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# THAILAND

## Newsletter

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## Thailand Adopts a New Merger Control Regime for the Energy Sector

The Thailand Energy Regulatory Commission ("ERC") is the primary regulatory body responsible for monitoring and regulating competition in the power and natural gas sectors. The merger control regime in the natural gas and power sectors introduced in 2009 is limited in scope and in need of updates to account for the increase in private investment brought on by the energy transition and the growing nuances of business structures.

In November 2022, the ERC launched a public hearing on the new merger control regime for the energy sector. Our firm has provided a brief summary of this in our Thailand's Energy Transition Report: Outlook for 2023 ([LINK](#)). Promptly afterwards, with effect from 20 December 2022, a suite of five ERC regulations and notifications was launched to upend the status quo in competition law in the power and natural gas sectors. Set out below is a list of the new laws:

- (1) The ERC Regulation Re: Rules and Procedures for Mergers and Acquisitions and Cross-Shareholding in Energy Businesses ("**M&A Regulation**");
- (2) The ERC Notification Re: Rules, Procedures, and Conditions on Transfer of Energy Licenses ("**License Transfer Notification**");
- (3) The ERC Regulation Re: Definition of Market and Scope of Relevant Energy Market ("**Market Definition Regulation**");
- (4) The ERC Regulation Re: Rules on Dominant Player ("Dominant Player Regulation"); and
- (5) The ERC Regulation Re: Rules and Measures Relating to Monopoly, Reduction of Competition, and Restriction of Competition ("**Monopoly Regulation**").

Key issues from the regulations and notifications are highlighted below.

### Regulated Mergers and Acquisitions ("M&A")

#### ***Buyers and Targets***

Unlike the 2009 merger control regime, which captured only straightforward M&A activities between energy licensees, the M&A Regulation extends the scope to apply to regulated M&A activities between the energy licensee as well as its controlling person, parent company, subsidiary, or affiliate as buyer and another energy licensee as target.

### **Regulated M&A Activities**

The M&A Regulation provides a broad definition of M&A and spells out regulated M&A activities as outlined below:

No.	Regulated M&A Activities	
(1)	Merger or amalgamation	M&A which causes one juristic person to survive and another to cease to exist, or results in a new juristic person
(2)	Asset purchase	Purchase of assets used in the normal energy business operations of another energy licensee for more than 25% of the asset value of the same in the preceding accounting year by the energy licensee or its controlling person with an aim to control business management or administration policies of another energy licensee, whereby the asset value is calculated from accounting value as at the date of agreement to purchase or actual acquisition, as the case may be
(3)	Share purchase	Purchase or acquisition of shares, warrants, or other securities which can be converted into shares in the following manners with an aim to control business management or administration policies of another energy licensee:  (a) Direct shareholding in another energy licensee for at least 25% of all shares, including shares held by related persons; or  (b) Indirect shareholding in each shareholding level that exceeds 50% of all shares, including shares held by related persons
(4)	Acquisition of managerial control	Acquisition of control of business by the energy licensee or its controlling person by holding less than 25% of all shares, but the energy licensee or its controlling person has the direct power of control or indirect power of control through indirect shareholding

### **Approval Requirements and Clarification Reports**

**(1) Approval requirements:** The energy licensee must file for the ERC's pre-approval for the regulated M&A activities as outlined above at least 60 days in advance, unless it is permitted to submit a clarification report in lieu of the ERC's pre-approval.

The vetting process by the ERC is changed from a single step process (i.e., where the regulated M&A activity is either approved or not approved) to a two-step process, whereby if an application is considered likely to fall short of achieving certain criteria, the energy licensee would be required to submit an impact assessment report for an additional round of consideration. Notification requirements under the 2009 regime have been removed, as they have been conceptually shifted to approval requirements instead.

**(2) Clarification reports:** The energy licensee will be permitted to submit a clarification report pre-merger in lieu of the ERC's pre-approval if the energy licensee can demonstrate that following the regulated M&A activity:

- (a) Assets used in normal energy business operation of the energy licensee will not exceed THB 1,000 million;
- (b) The energy licensee will acquire assets used in normal energy business operation of another energy licensee for no more than THB 50 million; or
- (c) Annual revenue of the energy licensee will not exceed THB 120 million.

### **Regulated Cross-Shareholding**

According to the M&A Regulation, cross-shareholding is an action where at least two of the energy licensee, another energy licensee, a material shareholder, a subsidiary, an affiliate or a parent company of the energy licensee, or another energy licensee hold shares in each other in a manner that results in power of control over another energy licensee, whether directly or indirectly through indirect shareholding.

Cross-shareholding is subject to approval requirements in the same way as the regulated M&A activity, but the clarification report process does not apply.

### **Transfer of Energy Licenses**

The License Transfer Notification adds a clear definition of what constitutes a transfer of license. Currently, it is an action where an energy licensee transfers all or part of its rights under an energy license to another person, where the transfer is neither (i) a mere change of an energy licensee's name, nor (ii) the M&A as prescribed by the ERC.

As with the 2009 regime, a transferor would have to submit an application for approval of the transfer of its license, while the transferee must be demonstrably qualified to be an energy licensee in accordance with its contemplated energy business.

The vetting process by the ERC is changed from a single step process (i.e., where the transfer is either approved or not approved) to a two-step process, whereby if an application is considered likely to fall short of achieving certain criteria, the transferor would be required to submit an impact assessment report for an additional round of consideration.

### **Anti-Competition**

#### ***Definitions of Market and Scope of a Relevant Energy Market***

According to the Market Definition Regulation, relevant energy markets subject to the 2022 merger control regime are:

- (1) Power businesses:** power generation; power transmission system services; power distribution system services; power distribution services; and power system control services; and
- (2) Natural gas businesses:** natural gas transmission through pipelines via natural gas transmission systems; natural gas procurement and wholesale via natural gas distribution systems; natural gas retail via natural gas distribution systems; and storage and regasification of liquified natural gas

As a facilitating tool for market competition measurement and prescription of specific measures with an aim to prevent monopoly, reduction of competition, and restriction of competition by energy licensees with dominant positions, the Market

Definition Regulation authorises the ERC to set out definitions of market and scope of a relevant energy market by primarily relying on types of energy licenses, and using geographical areas of energy service provision and competition conditions as supplementary determining factors. The ERC can also factor in substitutability of energy services in terms of their characteristics, prices, and usage in accordance with economic principles by contemplating supply substitutability and demand substitutability.

### ***Dominant Players***

Based on the Dominant Player Regulation, two energy licensees with a relationship in terms of policies or power of command are considered the same licensee. What constitutes a market dominant player is specified in the Dominant Player Regulation. In each relevant energy market, the ERC will prescribe a single energy licensee with market dominant power as a significant market dominant player. Joint significant market dominant players are possible. The ERC will impose specific measures on significant market dominant players, but may not do so with an energy licensee which lawfully is the only licensee in the relevant energy market.

### ***Monopoly, Reduction of Competition, and Restriction of Competition***

A monopoly, a reduction, or restriction of competition under the Monopoly Regulation covers actions taken singly by an energy licensee or operator, or jointly with a third party, regardless of whether that third party is another energy licensee. An energy licensee or operator is required to notify the ERC of actions or behaviours which demonstrate monopoly, reduction of competition, and restriction of competition without delay. The Monopoly Regulation also sets out steps regarding complaint filing and interrogation regarding these actions.

### **Heads-up on Upcoming Restrictions on Foreign Ownership and Foreign Directors**

Other than the five regulations and notifications mentioned above, the ERC is refreshing its secondary laws relevant to power license application. Based on the draft ERC Notification Re: Characteristics, Documentary Evidence and Approval in Relation to Power Business Operations (the "**Licensing Requirement Notification**"), the ERC aims to introduce the restrictions below which should be of note when conducting M&A transactions with respect to power businesses.

Unless exempted by the Specific Commitment (Mode 3 or Mode 4 as the case may be) of international agreements which grant national treatment, or by any other law, if a power license applicant is a partnership, limited company, or public limited company:

- (1) It must be incorporated under Thai law or registered in Thailand;
- (2) In the case of a limited company, foreign ultimate shareholders must not hold more than 49% of all shares, and the number of foreign shareholders must not exceed half of all shareholders;
- (3) Not less than half of its directors must hold Thai nationality; and
- (4) Authorized directors must hold Thai nationality.

Based on the draft Licensing Requirement Notification, these requirements will not take retroactive effect on energy licenses issued before the effective date of the new law. However, since energy licenses are customarily issued for a limited period of time which does not cover a project life, it is important to note that once renewed, these licenses will be subject to the new requirements. The draft Licensing

Requirement Notification is now under the near-final drafting process.

If you have any questions in relation to the issues raised, please contact the authors in the left-hand column.

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