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New Terms & Conditions for Retail / Wholesale Activities in Myanmar

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GERMAN MYANMAR
BUSINESS CHAMBER



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Agenda.

- I. Relevant Laws and Regulations
- II. Trade Restrictions in Myanmar
- III. Wholesale Activities in the Thilawa Special Economic Zone
- IV. New Wholesale and Retail Regulations
- V. Specific Questions



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About Luther

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- European law firm with Asian offices in Yangon, Singapore, Kuala Lumpur, Jakarta, Delhi-Gurgaon and Shanghai
- Ca. 380 lawyers and tax advisors worldwide
- In Yangon since 2012, currently ca. 45 European and Myanmar lawyers, tax advisors and accountants
- Provision of:
 - Legal advice
 - Tax advice
 - Incorporation services
 - Corporate secretarial services
 - Accounting
 - HR administration and payroll
 - Cash, fund and payment administration

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I. Relevant Laws and Regulations

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Relevant laws:

- Contract Act 1872
- Sale of Goods Act 1930
- Export and Import Law 2012 (Replaced the Control of Imports and Exports (Temporary) Act 1947)
- Special Economic Zone Law 2014
- Myanmar Investment Law 2016 (Replaced the Foreign Investment Law 2012)

Relevant Regulations and Notifications:

- Order No. 2/89 – Registration of Business Representatives
- Instruction 2/2015 of the Thilawa Management Committee concerning Wholesale Trading
- Various Notifications concerning the import of agricultural and hospital products, cars, construction materials, construction and project equipment, farm equipment
- **NEW: Notification 25/2018 - Terms & Conditions for Retail / Wholesale Trading**

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II. Background: Trade Restrictions in Myanmar

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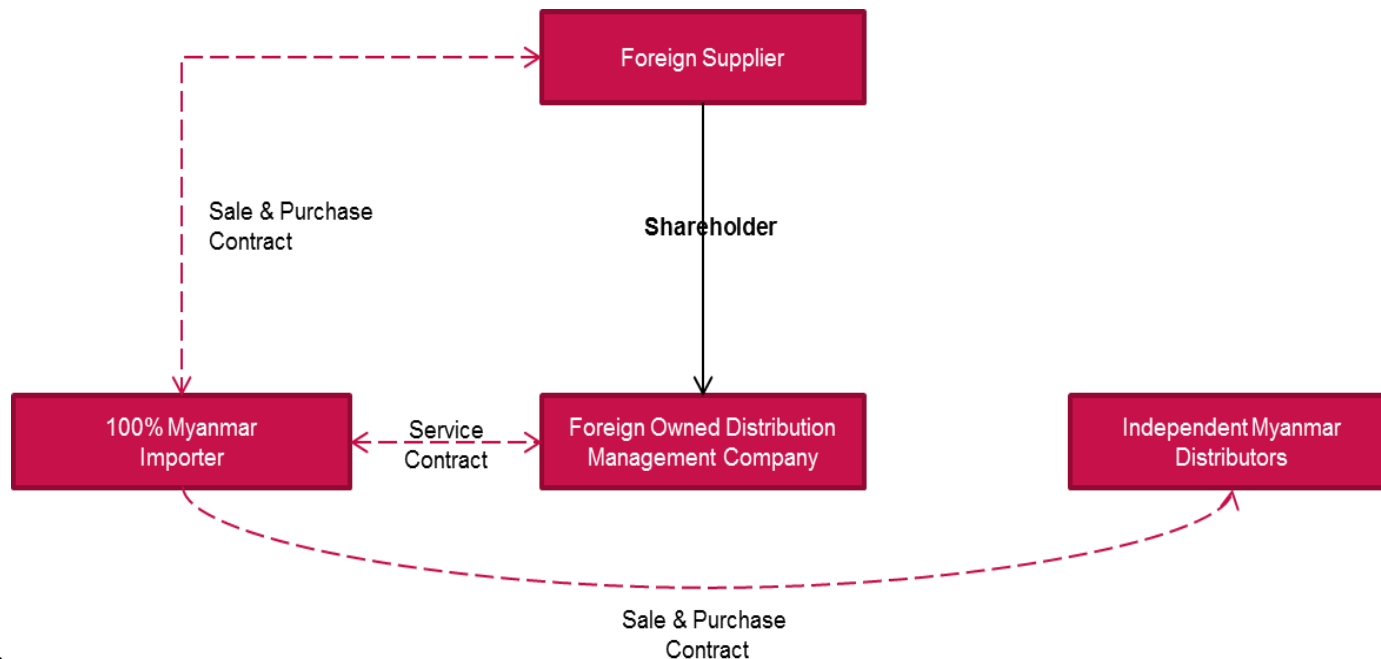
Trading Restrictions in Myanmar

- Most trading activities were prohibited for foreign companies in Myanmar since 2001 (other than sale by a domestic manufacturer)
- In practice, the Directorate of Investment and Company Administration did no longer allow the incorporation of trading companies by foreigners:
 - Trading was no longer allowed as a business activity in the Form-1 Trade Permit
 - Shareholders were required to give an undertaking not to trade at the time of incorporation or renewal of a foreign owned company
 - Similarly, foreign owned companies had to give an undertaking not to trade when they applied for an Exporter/Importer Registration Certificate with the Ministry of Commerce
- While the Ministry's powers under the Export and Import Law 2012 should be restricted to the control of import activities, the unofficial trade prohibition also included domestic trade
- Notification 1/2013 of the Myanmar Investment Commission first formalized the restriction, providing that foreign companies require a recommendation from Ministry of Commerce to do wholesale / retail trading, which was in practice never granted by the Ministry

II. Background: Trade Restrictions in Myanmar.

“Old“ distribution structure for foreign investors:

- The most often used structure combined a 100% Myanmar company, which acts as importer and official seller of the imported goods with a foreign owned service company managing the distribution
- Problem: In practice tolerated, but Order No. 2/89 on the registration of Business Representatives has to be observed, foreign supplier has no control over the 100% Myanmar owned importer and the structure commonly faces tax issues resulting from the use of multiple companies



II. Background: Trade Restrictions in Myanmar.

Legal Reforms since 2012

Legal reforms since 2012 were trying to address the unofficial trade prohibition, but were not successful:

- Notification 1/2013 of the Myanmar Investment Commission provided, that Retail and Wholesale Trade would require recommendation of the Ministry of Commerce, but no foreign investments in the trade sector were ever approved by the Ministry of Commerce
- Notification 49/2014 which replaced Notification 1/2013 no longer provided for any approval requirement and explicitly stipulated that all business activities not listed in the notification should be allowed for 100% foreign owned companies; this relaxation of the foreign investment restrictions has never been adhered to by the Ministry of Commerce
- Notification 26/2016, which replaced Notification 49/2014, did also not provide for a restriction on trade, but now required ministerial approval for the incorporation of every foreign owned company; this change created a new legal basis for the Ministry of Commerce to stop the incorporation of foreign trading companies

II. Background: Trade Restrictions in Myanmar.

Since 2015, the Ministry of Commerce granted various exemptions from the trade prohibition to address certain needs of the Myanmar market:

- March 2015: Notification 20/2015 allowing joint-ventures with a Myanmar partner to operate car showrooms for the import and sale of new motor vehicles
- May 2015: Management Committee of the Thilawa Special Economic Zone issues Instruction 2/2015, permitting foreign investors in the Thilawa Special Economic Zone to carry out import and wholesale trading activities throughout the country
- November 2015: Notification 96/2015 allowing joint-ventures with a Myanmar partner to import and sell agricultural and medical products, namely fertilizers, seeds, pesticides and hospital equipment
- July 2016: Notification 56/2016 allowing joint-ventures with a Myanmar partner the import and sale construction materials
- February 2017: Notifications 17/2017 allowing joint-ventures with a Myanmar partner to establish showrooms for the import and sale of construction machinery and project equipment
- February 2017: Notification 36/2017 allowing import and sale of agricultural and medical products as well as construction materials by 100% foreign owned companies
- November 2017: Notification 55/2017 allowing joint-ventures with a Myanmar partner the import and sale of farm equipment

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III. Thilawa Special Economic Zone

III. Wholesale in the Thilawa Special Economic Zone.

Trading in Thilawa

- 27 May 2015: Management Committee of the Thilawa Special Economic Zone issues Instruction 2/2015, which allows for the establishment of (foreign owned) wholesale trading companies permitted to import and trade within and outside of Thilawa
- Distinction is made between wholesale of company-group products and wholesale as a distributor / agent for third parties
- Some products, e.g. automobiles, are prohibited for trading in Thilawa and governed by separate regulations

Wholesale of company group products

- Import and wholesale throughout the country is permitted for products manufactured by the foreign investor, its parent company or a group company, provided that the following requirements are met:
 - Minimum investment of USD 2 Million (excluding leasing costs for the land in Thilawa)
 - Establishment of a warehouse at the company's lot in Thilawa
 - The provision of value adding services or activities

III. Wholesale in the Thilawa Special Economic Zone.

Wholesale as a distributor or agent of third party products

- Foreign investors intending to act as distributors or agents of third parties for the import and wholesale of products throughout Myanmar have to meet the following conditions:
 - The parent company or a group company must have established places of business in at least five (5) countries, a minimum of ten (10) years' experience in international trading, a minimum of three (3) years' average annual consolidated sales of at least USD 500 million and a paid up capital of at least USD 25 million
 - The Myanmar company must be appointment as official agent or distributor by the overseas manufacturer
 - Minimum investment of USD 3 Million (excluding leasing costs for the land in Thilawa)
 - Establishment of a warehouse at the company's lot in Thilawa
 - The provision of value adding services or activities

III. Wholesale in the Thilawa Special Economic Zone.

Value Adding Services

- Further, investor must provide value adding services, which includes:
 - Repacking, labeling and any other form of processing of imported products
 - Quality control, laboratory testing, maintenance and other technical services

Wholesale

- Wholesale is defined as sale to other businesses for resale or use in the manufacture of goods or supply of services, but also includes the direct sale to end-users in the case of industrial materials in bulk as well as the direct sale of industrial machinery and equipment with a sales price in excess of USD 500,000.

Activities outside Thilawa

- Investor may set up facilities outside of Thilawa, including sales offices

Actual Requirements

- Despite the official capital requirements, in practice, investments of USD 6-8 Mio minimum are required for a pure trading company

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IV. New Wholesale and Retail Regulations

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Latest Legal Reforms

- 10 April 2017: MIC issued a revised list of restricted investment activities (Notification 15/2017), allowing foreign investors to carry out retail and wholesale trading subject to approval by the Ministry of Commerce
- With the publication of the new Companies Law 2017, the basis was created for the acquisition of shares in Myanmar trading companies by foreign investors; the new Companies Law 2017 further abolishes the requirement to register specific business activities and stipulates, which documents may and may not be requested at the time of incorporation, limiting the company registrar's power to require an undertaking not to trade from foreign investors
- Drafting of new Wholesale and Retail Regulations by the Department of Trade, Ministry of Commerce as well as public consultation in Q2 of 2017
- Approval of the draft Wholesale and Retail Regulations by the Economic Committee in February 2018
- 9 May 2018: Notification No. 25/2018 was issued, stipulating terms and conditions for Myanmar-owned companies, foreign-owned companies as well as joint venture companies between Myanmar citizens and foreigners carrying out retail and wholesale trading activities in Myanmar

IV. New Wholesale and Retail Regulations.

Definitions

- “Retail” is the sale of goods to the public in small quantities for consumption, but not for resale
- “Wholesale” is the sale of goods in large quantities to retailers for re-sale or to manufacturers for use as input in their production

Applicability of the Regulations

- 100% foreign-owned companies
- Joint-venture companies between Myanmar citizens and foreigners
- 100% Myanmar-owned companies

Scope

- Applicable for the entire territory of Myanmar
- Investments must be in accordance with the prescribed procedures
- Applicable to domestically produced or imported goods, which are not restricted/prohibited goods

IV. New Wholesale and Retail Regulations.

Requirements

- Minimum investment requirements depend on the trading activity and the ownership of the company
- The stipulations of the Companies Law 2017 concerning foreign ownership of up to 35% in Myanmar companies will no longer be relevant for trading activities, since the new Regulations will apply irrespectively of the corporate status of the company

Minimum Investment

- Ministry of Commerce is considering a deferred payment of the requirement investment over a certain period of time - e.g. within validity of license of 3-5 years
- If so implemented, the license would be issued upon contribution of a part of the committed investment
- Reference to land rental fees seems to be a remnant from the Thilawa notification (where the pre-payment of the land within the Thilawa Special Economic Zone was to be disregarded)

IV. New Wholesale and Retail Regulations.

Foreign-Owned Companies

- Less than 20% Myanmar-owned shareholding
- Minimum investment for a wholesale company: USD 5,000,000 (excluding land rental fees)
- Minimum investment for a retail company: USD 3,000,000 (excluding land rental fees)
- No engagement in retail distribution in premises with a floor area of less than 929 square meters, including mini-markets and convenience stores (cf. MIC-Notification 15/2017)

Joint-Venture Companies

- At least 20% Myanmar-owned shareholding
- Minimum investment for a wholesale company: USD 2,000,000 (excluding land rental fees)
- Minimum investment for a retail company USD 700,000 (excluding land rental fees)
- No engagement in retail distribution in premises with a floor area of less than 929 square meters, including mini-markets and convenience stores (cf. MIC-Notification 15/2017)

100% Myanmar-Owned Companies

- Neither minimum capital nor flooring-space requirements apply

IV. New Wholesale and Retail Regulations.

Conditions and Restrictions

- Retail/wholesale companies to abide by the rules and regulations of the City/Township Development Committees and the local authorities
- Businesses only to be opened at prescribed locations during prescribed operating days and hours, complying with the prescribed dimensions and number of outlets
- Goods distributed must be safe and of specified quality, provision of after sales services

Prohibitions

- No distribution of retail/wholesale goods which are restricted or prohibited under Myanmar law, rules or regulations
- List of restricted/prohibited goods based on existing laws (alcohol, tobacco, arms, etc.); Line Ministries have been asked to submit further restrictions, as necessary
- No engagement in unfair competition in the sale of goods and services

Non-Compliance

- Companies violating terms and conditions are subject to Ministry of Commerce sanctions as well as any applicable law, rules and regulations

IV. New Wholesale and Retail Regulations.

Basic Registration Process

- Application for a retail/wholesale license
- Documents/ information to be submitted to the Ministry of Commerce:
 - Certificate of Incorporation
 - Copy of MIC Permit or MIC Endorsement
 - Recommendation letter from the relevant City Development Committee or the relevant Township Development Committee in the Region/State concerned
 - List of goods to be distributed by retail/wholesale
 - Detailed business plan (including initial investment amount, location, dimensions, etc.)
- The actual procedures have not yet been established by the Ministry, which is currently working on the internal instructions

Myanmar citizen-owned companies

- Myanmar citizen-owned companies with an investment capital of USD 700,000 or more shall register within 150 days from the issuance of the Regulations
- Myanmar citizen-owned companies with an investment capital of less than USD 700,000 are not required to register

IV. New Wholesale and Retail Regulations.

Additional Requirements

- Existing service companies may be required to amend their business objectives, if application is intended before enforcement of the new Companies Law 2017 and re-registration with DICA
- Application of a business license with the relevant City/Township Development Committee
- Application of an Importer/Exporter Registration Certificate
- Registration as a Business Representative
- Product-specific registrations with authorities, e.g. Food and Drug Administration

New / Additional Branches

- Companies already registered and desirous of opening additional branches must notify the Ministry 90 days prior to opening/extension

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V. Specific Questions

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Existing Notifications

- Certain goods may already be imported (e.g. motor-vehicles, certain construction materials, hospital equipment, agricultural products, construction machinery, project equipment), subject to the specific terms published by notification
 - Notifications providing for additional requirements and conditions, e.g. for the establishment of showrooms requiring the construction of a showroom and application of a showroom license, continue to apply
 - Transition period for Notifications, that are more liberal than the new Wholesale and Retail Regulation (e.g. providing for no minimum capital), with a suspension of the higher requirements of the Wholesale and Retail Regulation during the transition period

Retail Space Requirements

- 929 square meter requirement will also apply in malls commercial and shopping centers, i.e. per boutique shop

Prohibited Goods

- Restrictions under existing laws (e.g. Excise Act) continue to apply
- Unclear, whether prohibitions for restricted goods such as alcohol and tobacco will only apply to import, or also domestic trading

Q&A

Thank you for your attention.



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