

# Foreign Investment Review 2020

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**Contributing editor**

**Oliver Borgers**  
McCarthy Tétrault LLP

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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



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# Myanmar

Nwe Oo and Ross Taylor

Tilleke & Gibbins

## LAW AND POLICY

### Policies and practices

1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Under the Myanmar Investment Law 2016 (MIL), the Myanmar Investment Commission (MIC) classifies a limited number of investments as restricted investment activities and promoted investment activities. Restricted investment activities are further divided into investment activities to be carried out only by the union government (federal government); investment activities that are not allowed to be carried out by foreign investors; investment activities allowed only in the form of a joint venture with any citizen-owned entity or any Myanmar citizen; and investment activities to be carried out with the approval of the relevant ministries.

There are also promoted investment activities (of both foreign and local investors) eligible for tax exemptions and reliefs.

The MIL requires certain investment activities to obtain an investment permit. These include: (i) activities that are essential to the government's strategy; (ii) activities with large capital intensive investment projects; (iii) projects which are likely to cause a large impact on the environment and the local community; (iv) investment businesses that use state-owned land and buildings; and (v) investment businesses required by the government to submit a proposal to the MIC. Other types of investment would require only investment endorsement.

The Central Bank of Myanmar (CBM) had been maintaining a managed floating exchange rate regime as a reference exchange rate since 2012 but changed to a market-based weighted average rate regime as the reference exchange rate in February 2019.

### Main laws

2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

- The Myanmar Investment Law (18 October 2016) (MIL);
- the Myanmar Companies Law (6 December 2017) (MCL);
- the Myanmar Special Economic Zone Law (23 January 2014) (MSEZL);
- the Transfer of Immovable Properties Restriction Act (16 March 1987) (TIPRA);
- the Income Tax Law (23 February 1974) (ITL);
- the Union Tax Law (UTL) (drafted and enacted anew each fiscal year);
- the Competition Law (24 February 2015) (CL);
- the Foreign Exchange Management Law (10 August 2012) (FEML);
- the Insurance Business Law (24 June 1996) (IBL);

- the Financial Institutions of Myanmar Law (25 January 2016) (FIML); and
- the Environmental Conservation Law (30 March 2012) (ECL).

### Scope of application

3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The MIL governs all investment activities, while the MCL regulates company incorporation. The MSEZL deals specifically with all investment activities in Myanmar's special economic zones. The TIPRA restricts foreign persons and entities from owning immovable properties such as land (except short-term lease of up to one year). However, as an exception to the TIPRA, the MIL and the MSEZL allow foreign investors to obtain long-term leases of up to 70 years (50+10+10) with the approval of the government. Foreign operators in the insurance and banking sectors must secure permits from the Insurance Business Regulatory Board and the CBM respectively.

A limited range of investment activities such as manufacturing products for security and defence; manufacturing and servicing arms and ammunition for national defence; air traffic services; pilotage services; feasibility study and production of radioactive metals (eg, uranium and thorium); and administration of electric power systems to be undertaken by the government and private investors (either domestic or foreign) are not allowed. Investment activities such as publishing and distribution of periodicals in ethnic languages including Burmese; medium-scale and small-scale refinement of minerals; operating shallow oil wells; prospecting, exploration and production of jade or gem stones; tour-guide services; and small retail or convenience stores are not open to investment by foreign investors.

### Definitions

4 | How is a foreign investor or foreign investment defined in the applicable law?

Under the MIL, a foreign investor is defined as a person who invests within the country and is not a Myanmar citizen. This also includes foreign companies (ie, companies with more than 35 per cent foreign shareholding), branch offices, and other enterprises established and registered in accordance with the MCL, as well as enterprises formed in accordance with the laws of any other country. Foreign investment is defined as any direct investment (an investment in which the investor has the right to control, influence, or manage the assets that are invested) made by a foreign investor within Myanmar.

## Special rules for SOEs and SWFs

- 5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

No. Every investment made by a foreign person or entity, including of a foreign state-owned enterprise or a sovereign wealth fund, is considered a foreign investment in accordance with the MIL. There is no specific definition for state-owned enterprises or sovereign wealth funds under the MIL.

## Relevant authorities

- 6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The union government of Myanmar, the MIC and the company registration body of the Directorate of Investment and Company Administration (DICA) usually review mergers and acquisitions (M&A) on national interest grounds. The Myanmar Competition Commission may scrutinise potential M&A to see whether potential M&A activity would infringe competition provisions. Sometimes M&A deals would require approval from the union parliament in the case of significant impact on security, economic condition, the environment and national interest.

## National interest

- 7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

There is no information available on transactions rejected on national interest grounds for M&A, since there are no pure M&A transactions taking place in Myanmar, and most 'M&A' activities in Myanmar are types of share or asset acquisition.

## PROCEDURE

### Jurisdictional thresholds

- 8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The MIC has delegated local investment committees and local governments to oversee and issue investment permits or endorsements for investments up to the threshold of US\$5 million and for non-strategic investment activities.

However, the following are considered strategic investments and are required to be reviewed by the MIC and the union government:

- investment exceeding US\$20 million in any business in the area of communication and information technology, pharmaceutical technology, biotechnology, similar technologies, energy, infrastructure and urban development, extraction of natural resources and media;
- investment exceeding US\$20 million under a grant of land use (or other property) rights, concession agreement, or similar authorisation by government department or government organisation;
- investment in agriculture on more than 1,000 acres of land;
- investment to carry out a business other than agriculture on more than 100 acres of land;
- large capital intensive investment if the expected investment value exceeds US\$100 million;
- investments with a large impact on the environment and the local community requiring an environmental impact assessment; and
- investment business located in a designated or proposed protected area, forest reserve area, key biodiversity area or area selected to support the ecosystem, and cultural and natural heritage including cultural monuments and unspoiled natural areas.

## National interest clearance

- 9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Usually, an investor or promotor can make an investment screening application to the MIC to determine whether the desired investment activity is eligible for immediate investment; would fall under restricted investment activity; or would require special clearance from union government or union parliament. The MIC will issue non-binding guidance in response to a screening application, explaining whether a potential investment would require national interest clearance.

In the case of M&A, major transfers of shares or assets or business require prior approval from the MIC. If the MIC considers that a potential M&A needs governmental or parliamentary clearance, the MIC will submit the M&A-related application to the union government, which would in turn submit it to the union parliament if necessary. Large-scale investment using a vast area of land, such as an economic zone, housing project, urban development, are frequently submitted to the union parliament through respective line ministry for approval. Potential M&A transactions involving large-scale investment would require approval by the union government or the union parliament on case-by-case basis.

## Securing approval

- 10 | Which party is responsible for securing approval?

Generally, the target must secure approval for pre-M&A transactions, and the investor is responsible for post-M&A activities.

## Review process

- 11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Generally, M&A-related transactions must apply to the Investment Monitoring Section of the MIC for approval before transactions are made – this process will only take a few weeks. The Investment Monitoring Section will then submit the application to the MIC if the proposed transactions meet the criteria, and the proposed transactions will be assessed by the MIC. This process takes two to three months. The MIC will, if the proposed transactions are related to strategic investments or national interests, submit the proposed transactions to the union government. This process is rare but would take much longer.

## Clearance penalties

- 12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, the review should be completed before parties finalise the deal, as the investment rules require prior approval when transferring majority ownership. Even if a deal does not involve transferring majority ownership, it is good to get prior approval if the potential M&A relates to a sensitive industry or strategic investment. The MIL provides administrative actions in breaches of investment law and rules, regulations, notifications, orders, directive, procedures or terms and conditions contained in the permit or endorsement. Penalties include censure; temporary suspension of business; temporary suspension of tax exemption and reliefs; revocation of the permit or endorsement; and blacklisting the business for future consideration of permits or endorsements.

### Involvement of authorities

- 13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The Investment Monitoring Section of the MIC is open for all investors to consult before filing or arranging transactions to ensure compliance with the relevant laws.

### Facilitating clearance

- 14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

There is no news or relevant information available on this. The MIC or the union government usually decides independently.

### Post-closing powers

- 15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

There is no news or other relevant information available on rejections of M&A transactions on national interest grounds since there are no pure M&A transactions in Myanmar, and most 'M&A' activities in Myanmar are types of share or asset acquisition.

## SUBSTANTIVE ASSESSMENT

### Substantive test

- 16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

There are no specific test procedures for clearance. The MIC or union government decides in accordance with the scope of permissible investment types and the government's economic policy.

### Consulting other countries

- 17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Generally, they will perform cross-checks only on the financial standing of potential investors.

### Other relevant parties

- 18 | What other parties may become involved in the review process? What rights and standing do complainants have?

The review process may garner involvement especially by respective line ministries, and sometimes by civil society organisations. Respective line ministries have the right to oppose, recommend or make exceptions.

### Prohibition and objections to transaction

- 19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The MIC has the right under the MIL to give approval if the transfer does not impact the interests of the country. However, MIL and its regulations do not deal clearly with prohibition or interference. The comments of respective line ministries will have adverse impact on the decisions.

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### Mitigating arrangements

- 20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Theoretically, yes, especially for environmental impact-related projects. Respective parties must undertake the following: an initial environmental examination; an environmental impact assessment; a social impact assessment; and an environmental management plan and they must comply with the tight regulations.

### Challenge and appeal

- 21 | Can a negative decision be challenged or appealed?

Yes, a negative decision can be challenged and appealed to the union government. The decision of the government is final and conclusive on grounds of national interest.

### Confidential information

- 22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Competition Law prohibits the breach of confidential information or trade secrets by any means. Such a breach, or dissemination of false news, is punishable by imprisonment, a fine or both.

## RECENT CASES

### Relevant recent case law

- 23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

There is no news or other information available on transaction rejections. In the past, a major urban development project was opposed by civil society organisations and, as a consequence, the MIC paid compensation to the foreign developer for development costs and replaced a land plot to enable the developer to proceed with the project.

**UPDATE AND TRENDS****Key developments of the past year**

- 24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

No proposed changes yet.

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