

# Electricity Regulation 2021

Contributing editor  
John Dewar



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

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 September 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020  
No photocopying without a CLA licence.  
First published 2003  
Nineteenth edition  
ISBN 978-1-83862-331-9

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



---

# Electricity Regulation 2021

**Contributing editor****John Dewar****Milbank LLP**

---

Lexology Getting The Deal Through is delighted to publish the nineteenth edition of *Electricity Regulation*, which is available in print and online at [www.lexology.com/gtdt](http://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.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology 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.lexology.com/gtdt](http://www.lexology.com/gtdt).

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.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, John Dewar of Milbank LLP, for his continued assistance with this volume.



London  
September 2020

---

Reproduced with permission from Law Business Research Ltd  
This article was first published in October 2020  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Global Overview</b>	<b>3</b>	<b>Japan</b>	<b>77</b>
John Dewar Milbank LLP		Nagahide Sato, Sadayuki Matsudaira and Junya Ohashi Nishimura & Asahi	
<b>Australia</b>	<b>7</b>	<b>Mexico</b>	<b>84</b>
Andrew Monotti, Simon Cooke and Joe McQuillen King & Wood Mallesons		Rogelio López-Velarde and Amanda Valdez Dentons López Velarde SC	
<b>Belgium</b>	<b>19</b>	<b>Panama</b>	<b>94</b>
Arnaud Coibion, Lothar Van Driessche and Philippe Jonckheere Linklaters LLP		Erika Villarreal Zorita, José A Brenes and Ixalondra Chee Chong Anzola Robles & Asociados	
<b>Brazil</b>	<b>28</b>	<b>South Africa</b>	<b>103</b>
Marcello Portes da Silveira Lobo and Pedro Vargas Pinheiro Neto Advogados		Jonathan Behr Werksmans Attorneys	
<b>Croatia</b>	<b>38</b>	<b>Turkey</b>	<b>113</b>
Ivana Manovelo and Miran Maćešić Maćešić & Partners		Değer Boden Akalın, Şeyma Olğun and Ayşegül Önel Boden Law Office	
<b>Ghana</b>	<b>45</b>	<b>United Kingdom</b>	<b>126</b>
Kimathi Kuenyehia, Sarpong Odame, Kojo Amoako and Kafui Quashigah Kimathi & Partners Corporate Attorneys		John Dewar, Seyda Duman and Jasmin Ash-Briggs Milbank LLP	
<b>India</b>	<b>58</b>	<b>United States</b>	<b>134</b>
Neeraj Menon and Akshita Amit Trilegal		Daniel A Hagan, Hagai Zaifman and John N Forbush White & Case LLP	
<b>Ireland</b>	<b>66</b>		
Eoin Cassidy, Peter McLay and William Carmody Mason Hayes & Curran LLP			

# India

Neeraj Menon and Akshita Amit

Trilegal

## LEGAL FRAMEWORK

### Policy and law

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

The electricity sector is subject to regulation by both the federal and state governments.

The Electricity Act 2003 (the Electricity Act) is the parent legislation governing the electricity sector in India (other than nuclear energy, which is governed by the Atomic Energy Act 1962). The Electricity Act consolidated various laws governing the electricity sector in India and introduced key reforms such as restructuring state electricity boards into separate entities governing generation, transmission and distribution activities; delicensing most generation activities, recognising power trading as a distinct activity and promoting captive generation; introducing the requirement for providing non-discriminatory open access; and promoting renewable energy projects.

In accordance with the provisions of the Electricity Act, the government of India, in consultation with the Central Electricity Authority of India (CEA) and state governments, has prepared the National Electricity Policy 2005 and the Tariff Policy 2016 for the development of the power sector, based on optimal utilisation of natural resources.

### Organisation of the market

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

The Electricity Act restructured the electricity sector into separate generation, distribution and transmission sectors. Additionally, there exists a separate market for electricity trading that is undertaken by companies with a trading licence or at power exchanges.

### Generation

Generation of electricity (including captive generation) is a delicensed activity (other than for hydro projects exceeding the notified capital cost, for which an approval of the CEA is required). Private entities are permitted to set up power stations using any type of fuel or power source (such as coal, gas, wind, solar and biomass) except for nuclear power projects, which may be undertaken only by a government of India entity or a government company (ie, where the government holds a minimum of 51 per cent of the shareholding). India is transitioning towards competitive bidding in power procurement across conventional and non-conventional sources (predominantly solar and wind energy with waste-to-energy and other new technologies largely procured at feed-in tariffs).

### Transmission

Transmission of electricity in India is a licensed activity and transmission systems are divided into interstate and intra-state transmission systems. The interstate transmission system is mainly owned and operated by Power Grid Corporation of India Limited, a government of India-owned company, and the intra-state transmission systems are owned and maintained by state transmission utilities.

Transmission projects may be undertaken for developing new transmission systems or for strengthening the existing transmission system (which typically include investments in substations along with transmission lines for augmenting the capacity of the existing transmission system). In a manner similar to generation projects, such projects may be implemented under two modes, namely the negotiated route (where the transmission tariff is determined by the relevant electricity regulatory commission) and the competitive bidding route (where the transmission tariff is discovered through competitive bidding under standard bidding documents, which is mandatory for certain kinds of intra-state and interstate transmission projects).

### Distribution

At present, the sale and distribution of power to consumers is undertaken under a single licence and once the distribution licence has been issued, the licensee does not require a separate licence for the sale of power. While distribution licensees in India have been largely owned and controlled by the government, there is an increased impetus on private participation in the distribution sector of late through the induction of non-government shareholders in distribution licensees and the establishment of distribution franchisees to undertake various functions of the distribution licensees.

### Trading

Electricity trading is a distinct recognised activity for which a separate licence is required (except for distribution licensees) from the Central Electricity Regulatory Commission (CERC) or a state electricity regulatory commission (SERC), for interstate and intra-state trading respectively). Trading may involve purchasing electricity from generating stations or distribution licensees for sale to end consumers.

### Electric products

There is no consolidated law on procurement and adoption of electric products. At the national level, schemes for procurement and modernisation of electric products are carried out through bespoke schemes and programmes administered by the government of India. For instance, the government of India has implemented the Street Lighting National Programme from 2015, which aims to replace India's 14 million conventional street lamps with smart light emitting diode variants.

## REGULATION OF ELECTRICITY UTILITIES - POWER GENERATION

### Authorisation to construct and operate generation facilities

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

Generation is a delicensed subject; however, the construction, operation and maintenance of a generation facility require permits, consents and approvals under other laws relating to land acquisition, environmental clearance, corporate and labour compliance, approvals for use of restricted land and consent to establish and operate the power station from pollution control authorities. Further, in the case of power stations using domestic coal, the developer is required to obtain a coal linkage (which provides for assured fuel supply from the coal mines of Coal India Limited and its subsidiaries) or use coal extracted from a coal block specifically allotted to it by a government entity (and procure applicable permits for the coal block in addition to the power plant).

All power-generating stations are also required to comply with technical standards prescribed by the Central Electricity Authority of India, including those in relation to the construction of power plants, safety requirements for construction, operation and maintenance.

### Grid connection policies

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

Under the Electricity Act 2003, each transmission licensee is required to provide non-discriminatory use of transmission lines, distribution systems or associated facilities to a licensee, consumer or a person engaged in generation. Granting connectivity and long, medium or short-term open access is governed by regulations issued by the Central Electricity Regulatory Commission (CERC) (for interstate connectivity) and the respective SERCs (for connectivity in the relevant state). The CERC has issued amendments to regulations dealing with the interstate transmission system with the aim of planning and developing an efficient, coordinated, reliable and economical system for the smooth flow of electricity from generating stations to the load centres. The recent amendments specifically include renewable energy developers and operators of solar and wind power parks. This provides much-needed clarity on procedures to be followed by solar and wind park developers that have been involved in large-scale power projects across the country.

### 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?

While in the past a feed in tariff scheme existed, in 2017 tariff-based competitive bidding guidelines for the procurement of power were introduced for solar and wind power projects. The procurer sets a benchmark tariff above which a bid cannot be made and the bidder with the lowest tariff bid discovered through a reverse auction is selected to enter into a power purchase agreement with the procurer. These bidding guidelines have introduced several provisions to enhance attractiveness of the solar and wind bids through measures such as:

- generation compensation by the procurer to the developer in the case of power evacuation constraints;
- a payment security mechanism for tariff payments; and
- termination compensation in the event of procurer default.

The feed-in tariff regime continues to be applicable for solar and wind plants with capacities under 5MW and 25MW respectively. Benefits such as the continued availability of accelerated depreciation for wind power projects, and exemptions from paying electricity duty (which are state-specific and are granted by many states) are also provided to renewable power generators.

Solar plants can be set up under state policies or the government of India-launched National Solar Mission (NSM), which has been at the forefront of the government's renewable energy policy. Solar projects, under either the NSM or state-specific policies, are envisaged to be developed in a phased manner with a target of achieving 100GW (increased from the original target of 20GW) of installed solar capacity by 2022. The government of India has doubled the capacity target from 20GW to 40GW for solar projects to be set up in a solar park, to be achieved by 2021-22.

While onshore wind power projects account for a substantial portion of the installed renewable capacity in India, the government of India issued the National Offshore Wind Energy Policy in September 2015 with an aim to promote the country's offshore wind energy potential and recently issued an expression of interest from suitable and experienced bidders for the development of 1GW of offshore wind energy anywhere within India's exclusive economic zone. Gujarat and the state of Tamil Nadu are estimated to have the potential to generate 106GW and 60GW of offshore wind energy respectively. The principal agency charged with the development of the sector is the National Institute of Wind Energy. The government of India plans to develop 5GW and 30GW of offshore wind energy by 2022 and 2030, respectively.

Additionally, in May 2018 the Ministry of New and Renewable Energy (MNRE) issued a National Wind-Solar Hybrid Policy that seeks to optimise the utilisation of infrastructure such as land and the transmission system, as there are regions in India where wind and solar energy have moderate to high potential. The policy not only aims at the development of new wind-solar hybrid plants but at the hybridisation of existing wind and solar plants. Further, the MNRE, in May 2018, issued a scheme for setting up 2500MW of interstate transmission connected wind-solar hybrid power projects.

In the context of municipal waste-to-energy projects, while Indian cities present significant scope for growth, the industry has faced intense opposition on account of environmental and health concerns. The government of India is undertaking measures to promote waste-to-energy projects. In this context, the National Biofuels Policy was approved by the Union Cabinet in May 2018, which, among other things, promotes research and development into technology using biofuels for the generation of power.

### 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?

India has ratified the United Nations Framework Convention on Climate Change and the Kyoto Protocol (but with no binding obligations) to reduce its greenhouse gas emissions. Consequently, the government of India launched the National Action Plan on Climate Change, under which major initiatives such as the NSM have been introduced, and the Wind Energy Mission and Waste to Energy Mission are proposed. Additionally, the sharing of Clean Development Mechanism benefits (between the developer and the consumer, usually a state-owned distribution utility) is present across most states. India has also ratified the Paris Agreement. The Paris Agreement requires its signatories to devise a national plan to limit global temperature rise, and as part of its plan India has set a goal of producing 40 per cent of its electricity with non-fossil fuel sources by 2030.

While the government of India has been promoting the development of India's renewable energy capacity and capability through various policy measures, a decision by the Directorate General of Trade Remedies to impose a safeguard duty on the import of solar cells and modules from Malaysia and China is likely to adversely impact solar tariffs. The duty was first imposed in 2018 and it was envisaged it would apply until July 2020. In a recent notification, the Ministry of Finance has recommended a duty of 14.5–14.9 per cent on solar panels imported from countries such as China, Thailand and Vietnam until 2021.

## Storage

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

Currently, there is no regulatory framework governing electricity storage in India.

While the government of India has, in the past, floated tenders for renewable energy capacity with storage systems, most of these systems have been suspended or withdrawn for various reasons. There have been several tenders for storage-linked renewable generation capacity in various parts of the country, such as Andhra Pradesh and Karnataka, and the latest bid process was run by the Solar Energy Corporation of India (for storage-backed solar projects) and is underway.

## Government policy

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

While the government is positive about setting up power stations based on nuclear energy, currently only a government of India entity or a government company (ie, where the government holds a minimum of 51 per cent of the shareholding) can own and operate a nuclear power plant. Private ownership of nuclear power generation assets is not allowed.

A major issue that had hampered private investment in other areas of nuclear power generation was the interpretation of a provision of the Civil Liability for Nuclear Damage Act 2010 as mandating a civil nuclear liability clause in supply contracts, therefore dissuading foreign equipment suppliers from supplying Indian nuclear power projects. However, the government of India has clarified (as part of its 'frequently asked questions', which may not be legally binding) that while the legislation would not be amended, it is not mandatory to include a civil liability clause in the contractual arrangements between the foreign supplier and the Indian operator.

## REGULATION OF ELECTRICITY UTILITIES – TRANSMISSION

### Authorisations to construct and operate transmission networks

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

Owning and operating transmission assets requires a licence from the Central Electricity Regulatory Commission (CERC) for interstate transmission facilities and the relevant state electricity regulatory commissions (SERCs) for intra-state transmission facilities. The Electricity Act 2003 (the Electricity Act) allows the appropriate electricity regulatory commission to specify any general or specific conditions that a licensee must comply with. The appropriate electricity regulatory commission may, on the recommendation of the government and in the public interest, even permit any local authority, cooperative society, government institution, etc, to transmit (and distribute) electricity, subject to certain terms and conditions, without a licence.

Transmission licensees also require right of way from landowners for the construction of transmission lines, approvals under the Electricity Act for the installation of overhead lines and installation of transmission towers, apart from other applicable clearances such as those from the Environment Ministry. Alternatively, the Electricity Act also enables a transmission licensee to place and maintain a transmission line on any immovable property, upon being authorised by the government.

### Eligibility to obtain transmission services

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

The open access regulations issued by the relevant electricity regulatory commissions permit the usage of transmission lines by any generating company, distribution licensee, any consumer with a requirement of over 1MW of electricity and electricity traders, provided they comply with the requirements of obtaining connectivity and open access to the transmission system. The regulations also cast an obligation on the transmission licensees to provide non-discriminatory access to their transmission lines upon application for such access. The applicant is required to pay transmission charges and other charges as applicable, which may include a cross-subsidy surcharge, wheeling charges and open-access charges.

### Government transmission policy

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

The government is looking to increase private participation to strengthen transmission networks and has introduced a string of measures such as introducing electronic competitive bidding for transmission projects and a viability gap funding model on a public-private partnership (PPP) structure for setting up intra-state transmission networks. The inter-state transmission system is mainly owned and operated by Power Grid Corporation of India Limited, a state-owned company, and the intra-state transmission system is owned and maintained by state transmission utilities. However, the PPP structure is increasingly being preferred by the government for setting up interstate and intra-state transmission networks.

### 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?

The rates and terms for the provision of transmission services are determined by the appropriate electricity regulatory commission (the CERC in the case of interstate transmission and the relevant SERC in the case of intra-state transmission). For transmission schemes implemented through the negotiated route, transmission charges are determined by the relevant electricity regulatory commission in line with tariff regulations issued by it, which take into account factors such as return on equity, interest on loan capital and working capital, depreciation, operation and maintenance expenses, and allowance for any renovation and modernisation. Under the competitive bidding route, transmission charges discovered through a competitive bidding process are required to be adopted by the relevant electricity regulatory commission.

## Entities responsible for grid reliability

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

The CERC (Indian Electricity Grid Code) Regulations 2010 brings together a single set of technical and commercial rules that facilitate the planning and development of reliable national and state grids, encompassing all the utilities connected to or using the interstate transmission system.

The key entities responsible for ensuring reliability of the transmission grid include the National Load Despatch Centre, the regional load despatch centres (established for five regions in India) and state load despatch centres (established for each state). They ensure optimum scheduling and despatch and integrated operation of the power system in their respective jurisdictions. Additionally, the Central Transmission Utility and various state transmission utilities are responsible for the planning and coordination of interstate and intra-state transmission systems respectively.

## REGULATION OF ELECTRICITY UTILITIES - DISTRIBUTION

### Authorisation to construct and operate distribution networks

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

Electricity distribution activities (except for the distribution of electricity in rural areas notified by the relevant state government and distribution by notified exempted entities such as local authorities and non-governmental organisations) require a licence from the relevant state electricity regulatory commission (SERC). Additional clearances may be required from relevant authorities. To promote open access and competition in distribution activities, the Electricity Act 2003 (the Electricity Act) permits two or more distribution licensees to operate within the same area of supply through their own distribution network and also permits applicants to file petitions for obtaining a distribution licence in the same area and for the same purpose, as previously granted to another distribution licensee, so long as they comply with additional requirements in relation to capital adequacy, creditworthiness and codes of conduct as may be prescribed by the government of India.

### 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?

Distribution licensees are obligated to provide a non-discriminatory supply of electricity to any person situated in the licensee's area, in accordance with the regulations made by the relevant electricity regulatory commission.

Every person whose premises are situated within the distribution licensee's area and who has given notice for wheeling electricity is eligible to receive electricity from: the distribution licensee; or from any other supplier through the distribution licensee's network, by seeking open access. In the first option, the distribution licensee operating in a particular area is required to lay down its network, if required, in order to supply electricity itself to a consumer seeking supply. Under the second option (ie, through open access), a consumer has the right to require a distribution licensee to make its network available for wheeling electricity to such consumer from a third-party supplier upon payment of wheeling charges and an additional surcharge (in the nature of a cross-subsidy surcharge) as determined by the SERC to meet such distribution licensee's fixed costs arising out of its obligation to supply. The cross-subsidy charge is payable irrespective of whether the distribution licensee's network is used, in the case of third-party supply.

## Government distribution network policy

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

Electricity distribution is largely controlled by government distribution utilities, with minimal privatisation on account of significant historic liabilities of the state distribution companies. However, a few examples of privatisation in certain areas (such as Delhi and Mumbai) have met with success. A tariff for electricity distribution, comprising wheeling charges and cost of supply, is levelled and determined on a cost-plus basis by the relevant SERC.

One of the major problems plaguing the distribution sector is the abysmal credit ratings of the state distribution utilities and their persistent or extensive delays in making payments to generators under power purchase agreements. Distribution utilities have borrowed heavily to finance losses in their businesses, and are facing major hurdles in repaying their debt. The government has launched the Ujwal Discom Assurance Yojana Scheme (UDAY Scheme) with the objective of improving the operational and financial efficiency of state-owned distribution utilities. One of the major features of the UDAY Scheme involves requiring participating states to take over 75 per cent of the debt of distribution licensees by way of a grant over a period of two years (and the subsequent issuance of bonds by state governments for these amounts). To date, 32 states and union territories have signed up for the UDAY Scheme.

It has become apparent, however, on the basis of data supplied by various states that the UDAY Scheme has not achieved the intended results.

### 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 tariff for electricity distribution, comprising wheeling charges and cost of supply, is levelled and determined on a cost-plus basis by the relevant SERC. In this regard, SERCs are also competent to formulate regulations that set out the terms and conditions for distribution of electricity. While determining the rates and terms, the SERCs are guided by factors mentioned in the Electricity Act, which include the promotion of competition, safeguarding of consumers' interest and, at the same time, recovery of the cost of electricity. The rates so determined are usually notified by the relevant SERCs by passing tariff orders. In relation to cross-subsidies, the Tariff Policy 2016 provides that the cross-subsidy charge shall be an aggregate of the weighted average cost of power; transmission and distribution losses; transmission, distribution and wheeling charges; and per unit cost of carrying regulatory assets, if applicable.

## REGULATION OF ELECTRICITY UTILITIES - SALES OF POWER

### Approval to sell power

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

Sale and distribution of power are bundled activities and, hence, if a developer has obtained a distribution licence for distribution of electricity for a certain area, it has approval to sell power as well to both commercial and domestic consumers, and no specific authorisations are required.

Further, generating companies can also sell power directly to a bulk consumer using open access or through dedicated transmission lines. The consumer, however, is not allowed to further sell the power to other consumers. Licensed traders are also authorised to supply and trade in power.

## Power sales tariffs

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

The state electricity regulatory commissions (SERCs) issue multi-year tariff regulations to regulate the procedure for determination of a power sales tariff (comprising fixed charges and energy charges, which are usage-based) of distribution licensees for various classes of consumers, the categorisation of which depends on the type of entities that require the electricity and the voltage levels at which the electricity is to be distributed. For instance, a separate tariff is determined for low-tension (LT) consumers (which includes domestic, residential and commercial units) and high-tension (HT) consumers (which includes industries and railways). The components and factors to be considered while determining a tariff are similar to the components of a generation tariff and include return on equity capital, interest on debt, interest on working capital, depreciation, power purchase cost, and operation and maintenance expenses, albeit with respect to the distribution business.

## Rates for wholesale of power

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

In furtherance of the multi-year tariff orders issued by each SERC for distribution tariffs for various types of HT and LT consumers, distribution licensees file their respective petitions before the SERC for their area of supply. Such tariff petitions typically include true-up of the tariff based on the previous year (ie, specific adjustment required on a case-by-case basis in relation to units sold, aggregate technical and commercial losses, etc), review of the current year's performance and approval of the aggregate revenue requirement of the distribution licensee for the upcoming year. In reviewing the aggregate revenue requirement, the SERC takes into consideration factors such as the cost of procurement of electricity (through long-term contracts or short-term procurement from the open market, in the case of shortage) and, based on such review, the commission may alter the tariff mentioned in the multi-year tariff order for such distribution licensee.

## Public service obligations

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

The Electricity Act 2003 (the Electricity Act) sets out various obligations and duties of a distribution licensee, which include the obligation to provide open access to any applicant (subject to system constraints), the duty to develop and maintain a distribution system and commence supply within one month of a request in the distribution licensee's area of supply. The Supreme Court has stated in various judgments that there is no exemption from the universal service obligation of any distribution licensee under the Electricity Act and the licensee has a statutory duty to supply electricity upon application to any premises located in the distribution licensee's area. One of the key reasons for the government's decision to reform debt-ridden distribution licensees under the Ujwal Discom Assurance Yojana Scheme was to ensure that the distribution licensees are able to fulfil and perform their roles and functions under the Electricity Act effectively.

## REGULATORY AUTHORITIES

### Policy setting

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

The power sector is governed by the government of India primarily through the Power Ministry and the Ministry of New and Renewable Energy. The Department of Atomic Energy of the government of India governs the development of nuclear energy.

Other regulatory policies and technical and performance standards are determined by the Central Electricity Regulatory Commission (CERC), the state electricity regulatory commissions (SERCs), NITI Aayog and the Central Electricity Authority of India (CEA).

### Scope of authority

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

The CERC and the SERCs exercise jurisdiction over all interstate and intra-state electricity regulatory issues respectively (except issues relating to nuclear energy, which are regulated by the Atomic Energy Regulatory Board) and are entrusted with the function of notifying regulations and acting as the independent regulators for their respective jurisdictions. Some of their key functions and responsibilities include preparing their respective grid codes, issuance of licences, determination of tariffs, adjudicating disputes, and aiding and advising the government on any matter referred to them.

The Power Ministry and the Renewable Energy Ministry act as the legislating bodies and are mainly responsible for evolving general policies (including the National Electricity Policy 2005, the Tariff Policy 2016 and the Rural Electrification Policy) for the development of the electricity sector, in consultation with the state governments and the CEA.

The CEA, not a regulator in the electricity sector, primarily serves as the technical advisory body to the government of India, advising on all technical matters related to the transmission, generation and distribution (including specifying technical standards for construction, and prescribing grid standards for the operation and maintenance of transmission lines and safety requirements).

### 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?

The CERC and SERCs are statutory bodies under the Electricity Act 2003 (the Electricity Act), which also sets out their powers and functions. Being autonomous bodies, they perform their functions in an independent manner without any government interference. However, regulatory authorities are required to be guided by policy directions of the government of India issued under the Electricity Act.

The CERC was established by the central government under the Electricity Act and the Electricity Regulatory Commissions Act 1998 where members of the CERC are appointed by a committee that is appointed by the central government. Similarly, SERCs are also established by the respective state governments under the Electricity Act and the Electricity Regulatory Commissions Act 1998.

## 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?

Under the Electricity Act, the CERC and SERCs (and adjudicating officers of such commissions) have the power to hold inquiries and adjudicate disputes relating to interstate matters for the CERC and intra-state matters for the respective SERCs. Under section 79 of the Electricity Act, the CERC is empowered to adjudicate upon disputes involving generating companies, either owned or controlled by the central government or generating companies that have entered into a composite scheme for the generation and sale of electricity in one or more states, or transmission licensees with respect to the interstate transmission of electricity and regulation of tariff. Section 86 of the Electricity Act authorises the respective SERCs to adjudicate upon disputes between licensees and generating companies. Both CERC and the SERCs also reserve the power to refer any dispute to arbitration.

The Appellate Tribunal For Electricity (APTEL) has the power to entertain appeals arising out of decisions of the CERC, the SERCs or adjudicating officers, if filed within 45 days from the date of receipt of the impugned order. APTEL is also conferred with suo motu jurisdiction to examine the validity of any order made by an adjudicating officer, CERC or SERC, in relation to any proceeding. Additionally, any person aggrieved by the order of any electricity regulatory commission may approach the relevant high court of the state for adjudicating on any question of law.

## 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?

Under the Electricity Act 2003 (the Electricity Act) every transmission and distribution licensee must seek the prior approval of the relevant electricity regulatory commission, without which it cannot undertake any transaction to acquire, or merge its utility with, the utility of another licensee; or assign its licence, or transfer the whole or a part of its utility.

Additionally, the Competition Commission of India (CCI), established under the Competition Act 2002 (the Competition Act) has, under the merger control provisions, the authority to block a combination (a merger or acquisition beyond specified assets or turnover thresholds) in the electricity sector if it is of the opinion that such merger or acquisition will have an appreciable adverse effect on competition (AAEC) on the relevant market, such as the electricity sector in India.

### 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?

The Competition Act prohibits any enterprise or person from entering into a combination that causes or is likely to cause an AAEC within the relevant market in India. The Competition Act also mandates that any person or enterprise proposing to enter into a combination obtains the prior approval of the CCI before executing the transaction. If the CCI is of the opinion that the proposed combination will not have an AAEC on the relevant market in India, it approves the transaction, and if it subsequently finds that the combination may have an AAEC within the relevant market in India, it may prohibit the proposed combination or

allow it subject to certain conditions meant to neutralise the adverse effects of such combination.

While the Electricity Act does not set out any specific thresholds, the bidding documents entered into by entities in the power sector typically prescribe provisions for equity lock-in and change in control for a specified period (except for wind power procurement), which effectively block a merger or acquisition.

Other than competition law and sector-specific restrictions, provisions of the Companies Act 2013 and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (applicable to listed companies) will also apply with respect to change in shareholding through mergers and acquisitions.

## 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 Central Electricity Regulatory Commission (CERC) and state electricity regulatory commissions (SERCs) are empowered to issue appropriate directions to a licensee or an electricity generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination that is likely to cause or causes an AAEC in the electricity sector. The CCI has the authority to initiate an inquiry into alleged anticompetitive conduct, either suo motu on the basis of information that it has or on the basis of complaints received or on a reference made by the government or statutory authorities (such as CERC and SERCs). Further, the CCI can also make a reference to other statutory authorities (such as CERC and SERCs) for their non-binding opinion on issues pertaining to the sectors under their jurisdiction. Similarly, other statutory authorities can also make a reference to the CCI for issues pertaining to competition law. This enables electricity regulatory authorities to make their own assessment and also consult the CCI with respect to alleged anticompetitive conduct.

Furthermore, consumer forums established under the Consumer Protection Act 1986 also have the power to deal with malpractice affecting end consumers. Additionally, any consumer who is aggrieved by non-redressal of their grievances by a distribution licensee may approach the ombudsman appointed by the respective SERCs. Any non-compliance of an order made by the ombudsman is typically punishable with a monetary penalty.

## Determination of anticompetitive conduct

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

Section 3 of the Competition Act prohibits agreements that cause or are likely to cause an AAEC in India. 'Agreement' includes an arrangement, an understanding or actions in concert. Such agreements can be oral or written, formal contracts or informal arrangements, and need not be enforceable by law. While determining AAEC, the CCI considers the following factors:

- the creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- the foreclosure of competition by hindering entry into the market;
- the accrual of benefits to consumers;
- improvements in the production or distribution of goods or provision of services; and
- the promotion of technical, scientific and economic development by means of the production or distribution of goods or provision of services.

Section 4 of the Competition Act prohibits the abuse of dominant position. In the case of a section 4 investigation, the CCI has to:

- define the relevant market;
- demonstrate dominance in such market; and
- establish abuse of dominance by the concerned enterprise.

Abuse of dominance is of two kinds – exploitative and exclusionary conduct. These cover predatory pricing, imposition of unfair terms and prices in one-sided contracts, leveraging, denial of market access, etc.

### Preclusion and remedy of anticompetitive practices

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

The Central Electricity Regulatory Commission (CERC) and state electricity regulatory commissions (SERCs) are empowered to issue appropriate directions to a licensee or an electricity generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination that is likely to cause or causes an AAEC in the electricity sector. The CCI has the authority to initiate an inquiry into alleged anticompetitive conduct, either suo motu on the basis of information that it has or on the basis of complaints received or on a reference made by the government or statutory authorities (such as CERC and SERCs). Further, the CCI can also make a reference to other statutory authorities (such as CERC and SERCs) for their non-binding opinion on issues pertaining to the sectors under their jurisdiction. Similarly, other statutory authorities can also make a reference to the CCI for issues pertaining to competition law. This enables electricity regulatory authorities to make their own assessment and also consult the CCI with respect to alleged anticompetitive conduct.

Furthermore, consumer forums established under the Consumer Protection Act 1986 also have the power to deal with malpractice affecting end consumers. Additionally, any consumer who is aggrieved by non-redressal of their grievances by a distribution licensee may approach the ombudsman appointed by the respective SERCs. Any non-compliance of an order made by the ombudsman is typically punishable with a monetary penalty.

## INTERNATIONAL

### Acquisitions by foreign companies

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

It is permissible to have 100 per cent foreign direct investment (FDI) in the generation (except nuclear power), transmission and distribution of electricity and power trading sectors. Up to 49 per cent foreign investment (26 per cent through FDI and 23 per cent through foreign institutional investment) in power exchanges is permitted without prior regulatory approval in the primary and secondary markets.

Further, while there are no special requirements or limitations on acquisitions of interest in the electricity sector by foreign companies, for competitively bid projects the standard bidding documents issued by the Power Ministry may specifically provide each distribution utility (that is procuring power) to evaluate the association of a foreign entity (with the bidder) from a national security or public interest perspective. To the extent such association is found to be detrimental to the national interest, the distribution utility has the ability to reject the associated bid.

### Authorisation to construct and operate interconnectors

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

As per the regulatory framework applicable to the construction and operation of interconnection and transmission systems, no separate authorisations are required to construct and operate interconnectors. Transmission licensees are required to abide by the regulations framed by the Central Electricity Regulatory Commission (CERC) and the Central Electricity Authority of India (CEA) with respect to the construction and operation of transmission systems and connectivity to the grid. Under the Electricity Act and associated Rules, the Chief Electrical Inspector is required to certify that any apparatus that is used for a transmission system meets the safety regulations and guidelines prescribed. Further, according to the CEA's regulations, any electrical installations and apparatus that are of a voltage exceeding 650V are required to be inspected and approved by the Chief Electrical Inspector to the Government. Therefore, the construction and operation of an interconnector, or any other similar apparatus, will be governed by the regulations that have been issued by the CERC and the CEA and where required, an approval must be obtained from the Chief Electrical Inspector.

### Interconnector access and cross-border electricity supply

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

The CERC notified regulations on the cross border trading of electricity in March 2019 (the Cross Border Regulations) that address key aspects of the cross-border trade of electricity such as connectivity, open access and system safety and set out the institutional framework for the cross-border trade of electricity, such as the designated authorities and agencies for facilitation of the approval process and procedures for import and export of electricity. The Cross Border Regulations provide that the electricity tariff payable for cross-border trades may be discovered through a competitive bid process or as agreed between India and the neighbouring country in framework agreements. In addition to the tariff, applicable charges for the transmission of electricity within the Indian grid are required to be paid.

## TRANSACTIONS BETWEEN AFFILIATES

### Restrictions

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

Restrictions on transactions with affiliates are typically provided in licence conditions and in regulations formulated by the relevant electricity regulatory commissions. Typically, such transactions should be undertaken on an arm's-length basis and at a value that is fair and reasonable. Additionally, the Electricity Act 2003 (the Electricity Act) also allows transmission or distribution licensees to engage, with the prior approval of the relevant electricity regulatory commission, in other businesses for the optimum utilisation of their assets, if a specified proportion of revenues from such other business are used towards reducing charges for wheeling, or wheeling and transmission, as the case may be.

### Enforcement and sanctions

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

The appropriate electricity regulatory commission is the body responsible for enforcing such restrictions. These restrictions form part of the terms of the licence; therefore, the appropriate electricity regulatory

commission can ensure compliance, pursuant to the powers provided under the Electricity Act, and impose sanctions, which include imposition of penalties and revocation of the licence.

## UPDATE AND TRENDS

### Key developments of the past year

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

The Ministry of Power has released a draft of a comprehensive amendment to the Electricity Act for public comments. Key features of the proposed amendment include:

- the formulation of a national policy on renewable energy to encourage energy generation from renewable sources and minimum purchase obligations;
- authorising the national load despatch centre to implement measures for optimum scheduling and despatch of electricity in various regions of the country and to exercise supervisory control over transmission networks;
- the implementation of policies to reduce open access charges and surcharges levied from open access consumers; and
- the formulation and implementation of rules relating to the cross-border trade of electricity; and
- the establishment of an 'electricity contract enforcement authority' that shall have the sole authority to decide matters regarding the performance of obligations under contracts for the sale, purchase or transmission of electricity (but not matters relating to tariffs).

### Coronavirus

37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Several ministries of the Indian government have released ad hoc notifications to manage the pandemic in the country: while the Ministry of Home Affairs has issued notifications on foreign travel and quarantine norms that have addressed the health- and personnel-related issues, the Ministry of Finance, the Ministry of Power and the Ministry for New and Renewable Energy have issued several notifications to manage the risks and issues faced by the electricity sector in India. Some key notifications and initiatives are:

- in one of the first notifications to address the spread of the pandemic, the Ministry of Finance issued a circular recommending that covid-19 be treated as a 'natural calamity' owing to its disruptive effects on the supply chain;
- to assist with the increasing liabilities of electricity sector utilities, the Ministry of Power issued a circular in May 2020 announcing an infusion of 90 billion rupees to distribution licensees against receivables and loans to be given against state guarantees to assist distribution licensees in poor financial health. The amount is to be passed on to consumers through various modes such as the deferment of charges levied for power that has not been scheduled and the rebate of 20 to 25 per cent of power supply bills due to the national transmission utility (Power Grid Corporation of India Limited); and
- in a recent notification, the Ministry of New and Renewable Energy has directed that the lockdown owing to covid-19 should be treated as a force majeure event by all renewable energy agencies (as designated by the Ministry of New and Renewable Energy (MNRE)

# TRILEGAL

### Neeraj Menon

neeraj.menon@trilegal.com

### Akshita Amit

akshita.amit@trilegal.com

17th Floor, Tower B, Peninsula Business Park  
Lower Parel (West)  
Mumbai 400 013  
India  
Tel: +91 22 4079 1000  
Fax: +91 22 4079 1098  
www.trilegal.com

or implementing MNRE schemes) and a time extension of five months should be granted to all projects (without the requirement to submit any additional documentation) that were being implemented on 25 March 2020. The Ministry has also recommended that this extension be provided to other stakeholders in the value chain such as contractors and suppliers.

## Other titles available in this series

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

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)