A growing trend

Myanmar launches a new competition regime

*by **Dave Anderson** and **James Marshall****

Myanmar is the latest Asian jurisdiction to join the swelling ranks of the global antitrust community. The Competition Law prohibits anticompetitive agreements and abuse of market power. It also introduces a merger control regime.

Myanmar first announced its draft antitrust legislation in 2014. Following legislative scrutiny, Competition Law No 9/2015 was enacted on 24 February 2015. The Myanmar government is expected to publish further regulations to implement the Competition Law sometime in May 2015. The Competition Law will then come into force on a date determined by the president.

2015 marks another key year for antitrust in Asia: the Association of Southeast Asian Nations (ASEAN) is prioritising antitrust enforcement as part of the ASEAN Economic Community (AEC), pursuant to a pledge by member states to introduce competition by the end of 2015; and Hong Kong will begin enforcing its Competition Ordinance imminently.

Competition law risk has quickly become a priority for businesses operating in Asia.

Competition law reflects international principles

Myanmar's new law regulates anticompetitive agreements ("acts controlling competition") by "any person"; abuse of market power ("monopolising markets") by "business persons"; mergers between "enterprises"; and unfair trade practices.

The statute also provides a framework for private actions, penalties and leniency. Myanmar's enforcement regime is broadly consistent with international best practice in jurisdictions such as the EU and UK.

Enforcement and procedure

A Competition Commission (which is likely to be an independent body within the Ministry of Commerce) will enforce the Competition Law. The Competition Commission is expected to create a number of committees and divisions to carry out different enforcement functions – for example, investigation, review and decision-making.

The Competition Law provides the Competition Commission with significant power to define the scope of both its role and the operation of the regime. For example, the Competition Commission will be able to determine its internal procedures. It will also have the ability to grant exemptions from the prohibitions, establish a leniency regime, impose penalties and order structural remedies to address competition concerns.

The Commission will also have full investigatory powers. These include the ability to obtain written and oral information from businesses and individuals, as well as authority to conduct dawn raids.

Penalties for breach of the Competition Law include both corporate and individual liability – maximum fines are reported to be up to 15m kyat (approximately US$15,000) and individuals can face up to three years in prison.

Is there sufficient clarity?

At present, the Competition Law provides a basic framework. In line with most jurisdictions, the Law is sufficiently flexible to cover classic anticompetitive arrangements, along with novel anticompetitive behaviour not easily categorised in restrictive statutory language. But there remain gaps and ambiguities in the legislation. The forthcoming regulations are expected to provide additional clarity on a number of substantive and procedural questions, including for example the following:

▌**Who does the Competition Law affect?** The prohibition against illegal agreements appears to apply universally to "any person". By contrast, different terminology is used for abuse of market power ("business persons") and merger control ("enterprises"). While the Competition Law defines "enterprises" and "business persons", the practical relevance of the distinction is unclear. However, as the definitions are drafted relatively widely, it seems likely that any form of business entity (including state owned enterprises, corporates and partnerships) will be expected to comply with the Competition Law.

▌**Will the Competition Law apply to firms outside Myanmar?** The geographic reach of the Competition Law is not defined and it is unclear whether the Competition Law will have extraterritorial effect. But there is a good chance that it will apply to firms and activities located outside Myanmar – most jurisdictions can enforce domestic competition law against foreign businesses if anticompetitive behaviour has an effect within that country.

▌**What types of anticompetitive agreements are covered?** The Competition Law lists prohibited behaviours. These include standard hardcore prohibitions against price-fixing and bid-rigging, as well as more ambiguous provisions relating to controlling or limiting competition or markets, and preventing access to markets. However, the Law does not appear to distinguish between "per se" competition breaches and breaches that have "anticompetitive effect". Similarly, there is no distinction drawn between anticompetitive arrangements between competitors (horizontal arrangements), and those between businesses at different levels of trade (vertical agreements).

The Competition Law also provides limited exemptions from the prohibitions. Arrangements that increase supply efficiency and quality, develop technology and promote Myanmar's international competitiveness may be exempt from the general prohibitions. It remains uncertain what these provisions will mean in practice.

Despite the uncertainty, we would expect normal commercial arrangements at any level of trade – for example, production co-operation, joint ventures, exclusive and non-exclusive supply and distribution – to fall in the remit of the Competition Law. While the Competition Law is silent on the point, we would also expect Myanmar to introduce a regime for granting exemptions or authorisation to potentially anticompetitive arrangements.

▌**What is illegal "monopolisation"?** The Competition Law sets out a menu of illegal behaviour, which includes activities such

* *Dave Anderson and James Marshall are partners in Berwin Leighton Paisner LLP*

as restricting output, controlling prices and controlling markets. The language used differs from EU and equivalent international best practice. For example, the Competition Law does not include references to behaviour such as predatory pricing, applying dissimilar conditions to similar transactions, or tying/bundling.

Nonetheless, the Competition Law is sufficiently broadly drafted to allow standard forms of abusive behaviour to be covered by the prohibitions. In that regard, we would expect Myanmar to regulate "traditional" forms of abusive behaviour, such as unfair exclusivity obligations, pricing below cost, forcing customers to buy tied products or services, and refusal to supply.

Unfortunately, there is no clear indication of how market power will be assessed, or what degree of market power would trigger monopolisation concerns. For example, it may be useful to have a "soft" safe harbour for firms with market shares of below 40%.

▌**What will the merger regime cover?** All forms of business combinations – including joint ventures – will be covered by the merger regime. However, the merger provisions in the Competition Law are limited in detail and there are a number of uncertainties remaining.

First, it is not clear whether the merger regime will be voluntary or mandatory, nor whether it would be illegal to close a notifiable deal before obtaining clearance. Second, there are no clear thresholds to determine the jurisdiction of the Competition Commission to review mergers. Theoretically, it may be possible for the Competition Commission to review any transaction, irrespective of size. Third, the test for identifying an anticompetitive merger is ambiguous. The Competition Commission may block any transaction which creates or extends a position of dominance; reduces competition significantly; or gives rise to market shares above determined thresholds. This leaves great scope for the exercise of regulatory discretion by the Competition Commission. Fourth, the Competition Law provides for exemptions from the prohibition against anticompetitive mergers, including a form of failing-firm exemption (whereby the merger prohibition will not apply if the acquired entity is, or would have become, bankrupt). The scope of the exemptions will need to be defined further. Depending on how these exemptions are interpreted and applied, they may allow significant gaming – for example, through deliberate bankruptcy by a business being acquired in order to obtain exemption for an otherwise problematic deal. Fifth, there are no provisions relating to procedure or review timing. And sixth, there is no apparent deadline for the Competition Commission to publish market share thresholds and procedural rules. Any significant delay risks undermining the success of the whole competition enforcement regime. For example, Thailand has failed to publish merger control thresholds despite having a statutory framework in place for over a decade and the credibility of its competition regime is debatable.

At this stage, therefore, the basic provisions of the merger regime arguably raise more questions than they answer. However, it is hoped and expected that the procedural gaps that exist will be remedied by secondary legislation.

Myanmar in the wider antitrust context

▌**Antitrust enforcement is central to the AEC.** ASEAN has promoted a regional approach to competition enforcement since 2010. In particular, it considers that regulatory consistency and predictability will likely help facilitate foreign investment throughout the AEC. Most ASEAN states now have comprehensive antitrust regimes in place. Those remaining ASEAN member states without dedicated or consolidated competition frameworks (Brunei, Cambodia, Laos and Philippines) are reported to be working towards implementing appropriate legislation by the end of 2015.

ASEAN antitrust enforcement is also continuing to accelerate in line with international best practice. A number of ASEAN member states – led in particular by Singapore, Indonesia and Malaysia – are sophisticated and active antitrust enforcers, fining or imposing remedies on multinational businesses such as Malaysian Airlines, DHL, Nestlé and MOL in both antitrust and merger cases.

While there is some divergence between ASEAN states over merger control rules – for example, Malaysia does not regulate mergers while other ASEAN states do – competition law regimes are much the same throughout the ASEAN region. Consequently, business can adopt a regional approach to antitrust risk.

▌**Asian antitrust enforcement growing outside ASEAN.** Myanmar's commitment to competition law mirrors a broader regional escalation in antitrust enforcement. The majority of Asian jurisdictions now have comprehensive antitrust frameworks, which typically mirror EU and international best practice. In line with its peers, Myanmar is also engaging with global leaders, for example through the competition section at the United Nations Conference on Trade and Development (UNCTAD) in Geneva and recently attending a leading European conference hosted by the German Federal Cartel Office on 26 March this year.

China's Antimonopoly Law draws heavily on EU competition law, and China's regulators take a strong line with international businesses. For example, most recently, China imposed a near-USD $1bn fine on Qualcomm for abusive patent licensing practices. Hong Kong too is set to begin enforcing its Competition Ordinance later this year, bringing the whole of mainland China into the antitrust fold. India is also a major enforcer. It regularly reviews major merger transactions and, in 2012, imposed record aggregate fines of US$1bn on a dozen cement manufacturers.

Each of these jurisdictions has adopted significant elements of EU and international best practice in competition policy and enforcement. Combined with the increase in co-operation and co-ordination between international regulators, the move toward global antitrust convergence is continuing to accelerate.

Implications for businesses

A transitional period of up to two years is likely to apply prior to concerted enforcement of the Competition Law, with that time being used to promote awareness and understanding of the new regime. However, Myanmar is expected to enforce serious breaches of the law from day one. Relying on non-enforcement during any transitional period could be high risk, as the Competition Commission will be able to pursue any antitrust breaches during that time.

Increased co-operation between regional regulators increases the likelihood of cross-border investigations. Consequently, all businesses active in Myanmar should review their commercial practices to ensure compliance with competition law from the date of implementation. Given the regional growth in antitrust enforcement, an integrated cross-border approach to compliance is essential. Robust internal compliance can also give confidence to deploy competition law arguments in commercial negotiations.