

GETTING THE DEAL THROUGH®

Electricity Regulation

in 34 jurisdictions worldwide

Contributing editor: Earle H O'Donnell

2009



Published by
GETTING THE DEAL THROUGH
in association with:

Araújo e Policastro Advogados
Arthur Cox
Berkemeyer Attorneys & Counselors
Boden Law Office
bpy | Jádi Németh Attorneys at Law
Carey y Cía Ltda Abogados
Cavelier Abogados
Coeler Legal Consulting EOOD
urkovi , Januši & Bani
Dundas & Wilson LLP
Estudio O'Farrell
Fabara & Compañía
Gorrissen Federspiel Kierkegaard
Headrick Rizik Álvarez & Fernández
Heuking Kühn Lüer Wojtek
Hoet Peláez Castillo & Duque
Kelemenis & Co
Kocián Šolc Balaščík
Lehman, Lee & Xu
Lenz & Staehelin
López Velarde, Heftye y Soria
Macchi di Cellere Gangemi
McDougall Gauley LLP
Nestor Nestor Diculescu Kingston Petersen
Peltonen, Ruokonen & Itäinen
Pillsbury Winthrop Shaw Pittman LLP
Rodrigo, Elías & Medrano Abogados
Schönherr
SimmonsCooper Partners
Smaliukas, Juodka, Beniusis ir Partneriai
Stek
Tark & Co
Wierci ski Kwieci ski Baehr Spk
Yukov Khrenov and Partners

China

Edward E Lehman and Aldo Settimio Boni de Nobili

Lehman, Lee & Xu

1 Policy and law

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

On December 2007, the State Council issued its first-ever white paper on energy conditions and policies to assess the progress made in the energy sector and set goals and policies for the immediate future. The following principles and aims were set forth:

- national resources conservation, stressing both developing and saving, with priority given to saving;
- increase in the supply of energy by relying primarily on domestic resources;
- encouragement of diverse patterns of development;
- maximum support to science and technology;
- environmental protection and improvement of sustainable development; and
- promotion of international cooperation.

The government has marked its commitment to reducing greenhouse gas (GHG) emissions under its national climate change programme issued on 2007, and to increase renewable energy consumption to 10 per cent of total energy consumption by 2010 and to 15 per cent by 2020. Therefore, a main concern is to foster efficiency while reducing consumption and pollution and developing clean electric power by boosting cogeneration, hydropower and other renewable energy sources projects. Also of importance will be actively developing nuclear power and natural gas power, and gradually eliminating small and backwards thermal power units, according preference to large clean coal-fired plants. More than 50 million kW of small coal-fired plants are scheduled to be shut down and no small thermal power projects will be allowed to be launched in the future. The implementation of CDM projects by annex 1 countries continues to be highly encouraged.

Other goals are to privatise a significant amount of state-owned assets, to strengthen the building of regional power grids and power transmission and distribution networks, to expand the scope of power transmission from western to eastern China, and to proceed with the energy price reform to ensure that electricity generation and selling prices are eventually formed by market competition.

In an effort to combat power shortages while increasing the inflow of foreign investment, construction and operation of power plants are generally encouraged by the Catalogue for the Guidance of Foreign Investment Industries (the Catalogue).

The main law governing the electricity sector is the Electric Power Law (1996). Subsequent regulations have been issued to implement regional power markets in 2003 and to introduce the price reform in 2005.

General principles on renewable energy are set by the Renewable Energy Law (2005), while in 2006, further regulations have been introduced to regulate generation, uploading and pricing of electricity produced by renewable energy resources.

2 Organisation of the market

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

The power mix in China is heavily dominated by coal. Thermal power accounts for nearly 83 per cent of total power generation, while hydro represents 14 per cent, followed by nuclear (2 per cent) and wind (less than 0.1 per cent). China's National Bureau of Statistics forecasts a total power consumption of 3.7 trillion kWh by the end of 2008, with an increase of about 14 per cent as of 2007, and of 4.5 trillion kWh by 2010.

The industrial sector accounts for 75 per cent of total electricity consumption, while residential consumption accounts only for 11 per cent, commercial consumption for 9 per cent, and agricultural consumption represents only 4 per cent of total consumption. Demand for energy continues to exceed supply, with consequent high risks of power shortages.

After the 'separation of generation from the grid' reform of 2002, competition was introduced in the power generation market and former monopolistic State Power Corporation's power generation assets were split and distributed to five newly established state-owned power generation companies (the 'big five'):

- China Huaneng Group;
- China Huadian Power;
- China Guodian Power;
- China Datang Power Group; and
- China Power Investment Company.

The transmission grid was separated from power generation and divided into two power grid operators:

- State Grid Corporation of China; and
- China Southern Power Grid Corporation.

As a result of the reform, four ancillary companies have also been established, responsible for providing support services to the power industry:

- China Electric Power Engineering Consulting Group;
- China Hydropower Engineering Consulting Group;
- China National Water Resources & Hydropower Engineering Corporation; and
- China Gezhouba Group.

The market's regulator is the State Electricity Regulatory Commission (SERC). Power transmission and distribution in China are still regulated monopolies and no competition is allowed in this sector. The market is entirely dominated by the two power grid operators and their regional and provincial subsidiaries.

The transmission and distribution market is divided into seven regional networks, of which five are managed by the State Grid Corporation of China through its subsidiaries:

- North China Grid Company Ltd;
- Northwest China Grid Company Ltd;
- Northeast China Grid Company Ltd;
- East China Grid Company Ltd; and
- Central China Grid Company Ltd;

Two are managed by the China Southern Power Grid Corporation:

- South; and
- Guangdong.

The two power grid companies, through their subsidiaries at various levels, distribute electricity to the final consumer.

Nuclear power plants construction is managed by China National Nuclear Corporation and China Guangdong Nuclear Power Holding and their subsidiaries. Foreign investors can invest in this area through establishment of joint ventures in which the Chinese party holds the controlling stake.

Competition is allowed only in power generation, an area heavily dominated by state-owned enterprises, which hold nearly 90 per cent of the market shares.

The Beijing-based China Huaneng Group is the largest power generation enterprise, with assets of over US\$45 billion and an installed capacity of over 71,000MW. The company is also the controlling shareholder of Huaneng Power International Inc, which is listed on the Shanghai, Hong Kong and New York stock exchanges.

Another big state-owned player is the China Three Gorges Project Corporation, established in 1993, and operating the huge hydro-project in Yangtze river, which will be fully operational in November 2008 with an estimated power generation capacity of 84.7 billion kWh per year.

There is a trend to gradually increase the freedom of large power consumers to choose their own source of energy in their regions and to build up their own thermal generators. This is especially noticeable in Guangdong region.

In some rural areas, independent distribution companies have been established. Where it is not convenient to supply energy from the national grid, these companies may also have their own transmission and distribution networks.

Regulation of electricity utilities – power generation

3 Authorisation to construct and operate generation facilities

What governmental or administrative authorisations are required to construct and operate generation facilities?

Construction of power generation facilities is subject to the following procedures, according to source and type of the investment: approval, verification or reporting of the record.

The approval process is required for projects that utilise government funding. Projects that do not utilise government funding but are listed among the restricted forms of investment by the Catalogue are subject to the verification procedure before the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) at a local or national level, depending on the amount of the investment. For foreign-invested power generation projects with an investment of more than US\$100 million, approval must be obtained from NDRC and MOFCOM at the national level.

Special examination and approval procedures by the NDRC are required for hydroelectric projects built on main water courses, hydroelectric projects of 250,000kW and above, and wind power projects of 50,000kW and above. Other renewable energy projects are subject to examination and approval by the competent investment department of the governments at the provincial level and must be reported to the NDRC for registration.

Domestic private investment projects (if not restricted by the Catalogue) are not subject to the verification procedure; a report to the NDRC's local branches for the record is sufficient.

Approval from the State Administration for Foreign Exchange (SAFE) has to be obtained in case of project financing, and relevant approvals under the Environmental Impact Assessment Law should also be obtained.

According to the Electric Power Law, in order to be granted access to the power market, a power generation enterprise shall complete registration formalities at the relevant department of the State Administration for Industry and Commerce (SAIC) and apply at SERC to obtain a power business permit.

Within 30 days of having received and examined the application and relevant materials by the applicant, SERC will issue its approval and instruct the market operator (power dispatching and trading centre) to register the applicant or, if the application materials do not comply with the requirements, will notify the applicant of a motivated refusal.

4 Interconnection policies

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

Interconnection to the grid must be granted to every power generation plant, on the condition of possession of the power business permit and registration at the SAIC's relevant department.

In particular, electricity produced with renewable energy sources enjoys priority in uploading to the grid. Power grid enterprises shall build ancillary grid facilities to accommodate the electricity produced with renewable energy resources and ensure that it is all uploaded to the grid, actively conducting discussions on grid design and research and performing grid construction and improvements based on the request of interconnection from renewable energy power plants. Liability is incurred by power grid enterprises for failing to purchase renewable power in full, if a economic loss is generated to the renewable power generation enterprise.

5 Alternative energy sources

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

The Electric Power Law states that in the construction, supply and consumption of electric power, attention shall be paid to protecting the environment and adopting new technologies to decrease the discharge of poisonous waste, and to prevent and control pollution and other public hazards. The state encourages and supports the generation of electricity through the use of renewable and clean energy resources. The Catalogue qualifies foreign investment in the construction and operation of power stations using new and renewable sources of energy, of hydroelectric power stations, and of back pressure cogeneration plants as encouraged.

With the Renewable Energy Law, a special renewable energy development fund has been established to support scientific and technological research, to finance construction of renewable energy projects in rural and remote areas and islands, and to produce equipment for the development and utilisation of renewable energy. Financial institutions may offer preferential loan with financial interest subsidy to renewable energy development and utilisation projects. To these projects, furthermore, tax benefits are granted.

As examined before, electricity produced with renewable energy sources enjoys on-grid priority and full acquisition. The Relevant Provisions for the Administration of the Generation of Electricity using Renewable Energy Resources provide special prices for

uploading electricity generated by renewable energy projects to the grid. In particular, biomass projects are eligible to enjoy a tariff subsidy of 0.25 renminbi per kWh for a period of 15 years commencing from the date the project comes into actual operation (hybrid projects in which conventional energy accounts for more than 20 per cent of the calorific consumption in generating electricity are not eligible for the tariff subsidy).

A tariff surcharge is levied on the final consumer to cover the major costs related to the utilisation of the renewable energy project and its maintenance and operation.

CDM projects under the Kyoto Protocol are highly encouraged by the government, as stated in the CDM measures issued in 2005 and subsequent implementation rules. Priority areas for the PRC are energy efficiency, methane recovery and utilisation, and development of new and renewable energy.

According to the Medium and Long-Term Development Plan for Renewable Energy issued in June 2007 by the State Council, national consumption of electricity generated by means of renewable energy sources shall account for 10 per cent of total electricity consumption by 2010 and 15 per cent by 2020.

Regulation of electricity utilities – transmission

6 Authorisations to construct and operate transmission networks

What governmental or administrative authorisations are required to construct and operate transmission networks?

The two state grid corporations are in charge of planning, construction and operation of power grids. Therefore, these companies, through their subsidiaries, entirely manage construction and operation of transmission and distribution networks.

Foreign investment in construction and operation of power grids is currently restricted by the Catalogue. Therefore, these investments are subject to verification before NDRC and MOFCOM.

Plans for construction and rebuilding of power transmission and distribution networks are contained in the plans for electric power development and the overall plans for urban areas. Governmental authorities in urban areas shall provide land for transformation facilities, transmission line corridors and cable passages in accordance with the plans. Where it is necessary in order to construct a power network, requisition of land is performed under payment of compensation fees.

7 Eligibility to obtain transmission services

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

See question 4.

8 Government incentives

Are there any government incentives to encourage expansion of the transmission grid?

The grid operator is responsible for the development of the transmission grid. Therefore, no incentives are provided in this regard. However, to facilitate the construction of transmission lines, land expropriation rights can be granted.

9 Rates and terms for transmission services

Is there any tariff or other regulation regarding the rates and terms for the provision of transmission services?

Prices for transmission and distribution of electricity refer to prices charged by power grid operators for the provision of access systems,

inter-grid connections, electric power transmissions and sale services (power prices).

Power prices are set by the government pricing departments based on the principles of reasonable costs, reasonable profits, calculation of taxes in accordance with the law, and fair burden, so as to attract investment in power grids, improving the power grid structure, while promoting the establishment and development of regional power markets.

Power prices are divided into:

- prices for power transmission and distribution services provided by a grid operator to a electric power user connected to the grid (grid power price);
- prices for dedicated services such as access system and inter-grid connection; and
- prices for ancillary services, such as maintenance of stable voltage and frequency and recovery after grid malfunctions.

The Transmission and Distribution Tariffs Measures issued by the NDRC in 2005 provide a detailed technical explanation as to how the different prices are to be calculated.

The NDRC is responsible for approving the initial tariffs set out in the power purchase agreement, stipulated between power generator and grid company, and further adjustments are usually taken at the local level.

Competitive pricing systems are in the process of being adopted in six regional markets (Shanghai, Shandong, Zhejiang, Liaoning, Jilin and Heilongjiang).

10 Entities responsible for assuring reliability

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

SERC is responsible for the supervision of transmission grids. Power grid enterprises are responsible for operating the power network in an interrupted and stable way and for ensuring reliability of transmission and distribution networks. Additionally, power grid enterprises are responsible for ensuring the non-discriminatory and fair opening of the power grid, and for upgrading and innovating the power grid.

Regulation of electricity utilities – distribution

11 Authorisation to construct and operate distribution networks

What governmental or administrative authorisations are required to construct and operate distribution networks?

Power supply enterprises are subsidiaries of the two state grid operators and shall supply electricity to the consumers within their approved service areas, upon a concession obtained from the province, region or municipality within which they operate, or from the central government when the power supply enterprise operates through the boundaries of different provinces, regions or municipalities. Only one power supply enterprise for each electricity service area can be established.

Power supply enterprises shall obtain a power supply permit to establish an electricity service area or alter an existing one. Additionally, power supply enterprises shall obtain registration at relevant departments of the SAIC.

As noted in question 6, foreign investment in the construction and operation of power grids is currently restricted. Therefore, investment in these areas is subject to verification before NDRC and MOFCOM.

12 Access to the distribution grid

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

Access to the distribution grid is granted together with the access to the transmission line (see question 7).

13 Rates and terms for distribution services

Is there any tariff or other regulation regarding the rates or terms for the provision of distribution services?

Prices for transmission and distribution of electricity are determined by the Transmission and Distribution Tariffs Measures (see question 9).

Regulation of electricity utilities – sales of power**14 Approval to sell power**

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

Sale of power to customers is managed and performed exclusively by the two state grid operators through their subsidiaries, on the basis of fixed rates determined by the government, which are divided into three categories: residential electricity, electricity for agricultural production, and electricity used in industry, commerce or elsewhere.

Therefore, no specific authorisations or approvals are required other than those necessary for the construction and operation of power supply enterprises.

15 Power sales tariffs

Is there any tariff or other regulation regarding power sales?

The Electricity Sales Prices Measures issued by the NDRC in 2005 sets definitions and mechanisms for the determination of sales prices. Prices shall move in lockstep with the price of electricity uploaded to the relevant grid, and are periodically revised and adjusted according to the variation of the price of electricity uploaded to the grid.

The tariff is set on a cost-plus basis, in order to cover all operating costs plus a certain percentage, being sales prices composed of four elements:

- purchase cost of electricity
- electricity loss during transmission and distribution;
- prices for the transmission and distribution of electricity; and
- governmental fund.

The measures divide sales prices into three categories: residential electricity, electricity for agricultural production, and electricity used in industry, commerce or elsewhere. Prices for different types of users are determined based on the average sales price, determined by adding the unit's average electricity purchase costs to its average electricity loss during transmission and distribution, the average price for the transmission and distribution of electricity, and the governmental fund during the calculation period.

Under the measures, electricity is generally subject to a unitary kWh pricing, but electricity for industrial, commercial and other users which have receiving transformers with a capacity of 100kVA or more or an installed capacity of 100kW or higher is subject to a two-component price:

- kW/h price; and
- basic electricity price, calculated on the user's consumption capacity and billed, at the option of the user, based on the transformer capacity or maximum demand.

The measures introduce also a system of peak and valley pricing, or seasonal pricing, with the specific division of periods and the price differential between them determined by supply and demand in the grid's market and its load characteristics.

16 Public service obligations

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

According to the Electric Power Law, a power supply enterprise has to supply electricity to the consumers within its service area, and cannot refuse to supply electricity to any unit or individual within its service area that has applied for power supply. Additionally, power supply enterprises have to make known to the consumers in their service area the procedures, regulations and the rate for use of electricity and must provide the consumers with any other necessary information.

The law further determines the following responsibilities for power supply enterprises:

- guaranteeing that the quality of the electricity supplied meets the standards stipulated by the state, and satisfy, based on the power network's possible capacity, consumers' special requirements with regard to electricity quality; and
- supplying electricity continuously without shut-down under normal operation conditions – in case a shut-down is necessary, consumers must be notified in advance.

Regulatory authorities**17 Policy setting**

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

With a decision of the State Council issued on March 2008, in order to reform the administration of the energy sector seeking further efficiency and to avoid conflict of interests, the National Energy Commission (the Commission) has been established. Powers and responsibilities of the Commission (and its level of independence) are still to be exactly regulated.

Before the establishment of the Commission, management of the electricity sector has been handled by the SERC, in its role of regulator, and by the NDRC.

Other relevant authorities are the Ministry of Finance (MOF), the Environmental Protection Agency (EPA), the Technical Supervision Agency, and the State-Owned Assets Supervision and Administration Commission (SASAC).

18 Scope of authority

What is the scope of each regulator's authority?

The State Council is the highest-ranking authority, responsible for drafting national reform policies and for approving major investment projects.

The National Energy Commission will be responsible for administering the whole energy industry (coal, oil, gas, electricity, nuclear power, new and renewable energy), formulating the country's energy development strategy and policies and supervising energy security. The Commission will also be in charge of adjusting energy prices (while their determination remains in the hands of the NDRC), supervising the development of the industry, and promoting and coordinating energy development in rural areas.

SERC's main responsibilities are to:

- develop an overall regulation of the national power sector, review the operational structure of the power market, and propose relevant amendments to the Electric Power Law;

- monitor electricity market operations, ensure fair competition, and regulate transmission and distribution;
- issue and maintain business licenses, and enforce environmental laws, regulations and standards in coordination with the Environmental Protection Agency;
- propose tariffs and price adjustments to the NDRC and review tariff levels and regulation of fees and charges for ancillary services;
- investigate any possible violation of laws and regulations by market participants, and to settle disputes among them; and
- to issue statistics and information on the electricity market.

The NDRC is responsible for tariffs regulation (through examination of electricity prices and formulation, monitoring, and enforcement of government's pricing policy) and for the creation of strategic long-term plans for the development of the energy sector.

As a consequence of the establishment of the Commission, the role and relevance of these traditional authorities will be consequently redetermined.

19 Establishment of regulators

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

The NDRC is a macroeconomic management agency with ministerial status and its own party committee. The SERC is a governmental authority. Both the authorities are under the direct control of the State Council.

SERC and NDRC cooperate in the regulation of the power market, the NDRC being a superior-ranking authority technically capable of influencing SERC's decisions.

To avoid possible conflicts of interest between the two authorities and to give the government a higher grade of control over the power sector, the State Council has established, in March of 2008, the National Energy Commission and its National Energy Bureau, which will set up its own party committee. The exact role and grade of independency of the Commission are still undefined.

20 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?

SERC's administrative acts (such as sanctions, refusal to issue power permits, etc) can be challenged by a power generation enterprise by applying for administrative reconsideration within 60 days of the day of acknowledgement of the decision, or alternatively instituting administrative proceedings before the People's Court. Against a decision of administrative reconsideration organs, administrative proceedings in front of the People's Court can be initiated.

The challenged decision can be temporarily suspended by the court or by the administrative reconsideration organ, if the applicant can offer significant grounds to prove that a suspension is necessary.

Main laws governing administrative proceedings are:

- the Administrative Procedure Law;
- the Administrative Reconsideration Law;
- the Administrative Punishment Law;
- the Administrative Supervision Law; and
- the State Remedy Law.

Acquisition and merger control – competition

21 Responsible bodies

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

The new Anti-Monopoly Law, effective as of 1 August 2008, provides that a notification to MOFCOM is necessary prior to any operation of concentration of business operators in the following cases:

- mergers between business operators;
- assets or equity acquisitions through which a business operator obtains the control of another business operator; and
- acquisition of control or decisive influence over a business operator through contractual or other means.

Business operators are exempt from filing the notice in presence of the following circumstances:

- one of the business operators involved in the concentration holds at least 50 per cent of the voting shares or assets of each of the other business operators; and
- at least 50 per cent of the voting shares or assets of each business operator involved in the concentration are held by one business operator not involved in the concentration.

The Rules on the Notification Thresholds for the Concentration of Business Operators provide two jurisdictional thresholds:

- total turnover in China of at least two parties to the concentration in the last fiscal year exceeds 400 million renminbi each; and
- total worldwide turnover of all the parties to the concentration in the last fiscal year exceeds 10 billion renminbi, or their total turnover in China in the last fiscal year exceeds 12 billion renminbi.

Notification of the operation is necessary if either the first threshold is met, or at least one of the two parts of the second threshold is met.

The Anti-Monopoly law is enforced by MOFCOM's departments at a local and national level.

22 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 disapproving the transaction?

After having received the concentration's notice, MOFCOM, within 30 days, takes a decision and notifies the business operators. With the decision, MOFCOM can:

- prohibit or allow the operation; or
- announce the necessity of conducting further examination.

If the documents and information submitted by the business operators are incomplete, MOFCOM sets a deadline for the submission of relevant missing documents and information.

If MOFCOM renders a decision not to conduct a further examination or does not render a decision within the deadline, the business operators can create the concentration.

In cases of further examination, MOFCOM has to issue its final decision within 90 days from the date of the first decision with which it announced the necessity to conduct a further examination. In the presence of certain circumstances (such as consent of the business operators, inaccurate documents and information provided by the business operators, or material change in relevant circumstances) MOFCOM can extend the period for the further examination for a maximum of 60 days. If a decision is not made within the deadline, the business operators can create the concentration.

Update and trends

The government's white paper, issued in December 2007, calls for the introduction of full competition in the power market, aim that currently has not been achieved, although price reforms have been implemented and regional quasi-competitive wholesale pilot projects have been put into operation. Therefore, electricity pricing reform and market restructuring is to be further developed and constitutes a priority for the Chinese government.

More comprehensive market regulation is expected after the completion of the new Energy Law. In particular, the use of energy conservation to combat power shortages and the development of new and renewable energy aimed at lowering GHG emissions represent a primary concern for China. Therefore, renewable energy projects (hydro, wind, solar, biomass) and equipment and technologies manufacturing and development are becoming the main areas of investment.

Therefore, the maximum length of the overall procedure is 180 days, in the case that further examination is necessary and there is a full extension of the deadline by MOFCOM.

Furthermore, in addition to the normal procedure for the examination of the concentration of business operators, a state security review procedure can be conducted if a foreign investor participates in the concentration and a matter of state security is considered involved.

23 Prevention and prosecution of anti-competitive practices

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

MOFCOM is responsible for the enforcement of the Anti-Monopoly Law, prosecuting any act that can potentially eliminate or restrict the competition in the domestic market. Therefore, MOFCOM exercises its control also over monopoly agreements, acts of abuse of market dominance, and acts of abuse of administrative authority. Anti-unfair competition acts are regulated by the Anti-Unfair Competition Law 1993, as more recently interpreted by the Supreme Court in 2007.

24 Determination of anti-competitive conduct

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

Under the Anti-Monopoly Law, monopoly agreements, abuses of market dominance, concentration of business operators and abuses of administrative authority are considered acts potentially capable of affecting competition in the market, and can therefore be prosecuted by MOFCOM.

The law prohibits monopoly agreements that allow parties to control prices or quantity of goods or other trade conditions, as well as acts of abuse of market dominance (such as refusing to deal with trade counterparties without a legitimate reason, selling goods at an unfairly high or low price, or imposing unreasonable trade conditions in the course of the trading) and acts of abuse of power from administrative authorities, which can often hinder the free flow of goods between regions (such as imposing discriminatory charges or technical requirements on imported goods, and imposing administrative permissions exclusively on imported goods).

Whether business operators can demonstrate that the (potentially monopolistic) agreement between them is not affecting competition in the market, or that it has been stipulated for one of the reasons indicated in the law (namely to improve technology and develop new products, to improve the quality of the products, to save energy and protect the environment, etc) the agreement can be considered valid by MOFCOM.

25 Preclusion and remedy of anti-competitive practices

What authority does the governmental body (or bodies) have to preclude or remedy anti-competitive or manipulative practices?

MOFCOM performs investigations into suspected monopolistic acts, by means of inspections, questionings, or impounding relevant evidence, and cooperating with financial institutions to check infringer's bank accounts. If an illegal act is discovered, MOFCOM will issue a decision to stop the act and punish the infringer according to the Anti-Monopoly Law.

Sanctions are defined by the Anti-Monopoly Law. In addition, where the illegal act has civil or criminal relevance, correspondent liabilities are incurred by the infringer.

International

26 Acquisitions by foreign companies

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

While foreign investors can freely participate in any kind of power project (with the exceptions of small thermal plants) and with the only requirement of having obtained the necessary approvals, construction and operation of nuclear power plants can be engaged by foreign investors only in the form of joint venture in which the Chinese party holds the controlling stake. Furthermore, construction and operation of power grids is a restricted form of foreign investment (see questions 6 and 11).

Additionally, operations of concentration (through mergers and acquisitions, or contractual or other means) are subject to preliminary notification to SAIC and MOFCOM under the Anti-Monopoly Law, and approval from MOFCOM, except where the investor can demonstrate that the concentration does not affect competition in the market, or that, as a result of the concentration progresses in improvement of products' qualities, energy saving and environmental protection are achieved.

In general, though, every merger or acquisition by foreign enterprises of target domestic companies is subject to preliminary approval from MOFCOM and, in certain cases, approval from the state-owned Assets Supervisory and Administrative Commission (SASAC) and the China Securities Regulatory Commission (CSRC) is also necessary.

If the foreign investor acquires more than 25 per cent of the equity of the target domestic company, the latter, as a result of the acquisition, will change its status into foreign-invested enterprise (FIE). In the case of assets acquisition, a new FIE is established.

27 Cross-border electricity supply

What rules apply to cross-border electricity supply, especially interconnection issues?

GMS (Greater Mekong subregion) countries (PRC, Cambodia, Laos, Myanmar, Thailand and Vietnam) are in the process of developing schemes for cross-border power trading, which are supposed to be fully implemented by 2012 according to the five-year plan signed in March 2008.

Transactions between affiliates**28 Restrictions**

What restrictions, if any, exist on transactions between electricity utilities and their affiliates?

The 2002 plan for the reform of the electric power system provides the policies that transactions should be consistent with. Further

clarifications are supposed to be introduced once fundamental legislative reforms (that are currently in progress, such as the new Energy Law) are completed.

29 Enforcement and sanctions

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

Among NDRC's responsibilities, reviews of the electricity price in power purchase agreements have relevance in relation to electricity dealings. SERC is the authority responsible for supervising the power market and enforcing the Electric Power Law and subsequent implementing regulations.

However, currently, no relevant restrictions (or sanctions) have been introduced in the Chinese legal framework with regard to utilities dealings with affiliates. With the completion of the necessary legislative reforms currently in progress though, such restrictions may be implemented.



Edward E Lehman
Aldo Settimio Boni de Nobili

elehman@lehmanlaw.com
aldo@lehmanlaw.com

10-2 Liangmaqiao Diplomatic Compound
No. 22 Dongfang East Road
Chaoyang District
Beijing 100600

Tel: +86 10 8532 1919
Fax: +86 10 8532 1999
www.lehmanlaw.com