Electricity Regulation 2020

Contributing editor
John Dewar

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Getting The Deal Through

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Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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34-35 Farringdon Street
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Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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Contributing editor
John Dewar
Milbank LLP

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of Electricity Regulation, which is available in print, as an e-book, and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Contents

Global overview 3
John Dewar
Milbank LLP

Angola 7
Ricardo Andrade Amaro and Pedro Capitão Barbosa
Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL

Argentina 14
Hugo Martelli Martelli Abogados
Rogelio Baratchart Tecnolatina SA

Australia 20
Andrew Monotti, Simon Cooke and William Osborn
King & Wood Mallesons

Belgium 29
Arnaud Coibion, Lothar Van Driessche and Philippe Jonckheere
Linklaters LLP

Brazil 37
Marcello Lobo and Pedro Ícaro Lopes Vargas
Pinheiro Neto Advogados

Croatia 46
Ivana Manovelo and Miran Macesic
Macesic & Partners LLC

Ecuador 52
Roque Bustamante
Bustamante & Bustamante Law Firm

Ghana 59
Kimathi Kuenyehia, Sarpong Odame, Kojo Amoako and Kafui Quashigah
Kimathi & Partners, Corporate Attorneys

India 71
Neeraj Menon and Akshita Amit
Trilegal

Ireland 83
Peter McLay, Eoin Cassidy and William Carmody
Mason Hayes & Curran

Italy 92
Arturo Sferruzza and Ginevra Biadico
Norton Rose Fulbright Studio Legale

Japan 99
Nagahide Sato, Sadayuki Matsudaira and Junya Ohashi
Nishimura & Asahi

Mexico 107
Rogelio López-Velarde, Amanda Valdez and Daniela Monroy
Dentons López Velarde, SC

Netherlands 116
Sophie Dingenen and Margot Besseling
Bird & Bird LLP

Nigeria 124
Ike C Ibeku, Ifeyinwa Ufondu and Shammah Vidal
Benchmac & Ince

Panama 133
Erika Villarreal Z, José A Brenes and Ixalondra Chee Chong
Anzola Robles & Asociados

Portugal 142
Ricardo Andrade Amaro, Joana Alves de Abreu and Pedro Capitão Barbosa
Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL

South Africa 150
Jonathan Behr
Werksmans Attorneys

Spain 159
Gonzalo Olivera and Alberto Artés
King & Wood Mallesons

Turkey 166
Değer Boden Akalın, Şeyma Olğun and Ayşegül Önol
Boden Law

United Kingdom 179
John Dewar and Seyda Duman
Milbank LLP

United States 186
Daniel Hagan, Jane Rueger and John Forbush
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United Kingdom

John Dewar and Seyda Duman

Milbank LLP

GENERAL

Policy and law

1 What is the government policy and legislative framework for the electricity sector?

Legislative framework

Broadly speaking, the following legislation regulates the electricity sector in the United Kingdom:

- the Electricity Act 1989 (as amended most recently by the Electricity and Gas (Internal Markets) Regulations 2017 (SI 2017/493));
- the Utilities Act 2000;
- the Energy Act 2004;
- the Energy Act 2008;
- the Energy Act 2010;
- the Energy Act 2011;
- the Energy Act 2013, which implements key aspects of electricity market reform and is a policy initiative pioneered by the UK government to mobilise £110 billion of capital investment required by 2020 to ensure reliable and diverse supply of low-carbon electricity; and
- the Energy Act 2016.

As a member of the European Union, various EU legislation also applies to the UK electricity sector as a result of the either direct effect or by way of implementation of EU laws into domestic legislation. We noted last year that as Brexit discussions continue, so too does the legislative uncertainty within this area. This remains the same a year later.

Policy

The Department for Business, Energy and Industrial Strategy (BEIS), established after the UK's decision on 23 June 2016 to exit the EU, is celebrating its second anniversary and has continued to prioritise three key policy areas: security of supply, cost and decarbonisation. It has done so mainly through the enactment of the Electricity Market Reform (introduced by the Energy Act 2013, described above), which has introduced contracts for difference in furtherance of its decarbonisation policy and the capacity market in order to provide security of supply in times of high demand. On 19 July 2018, the Domestic Gas and Electricity (Tariff Cap) Act 2018 received royal assent. This act put in place a requirement on the energy regulator, the Office of Gas and Energy Markets (Ofgem), to cap standard variable and default energy tariffs. This is one of the BEIS policy initiatives to regulate the cost of electricity to the consumers.

The general energy policy outlined above, coupled with the potential impact of the continuing negotiations relating to the withdrawal of the UK from the EU, means that there will likely be a legislative overhaul regarding the electricity sector.

Organisation of the market

2 What is the organisational structure for the generation, transmission, distribution and sale of power?

The Gas and Electricity Markets Authority (GEMA) has primary responsibility for regulation of the energy sector. GEMA's powers and duties are largely provided for in statute (such as the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998 (CA 1998), the Enterprise Act 2002 and the Energy Acts of 2004, 2008, 2010 and 2011) as well as arising from directly effective European Community legislation.

GEMA is constituted of individuals who are appointed by the Secretary of State for specified terms of not less than five years. GEMA is independent and has very limited stakeholder participation (such as the Secretary of State's ability to remove members on the grounds of misbehaviour, determine the remuneration of members and give guidance).

GEMA delegates its functions to Ofgem and provides Ofgem with strategic direction and oversight.

A licence from GEMA is required before the generation, transmission, distribution or sale of power. Such licence is issued by Ofgem following receipt of a written application together with the relevant fee. Ofgem will determine the relevant conditions to the licence and the licence-holder must comply with those conditions as well as with various industry codes and standards, such as the Balancing and Settlement Code, the Grid Code, and the Distribution Code.

REGULATION OF ELECTRICITY UTILITIES – POWER GENERATION

Authorisation to construct and operate generation facilities

3 What authorisations are required to construct and operate generation facilities?

The authorisations required to construct and operate generation facilities depends on the type and size of facility to be constructed or operated. By way of example, certain types of energy infrastructure fall within the category of 'nationally significant infrastructure project', and as such require a Development Consent Order (DCO) under the Planning Act 2008. The thresholds for projects falling under this category are more than 50MW onshore, and more than 100MW offshore. Applications for DCO are made to and publicly examined by the Planning Inspectorate who then makes a recommendation to the Secretary of State for Energy and Climate Change. Projects with a generating capacity of 50MW and less in England and Wales are consented under the Town and Country Planning Act 1990.

For offshore generating stations with a generating capacity of more than 1MW but less than or equal to 100MW, consent under section 36 of the Electricity Act 1989 is also required.

In Scotland, section 36 of the Electricity Act 1989 applies to all projects above 50MW. Projects that are less must apply for consent

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to the local planning authority under the Scottish Planning Act. The Scottish Executive is responsible for dealing with applications for consent for generating projects onshore. Marine Scotland, a directorate of the Scottish Executive, is responsible for dealing with applications for consent under section 36 of the Electricity Act 1989 for offshore generating stations in Scottish waters.

Depending on the type of plant, further authorisations such as relating to health and safety, environmental or nuclear specific matters may also be required from the appropriate regulator.

Grid connection policies

4 What are the policies with respect to connection of generation to the transmission grid?

Generators applying directly to connect to the transmission system (ie, with a capacity of at least 100MW) need a connection agreement with National Grid Electricity Transmission (NGET) and are required to complete a connection application form, provide technical data and pay the relevant application fee.

The generator is required to become a party to the Connection and Use of System Code (CUSC) Framework Agreement and comply with the CUSC and the requirements of the Grid Code (which sets out rules related to planning, operation and use of the electricity transmission network). The Grid Code, the Balancing and Settlement Code and the System Operator Transmission Owner Code are maintained by NGET in accordance with its transmission licence to govern the relationship between it and the electricity industry participants.

Small generators wishing to connect to the distribution network, that do not require explicit access rights to the National Electricity Transmission System, make similar agreements with the relevant distribution network operator.

There may be other requirements, such as the provision of financial security by the generator, if additional works are required to be made before a connection is available.

Alternative energy sources

5 Does government policy or legislation encourage power generation based on alternative energy sources such as renewable energies or combined heat and power?

Government policy does encourage power generation based on alternative energy sources, in particular, renewable energies. See the *UK* chapter in *Getting the Deal Through: Renewable Energy 2019*.

Climate change

6 What impact will government policy on climate change have on the types of resources that are used to meet electricity demand and on the cost and amount of power that is consumed?

The Climate Change Act 2008 was the world's first legally binding climate change legislation. The UK is committed to achieving long-term goals of reducing greenhouse gas emissions and to ensuring steps are taken towards adapting to the impact of climate change under the Climate Change Act 2008, in addition to which, pursuant to the EU Renewable Energy Directive 2009/28 on the promotion of use of energy from renewable sources, the UK committed to have 15 per cent of its energy consumption derive from renewable sources by 2020 (Promotion of the Use of Energy from Renewable Sources Regulations 2011 (SI 2011/243)).

In November 2016, the government published its plans to upgrade UK energy infrastructure, reaffirming its commitment to spend £730 million of annual support on renewable electricity projects, also setting out proposals for the next steps to phase out electricity generation from unabated coal-fired power stations within the next decade. This indicates that government policy in the long-term is to invest in new, cleaner energy capacity.

In May 2019, parliament approved a motion declaring a national climate change emergency. This does not legally compel the government to act; however, it does demonstrate the will of House of Commons on the topic.

Storage

7 Does the regulatory framework support electricity storage including research and development of storage solutions?

Electricity storage is treated as a form of electricity generation and, as such, the applicable legal framework for electricity storage is currently the same as that applicable to electricity generation. As a result, there is a lack of legislative clarity with respect to electricity storage that may act as a deterrent to investment. Towards the end of 2017, Ofgem ran a consultation with the aim of making changes to the electricity generation licence to make it fit for storage. Ofgem has stated that the intention of the changes would be to provide regulatory certainty to storage facilities, both existing and developing, encourage deployment of this new technology into the system and to ensure that a level playing field exists, so that storage can compete fairly with other sources of flexibility. The proposed changes would also address in an appropriate manner the issues storage facilities face surrounding final consumption levies (currently some storage could face double charging of final consumption levies both at the time of importing from and at the time of exporting electricity to the grid). The consultation is currently awaiting decision but indicates that the government intends to encourage the support of electricity storage research and solutions.

In January 2019, BEIS launched the Storage at Scale competition, which will make up to £20 million available for up to three projects offering alternative storage solutions for either a minimum output of 30MW or minimum capacity of 50MWh. Successful projects will be built and tested by December 2021. A statement by BEIS said:

> *Projects should be at a technology readiness level of six or above, which could result in lower capital or operating costs to the traditional storage technologies, or improved capacity, sustainability and response rates at a comparable cost.*

Government policy

8 Does government policy encourage or discourage development of new nuclear power plants? How?

The UK does not have a separate subsidy regime for new nuclear power plants, however nuclear generation may be eligible for subsidies designed to promote low-carbon generation as well as being able to participate in capacity market auctions. It is expected that government policy in relation to new nuclear power plants will also take its lead from public response to the progress of the Hinkley Point C plant, which has experienced escalating costs and delays.

REGULATION OF ELECTRICITY UTILITIES – TRANSMISSION

Authorisations to construct and operate transmission networks

9 What authorisations are required to construct and operate transmission networks?

The authorisations required to construct transmission or distribution networks is dependent on the type and location of the distribution or transmission assets.

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Under section 37 of the Electricity Act 1989, an application to the Secretary of State is necessary in order to install electric lines above the ground (other than in certain circumstances), the application must be in writing and include all necessary information, depending on the location of the electric lines other consents such as from the highway authority may also be required.

As mentioned above, a DCO is required where the project in question is a nationally significant infrastructure project. Overhead electric lines with a nominal voltage of 132kV or more are considered to be a nationally significant infrastructure project. A DCO will include all necessary consents and ancillary planning permissions.

A transmission licence is required for the operation of a transmission network. National Grid has the transmission licence for England and Wales, and therefore owns and operates the transmission system in England and Wales.

Where territorial waters are concerned, the relevant authorities are the Marine Management Organisation, National Assembly Wales, Marine Scotland and the Department of the Environment for Northern Ireland.

Eligibility to obtain transmission services

10 | Who is eligible to obtain transmission services and what requirements must be met to obtain access?

To obtain connection to the transmission grid, a generator must have a capacity of at least 100MW, complete a connection application form, pay an application fee, provide the relevant technical data, and sign a bilateral Connection Agreement. The generator must also comply with the various applicable industry codes such as the Connection and Use of System Code, which sets out the contractual framework for connection to and use of transmission services.

Government transmission policy

11 | Are there any government measures to encourage or otherwise require the expansion of the transmission grid?

Ofgem published its 'Upgrading our Energy System, Smart Systems and Flexibility Plan' in July 2017. The plan sets out 29 actions to be taken by the government, Ofgem and industry to:

- remove barriers to smart technologies (such as storage and demand-side response);
- enable smart homes and businesses; and
- improve access to energy markets for new technologies and business models.

These actions are designed to reduce the costs of the energy system, and help keep energy bills low for consumers, as well as to promote cleaner energy.

Following the success of the competitive offshore transmission regulatory regime under which licences to operate offshore transmission infrastructure are granted following a competitive tender process, Ofgem plans to replicate the competitive tender for the purpose of high value onshore transmission assets. It is envisaged that this tender process would encourage innovation and reduce costs.

In addition to the above, as part of the revenue=incentives+innovation+outputs (RIIO) price controls, Ofgem introduced the Electricity Network Innovation Competition (NIC).

The Electricity NIC is an annual opportunity for electricity network companies to compete for funding for the development and demonstration of new technologies, operating and commercial arrangements. Funding is provided for the best innovation projects (ie, those that help all network operators understand what they need to do to provide environmental benefits, reduce costs, and maintain security). Up to £70 million per annum is available through the Electricity NIC.

Rates and terms for transmission services

12 | Who determines the rates and terms for the provision of transmission services and what legal standard does that entity apply?

Connection charges, transmission network use of system charges and balancing services use of system charges are currently the three types of charges payable to NGET by transmission systems users.

The charging methodologies are set out in the Connection and Use of System Code which is prepared by NGET and confirmed by Ofgem. NGET is required under its transmission licence to ensure that the charging methodologies are up to date. The charging methodologies are set primarily so as to reflect costs of operating the grid, but also to enhance stability and predictability of the transmission charges and to encourage competition in the electricity sector.

During 2017, Ofgem embarked on a process of setting up a new price control structure to reform and update the existing RIIO–ED1 model (see question 12 of last year's chapter for further details in relation to the RIIO-ED1 model) and it published its decision in relation to the RIIO-2 framework consultation at the end of July 2018. In summary, the consultation separated the framework into five key themes:

- a stronger voice for consumers;
- changes in how networks are used;
- driving innovation and efficiency to benefit consumers;
- simplifying price controls; and
- ensuring fair returns.

The key outcomes from the consultation were as follows:

- RIIO–ED1 has worked well, and the incentive based RIIO framework will be used to set price controls;
- higher returns are justified where these result from genuine innovation and efficiency;
- the price control mechanism will be tougher for network companies but those who deliver great customer service at lower cost will be rewarded; and
- the price control structure will continue to create an attractive environment for investors but returns should reflect the low level of risk of a stable, predictable regulatory framework.

The final view on the price control allowances will be published by the end of 2020.

Entities responsible for grid reliability

13 | Which entities are responsible for the reliability of the transmission grid and what are their powers and responsibilities?

Transmission licence holders are under statutory obligation to develop and maintain the transmission grid, as well as facilitating competition in the generation and supply of electricity. Ofgem has the authority to regulate the activities of the transmission licence holders and to set price controls. Both Ofgem and NGET have the authority to grant exemptions from certain obligations under the National Electricity Transmission System Security and Quality of Supply Standards which the transmission licensees must comply with.

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REGULATION OF ELECTRICITY UTILITIES – DISTRIBUTION

Authorisation to construct and operate distribution networks

14 What authorisations are required to construct and operate distribution networks?

A distribution licence is required for the operation and maintenance of a distribution network. See question 9 in relation to authorisations required to construct distribution networks.

Access to the distribution grid

15 Who is eligible to obtain access to the distribution network and what requirements must be met to obtain access?

The Electricity Act 1989 (section 16) states that an electricity distributor must make a connection between the distribution grid and any premises (including providing the electric lines as necessary to enable the connection), when requested by the owner or occupier (or an authorised supplier acting with the consent of the owner or occupier) of such premises.

Both transmission and distribution licences include conditions requiring the licence holders to provide equal access to third parties.

The Electricity (Connection Charges) Regulations 2017 (SI 2017/106) which came into force on 6 April 2017, make provision about the costs of electrical connections, where a person (a 'second comer') obtains a connection to premises or a distribution system that makes use of electric lines or an electrical plant previously provided for the purpose of giving a connection to other premises or another distribution system. In cases where other persons have paid for all or part of the cost of the first connection, these regulations require the relevant electricity distributor to recover an amount from the second comer and to apply that amount, less administrative expenses, to reimburse the persons who paid for the first connection.

Government distribution network policy

16 Are there any governmental measures to encourage or otherwise require the expansion of the distribution network?

Distribution licence holders are required by statute to develop and maintain an efficient, coordinated and economical system of electricity distribution and to facilitate competition in the supply and generation of electricity. See question 11. The government policy in relation to the transmission network described in response to that question applies also to the distribution network.

Rates and terms for distribution services

17 Who determines the rates or terms for the provision of distribution services and what legal standard does that entity apply?

The current price control framework for DNOs as set up by Ofgem is RIIO–ED1. This is based on the RIIO price control model and limits the revenues DNOs can collect until 31 March 2023. The new RIIO-2 price-control framework, as it applies to electricity distribution networks, will replace the current set of price controls for electricity distribution networks when it expires on 31 March 2023.

Approval to sell power

18 What authorisations are required for the sale of power to customers and which authorities grant such approvals?

Ofgem is the relevant authority to grant, supply licences to electricity suppliers before they may sell power to consumers. As a condition of the supply licence, the electricity suppliers must also act in accordance with certain other regulations, such as the Balancing and Settlement Code and the Smart Energy Code.

Power sales tariffs

19 Is there any tariff or other regulation regarding power sales?

Electricity suppliers set the electricity prices, but the Secretary of State does have the power to impose tariff-related conditions on the electricity suppliers through the supply licences.

Following a referral of the energy market to the Competition and Markets Authority (the CMA) by GEMA, a detailed review of the retail energy market was undertaken. Among other things, the review found that limitations on suppliers' tariffs were preventing competition and recommended that such conditions be removed. The CMA also suggested that electricity suppliers should be made to share details of domestic customers who have been on a default tariff for over three years to create an Ofgem-controlled database so that other suppliers would be able to contact such customers to offer cheaper rates tailored to their individual energy usage. The key area of concern was clearly the apparent overpayment for electricity by the customers on the poorest-value tariffs. On 19 July 2018, the Domestic Gas and Electricity (Tariff Cap) Act 2018 received royal assent, and as further discussed below, this act put in place a requirement on the energy regulator, Ofgem, to cap standard variable and default energy tariffs.

Rates for wholesale of power

20 Who determines the rates for sales of wholesale power and what standard does that entity apply?

Rates for sales of wholesale power are not determined by an entity but rather by the mechanics of supply and demand within the market.

Public service obligations

21 To what extent are electricity utilities that sell power subject to public service obligations?

The Energy Company Obligation (ECO) is a government energy efficiency scheme in Great Britain to help reduce carbon emissions and tackle fuel poverty. In brief, under ECO, larger energy suppliers fund the installation of energy efficiency measures in British households. Each obligated supplier has an overall target based on its share of the domestic energy market in Britain. The obligated energy suppliers work with installers to introduce certain efficiency measures into your home, such as loft or wall insulation, or heating measures.

The scheme began in April 2013, and over time it has been amended. The latest policy, ECO3, commenced on 3 December 2018, and applies to measures completed from 1 October 2018.

REGULATORY AUTHORITIES

Policy setting

22 Which authorities determine regulatory policy with respect to the electricity sector?

Ministerial departments

The Department of Energy and Climate Change (DECC), formed in 2008, was the ministerial department responsible for making decisions, setting policy and implementing legislation affecting the electricity sector. The corresponding government ministry in Northern Ireland is the Department of Enterprise, Trade and Investment. Following the EU Referendum held on 23 June 2016, DECC was merged together with the Department for Business and Innovation to create BEIS.

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Independent bodies

BEIS works closely with and is supported by other agencies and public bodies, including GEMA and Ofgem.

GEMA's principal objective is to protect the interests of existing and future consumers in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems. The interests of such consumers are their interests taken as a whole, including their interests in the reduction of greenhouse gases and the security of the supply of gas and electricity to them.

GEMA is constituted of individuals who are appointed by the Secretary of State for specified terms of not less than five years. GEMA is independent and has very limited stakeholder participation (such as the Secretary of State's ability to remove members on the grounds of misbehaviour, determine the remuneration of members and give guidance).

GEMA delegates its functions to Ofgem and provides Ofgem with strategic direction and oversight. Ofgem is also a non-ministerial government department and an independent National Regulatory Authority recognised by EU Directives. Ofgem states that its principal objective is to protect the interests of existing and future electricity and gas consumers.

Scope of authority

23 | What is the scope of each regulator's authority?

GEMA has primary responsibility for regulation of the energy sector. GEMA's powers and duties are largely provided for in statute (such as the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the CA 1998, the Enterprise Act 2002 and the Energy Acts of 2004, 2008, 2010 and 2011) as well as arising from directly effective European Community legislation.

Establishment of regulators

24 | How is each regulator established and to what extent is it considered to be independent of the regulated business and of governmental officials?

See question 23 above with respect to the establishment of GEMA and Ofgem. In addition to those two regulators, the CMA was established in April 2014 under the Enterprise and Regulatory Reform Act 2013 and the Office for Nuclear Regulation was created by the Energy Act 2013 and is responsible for ensuring nuclear safety in the UK. They are each independent, non-ministerial entities.

Challenge and appeal of decisions

25 | To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

GEMA's decisions may be challenged, in a number of ways, depending on the nature of the relevant decision. By way of example:

- modification of licence provisions: a licence-holder may apply to the CMA in respect of changes to licence conditions;
- GEMA decisions may be challenged by the licence-holder by application to the High Court where the licence-holder believes that GEMA did not have the authority to make such decision or that the relevant procedure was not followed; and
- GEMA penalties may be challenged by the licence-holder by application to the High Court within the relevant time frames.

In addition to the above, the decisions of regulators or local authorities are subject to challenge by way of judicial review.

ACQUISITION AND MERGER CONTROL – COMPETITION

Responsible bodies

26 | Which bodies have the authority to approve or block mergers or other changes in control over businesses in the sector or acquisition of utility assets?

CMA and Ofgem

In April 2014 the CMA became the UK's lead competition and consumer body. The CMA brought together the existing competition and certain consumer protection functions of the Office of Fair Trading and the responsibilities of the Competition Commission (Enterprise and Regulatory Reform Act 2013). The CMA investigates merger cases in the UK that do not have a community dimension. If it deems necessary, the CMA has the authority to agree voluntary measures to mitigate any anticompetitive effects. Under section 54 of the CA 1998, regulators such as Ofgem have concurrent powers in relation to certain anticompetitive practices.

European Commission

Under Regulation 139/2004 on the control of concentrations between undertakings (OJ 2004 L24/1) (Merger Regulation), the European Commission (the Commission) has the authority to review mergers in the electricity sector with a 'community dimension'. A concentration has a 'community dimension' if it meets one of the two sets of thresholds related to turnover of the undertakings contained in the Merger Regulation. Where there is a community dimension, the European Commission has exclusive jurisdiction to investigate, pulling the relevant merger out of the scope of jurisdiction of domestic bodies and legislation. This is, of course, subject to change following the outcome of the Brexit negotiations.

Review of transfers of control

27 | What criteria and procedures apply with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or blocking the transaction?

European Commission

As noted above, the European Commission has jurisdiction over concentrations with a community dimension, thus these must be notified to the Commission before their implementation. The Commission has 25 working days from its notification to complete its initial review. If the European Commission receives a request from a member state for the proposed merger to be referred back to the national competition authority, this period may increase to 35 working days. As a result of this initial investigation, the Commission may:

- find that it does not have jurisdiction, in which case consideration would be given by the relevant parties as to whether the CMA should be notified;
- permit the proposed merger, with or without additional conditions; or
- start an in-depth investigation if it considers that the proposed merger raises serious doubts as to its compatibility with the internal market ('Phase II Investigation').

If the Commission begins a Phase II Investigation, it must make a decision within 90 working days of the date on which such investigations started. The period is automatically increased to 105 working days if the undertakings concerned offer commitments to ensure that the merger will not obstruct competition, unless the parties offer such commitments within 55 working days from the start of the Phase II Investigation. As a result of the investigation, the Commission may permit the merger (with or without additional conditions) or state that it is not compatible.

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CMA

There is no obligation to notify the CMA; however, the CMA does have the power to initiate its own review without notification if it deems that there is a 'relevant merger situation'.

If the CMA is notified or decides to initiate its own investigation, it has 40 working days to conduct Phase I merger investigations. The 40-working-day period may be extended in certain conditions.

The CMA may commence a further Phase II merger investigation if it believes that there is a relevant merger situation that has resulted in or may be expected to result in a substantial lessening of competition within any UK market. Such investigation usually takes up to 24 weeks and may be extended by up to eight weeks in certain cases. If the CMA decides that the proposed merger would lead to a substantial lessening of competition, it may impose remedies that must be implemented within 12 weeks. The deadline for implementation of remedies may be extended once by up to six weeks if there are special reasons.

Prevention and prosecution of anticompetitive practices

28 | Which authorities have the power to prevent or prosecute anticompetitive or manipulative practices in the electricity sector?

The CMA, deriving its power from the CA 1998 has the power to investigate and prosecute anticompetitive behaviour.

Currently, EU law also has application in the UK, therefore the European Commission has the authority to enforce articles 101 and 102 of the Treaty on the Functioning of the EU.

Under the CA 1998 (the CA), the courts and the CMA are required to ensure that competition issues arising within the UK are dealt with in a manner consistent with the treatment of corresponding competition issues arising within the EU, and in line with this principle the CMA can also enforce the relevant articles of the Treaty on the Functioning of the EU (the TFEU). As highlighted throughout this chapter, the relationship between the UK and the EU remains in a state of flux and we expect that the application of competition law will also be part of the legislative overhaul expected to take place as part of the Brexit process.

The Energy Act 2010, also authorises the Secretary of State to modify licence conditions to limit or eliminate circumstances in which a licence holder may gain excessive benefit from electricity generation.

Determination of anticompetitive conduct

29 | What substantive standards are applied to determine whether conduct is anticompetitive or manipulative?

As mentioned above, the relevant EU legislation is set out in articles 101 and 102 of the TFEU and the CA 1998 sets out the applicable prohibitions in UK legislation. The provisions of the CA 1998 closely follow those of the TFEU. The relevant provisions of the CA 1998 include:

- a prohibition on agreements between entities that are intended to or that have the effect of preventing, restricting or distorting competition within the UK (Chapter I Prohibition) and may affect trade within the UK. There are limited exemptions, for example if the agreements provide benefits such as improving production or distribution or promoting technical or economic progress, but even where the agreements fulfil such criteria there are additional applicable conditions in order for the exemption to apply;
- a recognition of article 101 of the TFEU by stating that where an agreement is exempt under that article then it will also be exempt from the Chapter I Prohibition; and
- a prohibition on conduct that results in an abuse of a dominant position in a market if it may affect trade within the UK (Chapter II Prohibition).

Similarly to the Chapter II Prohibition, article 102 of the TFEU prohibits abuse of dominant position, but in this case it is as applied to trade between EU member states.

There is a presumption of dominant position if an undertaking has over 50 per cent of the market share; however, this is a simplification and in order to determine whether an undertaking has the dominant position, the geographical market, the product and other factors are taken into consideration, so it is possible that an undertaking with a market share falling under 50 per cent could be found to be dominant.

Preclusion and remedy of anticompetitive practices

30 | What authority does the regulator (or regulators) have to preclude or remedy anticompetitive or manipulative practices?

Under UK law, the CMA can apply to court to have a director of a company that is in breach of UK or EU competition law disqualified for up to 15 years. The Enterprise Act 2002 provides that persons involved in cartels may face criminal liability.

Under EU legislation, the Commission may take action if there is a breach of competition rules. This can be by way of fines (eg, up to 10 per cent of the entity's worldwide group turnover), by the ordering of cessation or modification of operation of the relevant anticompetitive practice or other remedies appropriate to the breach in question.

INTERNATIONAL

Acquisitions by foreign companies

31 | Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

There are no particular restrictions on foreign investment into UK energy projects. However, Ofgem, currently together with the European Commission (subject to any Brexit-related developments), additionally undertakes an assessment as to whether the foreign ownership or control of a power project poses a security of supply risk (Electricity and Gas (Internal Markets) Regulations 2011).

Authorisation to construct and operate interconnectors

32 | What authorisations are required to construct and operate interconnectors?

Construction

The authorisations required for the construction of interconnectors vary depending on whether the relevant works are onshore or offshore. For onshore works planning permission under the Town and Country Planning Act 1990 is required. The process for offshore developments is a little more complex – a licence must be obtained from the Marine Management Organisation, and where relevant, harbour authority consents and consents for other submarine infrastructure must also be obtained.

Operation

A licence from GEMA is required before operating interconnectors.

Where major infrastructure projects involving the cooperation of at least two EU states are concerned, the Trans-European Energy Networks Regulation (EU 347/2013) sets out guidelines for the co-ordinated granting of required approvals.

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Interconnector access and cross-border electricity supply

33 What rules apply to access to interconnectors and to cross-border electricity supply, especially interconnection issues?

An interconnector licensee may not hold a generation licence, transmission licence, distribution licence or a supply licence.

The current EU and UK system sets out two general routes for interconnector investment:

- a regulated route under the 'cap and floor' regime: through the cap and floor approach developers identify, propose and build interconnectors and there is a cap and floor mechanism to regulate how much money a developer can earn once in operation. If applying for a cap and floor regime, developers have to comply with all aspects of European legislation on cross-border electricity infrastructure; or
- alternatively, developers can seek exemptions from regulatory requirements. Under this route developers would face the full upside and downside of the investment and would usually apply for an exemption from certain aspects of European legislation in order to increase the safeguards for the business case of their investment. Ofgem will consider each request for exemption on a case-by-case basis and may attach certain conditions to the interconnector licence.

TRANSACTIONS BETWEEN AFFILIATES

Restrictions

34 What restrictions exist on transactions between electricity utilities and their affiliates?

The Electricity Act 1989 prohibits a licenced entity and those entities with which it is in common ownership with, from carrying out other licensed activities, this in effect sets out a separation of activities.

In addition to the above, the relevant licences may also impose conditions on the individual licensees.

Enforcement and sanctions

35 Who enforces the restrictions on utilities dealing with affiliates and what are the sanctions for non-compliance?

GEMA, as the regulator, has the authority to impose sanctions for non-compliance. In this instance GEMA derives its authority from the Electricity Act 1989 to impose penalties of up to 10 per cent of the licensee's annual turnover.

UPDATE AND TRENDS

Key developments of the past year

36 Are there any emerging trends or hot topics in electricity regulation in your jurisdiction?

No updates at this time.

Milbank

John Dewar
jdewar@milbank.com

Seyda Duman
sduman@milbank.com

10 Gresham Street
London
EC2V 7JD
United Kingdom
Tel: +44 20 7615 3000
Fax: +44 20 7615 3100
www.milbank.com

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