

Electricity Regulation

Contributing editor
John Dewar



2019

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Electricity Regulation 2019

Contributing editor

John Dewar

Milbank, Tweed, Hadley & McCloy LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

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

Dan White
dan.white@gettingthedealthrough.com

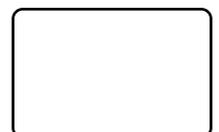


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2003
Seventeenth edition
ISBN 978-1-78915-018-6

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and October 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Japan	103
John Dewar Milbank, Tweed, Hadley & McCloy LLP		Nagahide Sato and Sadayuki Matsudaira Nishimura & Asahi	
Angola	9	Kenya	110
Ricardo Andrade Amaro and Pedro Capitão Barbosa Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL		Karim Lalji and Edwin Baru Anjarwalla & Khanna	
Argentina	15	Korea	116
Hugo Martelli Martelli Abogados Rogelio Baratchart Tecnolatina SA		Joonki Yi and Chin Pyo Park Bae, Kim & Lee LLC	
Australia	21	Mexico	122
Andrew Monotti, Simon Cooke and William Osborn King & Wood Mallesons		Rogelio López-Velarde, Amanda Valdez and Daniela Monroy Dentons López Velarde, SC	
Belgium	29	Netherlands	130
Arnaud Coibion, Lothar Van Driessche, David Mailleux and Léonore De Mullewie Linklaters LLP		Sophie Dingenen and Sharon van de Kerkhof Bird & Bird LLP	
Brazil	36	Nigeria	137
Marcello Lobo, Flavia Piras Lodi and Pedro Ícaro Lopes Vargas Pinheiro Neto Advogados		Ike C Ibeku, Ifeyinwa Ufondu and Shammah Vidal Benchmac & Ince	
Costa Rica	44	Panama	145
Ruben Zamora-Castro Aguilar Castillo Love		Erika Villarreal Z, José A Brenes and Ixalondra Chee Chong Anzola Robles & Asociados	
Croatia	48	Poland	153
Ivana Manovelo and Miran Macesic Maccesic & Partners LLC		Piotr Ciołkowski, Agnieszka Skorupińska and Adam Kędziora CMS	
Ecuador	54	Portugal	159
Pedro J Freile and Roque Bernardo Bustamante Bustamante & Bustamante Law Firm		Ricardo Andrade Amaro, Joana Alves de Abreu and Pedro Capitão Barbosa Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL	
Ghana	61	South Africa	166
Kimathi Kuenyehia, Sarpong Odame and Phoebe Arde-Acquah Kimathi & Partners, Corporate Attorneys		Jonathan Behr and Todani Sikhwari Werksmans Attorneys	
India	72	Spain	174
Neeraj Menon and Amit Maheshwari Trilegal		Gonzalo Olivera and Alberto Artés King & Wood Mallesons	
Indonesia	82	Turkey	180
Arfidea Dwi Saraswati, Tara Priscilla Ogilvie and Thalia Priscilla AKSET Law		Değer Boden Akalın, Şeyma Olğun and Ayşegül Önel Boden Law	
Ireland	89	United Kingdom	190
Peter McLay, Eoin Cassidy and William Carmody Mason Hayes & Curran		John Dewar and Seyda Duman Milbank, Tweed, Hadley & McCloy LLP	
Italy	97	United States	196
Arturo Sferruzza and Ginevra Biadico Norton Rose Fulbright Studio Legale		Daniel Hagan, Jane Rueger and John Forbush White & Case LLP	

Preface

Electricity Regulation 2019

Seventeenth edition

Getting the Deal Through is delighted to publish the seventeenth edition of *Electricity Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ecuador, Brazil, South Africa, Poland, Italy and the Netherlands.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, John Dewar of Milbank, Tweed, Hadley & McCloy LLP for his assistance with this volume. We also extend special thanks to Kirsti Massie of White & Case, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE 
DEAL THROUGH 

London
October 2018

Japan

Nagahide Sato and Sadayuki Matsudaira

Nishimura & Asahi

1 Policy and law

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

The electricity sector in Japan is governed by the Electricity Business Act (EBA).

Prior to 1995, the EBA allowed 10 general electricity utilities to basically dominate all of the generation, transmission, distribution and sale of power. Although the industry, especially generation and sale of power to high-voltage consumers, had been partially liberalised since 1995, it was not until the Fukushima nuclear disaster in March 2011 that the Japanese government began to seriously reform the electricity market.

The regulations on the electricity business by the EBA are being significantly amended by three steps: the first in April 2015, the second in April 2016 and the third in April 2020.

The Organisation for Cross-regional Coordination of Transmission Operators (OCCTO) was established by the first-step amendment. This organisation is expected to facilitate nationwide efficient grid establishment and operations.

The second-step amendment liberalised the sale of power to low-voltage consumers (those with contracts for electricity consumption of less than 50kW; eg, ordinary households), which has been dominated by general electricity utilities, and all electricity retail companies registered with the Minister of Economy, Trade and Industry (ETI) (Minister of ETI) are generally able to provide electricity to any consumers at discretionary terms and conditions. Regulations on the wholesale of electricity were also fully abolished.

By the third-step amendment, a company that engages in general transmission business (which provides wheeling services through its grids) will no longer be permitted to engage in retail or power generation, and the general transmission utility will have to be a separate legal entity from the generation or retail business company.

2 Organisation of the market

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

With effect from 1 April 2016, the regulations on generation, transmission, distribution and sale of power were substantially amended.

Until the effective date, 10 general electricity utilities had dominated transmission, distribution and sale of power to low-voltage consumers (those with contracts for electricity consumption of less than 50kW; eg, ordinary households) in each supply area, and wholesale supply conditions to general electricity utilities had been regulated by the EBA. On the effective date, a licence system was introduced, under which:

- filing with the Minister of ETI is generally required for power generation (of which output exceeds certain thresholds);
- approval from the Minister of ETI is generally required for transmission and distribution; and
- registration with the Minister of ETI is required for electricity retail business.

The concept of 'general electricity utility' disappeared, and former general electricity utilities became companies which own several licences.

In 2020, these companies will be required to split transmission and distribution business from power generation and retail business.

Generation and wholesale

Until the effective date, there had been three categories:

- wholesale electricity utility: an entity that supplies electricity to a general electricity utility, and that has an electricity generation capacity of more than 2 million kW, and are required to obtain a licence from the Minister of ETI;
- wholesale supplier: a supplier of electricity to a general electricity utility of more than 100,000kW for five years or more, or more than 1,000kW for 10 years or more, and conditions of its supply of electricity to a general electricity utility must comply with the EBA; and
- other power producers that are not regulated by the EBA.

With effect from 1 April 2016, all power producers are required to make certain filings with the Minister of ETI before engaging in the power generation business, unless such power producer satisfies certain requirements (such as total power producing ability of facilities owned by a producer being lower than 10,000kW), which are provided by rules of the Ministry of ETI. In April 2016, wholesale regulation was abolished, and wholesale entities are generally able to supply electricity at terms and conditions determined at their discretion, while the guideline provided by the Ministry of ETI provides that the former general electricity utilities should hold a bidding process when they are to construct or replace certain thermal power plants by themselves, based on the fact that they are obligated to supply electricity to low-voltage consumers at regulated prices at least until 2020 (see question 19).

Since July 2012, suppliers of electricity generated from certain renewable energy sources are entitled to sell the electricity to an electricity utility at a fixed price for a fixed period under feed-in tariff (FIT) regulations (see question 5).

Transmission and distribution

For operating the business of providing wheeling services through its own transmission and distribution lines dominantly throughout any of 10 service areas, it is necessary for a utility to obtain approval of the Minister of ETI, and only 10 general transmission utilities (the former general electricity utilities before April 2016) are allowed to engage in that business in each service area. Other companies that operate transmission lines for the connection between power plants and general transmission utilities' lines are required to obtain approval of the Minister of ETI, and those that operate transmission lines to supply electricity to customers in a specific area must make a filing with the Minister of ETI.

Sale of power

Until March 2016, the retail market for low-voltage consumers had not been liberalised, and 10 local general electricity utilities had been allowed to dominate the market in their respective service areas.

In April 2016, the retail market was fully liberalised, and all entities that are registered as electricity retailers are permitted to provide electricity to low-voltage consumers as well. As of August 2018, over 500 entities are registered as electricity retailers.

Regulation of electricity utilities – power generation

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

Starting on 1 April 2016, all power producers are required to make certain filings with the Minister of ETI before engaging in the power generation business, unless such power producer satisfies certain requirements (such as total power producing ability of facilities owned by a producer being lower than 10,000kW), which are provided by rules of the Ministry of ETI.

For the construction of a power plant, prior filing of the construction plan with the Minister of ETI is generally required, unless the output of such power plant is below certain thresholds. With respect to the construction and operation of nuclear plants, the EBA requires approval of the construction plan before construction and the inspection of construction before operation by the Nuclear Regulation Authority and the Minister of ETI. In addition, installation of a nuclear power reactor requires the approval of the Nuclear Regulation Authority.

In addition, construction of a thermal power plant, a hydropower plant, a wind power plant or a geothermal plant (whose generating power exceeds certain thresholds) or a nuclear plant requires prior environmental impact assessments.

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

A general transmission utility (a general electricity utility until March 2016) must allow connection of generation to the grid and provide a wheeling service, unless there are justifiable grounds to refuse it. Examples of justifiable grounds include the non-payment of service fees by the applicant and the inability of the general transmission utility to provide the service without new construction of transmission facilities that impose a heavy burden on the business operation of the general transmission utility.

A general transmission utility also must allow power producers to connect with its transmission facilities, unless there are justifiable grounds for refusal such as there being the risk of causing electrical or magnetic disorder on the transmission lines. Power producers are generally required to incur costs for constructing or strengthening the lines to avoid such disorder.

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

In July 2012, a feed-in tariff (FIT) for electricity generated from certain renewable energy sources (renewable energy electricity) was introduced. Under FIT, transmission utilities must purchase renewable energy electricity from the producer (which obtained certification on the business plan from the Ministry of ETI) at a fixed price for a fixed period. Solar photovoltaic (PV), wind, small and medium-sized hydro, geothermal and biomass are the renewable energy sources eligible for FIT.

The purchase prices and periods differ depending on the type of renewable energy and the scale of the plant and are decided by public notice issued by the Minister of ETI, who takes into consideration the opinion of the Calculation Committee of Purchase Price. The purchase prices and periods are renewed every year, and the set price and period applies to a project as of the date on which the certification on the business plan is issued. From April 2018 to March 2019, the price is between ¥12 and ¥55 (excluding sales tax) and the period is between 10 and 20 years depending on the type of renewable energy and the scale of the generating power.

As most projects since the introduction of FIT in 2012 have been solar PV projects, by an amendment of FIT which became effective in April 2017 a public bidding system for mega-solar projects was introduced to control the entire volume of electricity output from such solar projects. The public bidding system became applicable to certain types of biomass projects in April 2018.

As from April 2018, commercial operation commencement deadlines of between three and seven years, depending on the type of renewable energy sources, have become applicable to all types of renewable energy electricity generating facilities. Delays of commercial operation dates result in the shortening of applicable purchase periods under FIT.

6 Climate change
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?

FIT, which was introduced in July 2012, has facilitated and will facilitate a substantial number of new companies to enter the electricity generation market and is expected to increase the amount of electricity produced by solar PV, wind, small and medium-sized hydro, geothermal and biomass sources. From April 2012 to March 2018, total capacity expanded by approximately 39.1 million kW from new renewable power plants (approximately 36.7 million kW of such additional capacity comes from solar power plants).

The costs of FIT will be ultimately borne by electricity consumers as a surcharge, but is arranged so that the costs are spread equally throughout Japan by the Surcharge Adjustment Organisation.

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

There are subsidy programmes to support the introduction of electricity storage batteries, some of which are for households and others for business enterprises, provided by some local governments. The provider, scope and amount of subsidy programmes change year to year.

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

The Japanese government continued to position nuclear power as an important base-load electricity in the Fundamental Energy Plan promulgated in July 2018, and tries to develop an environment that is supportive to electricity utilities restarting existing nuclear plants (all of which stopped operations after the Fukushima accident, and some pressurised water reactor type plants have restarted operations as at 1 September 2018) once the utilities obtain the approval of the Nuclear Regulation Authority. The Minister of ETI plans to develop a favourable environment for nuclear power plants. However, for political reasons after the Fukushima accident, it is difficult to construct new nuclear plants.

Regulation of electricity utilities – transmission

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

An entity that intends to construct transmission facilities for high voltages (170,000 volts or more) must file its plan of construction with the Minister of ETI.

An entity that engages in construction and operation of transmission networks to supply electricity for consumers must obtain a licence as a general transmission business. Ten general transmission utilities (former transmission departments of general electricity utilities) dominantly own the licences and transmission lines in each of their service areas. A transmission utility which provides wheeling services for general transmission utilities (J-Power and entities which operate transmission lines through which remote renewable power plants access general transmission utilities' lines) is also required to obtain a licence from the Minister of ETI. Other entities that provide electricity to their customers by their own transmission and distribution lines are required to make certain filings with the Minister of ETI.

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

See question 4.

All electricity retail companies registered with the Minister of ETI are eligible to obtain transmission services (ie, wheeling services) from a general transmission utility, in accordance with the tariff on which the general transmission utility has obtained approval from the Minister of ETI, unless there are justifiable grounds for refusal.

All power producers are also eligible to connect with and obtain transmission services from a general transmission utility's facilities, unless there are justifiable grounds for refusal such as there being the risk of causing electrical or magnetic disorder on the transmission lines.

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

The cost-plus-margin wheeling service fee under the EBA, by which the costs for the expansion of the transmission grid are finally borne by consumers through such wheeling service fees paid by electricity retailers, enables general transmission utilities to expand the transmission grid. In addition, bondholders of a corporation acting as a general transmission utility have priority over other creditors in the right to receive payments from claims on the corporation's property, which enables general transmission utilities to obtain the financing necessary for expanding power generation and transmission facilities at lower interest rates on corporate bonds. From 2025, it will no longer be possible to issue bonds with such preferential treatment for bondholders.

In April 2015, the OCCTO was established and it prepares development plans for nationwide transmission lines and strengthens the capacity to transmit electricity beyond each of the service areas of the 10 general transmission utilities.

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

A general transmission utility must formulate a wheeling service tariff that sets rates and other supply conditions for the wheeling service and obtain approval on the tariff from the Minister of ETI.

The tariff must satisfy certain requirements including the following:

- the tariff will not harm the interests of recipients of electricity supply;
- the recipients of electricity supply under the wheeling service tariff will not experience any difficulty in receiving the wheeling service;
- the rates shall be calculated based on cost plus appropriate profit in accordance with the rule set by the Ministry of ETI, and the rates are clearly set as fixed rates or fixed amounts; and
- nobody will be treated in an unfair and discriminatory manner.

If the Minister of ETI finds that the wheeling service tariff fails to satisfy the requirements above, they may order the general transmission utility to revise the wheeling service tariff.

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

In Japan, general transmission utilities own and operate transmission facilities, and they themselves are responsible for assuring the reliability of the transmission grid. The OCCTO plans and monitors a nationwide transmission network beyond each regional transmission area owned and operated by a general transmission utility.

Regulation of electricity utilities – distribution**14 Authorisation to construct and operate distribution networks****What authorisations are required to construct and operate distribution networks?**

An entity that intends to construct distribution facilities for 50,000 volts or more must file its construction plan for the distribution facilities with the Minister of ETI.

Any entities that supply electricity to their customers by their own distribution lines (other than general transmission utilities (ie, transmission departments of former general electricity utilities) and the transmission utility (ie, the transmission department of the former wholesale electricity utilities) that have licence from the Minister of ETI) are required to make certain filings with the Minister of ETI.

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

See question 10.

Any electricity retail companies that are registered at the Minister of ETI have access to the distribution grid. They are required to become a member of the OCCTO beforehand.

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

The general transmission utilities are obligated to ensure electricity supply to all consumers in their service areas. In order to perform this obligation, general transmission utilities expand the distribution network as long as it is necessary to supply electricity to consumers. The wheeling service fee is determined based on the cost-plus-margin concept, and the costs for the expansion are finally borne by consumers through the payment of a wheeling fee by electricity retailers.

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

See question 12.

A general transmission utility must determine a wheeling service tariff that sets rates and other supply conditions for the wheeling service (including distribution services) and must obtain approval on the tariff from the Minister of ETI.

The tariff must satisfy certain requirements including the following:

- the tariff will not harm the interests of recipients of electricity supply;
- the recipients of electricity supply under the wheeling service tariff will not experience any difficulty in receiving the wheeling service;
- the rates shall be calculated based on cost plus appropriate profit in accordance with the rule set by the Ministry of ETI, and the rates are clearly set as fixed rates or fixed amounts; and
- nobody will be treated in an unfair and discriminatory manner.

If the Minister of ETI finds that the wheeling service tariff fails to satisfy the requirements above, he or she may order the general transmission utility to revise the wheeling service tariff.

Regulation of electricity utilities – sales of power**18 Approval to sell power****What authorisations are required for the sale of power to customers and which authorities grant such approvals?**

See question 2.

In April 2016 the retail business was fully liberalised, and all entities are allowed to engage in the retail electricity business including supplying electricity to low-voltage consumers, by registering as electricity retailers; to obtain the registration, an entity must prove its capacity to provide sufficient electricity to meet the demand of its customers.

An entity without registration as an electricity retailer is allowed to supply electricity after obtaining approval on 'specified supply' from the Minister of ETI to a recipient with which it is closely associated (such as a subsidiary).

19 Power sales tariffs

Is there any tariff or other regulation regarding power sales?

Yes. Even after full liberalisation of the retail market in April 2016, regarding electricity supply to low-voltage consumers (consumers with contracts for electricity consumption of less than 50kW), electricity retail companies (which were former general electricity utilities) must provide a power sales tariff and obtain approval for it from the Minister of ETI, and must supply electricity to low-voltage consumers in accordance with the tariff as long as such consumers desire. This treatment will continue until 2020 or later when the Ministry of ETI decides on an area-by-area basis (area means a service area of each general transmission utility) that sufficient competition exists in a certain supply area.

From April 2016, all retail companies are legally required to explain retail prices and other conditions in writing to their customers before entering into supply agreements.

20 Rates for wholesale of power

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

Both wholesale electricity utilities and wholesale suppliers have had to provide rates and other conditions of their wholesale supply and file them with the Minister of ETI. The price must be based on costs, except when the wholesale supply is provided under the conditions set by a successful bidder in a bidding process implemented by a general electricity utility. After the wholesale regulation was abolished in April 2016, all power generators are generally able to sell electricity at their discretionary conditions, even when they engage in electricity supply to the former general electricity utilities. On the other hand, to the extent that there is still a regulation requiring the former general electricity utilities to provide electricity at regulated prices to low-voltage consumers who desire it, these utilities are required to hold a bidding process when they are to construct or replace certain thermal power plants by themselves.

The Ministry of ETI would like to increase the volume of electricity traded on the electricity wholesale exchange (JEPX), so that power generators and electricity retailers can sell, purchase or both, electricity with more flexibility and can hedge their risks through market trading, including derivatives. Prohibitions against insider trading and manipulation in the electricity wholesale market and relevant rules were introduced in April 2016.

The rates and terms of supply of renewable energy electricity are provided, depending on the kind of energy and the scale of the facility, by public notice issued by the Minister of ETI, taking into consideration the opinion of the Calculation Committee of Purchase Price. The Minister of ETI considers costs that are ordinarily necessary for supply and appropriate profits when they decide the price and the time period. See question 5.

21 Public service obligations

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

Ten general transmission utilities (or, at least until 2020, for supply to low-voltage consumers, retail companies which were former general electricity utilities) are responsible for meeting certain public service obligations (to supply electricity at regulated conditions when certain end users cannot receive such service from any retail companies).

Regulatory authorities

22 Policy setting

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

The Ministry of ETI (including the Agency for Natural Resources and Energy, an affiliated agency of the Ministry of ETI, and the Advisory Committee for Natural Resources and Energy, a part of the Agency

for Natural Resources and Energy) determines regulatory policy with respect to the electricity sector.

Since September 2015, the Electricity and Gas Market Surveillance Commission monitors and supervises whether electricity companies comply with the EBA.

The Nuclear Regulation Authority, which is an affiliated agency of the Ministry of the Environment, has the authority to supervise nuclear power plants.

23 Scope of authority

What is the scope of each regulator's authority?

The Ministry of ETI has the authority to:

- issue licences to electricity utilities;
- order general transmission utilities to improve their operations;
- require an electricity utility to supply electricity to a general electricity utility, specified electricity utility or specified-scale electricity utility in the event of a disaster or other emergency;
- order a general transmission utility to provide a wheeling service;
- determine the purchase price and the contract period for renewable energy electricity; and
- warn and order an electricity utility to enter into a purchase agreement or an interconnection agreement with a renewable energy electricity producer.

The Electricity and Gas Market Surveillance Commission has the authority to:

- issue a warning against electricity companies to comply with the EBA; and
- recommend that the Minister of ETI should issue orders against electricity companies.

The Nuclear Regulation Authority has the authority to:

- approve the installation of a nuclear power reactor; and
- inspect nuclear plants periodically.

24 Establishment of regulators

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

The Ministry of ETI is one of the ministries of the Japanese government. Staff members of the Ministry of ETI are public officials who are not allowed to have another job while serving in the ministry in order to maintain independence from the regulated business.

The Electricity and Gas Market Surveillance Commission was established in September 2015. Its role is to supervise and monitor whether electricity companies comply with the EBA. The commission is independent from the Agency for Natural Resources and Energy.

The Nuclear Regulation Authority was established in 2012 after the Fukushima accident as an affiliated agency of the Ministry of the Environment. To achieve the nuclear regulatory authority's independence from the owners and operators of nuclear plants, staff members of the Nuclear Regulatory Agency, the administrative agency of the authority, are discouraged from moving to other governmental departments that may promote nuclear plants and also from being hired by owners or operators of nuclear plants even after retirement from the agency.

25 Challenge and appeal of decisions

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

All decisions and orders of the Minister of ETI can be challenged by an administrative appeal at the Ministry of ETI or by a lawsuit at a judicial court. Valid grounds for a challenge include the claim that the content or the procedures of a certain decision or order violates the EBA or other laws.

Acquisition and merger control – competition

26 Responsible bodies

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?

Mergers and demergers involving a corporation acting as a general transmission utility that result in the takeover of an entire transmission business are not effective unless approved by the Minister of ETI. In addition, an assignment and acceptance of the entirety of a transmission business is not effective unless approved by the Minister of ETI. Transfers of shares of an electricity utility and acquisitions of a part of a utility's assets are not subject to the approval of the Minister of ETI. Power generators and electricity retailers must make a filing without delay when they engage in mergers, demergers or business transfers which result in the transfer of the entire power generating business or electricity retail business.

For mergers, stock acquisitions and business acquisitions that meet certain thresholds, the parties involved must file a pre-merger notification or a pre-acquisition notification with the Fair Trade Commission, and the transaction cannot be completed until 30 days have passed from the date that the commission accepted the notification. If the commission believes that the transaction will substantially restrain competition in a particular market, it can order the entity concerned to dispose of all or a part of its stock, to transfer a part of its business, or to take any other measure necessary to remedy the situation.

27 Review of transfers of control

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?

When the Minister of ETI examines the application for a merger or acquisition of general transmission utilities, he or she considers the same items considered when granting a licence to a new applicant, such as whether the successor has sufficient financial resources and the technical capability to operate the electricity business properly. The general consideration period for the approval is eight weeks after the application is received, although it is expected to consult with the Ministry of ETI beforehand.

On the other hand, the Fair Trade Commission considers whether the transaction will affect competition in the electricity market. The commission is generally expected to decide whether it approves the transaction within 30 days after it receives the filing. If the commission cannot decide within that period, it may extend the consideration period to the final date of 120 days that has passed since it received the filing and the final date of 90 days that has passed since it received any additional reports the commission ordered the applying party to submit.

28 Prevention and prosecution of anticompetitive practices

Which authorities have the power to prevent or prosecute anti-competitive or manipulative practices in the electricity sector?

The Minister of ETI has the authority to order a general transmission utility to provide wheeling services to electricity retail companies. If a general transmission utility takes advantage of its dominant position in the transmission and distribution market and refuses to provide wheeling services to an electricity retail company outside the utility's group, the minister can order the general transmission utility to provide the wheeling service.

The Fair Trade Commission has the power to prevent anticompetitive or manipulative practices in the electricity sector as well. The commission can issue a cease-and-desist order or an order for payment of a surcharge, if it decides that an electricity company is engaging in anticompetitive practices that violate provisions of the Anti-Monopoly Act.

29 Determination of anticompetitive conduct

What substantive standards are applied to determine whether conduct is anti-competitive or manipulative?

The Minister of ETI uses the following standards:

Update and trends

The government continues its efforts to facilitate fair competition in the deregulated electricity market. First, in 2019 the government will introduce the base-load electricity trade market, where 10 former general electricity utilities will be required to provide at least a certain ratio of their base-load electricity to newcomers. Second, in 2019 the government will change the rule related to use of interconnection lines between neighbouring supply areas, from a first-come-first-served rule to the indirect auction rule through JEPX trade as mentioned in question 33, in order to fairly allocate the use of the interconnection lines among 10 former general electricity utilities and newcomers. In addition, the Tokyo Commodity Exchange endeavours to list the electricity derivatives, to enable newcomers to hedge the price volatility at JEPX.

Other efforts of the government include the introduction of the capacity market expected to be in 2020, in order to ensure that power plants provide sufficient electricity to adjust for any imbalance in the competitive market situation, even after the increase of renewable power plants.

The government is considering the possibility of amending the wheeling service cost charging framework, by which the costs will be imposed not only on electricity retailers but also on power generators, and collecting the fixed costs of the wheeling system more from the base rate rather than the meter rate, to make cost collection more stable in the future in a society where distributed power generation is evolving.

In regard to the environmental perspective, in May 2018 the government introduced a new market (non-fossil fuel value trade market) that enables relevant companies' trade value of electricity being generated without fossil fuel such as renewable power or nuclear power. The government will amend the guideline on the electricity retail business to ensure accurate explanation about the non-fossil fuel value.

- when deciding whether to approve the tariff of a general transmission utility, the minister considers whether:
- the rates reflect fair costs incurred as a result of efficient management and fair profits;
- the rates are clearly set as fixed rates or fixed amounts by type of supply; and
- certain persons are not treated in an unfair and discriminatory manner; and
- when deciding whether to order a general transmission utility to provide wheeling services, the minister considers whether there are justifiable grounds for refusing the service, such as non-payment of wheeling service fees.

The Fair Trade Commission together with the Ministry of ETI provides guidelines for what constitutes appropriate electricity sales. (The latest amendments to the guidelines were made in 2017.) The guidelines provide that the following behaviours engaged in by a former general electricity utility may violate the Anti-Monopoly Act:

- behaviour that hinders the business of a newcomer in the retail market; such as:
- offering substantially lower rates to consumers who may enter into an agreement with a newcomer, or who purchase the combined sale of electricity and other goods or services from the former general electricity utility;
- offering higher rates to consumers who intend to purchase electricity both from the general electricity utility and a newcomer;
- offering higher rates to consumers who have purchased electricity from a newcomer; and
- prohibiting a partner of a business alliance for the combined sale of electricity and other goods or services from entering into another business alliance with a third-party electricity retailer, or making such partner commit to a most-favoured-nation treatment for the combined sale with the former general electricity utility; and
- behaviour that hinders the business of a newcomer in the wholesale market (such as an independent power producer), such as:
 - offering a purchase price much higher than the market value for an electricity generation facility that a newcomer in the wholesale market intends to purchase; and
 - refusing to provide continuous back-up services to a newcomer in the wholesale market.

30 Preclusion and remedy of anticompetitive practices**What authority does the regulator (or regulators) have to preclude or remedy anti-competitive or manipulative practices?**

The Minister of ETI has the authority to do the following:

- order a general transmission utility to stop using or providing another person with information concerning electricity suppliers and users, which the general transmission utility has obtained in the course of providing wheeling services, for purposes other than for the provision of wheeling services;
- order a general transmission utility to stop treating any particular electricity retailer in an unreasonably preferential or disadvantageous manner or giving any other benefits or causing any other hindrances to such an electricity retailer in the course of providing a wheeling service; and
- order a general transmission utility to amend its wheeling service provisions, if it sets unreasonably high rates for imbalance services without an appropriate cost basis, or if it sets unreasonable rates for imbalance services that vary depending on season or time.

The Fair Trade Commission has the authority to do the following, if it decides that certain behaviour of a general electricity utility violates the Anti-Monopoly Act:

- issue a cease-and-desist order;
- issue an order for payment of a surcharge; and
- file a formal notification with the prosecutor general.

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

When a foreign company intends to obtain a share of a non-listed company or 10 per cent or more of issued shares of a listed company operating in the Japanese electricity sector, the company must report the business purpose, amount and timing, among other items, of the investment to the Minister of Finance and the Minister of ETI beforehand. When examining the report, these ministers take into consideration whether the investment by the foreign company may impair Japanese national security, disturb the maintenance of public order, obstruct the protection of public safety, or have a significant adverse impact on the effective management of the Japanese economy. Although the period for the examination of the report is generally set at 30 days, the ministers may extend the period for up to five months.

In 2008, when the Children's Investment Fund Management Ltd (the TCI Fund), a UK-based activist fund, tried to obtain up to 20 per cent of the shares of J-Power, a wholesale electricity utility, the Minister of Finance and the Minister of ETI decided not to allow the investment. The primary reason for the decision was that the TCI Fund had

made certain shareholder requests with respect to the management of J-Power, which was planning to construct a new type of nuclear plant, and the ministers were concerned that the activist nature of the investment would affect Japan's policy regarding the stable supply of electricity, atomic power and the nuclear fuel cycle.

Acquisitions of interests in renewable power generation by foreign companies are active since the introduction of the FIT in 2012, because the ministers generally do not become involved in such acquisitions.

32 Authorisation to construct and operate interconnectors**What authorisations are required to construct and operate interconnectors?**

There are 10 divided areas of electricity transmission lines in Japan, each of which is owned and operated by a regional transmission utility. These areas are interconnected with the neighbouring areas through interconnection lines between these areas. Authorisations required to construct and operate these interconnection lines are basically the same as those required for transmission lines. See question 9. General transmission utilities have constructed and operated these interconnection lines. As the volume of electricity that can pass through these lines is limited, the OCCTO is in the process of discussing how to strengthen the interconnection lines and how to share the costs fairly between the relevant business players.

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

Regarding access to the interconnection lines between the neighbouring transmission areas in Japan, the first come first served rule applies. The OCCTO plans to amend the rule in 2018 to facilitate wholesale electricity trading beyond each of the transmission areas and share the interconnection capacity fairly between the relevant business players. After the amendment, currently scheduled for October 2018 when the indirect auction rule is adopted, the available interconnection capacity will be generally allotted to the preceding day spot market transaction at JEPX and therefore parties that would like to provide or procure electricity through the interconnection grid between the neighbouring transmission areas need to sell or purchase the electricity at JEPX. Only those which succeed in completing the deal at JEPX will be able to use the interconnection line between neighbouring transmission areas.

Because Japan is an isolated island country, cross-border electricity supply does not exist at this stage and there are no rules relating to it.

NISHIMURA & ASAHI

Nagahide Sato
Sadayuki Matsudaira

n_sato@jurists.co.jp
s_matsudaira@jurists.co.jp

Otemon Tower
1-1-2 Otemachi
Chiyoda-ku
Tokyo 100-8124
Japan

Tel: +81 3 6250 6200
Fax: +81 3 6250 7200
www.jurists.co.jp/en

Transactions between affiliates

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

Under the EBA, general transmission utilities are prohibited from giving preferential treatment or conferring other benefits to their affiliates when they provide wheeling services. General transmission utilities are also prohibited from providing affiliates with information concerning other electricity suppliers and electricity users that they have gathered in the course of providing wheeling services, for purposes other than the provision of the wheeling service.

If a general transmission utility gives preferential treatment to its affiliates, such as charging its affiliates rates unreasonably lower than those provided in the tariff, it will also be deemed to be in violation of the Anti-Monopoly Act, which prohibits discriminatory consideration.

35 Enforcement and sanctions

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

If, in the course of providing a wheeling service, a general transmission utility gives unreasonable preferential treatment or benefits to its affiliates or if a general transmission utility provides its affiliates with information concerning other electricity suppliers or consumers that it has gathered in the course of providing wheeling services, the Minister of ETI may order the general transmission utility to discontinue or correct such behaviour. If the utility violates the order, the utility is subject to a fine of up to ¥3 million. The Minister of ETI also has the authority to cancel the utility's licence if the utility has violated the EBA or any order issued under the EBA, and he or she finds such violation to be harmful to the public interest.

If a general transmission utility company gives preferential treatment to its affiliates, such as charging its affiliates a rate that is unreasonably lower than those provided in the tariff, the Fair Trade Commission may issue a warning, cease-and-desist order or an order for payment of a surcharge.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com