

ALLEN & OVERY

Myanmar's Scope of Prohibited and Restricted Activities for Foreign Investment – A New Revision

Speed read

The Myanmar Investment Commission (**MIC**) issued notification 26/2016 on 24 March 2016 amending the list of activities in which foreign investment is prohibited or restricted, repealing the previous notification that dealt with this.

In this client bulletin, we highlight the main provisions of the new MIC notification and provide an overview of the regulatory framework for foreign investment in Myanmar.

Overview

The legal and regulatory framework governing foreign investment in Myanmar comprises a number of key instruments, including:

- (a) the Foreign Investment Law (2012)¹ (**Foreign Investment Law**), which was signed into law by President U Thein Sein on 2 November 2012;
- (b) the Foreign Investment Rules (2013)² (**Foreign Investment Rules**), which were issued by the Ministry of National Planning and Economic Development (**MNPED**)³ on 31 January 2013; and

- (c) orders, notifications and directives issued by MIC from time to time in accordance with the power delegated to it under the Foreign Investment Law.

On 31 January 2013, MIC issued a notification outlining restricted and prohibited activities for foreign investment⁴, which was amended by MIC Notification No. 49/2014⁵ (the **2014 Notification**) issued on 14 August 2014. The 2014 Notification further clarified the nature and scope of activities in which foreign investment is either prohibited or restricted. In particular, the 2014 Notification expanded the list of activities required to be undertaken by way of a joint venture with Myanmar citizens or, in certain cases, the relevant ministry or government department (see [here](#) for further details in our bulletin on the 2014 Notification).

¹ Union Parliament Law No. 21, 2012.

² Foreign Investment Rules, Government of the Republic of the Union of Myanmar, Ministry of National Planning and Economic Development, Notification No. 11/2013 (31 January 2013).

³ The Ministry of National Planning and Economic Development has been merged with the Ministry of Finance to create the Ministry of Planning and Finance.

⁴ The Republic of the Union of Myanmar, Myanmar Investment Commission, Notification No. 1/2013 (31 January 2013).

⁵ The Republic of the Union of Myanmar, Myanmar Investment Commission, Notification No. 49/2014 (14 August 2014).

On 21 March 2016, MIC issued MIC Notification No. 26/2016 (the **2016 Notification**) amending the classification of activities in which foreign investment is prohibited or restricted. The 2016 Notification only introduces limited

amendments to the list of activities established by the 2014 Notification but the impact of these amendments and their interpretation is already being questioned.

The 2016 Notification – Main Changes

The 2014 Notification provided that 100% foreign ownership is permitted except in relation to the following three categories:

Category 1	Activities in which foreign investment is prohibited
Category 2	Activities in which foreign investment is permitted only by way of a joint venture with Myanmar citizens
Category 3	Activities in which foreign investment is permitted in accordance with “specific conditions”, including: Category 3(a): Activities in which foreign investment is permitted: – on the recommendation of the relevant ministry; and – only by way of a joint venture with Myanmar citizens Category 3(b): Activities in which foreign investment is permitted: – in accordance with “other conditions”; and – only by way of a joint venture with Myanmar citizens, the relevant ministry or a government department (as prescribed)

The 2016 Notification does not amend this classification but introduces some changes in each of these categories. We set out below the changes introduced by the 2016 Notification to these categories. For a more detailed list of restricted or prohibited activities, see “*What activities are prohibited or restricted under the 2016 Notification?*” below.

New unrestricted activities

Wholly owned foreign investment is now allowed in the following businesses, which were previously only permitted in the form of a joint venture with Myanmar citizens:

- (a) production and distribution of hybrid seeds;
- (b) production and propagation of high-yield seeds and local seeds; and
- (c) manufacturing of rubber and rubber products.

In addition, foreign investors are now free to invest in ecotourism activities. Under the 2014 Notification, this was only allowed by way of joint venture with a Myanmar citizen and with the recommendation of the Ministry of Environment and Forestry⁶.

Prohibited activities

The 2016 Notification adds one new prohibited activity to the existing list: all business activities that “*can damage watershed forests, religious sites, traditional worship sites, farm and grazing lands and water resources*” (no. 2 in the list of prohibited activities).

The broad wording of this single addition to the prohibited activities list has raised some concerns, with some commentators suggesting that it could be used to exclude any type of foreign investment “on a whim”. While the impact of this change remains to be seen in practice, MIC and the relevant ministries would previously have had to consider the location of an investment and its likely impact on the environment and had the power to prevent an investment being granted approval. In addition, MIC has always had a high degree of discretion which, to date, does not appear to have been used capriciously or unreasonably. Therefore, while it cannot be excluded that this provision will be (ab)used to refuse some proposed investments, this may not be as negative as some of the commentary may suggest.

⁶ The Ministry of Environmental Conservation and Forestry has been merged with the Ministry of Mines to create the Ministry of Natural Resources and Environmental Conservation.

Activities permitted by way of joint venture with Myanmar citizens/the relevant ministry/a government department and in accordance with “other conditions”

A number of activities in relation to the Myanmar railway infrastructure which previously required: (i) a joint venture with “*the relevant enterprise/department/organisation*”; (ii) permission from the Government of the Union of the Republic of Myanmar (the **Union Government**); and (iii) a recommendation of the Ministry of Railway Transportation⁷, are now permitted under slightly different conditions.

The 2016 Notification now imposes the following requirements for railway-related activities:

- (a) a joint venture or BOT agreement with Myanmar Railways (except for fibre optic cables on land owned by the Ministry of Railway Transportation⁸ where the 2016 Notification refers to the “*relevant enterprise/department*”);
- (b) permission (instead of a recommendation) from the Ministry of Railway Transportation⁹; and
- (c) for the construction of new railways or railway stations, the authorisation from the Union Government (the 2016 Notification no longer requires authorisation from the Union Government for other railway-related activities listed in the 2016 Notification).

For business related to the generation of electricity to be used by railway activities, the 2016 Notification also imposes the requirement for the recommendation of the Ministry of Electric Power¹⁰.

The 2016 Notification also imposes a 50/50 joint venture requirement on businesses related to motor vehicle inspection, motor vehicle training, engine repair training and maintenance. Previously, the 2014 Notification required a joint venture but did not specify the ratios, although Union Government approval is no longer required under the 2016 Notification.

Finally, the 2016 Notification adds the distribution and manufacturing of vaccines to the list of activities allowed by joint venture and under specific conditions. The 2016 Notification requires a joint venture with the Union

Government and that the vaccines meet the minimum WHO GMP standards.

General amendments

In addition to the changes to the lists of activities under each category as mentioned above, the 2016 Notification contains two new general provisions, at least one of which has also been causing concern as a “significant amendment”.

The first new provision states that the activities not contained in the 2016 Notification are permitted with 100% foreign investment, except businesses for which MIC deems that the permission of the relevant ministry is required according to the nature of the business. This confirms that any foreign investment could in principle be vetoed by the relevant ministry. However, as mentioned above, it has always been the case that a ministry could veto an investment proposal by objecting to it, something the ministry of Environmental Conservation and Forestry¹¹ could have done had investors not given an undertaking to comply with applicable environmental regulations prior to those regulations being put in place. We are also aware of a ministry having objected to a potential investment (albeit temporarily), reportedly, on the basis that the investors had not consulted the relevant ministry. In some ways including this provision is a step forward in that it only concerns those investments that MIC deems require permission from the relevant ministry (rather than any that a particular ministry decides to veto) and in that scenario makes explicit the practice that had prevailed since the Foreign Investment Law was passed in 2012.

The second new provision states that any service businesses which “*in effect, is not an investment, shall be undertaken only with the permission of the relevant Ministry*”. Service companies do not typically come within the scope of the Foreign Investment Law or the 2016 Notification and have not (with certain exceptions) been granted MIC Permits in recent times, being registered exclusively by DICA. Typically, when an application for registration of a service company is received by DICA, it will review the scope of business and refer the application to the relevant ministry for approval. While this is outside the scope of the Foreign Investment Law, it may be recognition of that practice for service companies that are not investments under the Foreign Investment Law or we may see service companies attempt to obtain MIC Permits if the business has the permission of the relevant ministry. Given the lack of clarity and seeming incongruity of the provision, it is unclear what the intention or exact scope of this provision is and it remains to be seen how this will be implemented in practice.

⁷ The Ministry of Railway Transportation has been merged with the Ministry of Transport and the Ministry of Communications and Information Technology to create the Ministry of Transportation and Communication.

⁸ See footnote 7.

⁹ See footnote 7.

¹⁰ The Ministry of Electric Power has been merged with the Ministry of Energy to create the Ministry of Electric Power and Energy.

¹¹ See footnote 6.

The Regulatory Framework

What forms of investment are permitted?

The Foreign Investment Rules provide that 100% foreign ownership is permitted except in relation to the activities that MIC may prescribe from time to time. As mentioned above, under the 2016 Notification, as under the 2014 Notification, 100% foreign ownership is permitted (subject to no objections from Ministries MIC deems relevant) except in relation to the following three categories:

Category 1	Activities in which foreign investment is prohibited
Category 2	Activities in which foreign investment is permitted only by way of a joint venture with Myanmar citizens
Category 3	Activities in which foreign investment is permitted in accordance with “specific conditions”, including: Category 3(a): Activities in which foreign investment is permitted: – on the recommendation of the relevant ministry; and – only by way of a joint venture with Myanmar citizens Category 3(b): Activities in which foreign investment is permitted: – in accordance with “other conditions”; and – only by way of a joint venture with Myanmar citizens, the relevant ministry or a government department (as prescribed)

How does the 2016 Notification affect the foreign ownership restriction for joint ventures?

Under the Foreign Investment Law and Foreign Investment Rules:

- The foreign-to-domestic ownership ratio for joint ventures in activities that **are not restricted or prohibited** is subject to the agreement of the parties, although MIC has power under the Foreign Investment Law to prescribe a minimum foreign ownership requirement on a case-by-case basis depending on the nature of the proposed investment.
- Foreign ownership in a joint venture with a Myanmar citizen (as opposed to the state) **in a restricted or prohibited activity** is limited to 80% of the total investment amount, although MIC may amend this restriction by notification with the approval of the government. This restriction does not expressly apply to joint ventures between a foreign investor and the state.

Although the 2016 Notification does not affect the broader restrictions set out above, it does impose a maximum foreign ownership of 80% for certain activities, including the local distribution and export of certain crops. See “*What activities are restricted or prohibited under the 2016 Notification?*” below for further information.

What activities are restricted or prohibited under the 2016 Notification?

The tables below provide a summary of the key activities that fall within the scope of Categories 1, 2 and 3 of the 2016 Notification, which are essentially the same as under the 2014 Notification, save for the amendments mentioned above. MIC may, however, amend these activities from time to time with the prior approval of the government where the amendment is in the interests of the state and Myanmar citizens.



Category 1 – Prohibited activities	
Examples of Category 1 Activities	Is foreign investment permitted in a Category 1 Activity?
<p>General</p> <ul style="list-style-type: none"> – Activities which can damage watershed forests, religious sites, farm and grazing land or water resources <p>Mining</p> <ul style="list-style-type: none"> – Small and medium scale mineral production – Exploration and production of jade and gemstones <p>Power</p> <ul style="list-style-type: none"> – Administration of Myanmar’s electricity system <p>Defence</p> <ul style="list-style-type: none"> – Manufacturing of arms and ammunition and related services <p>Media</p> <ul style="list-style-type: none"> – Certain broadcasting and publishing activities without government approval 	<p>Prima facie no, but MIC may permit foreign investment in a Category 1 Activity if it is the interest of the state to do so</p> <p>Category 1 Activities are permitted to be undertaken by Myanmar citizens only. However, MIC may, in its discretion, permit foreign investment in a Category 1 Activity where the investment is in the interests of the state and Myanmar’s citizens, particularly Myanmar’s ethnic groups.</p>

Category 2 – Activities permitted only by way of a joint venture with Myanmar citizens	
Examples of Category 2 Activities	Is foreign investment permitted in a Category 2 Activity?
<p>Power</p> <ul style="list-style-type: none"> – Small and medium scale power production <p>Manufacturing and consumer goods</p> <ul style="list-style-type: none"> – Manufacturing and marketing of grain products, confectionary, malt, malt liquors and non-aerated products, plastics, purified water and ice – Preservation, manufacturing, canning and marketing of food products except milk and milk products – Packaging – Distilling, blending, rectifying, bottling and marketing beverages and non-beverage alcohol products – Manufacturing of vaccines – Manufacturing and marketing of chemicals derived from natural resources sourced locally: solid, liquid and gaseous fuels and aerosols, oxidants, corrosive chemicals and industrial chemical gases, excluding oil and gas and petroleum products <p>Real estate</p> <ul style="list-style-type: none"> – Development, sale and rental of residential buildings – Development and sale of commercial and office buildings – Services – Domestic and international air transport services 	<p>Yes, but only by way of a joint venture with Myanmar citizens</p> <p>Foreign investment in a Category 2 Activity is permitted only by way of a joint venture with Myanmar citizens.</p> <p>The foreign capital invested in a joint venture between a foreign investor and a Myanmar citizen (as opposed to the state) in respect of a Category 2 Activity must not exceed 80% of the total investment amount.</p>



Category 3 – Activities permitted subject to “specific conditions”

Examples of Category 3 Activities	Is foreign investment permitted in a Category 3 Activity?
<p><i>3(a) Activities permitted on the recommendation of the relevant ministry and which must be by way of a joint venture with Myanmar citizens</i></p>	
<p>Ministry of Livestock, Fisheries and Rural Development¹²</p> <ul style="list-style-type: none"> – Manufacturing and preservation of marine products – Cultivation, import and export of livestock and fish species <p>Ministry of Environmental Conservation and Forestry¹³</p> <ul style="list-style-type: none"> – Activities relating to the reduction of carbon emissions – Importing, exporting, breeding and the production of plant and animal species for commercial purposes <p>– Ministry of Industry</p> <ul style="list-style-type: none"> – Manufacturing and marketing of soft beverages, aerated and non-aerated products – Manufacturing of drugs from controlled chemicals for medical purposes <p>Ministry of Communications and Information Technology¹⁴</p> <ul style="list-style-type: none"> – Domestic and international postal services <p>Ministry of Health</p> <ul style="list-style-type: none"> – Private hospitals, clinics, diagnostic services and production of pharmaceuticals – Private medical/health-related education institutions <p>Ministry of Information</p> <ul style="list-style-type: none"> – Publication of foreign language periodical newspapers 	<p>Yes, but only by way of a joint venture with Myanmar citizens and on the recommendation of the relevant ministry</p> <p>The foreign capital invested in a joint venture between a foreign investor and a Myanmar citizen (as opposed to the state) in respect of a Category 3 Activity must not exceed 80% of the total investment amount.</p>



¹² The Ministry of Livestock, Fisheries and Rural Development has been merged with the Ministry of Agriculture and Irrigation to create the Ministry of Agriculture, Livestock and Irrigation.

¹³ See footnote 6.

¹⁴ See footnote 7.

Category 3 – Activities permitted subject to “specific conditions”	
Examples of Category 3 Activities	Is foreign investment permitted in a Category 3 Activity?
<i>3(b) Activities permitted subject to “other conditions” and which must be by way of a joint venture with Myanmar citizens, the relevant ministry or government department</i>	
<p>Ministry of Energy¹⁵</p> <p>The following activities must be carried out by way of a joint venture with the Ministry of Energy:</p> <p>Oil and gas: the construction and installation of storage tanks, jetties, pipelines and related equipment and structures for the purposes of importing, exporting, transporting, storing, distributing and selling oil, gas and petroleum products.</p> <p>Oil and gas: importing, producing and installing equipment, machinery and spare parts for the following purposes: (a) the exploration and refining of oil and gas by geological, geophysical and geochemical means; (b) the exploration and production of oil and gas and related laboratory services; (c) the transportation and construction of oil and gas pipelines; and (d) the construction and installation of offshore platforms.</p> <p>Refineries: the construction and refurbishment of refineries</p> <p>Ministry of Industry</p> <p>Cigarettes: the manufacture of cigarettes is subject to a 50% domestic raw material requirement for the first three years and a 90% export requirement. The manufacture of cigarettes is also subject to the approval of the Ministry of Industry. The 2016 Notification does not expressly provide whether a foreign investor is required to joint venture with a Myanmar citizen, the Ministry of Industry or a government department.</p> <p>Production of chemicals: the production and marketing of explosive chemicals and flammable liquids and solids is permitted only by way of a joint venture with the government.</p> <p>Ministry of Agriculture and Irrigation¹⁶</p> <p>The local distribution and export of crops cultivated using imported materials is permitted only for “value-added production”. Foreign investment in such activities is limited to 49%. Retail and trading could be permitted depending on the joint venture entity in question and water or border trade is prohibited. The 2016 Notification does not expressly provide whether a foreign investor is required to joint venture with Myanmar citizens, the Ministry of Agriculture and Irrigation or a government department.</p>	<p>Yes, but only by way of a joint venture with Myanmar citizens, the relevant ministry or government department and subject to other conditions that may be imposed by MIC and/or the relevant ministry</p> <p>The foreign capital invested in a joint venture between a foreign investor and a Myanmar citizen (as opposed to the state) in respect of a Category 3 Activity must not exceed 80% of the total investment amount. This restriction does not expressly apply to joint ventures between a foreign investor and the state.</p>

¹⁵ See footnote 10.

¹⁶ See footnote 12.

How does the 2016 Notification affect current investment projects and proposals?

Although the 2016 Notification expressly repeals the 2014 Notification, it does not provide any guidance as to how the 2016 Notification applies to investment proposals that MIC has already approved or that are awaiting MIC approval. However, based on the previous practice of MIC, we would generally expect that:

- the 2016 Notification will not apply to investment proposals approved by MIC prior to 21 March 2016 (i.e. investment proposals in respect of which MIC issued an investment permit prior to the date of the 2016 Notification); and
- MIC will consider, on a case-by-case basis, the extent to which the 2016 Notification will apply to investment proposals submitted to MIC prior to 21 March 2016 and in respect of which MIC approval was pending at the time the 2016 Notification was issued.

An additional layer to this is the potential new composition of MIC given that certain of its members are ministers or appointed from government. We have recently seen reports of newly elected members of the Yangon Region Government calling into question investment decisions of the previous administration. This is one area in particular where the new restricted activity could be used to try to halt existing investment or proposals. Again, under the 2014 Notification, investments were halted without a specific basis within the rules and regulations and so this would not necessarily represent a significant departure from previous practice, although we would encourage any party investing in Myanmar to engage with all relevant stakeholders early on to minimise the risks of objections after the fact.

What is the interplay with the state-owned Economic Enterprises Law?

As with the 2014 Notification, the 2016 Notification does not affect the restrictions or requirements imposed on foreign investment in activities that are reserved to the state under the state-owned Economic Enterprises Law (1989) (**SOEE Law**). Under the SOEE Law, the government has the sole right to carry out the following activities, among others:

- (a) banking, insurance and telecommunications services;
- (b) electricity generation (other than generation permitted by law to be undertaken by private individuals and co-operatives); and
- (c) the exploration, extraction and sale of petroleum and natural gas and production of petroleum and natural gas products,

(each a **Reserved Activity**).

Where it is in the interests of the state to do so, the government may permit an investor to undertake a Reserved Activity either by way of a joint venture with the government and/or subject to any conditions the government may impose.

A Reserved Activity falls within the operation of both the SOEE Law and the foreign investment framework and the relevant ministry may prescribe additional requirements or exempt an investor from the operation of certain laws or regulations. It is therefore open to the relevant Ministries (for example, the Ministry of Electric Power and Energy) to impose additional requirements or restrictions on the relevant activities outlined in the tables above.



Other Recent and Pending Amendments to the Foreign Investment Framework

On 29 March 2016, MIC issued Notification 80/2016 repealing the earlier notification 50/2014 which listed the activities that required an environmental impact assessment (EIA) to be undertaken. This follows the publication by the Ministry of Environmental Conservation and Forestry¹⁷ of the EIA Rules with which investors now have to comply.

The Foreign Investment Law itself is currently under review by DICA with assistance from the International Finance Corporation/World Bank and a draft bill is currently being discussed and negotiated. While it is not entirely clear how much the new Foreign Investment Law will amend the current regulatory framework, it is likely to significantly impact the framework for investment in Myanmar.

In addition, the Myanmar Companies Act is also under review by DICA with assistance from the Asian Development Bank and has passed through public consultation with revised drafts being published by DICA

on their website. It is anticipated the latest draft will be presented to parliament for consideration in the coming sessions. While the revisions are reported as updates and improving processes rather than wholesale changes, one of the key developments includes a potential amendment to the definition of foreign company, being a company owned more than the prescribed percentage by an overseas corporation or other foreign person. The exact level of the prescribed percentage has not yet been disclosed but this opens the door for joint ventures between Myanmar and foreign investors to benefit from classification as a Myanmar company in relation to permitted activities, licences, permits and land rights. While it is not known at this time what the final form of the amended Myanmar Companies Act will be, it is anticipated that many of the changes could lead to greater transparency and certainty for company administration for investors.

¹⁷ See footnote 6.

KEY CONTACTS



Simon Makinson
Senior Partner, Asia Pacific
Head of Myanmar Practice
Tel +66 2 263 7603
simon.makinson@allenoverly.com



Chris Burkett
Senior Associate – Yangon
Tel +66 2 263 7607
Mob +95 945 000 1264
chris.burkett@allenoverly.com



Olivia Lambrecht
Senior Associate – Yangon
Tel +66 2 263 7611
Mob +95 945 004 6350
olivia.lambrecht@allenoverly.com