



Compliance in Myanmar

AustCham Myanmar

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Agenda

- 1 The Competition Law

- 2 Developments in Australian Anti-Bribery Law

- 3 AFP activity in Myanmar

- 4 Compliance

1(a)

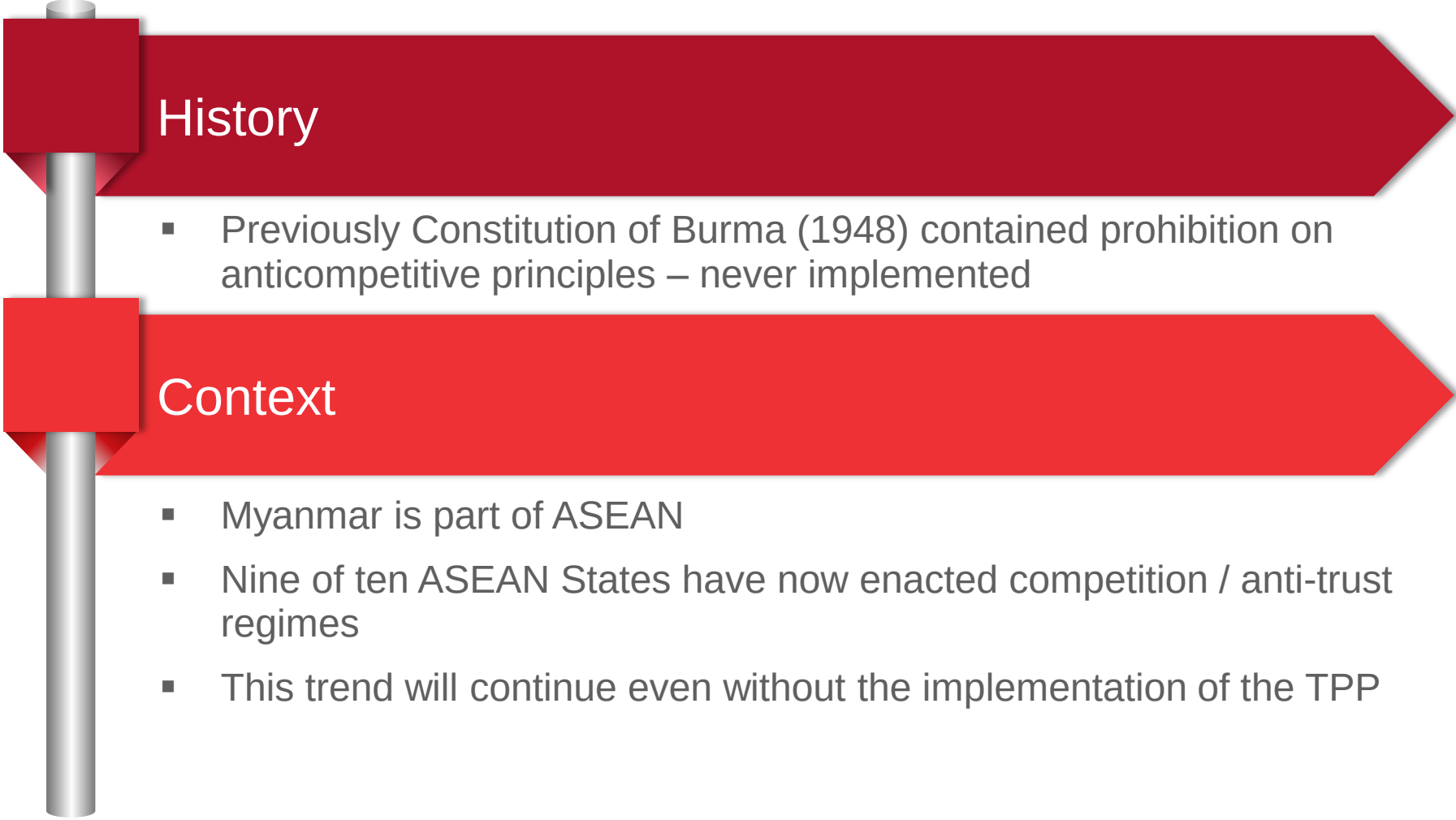
The Competition Law –
Background

The Competition Law of Myanmar

The Act

- Enacted 24 February 2015
- Came into force on 24 February 2017
- The Ministry of Commerce:
 - will implement rules and regulations to supplement the Competition Law (**Rules**)
 - will receive complaints prior to the establishment of the Myanmar Competition Commission (**MCC**)

History and context



History

- Previously Constitution of Burma (1948) contained prohibition on anticompetitive principles – never implemented

Context

- Myanmar is part of ASEAN
- Nine of ten ASEAN States have now enacted competition / anti-trust regimes
- This trend will continue even without the implementation of the TPP

Principles of The Competition Law

- Based on international best practices
- The Competition Law generally reflects the major elements of the European Union and United Kingdom regimes
- Four key pillars of The Competition Law:

1

Anti-competitive agreements

2

Abuse of market power

3

Unfair practices

4

Merger control / market monopolisation

Application of The Competition Law

No generic application – each section has a specific scope

Acts causing restraint on competition (s13) (including cartel conduct and abuse of dominance)



- Applies broadly to “any person”
- “Person” includes corporation (section 3 of the *Interpretation Act 1968*)

Anti-monopolisation (s15) / unfair practices (ss18-29) / Merger (ss30-3)



- Applies to “businessman” (sic)
- s2(j) defines a “businessman” as: a person who engages in any economic enterprise or service enterprise. In this expression, organizations engaging in economic activities as well as rendering services shall also be included

1(c)

The Competition Law –
Restrictive Agreements

Restrictive agreements

Operation

Prohibitions against cartel conduct and abuse of dominance.

The Competition Law prohibits (s13):

- fixing purchase or selling prices (directly or indirectly)
- making agreements in restraint of competition
- restricting the market or resource provision (likely a market sharing provision, or possibly predatory activities)
- restricting production, market acquisition or development
- bid rigging
- abuse by taking advantage of dominance in the market – but how does this sit with abusing market power unfairly? (s27)

Covers both collusive and unilateral; no definition of dominance

Restrictive agreements

Practicalities

- The term “agreement” is not defined in the Competition Law
- There is no guidance on whether restrictive agreements can only arise between competitors, or whether agreements with non-competitors may also fall foul of the penalties
- On a broad reading some of the usual forms of agreements could be prohibited:
 - exclusive distribution agreements
 - territorial sales restrictions

Restrictive agreements

Commission exemptions (s14)

The Commission can exempt certain agreements from the operation of the Competition Law for a number of objective reasons

Exemptions could be granted where there is benefit to consumers by:

- increasing efficiency
- developing technology
- developing industry standards or increasing quality
- ensuring uniformity in provisions that do not relate to price
- promoting competitiveness of SMEs
- promoting international competitiveness of Myanmar businesses

Note: Likely that this will require some form of notification or authorisation

Restrictive agreements

Leniency / immunity

There is no clear policy on leniency or immunity – assumed that this will be set by the MCC as with other jurisdictions

The possibility for leniency / immunity is, however, established by the Competition Law:

- MCC may work with the Courts to grant a pardon to person who discloses violation of s13 (s52)
- Different leniency may be granted depending on co-operation (time and conditions) (s53)

1(c)

The Competition Law –
Merger control

Operation

“Mergers” (s30): mergers, affiliations, amalgamations, acquisitions, joint ventures, any other mean prescribed by the Commission

Prohibited where (s31):

- intended to lead to excessive domination of the market
- reduces competition in a market with few competitors
- resulting market share exceeds the thresholds prescribed by the Commission (as yet undetermined) (s32)

Exemptions (s33)

Mergers which are otherwise prohibited are permitted if:

- the merged entity remains an SME (only relevant to the merger of two SMEs)
- one of the merging parties was, or was likely to become, bankrupt (“failing firm”)
- promotion of exports
- development of technology, systems or innovation

There is no guidance on whether this exemption must be provided by the Commission, or whether it is objectively justifiable

Practicalities

Significant practicalities are not yet outlined:

- none of the necessary forms, procedures or regulations for merger control have been released
- there is no guidance on how market share, sale volume, capital, control etc. will be determined for the purpose of merger assessment
- any merger filing fee
- timeframes for the assessment of a merger (and whether assessment will follow standard Phase I and Phase II processes)
- extraterritoriality – what thresholds will be used to assess the jurisdiction of the Commission? Will a merger need to have an impact on a business within Myanmar?

1(d)

The Competition Law –
Dominance and Unfair Competition

Monopolisation (s15)

Operation

Prohibition on monopolising markets by:

- controlling prices of goods or services
- limiting the availability of a good or service with the aim of controlling prices
- reducing the availability of a good or service without appropriate reasons
- lowering the quality of a good to reduce market demand
- controlling or restricting the geographic market for sales to prevent entry and control market share
- interfering in other business' operations in an unfair manner

No guidance on “monopolisation” nor how this section sits with abuse of dominance (s13)
Possible exemptions under s16 but needs clarification by the Commission

Operation

Unfair competition includes (s17):

- misleading customers
- disclosing business secrets and information
- intimidating other businesses
- damaging other businesses' reputations
- interfering with the activities of other businesses
- advertisements and sales promotions that constitute unfair competition

- discrimination against other businesses
- selling lower than production cost and landed cost
- abuse of business power
- any act prescribed by the Commission
- importing goods in an unfair manner
- selling goods below market price

Practicalities

Significant further clarification is required for:

- how are cost prices calculated
- will there be objective justifications for any of the activities (as there appear to be for other offences)

1(e)

The Competition Law –
Penalties

Penalties

Offence	Imprisonment	Pecuniary penalty
Restrictive agreement (s13)	Up to 3 years	Up to 15 million kyat (approximately USD 11,000)
False advertising (s23)		
Unfair promotional activities (s24)		
Importing through unfair means (s29)		
Monopolisation (s15)	Up to 2 years	Up to 10 million kyat (approximately USD 7,000)
Disclosing business secrets (s19)		
Disturbing other businesses (s22)		
Selling below cost (s26)		
Abusing market power unfairly (s27)		
Prohibited mergers (s31) / mergers above the prescribed market share (s32)		

Penalties

Offence	Imprisonment	Pecuniary penalty
Misleading consumers (s18)	Up to 1 year	Up to 5 million kyat (approximately USD 4,000)
Intimidating businesses (s20)		
Disseminating false information (s21)		
Discrimination (s25)		
Enticing breach of contract (s28)		
Failure to submit documents	Up to 3 months	Up to 100,000 kyat (approximately USD 75)
Appear as a witness without sufficient cause		

Penalties

Private actions

Not specifically established under the Competition Law, however:

- an “aggrieved person” can sue any person convicted under the Competition Law for “loss” (s51) – appears to require a finding by the Commission first
- administrative action under the Competition Law specifically does not prohibit follow-on criminal or civil actions (s38) – ie, follow-on litigation will not amount to double jeopardy

1(f)

The Competition Law –
Competition Commission

Composition

- Significant powers have been left with the MCC (including developing forms and regulations for use with The Competition Law)
- To be formed of individuals from:
 - the Ministries
 - Government departments
 - Government organisations
 - NGOs
- Shall be guided by appointed Chairman, Vice-chairman and Secretary
- Will be independent of the State, but required to operate in accordance with economic policies set out by the State

The Myanmar Competition Commission

Powers and duties (s8)

Under the Competition Law the MCC will:

- be responsible for international co-operation
- establish exemptions where relevant
- draft forms and requirements under The Competition Law
- set thresholds for permissible mergers, market share tests, dominance and monopolisation
- submit advice to the Government / relevant Ministry

Under the Competition Law the MCC can:

- form investigative committees (possibly for market investigations)
- direct businesses to reduce market share (yes, it says that)
- prohibit any act it considers to cause monopolisation
- investigate any activity its suspects is a violation
- request information, interview individuals, seize evidence / property

2

Developments in Australian Anti-Bribery

2017 Legislative Amendments

Deferred Prosecution Agreement

- Proposed in Australia
- Exists in US/UK (eg. FCPA)
- Australian option only for companies
- Similar to a leniency agreement
- Voluntary negotiated settlement
- Admit liability, pay fine
- Strong focus on compliance policy

- Company avoids prosecution
UNLESS
- Company breaches DPA

Foreign Bribery Offence

- Significant plans for expansion
- Include candidates for office (not just current officials)
- Test to “improperly influence” an official (rather than proving a payment was “not legitimately due”)
- Introduction of “recklessness” – still requires intent, but reckless conduct can prove intent
- “Failure to prevent” – emphasis on compliance as a company can be fined for failing to prevent foreign bribery
- No requirement:
 - to influence an official in their role
 - for the individual to have a business advantage from the bribery

Developments in Australian Anti-Bribery

2017 Prosecutions

Lifese Pty Ltd

- First sentences for conspiracy to bribe a foreign official
- 3 individuals each sentenced to 4 years imprisonment (2 citizens, 1 resident)
- 2 fined AUD250,000 (as well)
- Australian engineering and construction contracting in Iraq
- 2013-14 USD1 million paid into Iraq for the purposes of bribes
- No evidence bribes were ever paid
- Lifese was never awarded a contract
- Rejected the argument that bribery was necessary to operate in Iraq

World Bank sanctions

- Sanctioned 5 subsidiaries of Australian SMEC Holdings
- Evidence indicating “innappropriate payments
- Conduct occurred in South Asian region – Sri Lanka and Bangladesh
- Entities debarred between 6 and 30 months
- Entities disbarred for >12 months can be disqualified by other multilateral development banks under co-operation agreements

3

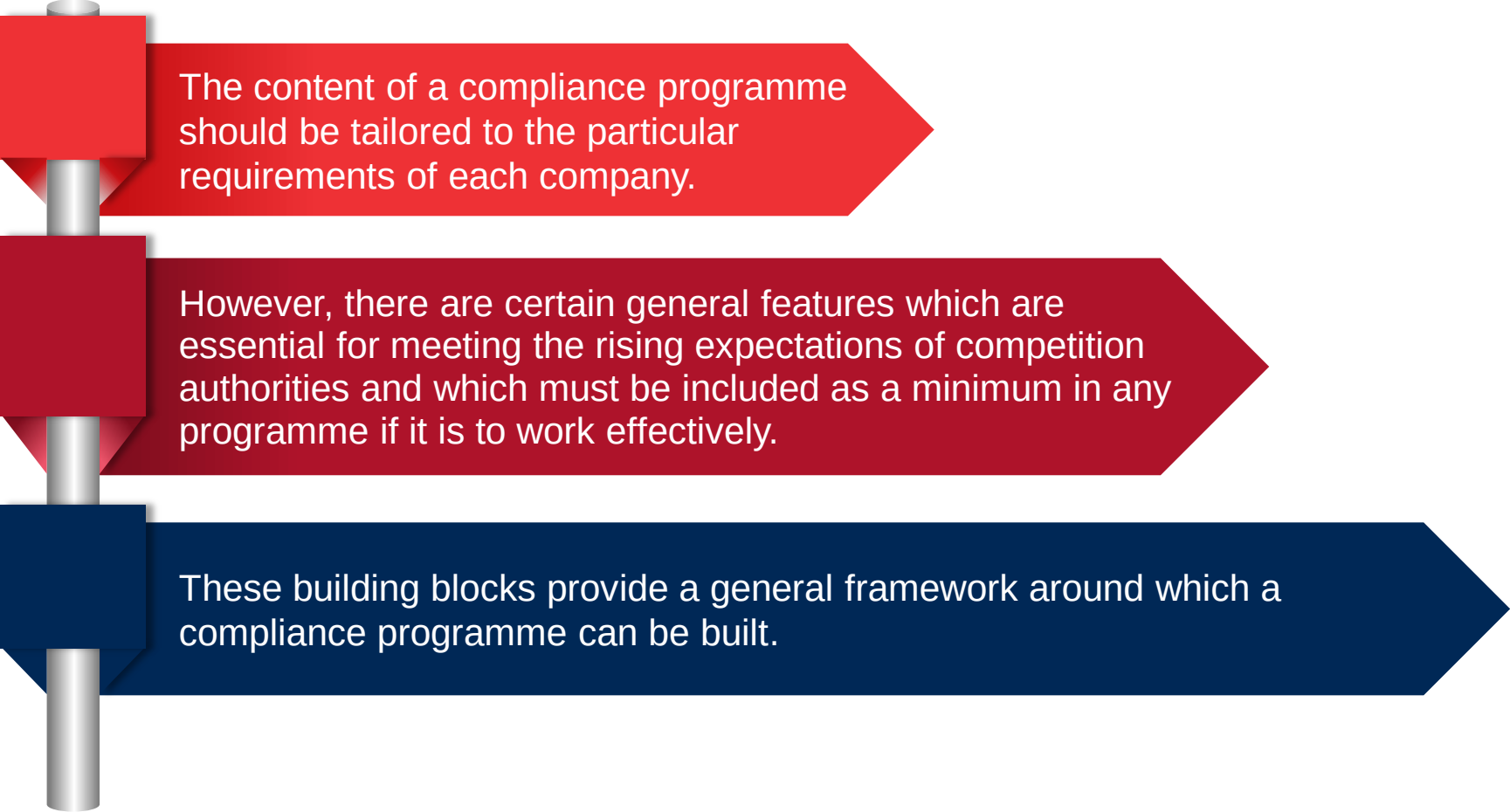
AFP Activity in Myanmar

4

Principles of Compliance

Next Steps to Stay Ahead | Best Practice

Consider implementing a competition compliance programme



The content of a compliance programme should be tailored to the particular requirements of each company.

However, there are certain general features which are essential for meeting the rising expectations of competition authorities and which must be included as a minimum in any programme if it is to work effectively.

These building blocks provide a general framework around which a compliance programme can be built.

Next Steps to Stay Ahead | Building Blocks

Building Blocks:

1

Leadership and the Support of Senior Management

- Visible, active and regularly reinforced eg personal all-staff emails; designated senior management with monitoring and reporting obligations.

2

Risk Assessment

- Periodically identify the nature and level of a company's compliance risks.

3

Standards and Controls

- Produce a compliance policy document and establish a reporting framework for staff. Consider requiring compliance commitments from staff.

4

Training

- On induction and a continuing basis to reinforce the message and keep staff updated with changes in the law.

5

Evaluation

- On a regular basis eg testing employees; reporting; formal audits or competition law 'healthchecks'.



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