

MYANMAR – COUNTRY REPORT

Background

This report outlines the main laws which provide law enforcement and intelligence agencies with legal powers in relation to lawful interception assistance, the disclosure of communications data, certain activities undertaken for reasons of national security or in times of emergency, and censorship of communications under Myanmar law.



1. PROVISION OF REAL-TIME INTERCEPTION ASSISTANCE

1.1 Telecommunications Law 2013 (the “2013 Law”)

The 2013 Law was drafted to update Myanmar’s telecommunications sector and to provide a legal framework for the introduction of foreign private investment in the industry. It repealed the Myanmar Telegraph Act 1895 (the “1895 Act”) and the Myanmar Wireless Telegraph Act 1934, although under section 85(b) of the 2013 Law, rules, notifications, orders and directives issued under the older legislation may continue to be applicable insofar as they are not inconsistent with the new law. There are also additional rules and regulations in relation to the 2013 Law, which are at varying stages of coming into force. The first of these are the Licensing Rules, which were introduced by Notification No. 16/2014 on 14 October 2014 (the “Notification”).

Under section 75 of the 2013 Law, the government may as necessary direct the relevant organisations to intercept any information or communications that may adversely affect national security or the rule of law and order, so long as the exercise of such powers does not infringe the fundamental rights of the citizens (as set out in the 2008 Constitution of Myanmar).

In general, all service providers wishing to provide network, network facility or application services must be licenced (section 5 of the 2013 Law) and so will be licence holders. Under section 77, the Ministry of Communications and Information Technology (the “MCIT”) has wide discretion to direct a licence holder to intercept communications, when it is in the public interest and with the approval of the government. The 2013 Law does not contain a test to determine what constitutes “in the public interest”. Section 5(1) of the 1895 Act, however, authorises the President of the Union or an authorised

representative, in times of public emergency or in the interests of public safety, to take temporary possession of, block, detain, intercept or disclose any telegraph, which may indicate how “in the public interest” would be interpreted under section 77 of the 2013 Law.

Section 5(2) of the 1895 Act states that if any doubt arises as to the existence of a public emergency, or whether any act done under section 5 (1) was in the interest of the public safety, a certificate signed by a Secretary to the Government is conclusive proof on the point.

In relation to monitoring and enforcement of licences, section 36(a) (ii) of the Notification also refers to a lawful interception request in the context of when a licensee may be exempt from providing certain information to the Telecommunications Department of the MCIT. There is currently no clarification as to what constitutes a lawful interception request.

Section 78 of the 2013 Law provides that a licensee must make necessary preparations to enable a telecommunication service to be utilised for security matters in accordance with the law. This suggests that a telecommunications provider may be required to assist the government in the implementation of interception capabilities on its network.

2. DISCLOSURE OF COMMUNICATIONS DATA

2.1 Telecommunications Law 2013 (the “2013 Law”)

Under section 17 of the 2013 Law, a licensee must keep information transmitted or received through its telecommunications service confidential and must not disclose the confidential information of each user to any unauthorised or irrelevant person except for matters allowed by the existing laws (such as those set out in sections 75 to 78, described above).

There is no definition of “irrelevant party” but this may be interpreted to mean any unauthorised third party. Section 36 of the Notification, however, provides that, the Telecommunications Department of the Ministry of Communications and Information Technology (the “Department”) may:

- (a) establish regular, reasonable reporting requirements on the activities of all or certain categories of Licensees; and
- (b) issue a written request to specific licensees for any information, data, document, agreement, operating log, papers or other information required by the Department to discharge its functions under the 2013 Law, provided that such request is reasonable, not unduly burdensome and affords the licensee at least thirty days to provide the requested information unless subject to a lawful interception request.

Under section 36(b) of the Notification, licensees are obliged to comply with this request.

In addition, section 38 of the Notification states that the Department has the authority to inspect the facilities and documents of any licensee, subject to a reasonable notice period prior to inspection and provided that the inspection has a legitimate aim and is proportionate and necessary for the purpose for which inspection is undertaken.

The wording of sections 17 and 69 of the 2013 Law also implies that disclosure may be required in the context of legal proceedings and under a court order. Section 69 of the 2013 Law makes it an offence to disclose any information which is kept under a secured or encrypted system unless in the context of court proceedings relating to telecommunications and when ordered to disclose such information by the court.

Furthermore, section 95 of the Code of Criminal Procedure 1898 (the “Code”) states that only a District magistrate, High Court or Court of session may require the delivery to any person they direct of “any document, parcel or thing” that is in the custody of the postal or telegraph authorities in relation to an investigation, inquiry, trial or any other proceeding under the Code.

3. NATIONAL SECURITY AND EMERGENCY POWERS

3.1 Telecommunications Law 2013 (the “2013 Law”)

Under section 76, the Ministry of Communications and Information Technology (the “MCIT”) or the department or organisation assigned by it may, for defence and security matters of the State or for the public interest, enter into and inspect, supervise and require submission to it of any documents relating to the service activities of the telecommunications service provider. “Service activities” is not defined and there is no detail provided in the law regarding how this section would be implemented. Note, however, that a licensee’s permitted activities will also be contained in its individual licence.

4. CENSORSHIP

4.1 Telecommunications Law 2013 (the “2013 Law”)

Section 77 of the 2013 Law permits the Ministry of Communications and Information Technology (the “MCIT”) to restrict and block certain kinds of communications and to control and use the business of any telecommunications service provider and its telecommunications devices when it is deemed in the public interest and with the approval of the government. The method by which this provision would be enforced is unclear. Under section 22 of the Notification the Telecommunications Department of the MCIT (the “Department”) is given authority to direct the Licensee to suspend any services rendered pursuant to a licence or to terminate a licence, either following a breach of the terms and conditions of a licence by the licensee, or failure by the licensee to comply with the duties of a licensee or with any directives or resolutions issued by the MCIT or the Department.

4.2 Electronic Transactions Law 2004 (the “ETL”)

The ETL applies to any kind of electronic record and electronic data message used in the context of commercial and non-commercial activities. Section 33 makes it an offence to undertake any act by using electronic transactions technology which is detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture. This may be interpreted widely.

The method by which this provision may be enforced is unclear.

5. OVERSIGHT OF THE USE OF POWERS

5.1 The Constitution of the Republic of the Union of Myanmar (2008) (the “2008 Constitution”)

The 2008 Constitution includes the grant of certain fundamental rights, including of freedom of expression, to each citizen so long as such rights are not exercised in a way that is contrary to laws that are enacted for the security of the state, the prevalence of law and order, community peace and tranquillity or public order or morality. The Constitution also requires the government to protect the privacy and security of correspondence and other communications under the law, subject to its other provisions.

5.2 Telecommunications Law 2013 (the “2013 Law”)

As a general comment, one of the overarching objectives of the 2013 Law is to provide legal protection to both telecommunication service providers and to the users of such services.

The Ministry of Communications and Information Technology (the “MCIT”) must seek government approval to request an interception under section 75 of the 2013 Law or to block or restrict access to communications under section 77. There is no clarification of what form government approval would take (for example, as an executive order or parliamentary resolution).

However, under section 82, in matters of national emergency, natural disaster or for national defence and security, the MCIT may exempt any government department, organisation or person from obtaining any permission, licence or recommendation required under the law without the prior approval of the government. Such exemptions must, however, be submitted to the government.

5.3 Judicial Oversight

There is no specific judicial oversight process laid out in law. Where disclosure of data is required in the context of legal proceedings, the competent court may control such disclosure.

6. PUBLICATION OF AGGREGATE DATA RELATING TO USE OF GOVERNMENT POWERS

There is no law in Myanmar preventing the publication of aggregate data relating to the use of the powers described above. Furthermore, no law prevents the publication of laws which set out the powers of government agencies or descriptions of those powers.

7. CYBERSECURITY

There is no specific legislation relating to cybersecurity in Myanmar.

8. CYBERCRIME

There is no specific legislation regulating cybercrime in Myanmar.

Law stated as at 15 March 2017