

# ALLEN & OVERY

## *Myanmar's New Investment Regime: Financing of investments in Myanmar*

### *Speed read*

On 30 March 2017, the Myanmar Ministry of Planning and Finance published the Investment Rules (the **Investment Rules**) completing the framework for the new and long-awaited investment regime in Myanmar established by the new Myanmar Investment Law, which came into force on 18 October 2016 (the **Investment Law**). It is hoped that the Investment Law and Investment Rules will streamline the approvals process for investment and create a more efficient, transparent and robust investment regime in Myanmar.

Foreign investors and their financiers should be aware of some key changes in process, policy and implementation applicable to new investments in Myanmar. Although the Investment Rules include grandfathering provisions, there is scope that the new regime will apply to changes to existing investments. This bulletin provides an overview of the investment approvals process under the new investment regime and outlines some key considerations for financing of investments in Myanmar.

For a more detailed look at the new Investment Law and Rules, see our bulletin here – [Myanmar's New Investment Regime \(April 2017\)](#).

### *Overview of the new regime*

The Investment Law regulates investors (both Myanmar citizens and foreign investors) and investments (any asset owned or controlled by an investor, including claims to money, right to extract natural resources and moveable and immoveable property) in Myanmar. It provides for two types of application:

- (1) proposal for a Myanmar Investment Commission (**MIC**) Permit to engage in certain business (**Proposal**); or
- (2) an application for an Endorsement.

This approvals regime will apply to all new investments in Myanmar. Existing investments in respect of which an MIC Permit has already been obtained are grandfathered – there will be no need to apply for an MIC Permit under the new regime. However, this grandfathering may not apply to protect an existing investment should any changes be made to it.

#### **Proposal for an MIC Permit**

Under the Investment Law and Investment Rules, an MIC Permit is required if the investment falls into one of the following five categories:

- (1) **Businesses that are essential to the Union strategy:** The Investment Rules prescribe a number of investments that will be taken as strategic to the Union, including, among others, (i) those in the technology (information, communication, medical, bio or

similar technologies), transport infrastructure, energy infrastructure, building urban development infrastructure and new cities, extractive/natural resources or media sectors with an expected value exceeding USD20 million; (ii) those made pursuant to the grant of a concession, agreement or similar authorisation by an authority with an expected value exceeding USD20m; and (iii) those to be conducted across the national border with an expected value exceeding USD1m.

- (2) **Large capital intensive Projects:** An Investment will be taken to be capital intensive if the expected value exceeds USD100m.
- (3) **Projects likely to cause large impacts on the environment and local communities:** The Investment Rules prescribe a number of projects that will be taken to fall within this category, including, among others, (i) investments located in a designated protected or reserved area or major biodiversity area; and (ii) investments that include rights to occupy or use land that would adversely impact the legal right of at least 100 individuals occupying such land to continue to use such land.
- (4) **Businesses which use state-owned land and building:** The Investment Rules prescribes state-owned land and buildings as those an Authority is authorised to deal in as an owner occupier. An MIC Permit is not required if the investor is leasing or licencing such land or buildings for a term of five years or less.
- (5) **Businesses designated by the Government:** The Investment Rules do not designate any such businesses.

## Application for Endorsement

For other categories of investment for which an MIC Permit is not required under the new regime there is now scope to apply for an Endorsement from the MIC to be eligible to apply for the right to take a long lease (50 years plus two ten year renewals) or any of the tax or customs duty exemptions and reliefs available under the Investment Law. This process to obtain an Endorsement is a new feature of the investment regime in Myanmar and was not previously available.

## *Key issues for financiers*

Although the changes to the investment regime are generally positive and provide greater certainty around the process for approvals, we outline below some points that should be considered by financiers prior to financing an investment in Myanmar:

- (1) **MIC Permit – Details of financing:** As with the previous investment regime, a borrower who is required to obtain an MIC Permit for its investment should include details of the financing package, including the security, in its application for that MIC Permit. This is recommended to facilitate enforcement of Myanmar based security, which will likely, depending on the security, require engagement with and approvals from MIC. We also expect that as a matter of practice a detailed finance and business plan will continue to be required as part of any application for an MIC Permit. Lenders will therefore need to continue to work closely with their borrower to ensure that the financing and the relevant security are adequately described in the relevant application for an MIC Permit.

Where a borrower seeks an Endorsement (rather than an MIC Permit), lenders will need to consider whether the financing package, including the security, should be disclosed to MIC as part of the application for an Endorsement. As Endorsements are a new feature of the investment regime, there is not yet any established practice. However, we would expect most significant cross border financings to be for investments that will require an MIC Permit.

Myanmar based security packages remain largely defensive for lenders to investments in Myanmar and the Investment Law and Investment Rules have not changed the steps we recommend lenders and borrowers take to ensure an effective financing and security package is put in place.

- (2) **Timeframe for approval:** One positive is that the Investment Rules now prescribe a reduced timeframe for the approvals process. The MIC has 15 working days from receipt of an application for an MIC Permit or Endorsement to accept an application as complete (or reject it as incomplete). The MIC then has a further 60 days in respect of MIC Permits, and 30 days in respect of Endorsements, from acceptance to assess the application and approve or reject it, whereas under the previous regime the MIC was entitled to 90 days for assessment. It is hoped that these reduced timeframes will be a target that MIC will seek to achieve. If this proves to be the case, it will add certainty around timing and structuring of transactions in Myanmar. However, Lenders should still work closely with their borrowers and MIC throughout the application process to ensure it proceeds in a timely manner.

- (3) **MIC discretion:** Under the Investment Law the MIC continues to have the discretion to issue an MIC Permit. The Rules do however set out a number of mandatory and non-mandatory criteria the MIC must consider in making its assessment. Although it should be noted that MIC's obligation extends only to consideration of these criteria and not to mandatorily approve an application that meets the prescribed criteria. Further, the availability of concessions under the Investment Law, including the right to take long leases and obtain tax and custom duty exemptions and reliefs are subject to an increased level of scrutiny under the new Investment Rules, no longer being automatic. Tax privileges must be applied for separately and will be considered by the MIC on a case by case basis rather than applied to all successful applications. As such, working closely with the MIC is likely to continue to be a feature of doing business in Myanmar.

- (4) **Transfer of funds:** The Investment Law permits foreign investors to transfer abroad income resulting from, and any payments made under a loan agreement relating to, an investment made under the Investment Law. However, the Investment Law expressly requires the transfer or taking of a loan to be separately approved by the Central Bank of Myanmar and, where an offshore loan is taken, the Investment Rules require investors to provide the following information to the MIC after receipt of an MIC Permit or Endorsement for circulation to the Central Bank of Myanmar: loan amount, repayment schedule, receiving bank in Myanmar and the banking channel for remittance. As is current practice and required under the Foreign Exchange Management Law 2012 and associated rules, offshore lenders will need to ensure that the Borrower applies for and obtains the requisite Central Bank of Myanmar approval in order to ensure that funds will be permitted to be transferred offshore to repay the loan.

## *Impact on existing investments*

The Investment Law applies to all investments which are being made at the date it came into force or after its enactment. Any MIC Permit issued under the previous investment law shall remain effective until it expires. However, if a change in an existing investment would bring the investment within the scope of those which are required to have an MIC Permit under the Investment Law, an MIC Permit must be obtained prior to making such change. Lenders to, and proponents of, investments already, or in the process of being, made should carefully consider how the Investment Law may apply to that investment and should seek guidance from MIC to the extent there is any uncertainty.

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