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## Merger Control in Thailand's Energy Sector

As policies are initiated under the Thai government's Thailand 4.0 initiative, laying the groundwork for economic growth over the next two decades, the country's energy demands will continue to increase. The Ministry of Energy's Thailand Power Development Plan of 2015 (PDP2015) outlines the framework for dealing with the increase in energy needs, including an expansion of installed electricity generating capacity. The PDP2015 makes it clear that the government sees private investment playing a crucial role in driving this expansion.

Thailand has added nearly 10 GW of additional capacity since 2012, increasing the country's installed capacity from approximately 32.6 GW to 42.4 GW (as of November 2017). Much of this growth has been driven by the increase in the number of small power producers (SPPs). Installed capacity for SPPs has increased nearly threefold over the same period, from 2.6 GW in 2012 to 7.5 MW in November 2017, and now represent approximately 17.8% of the country's total generating capacity.

As many SPP projects are reaching maturity and achieving steady, predictable returns for their investors, and as new SPP and very small power producer (VSPP) projects come online, we can expect a degree of market consolidation as producers aim to achieve economies of scale. With this in mind, it is useful to reflect on Thailand's pre-closing approvals in the energy sector.

In most sectors of the economy, Thailand's new Trade Competition Act B.E. 2560 (2017) provides a dual merger control system, involving premerger approvals and post-merger notifications. However, the new act is not applicable to businesses that have been governed by sector-specific antitrust and competition regulations, such as those in the energy sector.

Takeover and merger control in the energy sector is subject to a specific regime, that is, the Regulation of the Energy Regulatory Commission on the Establishment of Criteria to Prevent Mergers, Competition Lessening or Restrictions in Energy Services B.E. 2552 (2009). The regulation was promulgated by the Energy Regulatory Commission (ERC), which has the authority to regulate in order to prevent the reduction of competition in the energy services sector in accordance with section 60 of the Energy Industry Act B.E. 2550 (2007).

Section 4 of the regulation stipulates that an entity which has obtained a license from the ERC is prohibited from merging with another licensee without permission from the ERC. This effectively creates a preclosing merger control regime for licensees. The definition of "merger" under section 3 of the regulation captures situations where two or

more licensees amalgamate, or one licensee acquires the assets, shares, or managerial control of another licensee.

In addition to permission to merge, licensees are required to notify the ERC if any of the following events occur:

- ▶ The licensee wishes to enter into a contract causing any person to have absolute or partial direct or indirect control over its management;
- ▶ The licensee acts to take over, or is being taken over, pursuant to the laws relating to securities and exchange; or
- ▶ A person who has the power to control policies, management, supervision, or administration of a licensee takes direct or indirect control of the policies, management, supervision, or administration of another licensee.

Procedurally, permission must be granted by the ERC prior to closing the proposed merger. Once the parties to the proposed merger have submitted the application, the ERC has 90 days to render its decision, which may be extended for a period of up to 15 days if the ERC deems it necessary.

Section 10 of the regulation sets out the criteria for the ERC to consider when assessing whether to grant permission for a proposed merger. That said, the criteria are fairly general in nature and leave considerable room for the ERC to exercise discretion.

In addition to the preclosing merger approval, section 5 of the regulation requires notification to the ERC in the event a licensee is acquired by a third party. Under the Regulation of the Energy Regulatory Commission on Application for License and Permission for Energy Industry Operation B.E. 2551 (2008), one of the criteria of applying for a license to operate in the energy industry is having "sufficient financial and technical potential to construct and operate in the energy industry."

Accordingly, when a licensee is being acquired or will merge with a nonlicensee, the ERC can scrutinize the transaction to a certain degree. If the company no longer possesses the qualifications required to operate in the energy industry after closing, the ERC may revoke the company's license.

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With Thailand's ongoing push to increase electricity generating capacity, an opportunity exists for greater participation by private investors. As more projects come online and more producers become active in the sector, we anticipate seeing greater consolidation. The ERC's merger control regime can be expected to play an increasingly important role in future energy transactions. 🏗️