obligations must respect general principles of proportionality and reasonableness and are justified only where the Telecoms Dept. considers that the following three criteria are cumulatively met:

- There are high barriers to entry;
- The market structure does not tend toward effective competition; and
- General competition rules alone are insufficient to address such market failure.

The Telecoms Dept. has provisionally determined that these three criteria are met with respect to:

- Access to public telephone networks at a fixed location;
- Local, national, and international voice call services;
- Leased lines;
- Call termination on individual public telecommunications networks at a fixed location;
- Wholesale access to broadband services at a fixed location;
- Call termination on individual mobile networks; and
- National roaming services on mobile networks.

In practice, therefore, any provider of call termination on its own fixed or mobile network will be subject to the abovementioned access and interconnection obligations because it holds a monopoly over such termination services.

The rules also introduce a detailed set of alternative dispute resolution mechanisms to deal with disputes between licensees relating to access and interconnection. The Telecom Dept. retains the power to adjudicate such disputes should the parties fail to reach an amicable solution.

**The Numbering and Spectrum Rules**

The Numbering and Spectrum Rules provide that scarce resources such as numbers and radio frequencies will be allocated in accordance with national numbering and frequency allocation plans to be drawn up by the Telecoms Dept. on a transparent, objective, and nondiscriminatory manner.

Licensees may not use numbers or frequencies from these national plans unless such numbers or frequencies have been:

- Properly allocated to them,
- Exempted from the need of a license through the appropriate procedure, or
- Transferred by the person to whom the numbers or frequencies were originally allocated (number portability and spectrum trading/sharing). Currently, number portability is contemplated but without any specific provision on how it will work in practice. Spectrum trading/sharing is allowed subject to the Telecoms Dept.'s prior approval.

Separate fees apply for the allocation, management, and renewal of numbers and spectrum-related licenses.

**The Competition Rules**

The Competition Rules set out a framework for the promotion of fair competition in the telecoms sector in Myanmar, including:

- A prohibition against cartels and a related leniency regime, whereby licensees self-reporting to the Telecoms Dept. their involvement in a cartel may benefit from immunity or penalty reduction;
- A prohibition against any agreement having an anticompetitive object or effect unless such agreement is exempted by the Telecoms Dept., upon application by the parties to the agreement. Such exemption will be granted where the agreement's pro-competitive effects outweigh its anticompetitive effects—cartels may not benefit from such exemption;
- A prohibition against abuse of a dominant position unless objectively justified to attain pro-competitive effects—a dominant position will be presumed where a licensee's market share is 50 percent or more, although this presumption may be rebutted;
- An informal "settlement" procedure—similar to the one available before the European Commission in relation to violations of EU competition law—whereby licensees may offer commitments to bring an alleged competition law violation (other than cartels) to an end in return for the Telecoms Dept. closing its investigation without making any finding of infringement or imposing any penalty; and
- A merger control regime requiring notification to, and clearance by, the Telecoms Dept. prior to completion of: (i) the acquisition of more than 15 percent of the shares of a licensee; (ii) a change in control of the licensee; or (iii) the direct or indirect transfer or acquisition of any license, excluding purely internal reorganizations and restructurings.

Potentially, the scope of these rules extends beyond the telecoms sector, given that they arguably cover:

- Any commercial arrangement with a licensee even if the counterparty to such an arrangement is not a telecoms licensee in Myanmar; and
- Certain unilateral conduct by companies that are not telecoms licensees but control an essential facility for the provision of telecoms services, such as in-building wiring, lead-in ducts and associated manholes, subsea cable landing stations, poles, and radio towers (excluding towers used for the operation of any broadcasting service).

Any company found to have violated the Competition Rules may be punished with a penalty of up to 10 percent of its relevant turnover over the period during which the violation occurred.

## Conclusion

The enactment of the implementing rules is a very encouraging sign of willingness on the part of the Myanmar government to liberalize the country's telecoms sector in line with international standards. However, there remain obstacles that face international companies in Myanmar. Some problems are predictable, such as the chronic electricity shortages that mean new operators will need backup generators capable of running their computer system. Other difficulties are harder to plan for: political instability, corruption, and other compliance issues. It remains to be seen whether, in practice, Myanmar really is about to make this move into the global telecoms arena.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.


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## Endnotes

1 *See* Jones Day *Commentary*, "Myanmar's New Telecommunications Law" December 2013.

2 The EU has lifted all sanctions on Myanmar except the arms embargo. This embargo is potentially relevant to telecoms to the extent that it prohibits equipment that might be used for internal repression, including equipment or software used to monitor or control communications. While the U.S. has eased sanctions on Myanmar in the past two years, certain sanctions remain in effect and prohibit, *inter alia*, dealings with specified persons and entities.

3 The Competition Rules also contain provisions for the regulation of access and interconnection. For the convenience of the reader, we have summarized these provisions in this section.