

AMENDMENT TO MACAU GAMING LAW

KEY ISSUES EXPLORED
- A SERIES OF EXPERT
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PART III: THE MANAGING DIRECTOR

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The consultation document for the amendment of Law 16/2021, released by the Macau Government on September 14th, emphasizes the intention to increase the legal requirements related to the supervision of casino concessionaires.

One of the proposals the government has put forward to achieve this objective is the increase of local shareholding in gaming concessionaires with the purpose of *“centralizing the development of their business in Macau, facilitating the Macau SAR Government knowledge and effective verification of the suitability of the related shareholders”*.

The proposal suggests that the management of concessionaires be delegated to a managing director (“MD”) who must be a Macau permanent resident and directly hold at least 10% of the concessionaire’s share capital (article 19 of Law 16/2001). The consultation document, however, does not offer insight as to whether such a requirement would translate in (i) an increase of an MD’s minimum shareholding or (ii) the dispersion of a larger portion of the share capital amongst several Macau permanent resident shareholders (being directors or not).

The Managing Director and its role in the current legal framework

As previously mentioned, under the current legal framework, casino concessionaires are required to delegate its management to a MD who (i) must be a Macau permanent resident and (ii) hold 10% or more of their share capital.

The reasons offered for such requirements - when Law 16/2001 was being conceived and debated - were that having such a position (i) would make it easier to verify and monitor respective suitability, thus facilitating supervision; (ii) would grant further reassurances that management would be undertaken bearing in mind the specificities of doing business in Asia; and (iii) would allow for the Government to have a direct local liaison. It was also understood that placing a 10% minimum ownership in the hands of a local MD would

make sure that, whoever took the role, would have a real (economic) interest in the growth and sustained development of the business. They would, as the saying goes, have some “skin in the game”, as opposed to being merely an employee.

The general corporate legal framework provided by the Macau Commercial Code (“MCC”) also contemplates the existence of an MD on the board of directors of commercial companies. The matters subject to delegation are not statutorily prescribed but there is a set of powers that may not be delegated to the MD (i.e., must remain within the board). Apart from such “reserved” matters, the scope of powers to be delegated is subject to a decision of the board and it may be as broad or as narrow as the latter decides.

However, for “common” companies such delegation is voluntary and may be made by the board of directors to either a MD or an executive committee. Under Law 16/2001 that delegation becomes mandatory and must be made to one MD only. Moreover, the appointment of an MD to a casino concessionaire is subject to a suitability check and the scope of his/her powers, the term of office and any changes thereto are subject to government approval. Undoubtedly tough, the most significant departure from general corporate law is the requirement of residency and of a minimum shareholding.

Despite such departure, the requirement for local directors or representatives is not uncommon and may be found in certain regulated industries such as in the banking and insurance sectors. The uniqueness of Law 16/2001 lies in the ownership requirement. There is no other parallel example within Macau’s legal framework, even in the context of concession contracts of essential public services or in other highly regulated sectors such as financial services.

The intention behind this unique requirement was, in our view, justified by the historical context in which it was introduced: Macau was opening its casino industry and for the first time, outside companies, with foreign capital and no roots in Macau, were able to participate. There was plenty at stake as investment obligations under the contracts were aimed to change Macau’s economy in an unprecedented manner. The 10% ownership requirement was therefore intended to ensure that relevant local interests would be invested in the success of the operations and would be considered in the management of casino operators.

However, pragmatic as it was, the legislator did not impose any limitations to the types and/or categories of shares to be held by the MD. This meant that such shares may be ordinary, preferential (redeemable and non-redeemable) or be part of a special category that grants different rights (from the other shareholders). Ultimately, the issuance of shares to each concessionaire's MD was left to the Government's purview; and expressed through its approval requirement for any amendments to the articles of association, to the issuance of any types of shares and to agreements involving rights over shares.

Despite its original intention, the conjugation of several factors, plus the broader economic context in which concessionaires operate have resulted in the fact that most MD's are not effectively invested in the full spectrum of rights and entitlements corresponding to a 10% shareholding. This became evident in the context of the public offering and listing of casino operations in regulated stock markets. In this process, and to comply with listing rules and requirements, several legal arrangements, duly sanctioned by the Government, were implemented to ensure that the listed holding company would be entitled to 100% of the economic interest in the casino concessionaires. At the same time, the 10% shareholding had to be available, and from time to time be held by anyone who may be appointed as MD. As a result, although the MDs are formally holding 10% of the concessionaires share capital, their shares are typically not invested with an equivalent economic interest and their ownership is contingent on their appointment to the MD position.

The proposed increase of local shareholding and its potential implications

The proposed increase of permanent resident shareholding may be achieved through different forms, e.g. (i) the increase of the MD's shareholding threshold, (ii) the determination of a minimum number of local shareholders; (iii) a minimum local shareholding irrespective of the number of shareholders, etc. Irrespectively of how the proposal may be implemented, the following issues require consideration:

- 1) Should the expansion of local interests prevail over the management expertise and/or financial resources of shareholders.
- 2) How effective would it be to enforce that local shareholders are fully invested in the economic and voting rights of their shares.

- 3) What implications does this measure have in the listing of existing and/or future casino operations, considering that these companies are currently entitled to 100% of the economic interest of the concessionaires.
- 4) What relevance would be given to the indirect ownership held through the concessionaires' listed companies, i.e. would the shareholding indirectly held by Macau residents or by their controlled corporations be considered to determine the minimum threshold requirement.
- 5) If this proposal is implemented through the dispersion of a larger percentage of the share capital through several local shareholders, could this make the concessionaires' shareholding structure and relations significantly more complex and potentially contentious.
- 6) How many local permanent residents have the financial resources to purchase a real economic interest in a casino concessionaire and would such measure benefit only a selected minority.

In our view, the above considerations question the very need to impose a minimum threshold for local shareholders, as well as the purposes and effectiveness of such requirement.

In fact, the objective consequence of the proposal translates into a limitation to overseas ownership. Determining that a minimum percentage of the share capital must be held by Macau residents means that a lower percentage is available for investors from outside the Region, including from Hong Kong and Mainland China.

Despite being in retreat for the past 20 years, restrictions on foreign ownership in strategic industries are not uncommon, even among OECD's countries, particularly in sectors deemed economically essential or strategic. However, these restrictions, are normally targeting the possibility of taking a controlling interest in entities engaged in such industries.

Macau's economy, however, has historically been open to overseas investment without any restrictions. This has been a practical inevitability due to Macau's limited territory, population and resources. As in many other industries, the transformation of Macau's gaming and tourism industries was only possible due to the importation of business models, expertise and capital from abroad. Its success is self-evident. These factors are also inevitably necessary to establish Macau as a world center of leisure and entertainment.

If the policy objective that motivates this proposal is the enhancement of scrutiny over the shareholders of the concessionaires, we note that the gaming industry is already heavily regulated, and the Government holds significant legal (and practical) power over concessionaires and its shareholders. As per the measures proposed in the consultation paper, the Government is simultaneously considering both the increase of its supervising role and the reduction of the concession term. In this scenario, the concessionaires are and will be subject to a tight and continuous monitoring of their suitability, performance as well as to *periodical reviews* resulting from their need to retender at the term of their contracts. These measures already provide a very significant level of control over overseas (as well as domestic) investment.

If the policy objective is, however, a rebalance of the gaming concessionaire executive powers, shifting towards a centralized decision-making process in Macau, the natural way forward would be to implement a higher ratio of resident directors. That could be achieved, for instance, with the creation of an executive committee with a number of members that are permanent residents and effectively domiciled in the SAR. This would impose that board and executive committee meetings would have to be held locally, establishing Macau as their effective base of operations. Such mechanism, if combined with corporate governance requirements of international standard, would contribute not only to localize but also to improve the management of casino concessionaires.

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