

# TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY MYANMAR UPDATE

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SEPTEMBER  
**2017**

*“VDB-loi have been very effective in finding the current regulations on satellite communication and he has communicated directly with governmental authorities on this matter to obtain the latest relevant information.”*

*- IFLR1000*



# PTD SPEEDS UP LICENSES AND REFORM

The Post and Telecommunications Department (PTD) has been active recently administering and issuing new licenses and pushing for regulatory reform. In this note we outline some key developments in the Myanmar telecom sector in that regard.

## **International gateway license on the way**

The PTD is proposing to grant the first batch of licenses for International gateway (IGW) in the country. It is said that the prospected licensees have been decided and the PTD is in the final stage before they clear some administration hurdles. As part of the licensing compliance requirement, PTD recently issued the Technical Specification and Quality of Service for International Gateway Service as a supplement on 5 April 2017. The technical specification, read together with the Guidelines on Provision of International Gateway Services (issued in September 2016), constitute the two rules directly regulating licensees holding the IGW license. The technical specification specified a set of parameters for ranging from routing, and quality of service to reporting and monitoring requirements. New IGW license holders shall comply fully with this technical specification immediately, and existing IGW operators are expected to be in full compliance by the end of 2017. The technical specification also gives PTD the power to determine “floor price” for international voice traffic terminating in Myanmar.

## **PTD to look into interconnection prices**


PTD is recruiting eligible international interconnection pricing specialist as consultant to provide services to review current interconnection price regime and develop assessment mechanism and models for interconnection pricing. The recruitment is one step toward the Myanmar government’s contemplated reform in the telecommunications sector to increase market competition and service level in the sector. By developing a proper assessment mechanism, the regulatory authority can enhance its regulatory framework under the current Interconnection and Access Rules, particularly for evaluation of rates for access and interconnection offered by various telecom operators in the market now. Precedent to this recruitment, PTD also recruited consultant In March 2017 to verify the performance of mobile operators’ networks by conducting the drive test and quality of service measurement. The operation is intended to monitor whether the current mobile operators have fulfilled their commitment to their services level.

## **1800 MHz spectrum license awarded to three mobile operators in Myanmar**

The Ministry of Transport and Communication (MCT) granted licenses on the 15 May 2017 for use of the 1800 MHz spectrum for a term of 12 years to MPT, Telenor and Ooredoo, which are each holders of a nationwide telecommunication license. The award of the spectrum did not go through auction or tender, unlike the auction for the 2600MHz spectrum held in late 2016. The licensees of the 1800MHz spectrum license have each paid USD 80 million as the spectrum fee. It should be noted that in the Consultation Paper for the 1800MHz Spectrum Allocation Process published by PTD in late February this year, Mytel, the fourth operator which just received the license in January this year, was part of the allocation plan, but it was not listed in the final announcement.

## **Draft Myanmar Communications Regulatory Commission Law**

The MCT published the unofficial English translation of the draft Myanmar Communications Regulatory Commission (MCRC) Law in May 2017 and invites public comments for the draft law, following publication of the Burmese version in April 2017. The purpose of the law is to establish the MCRC as a regulator in the telecommunications sector and replace the PTD. Under the draft law, the MCRC will take up responsibilities from PTD to issue telecommunications licenses, allocate use of spectrum, administer industry standards, assist the Competition Commission (established under the Myanmar Competition Law effective in February 2017) in investigating competition complaints in the sector and investigate other contravention conduct in the telecommunications sector. It should also be noted that the draft law sets out a clear penalty amount. A breach of the MCRC law is subject to a fine up to US\$7500, and a breach of other relevant laws, rules and orders is subject to a fine up to US\$4500. ■



*“Highly active regional firm with a large team, Experienced in advising clients on a number of headline deals, including considerable activity in the telecoms sector”*

*- IFLR1000*

# WHAT YOU CAN'T SAY OR DO WHEN ADVERTISING YOUR PRODUCTS OR SERVICES

The measures which your business must take to ensure compliance with Myanmar law does not end with incorporation. In fact, the Consumer Protection Law, read with the recent Competition Law (effective February 2017) mean that you must now take additional precautions to ensure that your day to day business advertising and marketing are up to scratch.

Whilst advertising and marketing are just one facet of Myanmar competition law, failing to comply with the relevant provisions can land your business in hot water. If your business is not careful you run the risk of fines as well as criminal sanctions under the Competition Law.

Apart from these penalties your business could stand to suffer damage to its commercial reputation for failing to take a few easy, yet important safeguards to ensure that your advertising policy is aligned with both the Consumer Protection Law and the Competition Law.

In this client briefing note we set out several measures which your business can take today in order to reduce exposure to liability under the above laws. However, this briefing note is intended to provide you with some useful illustrative points and is not intended to be a comprehensive briefing on the subject. Whilst reference is made to both the Consumer Protection Law and the Competition Law, there are other sources which are not explored in this briefing note.

## **In what way does the law regulate your advertising?**

Firstly, the laws are concerned with both the substance and form of your business advertising and marketing. The laws require that the mode of advertising, such as the packaging on products, logos and slogans are correct and not in any way deceptive.

Secondly, the laws require that all information pertaining to price, quantity and the warranty period are true and correct.

Thirdly, the laws prohibit an entrepreneur from engaging in advertising which does not inform consumers of the risk, if any, of using the good or

service to which the advertisement relates.

Accordingly, any discrepancy in the accuracy of product information, or, any advertisement which offends against the above principles, is enough to trigger sanction under the law. However, there has been very little, if any, litigation based on advertisements but that is unsurprising since the laws are new.

## **What is the next step?**

With the Competition Law recently becoming effective, businesses should waste no time in revising their advertising and marketing policies and bringing them up to speed. Below we set out a table of actions which your business can take to guide you in the right direction.



What you need to be aware of:	Explanation:
Direct comparative adverts and reputation	<ul style="list-style-type: none"> <li>• Directly comparing the goods or services with those of other businesses is dangerous territory.</li> <li>• Focus on the product's own merits. Myanmar law does not allow much in terms of comparisons with your competitors. In case of doubt, retain legal advice.</li> </ul>
Information, slogans and claims to be proven	<ul style="list-style-type: none"> <li>• Always be aware of slogans or the names appearing on your goods and ensure that they are not deceptive or misleading against your customers.</li> <li>• Your innovation will be rewarded but the law won't tolerate piggybacking off a competitor's slogan, logo etc.</li> <li>• Do check to make sure that your business logo or any slogan you use is lawfully registered.</li> </ul>
Do not imitate	<ul style="list-style-type: none"> <li>• Whilst the Consumer Protection legislation does not define what amounts to imitative advertising – it is best to be creative and original in your approach.</li> <li>• If in doubt, retain legal advice.</li> </ul>
Safety first	<ul style="list-style-type: none"> <li>• Always make sure that any risks associated with using your products are adequately set out in the advertisement.</li> <li>• Informing consumers of risks in your products is not only good ethics but a requirement under the Consumer Protection Law as well.</li> </ul>
Sources of quotes are helpful	<ul style="list-style-type: none"> <li>• Always insist that you are aware of the sources of information, which you use in your advertising.</li> <li>• Remember, even if you use quotes, always be able to point to where you obtained that information.</li> <li>• Never handle information which you suspect to be sensitive or a trade secret.</li> </ul>

## OUR PARTNERS



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Jean is one of the region's most experienced tax and regulatory specialists with more than 12 years of experience in Indochina, Myanmar and Singapore.

She has advised on a large number of project transactions and tax disputes in the specialties of structuring, power plant projects and oil & gas.

As the managing partner of VDB Loi, Jean has extensive experience with projects related to the market entries of companies in the infrastructure, telecommunications and financial services industries in the region, as well as with supply chains. She lives in Yangon.



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*"They are very efficient, knowledgeable and are well informed especially on telecom, tax and labour laws"*

*- Asia Law*



# ACCESS TO PERSONAL ELECTRONIC DATA: NOW THE LAW SAYS YOU NEED PERMISSION

The Pyidaungsu Hluttaw published a new law on 8 March, 2017, the Law Protecting the Privacy and Security of Citizens (Union Parliament Law 5/2017).

This new law sets out general duties of relevant ministries and authorities to protect privacy and security of citizens, while a “citizen” is defined as “the person who is a citizen either under the Constitution or any other existing law”.

More importantly, Section 8 of the law prohibits conducts infringing on personal privacy and information. In particular, Article 8 (d) reads:

*“In the absence of an order, permission or warrant issued in accordance with existing law, or permission from the Union President or a Union-level Government body... (d) No one shall demand or obtain personal telephonic and electronic communications data from telecommunication operators.”*

Section 10 further sets out whosoever is found guilty of committing an offence under Section 8 shall, in addition to a sentence for a period from six months to up to three years, subject to a fine between 300,000 to 1,500,000 kyats.

The wording of Section 8 is very broad as it does not restrict access to the electronic data to those only of the Myanmar citizens, nor does it limit the type of infringers. Any person, except for the telecommunication operators which would hold personal data generated from their end users at the first place, could be an infringer under Section 8 and subject to penalty under Section 10, which leads to imprisonment and fine. It doesn’t mean that telecommunication operators themselves could be immune from this new law. Section 12 of the new law provides

*“whoever is found guilty of encouraging, ordering, joining with, and assisting or abetting another to commit an offence under this law shall be sentenced in accordance with this law”.*

Therefore a telecommunications operator assisting non-authorized access to personal data could be subject to penalty of the new law, too.

The new law is not clear on which authorities will be responsible to enforce this law. While the Ministry of Home Affairs is certainly one of them, any other government department, organizations or officials could be responsible to ensure the privacy and personal affairs of citizens are protected because the definition of “Responsible Authorities” is very broad. Hence the law seems to empower any Myanmar authority to take action under the name of protection of privacy.

This is the first time a law in Myanmar lays down a direct imprisonment term for unauthorized access to personal electronic communications data. The telecommunications laws in Myanmar imposes general duties for telecommunication licensees to protect personal data and privacy, however it does not set forth penalty for violation of such duties. Moreover, a party which is not a telecommunications licensee would not be subject to the same duties. A law to fill in this gap is Section 34 of the Electronic Transactions Law which provides anyone who accesses or uses data without permission of the data originator and the addressee could be subject to a fine, and only imprisonment if failing to pay the fine. Again, Section 34 of the Electronic Transactions Law does not lead to direct criminal penalty. It only becomes so under Section 10 of the new Law Protecting the Privacy and Security of Citizens.

It should also be noted that Section 13 under the new law states that provisions in the new law takes precedence upon other existing laws. In other words, if one is committing illegal acts punishable under both the Electronic Transactions Law and the new law, the new law should be applicable and a more serious penalty would be applied.

With implementation of the new privacy law, anyone who wants to obtain personal telephonic and electronic communication data from telecommunications operators should seek



permission beforehand to avoid jail time. Even the telecommunication operators should be cautious to ensure they have obtained proper permission from the data originators to grant access for such personal data to any third party, to avoid being a conspiracy under Section 12 of the new law.

### What permission will qualify?

The new law makes it important to get permission to access personal electronic data. Order, warrant or permission from government authorities or court will of course suffice, but any non-authority permission? Section 8 of the law states “permission... in accordance with existing law” can also satisfy the permission requirement. Therefore permission from the data originator could suffice such permission as it fits in the Electronic Transactions Law and Myanmar general legal principles.

The new law posts challenges to telecommunications operators to draw out the proper scope and steps of obtaining permission regarding use of data generated and received from the end users’ side. In the privacy agreement between the telecommunication operators and the end users, there should be clauses articulating end users’ permission which sufficiently covers possible and necessary third-party access and use of their personal data like third party access for system maintenance purpose. The telecommunications operators should also keep an eye on updating their privacy agreement with the end users any time when they need to change the scope of permission. For example, they need to expand the list of third party to access such data. In practice, it might be prudent to seek a “double security” from both the relevant authority and private side for third-party access and use of such personal data. ■

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## OUR TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY TEAM



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# SOME REGULATORY POINTS OF ATTENTION FOR TELECOM M&A AND CONTRACTING IN MYANMAR

Once regarded as one of the world’s last remaining frontiers for telecom companies, Myanmar’s telecommunication sector has seen a surge in investment in recent years, fuelled by the opening up of the mobile segment in 2014, rise in phone ownership and internet penetration rates.

In 2016, telecommunication sector attracted most foreign investment in Myanmar, according to statistical data released by the Myanmar Investment Commission (MIC), and this trend is expected to continue over the coming years.

As the telecoms sector’s long-term prospects remain bright, understanding the telecom contracting process in Myanmar, regulatory requirements and risks associate with it remains key for investors entering this segment. In this client briefing note, we explain ten tips for telecom contracting in Myanmar.

## **Make it clear who is responsible to get the license in a JV**

At present there is no requirement that a company must be a joint venture (JV) company in order to provide telecommunications services in Myanmar. In other words, you can have a 100% foreign-owned telecom company. Nevertheless, should you consider a JV, you should clearly state which party is responsible for obtaining telecom license under the JV agreement. Since obtaining the license is a key part of carrying out telecom business in Myanmar, it can either be set forth as a condition precedent or as a termination event for the JV under the JV agreement.

## **When you buy or sell shares, get PTD approval first**

It is stipulated by the Competition Rules for the Telecommunications Sector that a shareholder transferring over 15% of shares in a licensed company should get approval from the Posts and Telecommunications Department (PTD) before the transfer can take effect. The following table explains actions required to carry out this task:

Share %	PTD Action Required	Type of Action
<15%	Yes	De facto approval prior to DICA registration
>15%	Yes	Approval
Change in control	Yes	Approval

As stated in the table, “change in control” will require prior PTD approval and it is widely defined under the Telecommunications Law. It not only includes (either direct or indirect) transfer of more than 50% shares, but also the right to appoint a majority of board members and senior executives, as well as decisive power to make management decision for the licensed company. As a result, any instrument or arrangement results with respect to direct or indirect change in control of the licensed company will be subject to PTD approval.

Just in this February, PTD circulated a letter which further strengthens the approval requirement. Any change of information regarding shareholding will now be required to get PTD approval before it is filed with the Directorate of Investment and Company Administration (DICA).

## **When you are changing the directors, get PTD approval first**

A recent letter circulated by the PTD in February 2017 confirms that any information regarding changes to the company should first obtain PTD approval before they are registered with DICA. Such information includes change of directors, shareholders, company name and registered address.

## **When you are increasing the capitals, get PTD approval first and mind the deadline**

Subject to the letter mentioned above, you have to get PTD approval for increasing the capital investment in a licensed company before you can file it with DICA. Such increase of capital also include capital in kind and loan-converted capital. Given that such increase of capital is required to be filed with DICA within 15 days from the passing of resolution authorising the

increase, it should take into account the time for getting PTD approval (and approvals from MIC as well as the Central Bank of Myanmar for foreign capital) in order not to delay the registration with DICA.

**When you are reducing the capitals, get PTD approval first**

Again, de facto approval from PTD now is required. Since reduction of capital in a company holding a MIC permit will inevitably result in amending its investment proposal, MIC approval is also required. In this context, a prior PTD approval could be used for applying MIC approval and filing with DICA.

**PTD approval is required for import of telecommunications equipment (and sometimes export, too)**

Although dealing with telecommunications equipment alone may not necessarily require a telecom license, PTD recommendation will be required to secure import permits for telecom equipment. Depending on the nature of the equipment, PTD recommendation is nearly always required for exportation of the equipment as well.

In a supply contract involving telecomm equipment, highlight which party will be responsible for import/export permits of such equipment.

**Business in international gateway services? Watch out for shareholding and personnel restrictions**

A licensee with a Network Facility Services (individual) license may apply to provide international gateway services. However, Guidelines on Provision of International Gateway Services states that such a licensee shall not own more than 10% shares in another licensee that has received a license or authorization to provide international gateway services. The Guidelines also forbid such licensees from sharing directors or officers. Directors or officers in such a licensed company can also not hold shares in another licensed company with approval of international gateway services.

If you have a business plan for international gateway services, be aware of the shareholding restriction and leave an exit for yourself in a share purchase agreement. Regarding the personnel restrictions, you may set it as a disqualification criteria of director or officer in the shareholder agreement. You may also wish to do a background check when appointing a director or an officer.

**New services? Tell PTD**

Telecom licenses in Myanmar come in categories such as NFSI, NFSC, AS and NS. That category does not say what the licensee is actually allowed to do.


That is mentioned in the license application and in the license itself.

Therefore, even when you have been granted a telecom license, PTD must still be notified about the expansion of scope of services, if the newly-added services are under the original license scope. PTD approval is required if it is out of the original license scope or international gateway services.

**Yes, there are rules regulating anti-competitive conduct**

A set of competition rules have been laid down in Myanmar to regulate competition in the telecom sector. These rules cover competition restraining activities such as bundled services, unjustified low-price offer, horizontal/vertical agreement, etc. Furthermore, PTD is empowered by rules to review and approve M&A and takeover transactions in relation to a licensed company, and tariffs imposed by a licensed company. ■





*“Very good in terms of response times, industry knowledge, business understanding and the level of advice provided.”*

*- Legal 500*

# HOW TO NEGOTIATE A SPECTRUM LICENSE IN MYANMAR?

The Myanmar Ministry of Transport and Communications has on 18th October 2016 successfully auctioned 40MHz of spectrum in the 2600MHz band (2575-2615 MHz), made up of two times 20MHz (2575-2595 MHz, 2595- 2615 MHz) divided into three regions. Each successful bidder was able to acquire up to two regional licenses, thus allowing for three to six regional licensees in total. The spectrum license is for 15 years. The 2600MHz spectrum allows for the provisioning of broadband data service such as 4G/LTE services.

In this briefing note we dive deeper into what lies ahead for the winners, Yatanaporn Teleport, Fortune International, Global Technology and Amara Communications Services. Now that they have won one or more spectrum licenses, how to best finalize the license negotiation with the PTD? What other steps lie ahead?

## Is there something to negotiate?

The telecom sector is one of the more comprehensively regulated ones in Myanmar, and nearly all regulation is very recent. Draft regulations were prepared in 2013 with the help of international consultants. These regulations were then adjusted to Myanmar (with the help of VDB Loi) and released bit by bit from 2014 to 2016. Among the regulation feature the Licensing Rules and the Spectrum Rules. That being the case, the regulatory framework of all telecom licenses which are issued after the regulations were prepared, including spectrum licenses, is fairly set. You would think that there is not much to negotiate about, because all important things must have already be fixed by those regulations. The PTD cannot deviate from its own regulations in any particular license anyway, so there is nothing to talk about, is there?

Wrong. There were various forces at work in the 2012-2016 time period, which was basically the birth period of liberalized telecommunications in Myanmar. First of all, you had the Ooredoo and Telenor licenses. They pre-date the entry into force of the telecom regulations and therefore the text of these two are entirely not aligned. Secondly, the regulations themselves. Although drafts were circulated, the final official versions are not the same as the drafts. That is, the official versions were made a bit shorter, simpler. That also creates distortions for the text of future licenses. Finally, and most importantly, there are plenty of important commercial and logistical factors which are not addressed by the Licensing or Spectrum Rules. For example, the performance and coverage commitments, the quality of service commitments, and applicable penalties and guarantees. How these need to be agreed and written down may be crucial for the licensees.

## A license for 15 year. From when, exactly?

When you pay a considerable sum of money for using spectrum for a limited period of time, each day counts. However, in Myanmar a licensee cannot just start using spectrum from the first day the license is signed. In most cases, a network must be rolled out in a fairly similar fashion as the mobile network operators had to do, and are still doing. This requires equipment being imported, import licenses being granted, and depending on the region, even deploying passive network infrastructure if none is already available for co-locations.

The thing is, one cannot commence actually providing any telecommunications services until close to a year into the investment. Or at least that is the case for most licensees, those that do not yet own

Regional	Lot No.	Auction Winner Names	Price USD (Mil)
Region 1 (Nay Pyi Taw, Magway, Bago, Mon, Kayin, Tanintharyi )	1.1	Fortune International Ltd	6.09
	1.2	Global Technology Co.,Ltd	7.03
Region 2 (Yangon, Ayeyawaddy, Rakhine)	2.1	Amara Communications Co.,Ltd	95.81
	2.2	Yatanarpon Teleport Public Co., Ltd	83.44
Region 3 ( Mandalay, Sagaing, Chin, Shan, Kachin, Kayah)	3.1	Yatanarpon Teleport Public Co., Ltd	27.24
	3.2	Amara Communications Co.,Ltd	24.55

a network of their own to make use of the acquired spectrum rights.

The Spectrum Rules do not prescribe the moment in time when the spectrum license is deemed to commence. That will be left up to the license terms and thus up to negotiation with the PTD.

### Negotiating the roll-out commitments

As part of the auction, the PTD has sent out certain roll-out requirements. Depending on the region of the licensee, the network must achieve between 30% to 50% completion by year 5.

	Roll out Requirements in Regions (by population)		
	Region 1	Region 2	Region 3
By Year 5	30%	50%	35%

These commitments are not really biddable terms, but parameters set out in the 2600 Mhz Auction Framework. The purpose of these roll-out commitments is first of all to make sure the licensee is efficient enough to indeed monetize the asset for the Government. An inept licensee would not make a good business partner. The roll-out commitments have population and/or geographical targets to ensure that licensees do not just focus on the lucrative, highly populated areas. They are obligated to also to spend money developing a network in lesser lucrative areas.

The parameters mention that the parameters are set in terms of "population". The alternative would have been in terms of "geography". A benchmark based on geography is a serious problem for operators, because it virtually guarantees you need to spend money in areas where there are not enough people to make money. A benchmark in terms of population, less so.

To negotiate the license, with respect to the roll-out commitments one should focus on two things:

1. when exactly does the licensee fail the standard; and
2. what happens then.

Firstly, roll-out and coverage are not black and white issues. Radio rings reach many people, but the power of the connection will decrease the farther you are away from the source. In other words, how many Mbps is enough to include people as having been covered in the roll-out?

Secondly, what happens if the licensee misses a target? From the licensee's perspective it will be important and reasonable to be given a chance to

remedy the situation.

### Quality of service commitments in the spectrum license

The Auction Framework set forth two crucial quality of service (QoS) benchmarks in terms of bandwidth throughput:

1. The Winning Bidders/licensees will be required to support a minimum bandwidth speed of 5 Mbps to each customer by the end of the 1st year of operation;
2. In the subsequent years, PTD will reevaluate the appropriate minimum bandwidth speeds taking into account the needs of Myanmar consumers and businesses in the license areas as well as ASEAN's broadband average speed.

There are a few things problematic with this approach.



First of all, the QoS benchmark says that the minimum bandwidth speed of 5Mbps must be reached by the end of the 1st year of operation. That is remarkable, since there is not even a network roll-out commitment by the end of year 1. The network roll-out commitments are for the end of year 5, as was discussed above. So, which network is this quality test supposed to be applied to? This needs to be clarified in the negotiations finalizing the license.

The second benchmark is quite vague. Basically the Auction Framework says that the licensee must be able to hit a certain bandwidth speed which the PTD will determine at some stage in the future. Licensees would be reluctant to commit to a blank check.

### **Renewal of a spectrum license**

One of the likely points of controversy is the right of the licensee to renew his spectrum license. The basic rule is that if the licensee wants, he can renew

the license and the Government has to agree to give them the renewal.

The Draft Spectrum Rules provided in this regard that the licensee has a right to renew, except in certain cases, as is provided in s. 14 b) of the Draft Spectrum Rules:

Upon receiving a request for renewal pursuant to provision a) in this Section, unless the Department and the Licensee agree otherwise, the Department will renew the License, on the same or substantially similar terms, for no less than ten (10) years, if the Licensee has substantially complied with:

1. all applicable Primary Legislation;
2. the Applicable Regulatory Framework; and
3. the Conditions contained in its License.

However, these exceptions to the automatic right to renew are not found in the actual Spectrum Rules

## s. 23 Spectrum Rules

- (e) "The Licensee shall maintain, and keep up-to-date, records of their operations and equipment as determined by the Department from time to time, including but not limited to:
- i. The equipment specifications of all Radio Stations and other Radio Apparatus operating under its License;
  - ii. The coverage area of the Licensee's Telecommunications Network and of each Radio Station;
  - iii. The effective radiated power of any Radio Station and its location and height;
  - iv. The measures taken to ensure that each Radio Station is not a source of harmful radiation to the public, and the Licensee's employees and contractors;
  - v. Any information necessary for the Department to develop and keep updated the National Table of Frequency Allocations and National Frequency Assignment Register;
  - vi. The emission designation of each Radio Station; and
  - vii. The types of services provided to the Licensee's End Users using the Assigned Frequencies.
- (f) The Licensee, upon receiving a written request from the Department pursuant to Section 40 of the Telecommunications Law and the Applicable Regulatory Framework, shall within the reasonable period specified by the Department:
- i. Make any officer or employee available for examination by the Department;
  - ii. Provide the Department with any information, data, document, papers or other information required by the Department concerning the Licensee's actual or proposed use of the Assigned Frequencies and other Radio Spectrum resources;
  - iii. Provide the Department with the equipment specifications of all Radio Stations and other Radio Apparatus operating under its License".

which were issued. The exceptions were cut as part of the PTD's drive to simplify the regulation.

If the PTD still wants these exception to apply, which we think is likely, their last chance is to put them back on the table in actual licensing negotiations. Of course, it would be in the licensee's interest to stick to what the Spectrum Rules say at present, and have no exceptions whatsoever to license renewal.

### **Information licensees need to provide to the PTD**

The Spectrum Rules provide in an extensive duty upon licensees to inform the PTD in s.23 e) an f) Spectrum Rules.

Some of these requirements are asking for the licensee's crown jewels. One might ask whether such extensive duties are really necessary. I guess we cannot argue much with the regulations in force, but it may be advisable to build in extra safeguards and protection for licensees in the license itself so that they do not incur any risk unnecessarily.

### **How much are the spectrum management fees?**

The Spectrum Rules do not determine what the fees are that licensees have to pay. Remarkably, the Auction Framework also did not specify what fees, besides the initial fee which is the key biddable term. The Spectrum Rules provide no answer either. S. 21 Spectrum Rules just lists the fees, without naming a rate or a number.

"21. Licensees shall be subject to the following fees:

- (a) Spectrum Fee. Licensees shall pay Spectrum License Fee in the prescribed manner;
- (b) Spectrum management fee. Licensees shall pay spectrum management fee as part of Spectrum License Fee yearly;
- (c) Renewal Fees. If a License is renewed, the Licensee shall pay a Renewal Fee as specified in the terms and conditions of the License, per the relevant authorization category;
- (d) Other Fees. The Licensee shall pay any other reasonable fees that the Department may establish under Section 15(c) and these rules."

This was already the case in the Draft Spectrum Rules, although these did contain some more details on when the fee would be payable.


In other words, none of the bidders knew how high the management fee, the renewal fee and the "other fees", if any, were when they put in the bid. They could not know as these were not determined in the Spectrum Rules nor in the Auction Framework. That is, of course, a recipe for controversy between the licensees and the PTD. ■

*Winning bidders will be required to remit their Spectrum Fee in 3 payments:*

- i. 50% on the effective date of the spectrum assignment to bidder.*
- ii. 25% within 1 year after the effective date of the spectrum assignment to bidder.*
- iii. 25% within 2 years after the effective date of the spectrum assignment to bidder.*







*“The team is good at anticipating and dealing with the challenges that arise from doing business in Myanmar”*

*- Asia Law*

# MYANMAR OPENS APPLICATIONS FOR INTERNATIONAL GATEWAY LICENSES: FOREIGN APPLICANTS WELCOME

The Post and Telecommunications Department (“PTD”) under the Ministry of Transport and Communications (“MOTC”) is accepting applications from additional foreign owned operators in a move that further liberalises the country’s International Gateway (“IGW”) licensing policy. The additional opening up of the telecom’s industry comes after the release of the Guidelines on Provision of International Gateway Services (the “Guidelines”). In the past, the PTD did not accept applications for IGW licenses from foreign companies (except for the IGW licenses which were provided to Ooredoo and Telenor as part of the 2012-2013 tender) although there was no official written policy on the subject.

This liberalisation of IGW presents an opportunity for foreign companies to enter a market which was previously served by only a very limited number of players. We expect that a number of foreign-owned and joint venture companies will submit their applications in the coming weeks and months.

## **What activity does an IGW license allow you to perform?**

An IGW is defined under Notification 16/2014 (the “Licensing Rules”) as the construction and operation of a network facility for the provision of telecommunications services that enables international communications and connectivity between Myanmar and foreign points.

In September, the MOTC released the Guidelines which provide the process and conditions for operating an IGW service. It further prescribes that IGW licensee may undertake the following:

- (a) International transmission capacity, using any kind of network and any form of transmission technology, between places outside Myanmar and the relevant cable landing station or cross-border transit facility or radio communications facility in Myanmar;
- (b) Cable landing stations or cross border transit facility or Terrestrial Cable Station;
- (c) VSAT devices;
- (d) International gateway facilities;
- (e) Facilities ancillary to the facilities required for provision of the international gateway services, such as a customer support center, billing

systems or an intelligent network platform.

- (f) The Network Service License (“NS”) also allows for the resale of IGW, however the Guidelines are not applicable to the resale of IGW.

## **Who can apply for an IGW license?**

Pursuant to the Licensing Rules, if a Network Facilities Service (Individual) License (“NFS(I) License”) holder wishes to offer IGW services it must apply to the PTD. So, as a rule, one must already hold an NFS-I license to apply for an IGW license. However, we believe there is a work-around possible for this situation.

Applications are now open, pursuant to the existing Guidelines.

The Guidelines impose some anti-competition restrictions which may prohibit some potential applicants from applying. It should be noted that the Guidelines should be considered as supplementary to the anti-competition prohibitions also contained in the Telecommunications Law. The Guidelines provide two explicit anti-competitive restrictions per Section 7, namely:

- An IGW licensee shall not own more than 10% of another share in another IGW licensee; and
- Directors or officers of an IGW licensee may not be eligible to be directors, officers, or hold shares in another IGW licensee.

## **Are there any foreign ownership restrictions?**

The Guidelines mention no foreign ownership restrictions, and neither do the rules implementing the Foreign Investment Law (transitioning to the Investment Law 2016). We believe that foreign owned applicants or applicants who are joint ventures may apply for IGW provided they qualify for the conditions set out in the Licensing Rules and the Guidelines. There is no requirement for a local partner.

## **What is the application procedure?**

The Guidelines provides explicitly for what must be included in the application at Section 11, including the following:

- location in Myanmar of the proposed facility or facilities;
- design plans of the proposed facility and a network diagram of the related international connectivity;
- implementation plan;
- proposed launch date (within two years) for provision of the international gateway service;
- initial total international bandwidth/capacity;
- technical arrangements for data collection and storage
- a disaster recovery plan;
- a redundancy plan;
- a Quality of Service(QoS) minimum commitment;
- commitment on Lawful Interception requirement;
- monitoring compliance; and
- total proposed investment for the project.

In practice, there are a number of additional unwritten expectations and requirements applicants need to factor in.

The location of the proposed facility or facilities may not be ascertained at the time of the application, or land rights to the proposed land may not be finalized. In practice, the PTD will have additional requirements in connection with the location, some of which may depend on the nature of the site.

In addition to the requirements of s. 11 Guidelines, in practice the applicant will need to prepare a tariff plan. The tariff plan must at some stage be approved by the PTD.

The exact QoS commitment that is required by the PTD is yet to be formally published, and is in fact still being drafted. As such, the PTD will request a formal letter from companies which confirms they will comply with the future QoS requirements. As a baseline, the PTD has advised that companies can reference existing international standards for QoS requirements.

#### **How does PTD decide who gets an IGW license?**

The Guidelines do not state whether the number of IGW licenses will be limited. We believe that at this time any company, foreign or local, which fulfils PTD's application requirements listed above for both the IGW and NFS(I) license may be put forward by the PTD to the Cabinet's Economic Committee for an IGW license. It is unclear how many IGW licenses the Economic Committee might approve, or whether there is no limit at all. At this time, we have not seen any clear indication that there is a quota of IGW licenses which may not be exceeded.

#### **How long does the application process take?**

PTD must approve the license within 60 days once the complete documents are provided. However, the application will also have to go through the Economic Committee led by Vice President and then to Cabinet for approval – a process which PTD is currently unable to guarantee a timeframe for.

#### **What issues are likely to arise with the bid bond?**

Under the Guidelines, applicants must comply with a commitment bank guarantee both initially as the authorization is granted, and subsequently upon commencement of the operation. This table provides an overview:



Name	Guidelines reference	Timing and amount (USD)	Conditions	Release
Commitment Bank Guarantee	s.15-19	\$1,000,000 at the time the PTD grants the authorization. For one year then renewed annually two years.	<ul style="list-style-type: none"> <li>Issued in favor of the PTD, to a bank of institution approved by the PTD.</li> <li>25% of the value shall be taken as a financial penalty for every three month period that the licensee does not meet the launch date.</li> <li>If the licensee abandons its IGW authorization, or such authorization is revoked or cancelled by the PTD, PTD may exercise all of the remaining money.</li> </ul>	If the licensee meets the approved launch date, the Bank Guarantee will be released.
New Bank Guarantee	s. 20-23	\$500,000 within 90 days of the accepted date of commencement of the service. For one year then renewed after PTD review for a second year.	<ul style="list-style-type: none"> <li>Issued in favor of the PTD, to a bank of institution approved by the PTD.</li> <li>Up to 100% of the New Bank Guarantee may be taken as a financial penalty if the licensee fails to meet with the QoS commitment within a given year.</li> <li>If the licensee abandons its IGW authorization, or such authorization is revoked or cancelled by the PTD, PTD may exercise all of the remaining money.</li> </ul>	If the licensee fulfills all QoS commitments for 2 years following the launch, the Bank Guarantee will be released.

We have experienced a number of practical complications in similar guarantees in Myanmar in the past. PTD has advised that any bank authorized by the Central Bank of Myanmar (“CBM”) will be accepted by the PTD for the guarantee. Such a bank may be a local Myanmar bank or a foreign bank authorized to operate within Myanmar. However, the following complications often arise and tend to slow down this process in practice:

- The applicant’s foreign bank may not have a presence in Myanmar, and as such they will have to arrange with a state bank or a foreign branch bank.
- If the applicant is to go through a foreign branch bank, they may have to go through ‘know-your-client’ processes which may slow things down. This process will come with additional headaches such as notarization of documents, certifying copies and so forth.
- Applicants’ banks may have issues with the wording of the guarantee, as in this case it may be drafted entirely in favor of the PTD and may use quite strong language that clients’ bank may have issues with.
- Applicants may not have anyone on the ground to ensure things are progressing as they ought to.

**When can an IGW operator obtain an MIC Permit?**

The MIC Permit application process can at this point in time only be commenced after having received the relevant telecom license. That is to say, an operator who exclusively operates an IGW would have to wait with his MIC application until the NFS-I license and the IGW license have been secured.

The MIC process has four distinct steps:

1. Intake: the initial screening of the MIC proposal;
2. Project Assessment Team meeting: the most crucial stage where all relevant departments scrutinize the application and conduct an in-depth interview with the investor;
3. Non-objections: The MIC collects approvals or non-objections from various departments, states or regions; and
4. MIC meeting: the formal vote by the Commission.

Applicants should also be weary of the ability to avail themselves to the benefits provided under the Foreign Investment Law 2012. Under this law, investors can receive a 5-year tax holiday, rent land for up to 50 years (with two extensions), exemptions from customs duties and various other benefits. However, the Investment Law 2016 has recently been passed by both houses of Parliament in Myanmar, and is currently awaiting the President’s approval to be enacted. Under this new law, investors will be able to either acquire an MIC Permit or an abridged version of an MIC Permit called an Approval Order, both of which will also result in numerous advantages for the investor. It is unclear whether the IGW operators would be allowed to apply for, in the long term, an actual MIC Permit. ■



*"...excellent sense of how to deal with the  
bureaucracy in Myanmar."  
- Chambers and Partners*

# OUR RECENT EXPERIENCE IN TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

## Transactions

- ▶ Conversion of a state-owned former monopolist operator in Myanmar into a commercial company
- ▶ First-ever merger between two telecom operators in Cambodia
- ▶ US\$50 million acquisition of a group of telecom network assets in Vietnam by a foreign-listed entity
- ▶ Joint venture between a Japanese trading house and a leading Myanmar ISP
- ▶ First-ever spin-off by an operator of its telecom towers into a new affiliate in Cambodia
- ▶ Purchase of a US\$52 million stake in a telecom network company in Cambodia and Myanmar
- ▶ Acquisition of a Cambodian ISP and cable TV provider, acting for the purchaser
- ▶ Purchase of fiber optic cores by a mobile network operator in Myanmar

## Data centers

- ▶ Assisting in the development of a data center in Thilawa, Myanmar
- ▶ Regulatory compliance for construction of a data center in Yangon, Myanmar

## Satellites

- ▶ Advising an international satellite operator on leasing satellite capacities to Myanmar customers
- ▶ Development and licensing of a satellite ground station in Myanmar

## Market entry and licensing

- ▶ Multibillion dollar greenfield market entry by Qatar Telecom in Myanmar
- ▶ Advised 5 out of 12 bidders in the 2012 telecom tender in Myanmar
- ▶ Advising 5 out of 7 tower companies in Myanmar
- ▶ Advised on the deployment and financing of a submarine fiber optic cable in the Andaman sea
- ▶ Assistance with the concession for a nationwide fiber optic cable network in Laos
- ▶ Deployment and licensing of a closed circuit FOC network in Indonesia
- ▶ Assisted the top 3 world leaders in communications technology with their investment licensing in Myanmar
- ▶ Obtained over a dozen telecom licenses of various categories in Myanmar
- ▶ Market entry of an internet gaming company in Cambodia

## Financing

- ▶ US\$300 million financing of telecom network infrastructure, the largest-ever transaction by international financial institutions in Myanmar, acting for the lenders
- ▶ Providing specialized advice to a towerco in Myanmar on its US\$250 million financing from a US development lender
- ▶ Acting for a group of development financial institutions on the nearly US\$200 million financing of a towerco in Myanmar
- ▶ First-ever non-recourse financing involving Myanmar, US\$87 million financing of a Myanmar tower company, acting for the borrower
- ▶ US\$50 million financing of a fiber optic cable project in Cambodia and Myanmar, acting for the lenders
- ▶ Financing of a US\$40 million submarine fiber optic cable project, advising the borrowers
- ▶ US\$40.2 million financing by a consortium of commercial banks for the construction of 3,000 telecom towers, acting for the borrowers

## Media

- ▶ Advising a global, US-based social media giant on its compliance in Vietnam
- ▶ Market entry and joint venture in Myanmar of a global leader in cinemas and the distribution of motion pictures
- ▶ Acting for the majority shareholder in a print media partnership dispute in Myanmar
- ▶ Assisted in connection with the acquisition of a media services company with a presence in Cambodia, Laos and Vietnam

## E-Money

- ▶ Acted for the purchaser on the acquisition of a mobile money service platform in Cambodia
- ▶ Advising the joint venture between a bank and a mobile network operator on its e-money business in Myanmar
- ▶ Assisting an independent e-money issuer to secure its licenses in Myanmar

## Regulatory

- ▶ Assisted with procuring licenses and permits for a nationwide network of telecom infrastructure
- ▶ Acting for a telecom operator in a dispute with a telecom regulatory body in Cambodia
- ▶ Advised a group of development financial institutions on regulatory compliance for a nationwide network of telecom infrastructure in Myanmar
- ▶ Assisted in connection with tax structuring and compliance for a telecom vendor in Indonesia



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