South Africa

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1 Policy and law

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

Key policies
South Africa's energy policy is influenced by numerous policies including the White Paper on the Energy Policy of South Africa 1998 and the National Development Plan (NDP) which aim to eradicate poverty and reduce inequality by 2030. The NDP's economic infrastructure objectives include providing at least 90 per cent of the South African population with access to the electricity grid (with the remaining proportion having access to non-grid options). The White Paper envisages the publication of an Integrated Energy Plan (IEP) to inform energy procurement strategy in South Africa. A draft IEP was published for public comment in 2016.

Energy policy is also influenced by the Integrated Resource Plan 2010–2030 (IRP) which was promulgated in March 2011. It sets out the country's electricity demand profile for the next 20 years and determines how to best meet this demand from various energy sources. It is intended to be a 'living plan' and to be revised at two-year intervals and has formed the basis of recent independent power producer (IPP) procurement programmes. The original IRP is yet to be updated.

On 22 August 2017, South Africa's Minister of Energy reported to the Portfolio Committee on Energy that the Minister anticipates that the upcoming IRP update and the draft IEP will each be finalised by the end of February 2018.

Future planned policies include: (i) the IEP, which will inform South Africa's future energy mix and prioritise policy interventions for future programmes within the energy sector; and (ii) the Gas Utilisation Master Plan (GUMP) which should clarify South Africa's current approach in developing its nascent gas economy.

Key statutes
Key sector-specific statutes include:

- the Electricity Regulation Act No. 4 of 2006 (the ERA), which established a national electricity supply regulatory framework, the National Energy Regulator, as custodian and enforcer of the regulatory framework and provides for licencing and registrations required in respect of the generation, transmission, distribution and trading of electricity;
- the National Energy Regulator Act No. 40 of 2004 (NERA), which established the National Energy Regulator (NERSA) to regulate the electricity, piped-gas and petroleum pipeline industries; and
- the National Energy Act No. 34 of 2008, which (i) seeks to ensure that diverse energy resources are available to the South African economy (in sustainable quantities and at affordable prices) to support economic growth, and (ii) provides for energy planning including for (among other things) increased generation and consumption of renewable energies and adequate investment in, and appropriate upkeep of and access to, energy infrastructure.

2 Organisation of the market

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

- Generation – Eskom Holdings SOC Limited (Eskom), a state-owned national power utility, generates the vast majority of the country's electricity, typically through large coal-fired power stations and a single nuclear facility.
- Transmission and Distribution – Eskom owns and controls the national high-voltage transmission grid, and distributes approximately 60 per cent of electricity directly to customers. Direct electricity sales to mines and industry account for approximately 40 per cent of Eskom's distribution business. Local authorities buy bulk electricity from Eskom and distribute the balance of electricity supply in South Africa.
- IPPs – Since at least 1998, the South African government has recognised the need for IPPs in the country's power generating capacity. Early steps towards a competitive wholesale power exchange were abandoned in favour of the existing single-buyer model with Eskom as the off-taker. IPPs are still expected to play a significant role in power generation. In 2001, the Renewable Energy IPP Procurement Programme (REIPPPP) was successfully launched, and has been followed by IPP procurement programmes for new generation capacity from coal (a baseload programme or CBLIPPPP) and via cogeneration. As at the date of this publication, one or more gas-to-power IPPs and nuclear energy procurement programmes are contemplated. Please refer to the 'Update and trends' section below for more information on the current status of the various IPP programmes. The status of the nuclear programme is discussed in question 8.

Regulation of electricity utilities – power generation

3 Authorisation to construct and operate generation facilities

What authorisations are required to construct and operate generation facilities?

Construction – No electricity-sector specific authorisations are required. However, general (non-sector-specific) construction authorisations must be obtained. These may include authorisations under the National Building Regulations and Buildings Standards Act 103 of 1977, zoning approvals and environmental authorisations.

Operation – A licence from NERSA under the ERA is required unless the facility is constructed and operated exclusively on an 'own use' basis (and is not connected to the wider electricity grid).

4 Grid connection policies

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

South Africa has a grid code (Grid Code) which specifies connection conditions for generators to the transmission grid. Generators seeking connection to the transmission grid will need to apply, in writing, to the National Transmission Company (NTC) and to provide the necessary information as prescribed by the Information Exchange Code. Following such an application, the NTC will provide quotes or cost estimates for new connections (or for upgrading existing connections) according to an approved tariff methodology. The Grid Code prescribes the minimum technical and design requirements with which generators will need to comply when connected or seeking to be connected with the transmission grid.

5 Alternative energy sources

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

The ERA empowers the Minister of Energy (in consultation with NERSA), among other things, to determine (i) whether new generation capacity is needed to ensure an uninterrupted supply of electricity in South Africa; (ii) the types of energy sources from which electricity must be generated; and (iii) the percentages of electricity that must be generated from each such source. To date, determinations have been made for procurement (through IPP Procurement Programmes) of capacity from renewable energy sources (ie, concentrated solar power (CSP), wind, solar PV, biogas, biomass, landfill gas and hydropower), as well as capacity from industrial cogeneration energy sources (including, without limitation, biomass, industrial waste and combined heat and power).

6 Climate change

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

The government has voluntarily committed to reducing South Africa's greenhouse gas (GHG) emissions by 34 per cent below the business-as-usual (BAU) trajectory by 2020, and by 42 per cent below the BAU trajectory by 2025. This commitment is subject to the availability of adequate financial, technological and capacity-building support from developed countries. To date, several policies have been set in place to provide a regulatory framework for South Africa's response to climate change. These include, without limitation, the following:

- the National Development Plan 2030 which identifies various possible strategies for the reduction of South Africa's GHG emissions. These include: (i) flagship renewable energy projects; (ii) greater reliance on natural gas as a less carbon-intensive transitional fuel; (iii) partnerships with neighbouring countries to obtain hydropower resources (initially in Mozambique and Zambia, and eventually in the Democratic Republic of Congo); and (iv) carbon capture and storage, the imposition of carbon budgets and carbon pricing;
- the IRP which provides for the maintenance of an emissions constraint of 275 million tons of CO_2 per year from the electricity industry after 2024;
- the 2011 National Climate Change Response White Paper which supports the use of carbon budgeting and carbon pricing measures; and
- the Carbon Tax Policy Paper (2013) which proposes the introduction of a carbon tax. As a tax base, a preference is expressed for the taxation of fossil fuel input (ie, coal, crude oil and natural gas) based on their carbon content. A carbon tax rate of 120 rand per ton (t) of carbon dioxide-equivalent (CO_2-eq) above certain tax-free thresholds (which take into account the competitiveness concerns of locally based and trade-exposed carbon-intensive sectors and businesses as well as distributional concerns including the impact on low-income households) is proposed (Carbon Tax). The Carbon Tax was originally set to be imposed from 1 January 2015 and was subsequently deferred to 1 January 2017. However, at the time of writing, the effective date of the Carbon Tax has been further postponed to the last quarter of 2017 or to 2018.

7 Storage

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

There are no incentives specific to the research and development of storage solutions (outside general R&D tax incentives and the 50/30/20 capital depreciation allowance available in relation to renewable energy projects). Section 12L of the Income Tax Act 58 of 1962 does permit energy efficiency claims but there has been no provision made specifically for electricity storage.

However, the problems posed by the intermittent nature of renewable energy sources and the challenges associated with balancing energy supply and demand have been recognised in South Africa although (to date) there has been only a limited regulatory and governmental response to these problems. For instance, the Grid Code deals specifically with the requirements applicable to renewable energy power plants but does not impose any special requirements on concentrated solar power projects which typically incorporate a storage element. The IRP does recognise that energy storage technologies have the potential to substantially strengthen South Africa's grid by offsetting the need to use fossil fuels for peaking power, providing grid balancing and resiliency, improving power quality, and increasing the ability to successfully integrate renewable energy resources. While the focus to date has centred on smart metering and demand-side management initiatives rather than storage solutions, it is recognised that support for electricity storage should be addressed in future iterations of the IRP.

At present, there are three pumped hydro storage schemes in South Africa and three concentrated solar power plants which have reached financial close under the DoE's REIPP Procurement Programme, which specifically provides for the procurement of 600MW of energy from CSP projects by 2030.

8 Government policy

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

According to the Department of Energy, only 6 per cent of South Africa's electricity is presently generated from the country's two nuclear reactors.

The current draft of the IRP contemplates the acquisition of an additional 9,600MW of new nuclear generation capacity.

In the 2016 State of the Nation Address, the President of South Africa confirmed that a nuclear energy expansion programme remained part of South Africa's future energy mix and that South Africa had plans to introduce this 9,600MW of nuclear energy in the coming decade, in addition to the existing nuclear generation capacity. The President further confirmed that South Africa would 'test the market to ascertain the true cost of building modern nuclear plants' and would 'only procure nuclear on a scale and pace that' the country could afford.

However, in April 2017, the Western Cape division of the High Court of South Africa set aside the initial ministerial determination to procure 9,600MW of nuclear energy as well as the bilateral nuclear cooperation agreements South Africa has signed with Russia, the United States and South Korea respectively.

As recently as 14 August 2017, the Department of Energy indicated in response to a parliamentary question that it will restart the nuclear procurement process and that it intends on doing so once the updated IRP and the IEP have been finalised in early 2018.

Regulation of electricity utilities – transmission

9 Authorisations to construct and operate transmission networks

What authorisations are required to construct and operate transmission networks?

- Construction – No electricity-sector specific authorisations are required. However, general (non-sector-specific) construction authorisations and land-use rights must be obtained. These may include servitudes, authorisations under the National Building Regulations and Buildings Standards Act 103 of 1977, zoning approvals and environmental authorisations.
- Operation – A transmission licence, issued by NERSA under the ERA, must be obtained. However, Eskom currently owns and operates the transmission grid.

10 Eligibility to obtain transmission services

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

South Africa has a grid code (Grid Code) which specifies connection conditions for generators to the transmission grid. Generators seeking connection to the transmission grid will need to apply, in writing, to the National Transmission Company (NTC) and will have to provide information prescribed by the Information Exchange Code. Following such an application, the NTC will provide quotes or cost estimates for new

connections (of for upgrading existing connections) according to an approved tariff methodology. The Grid Code prescribes the minimum technical and design requirements with which generators will need to comply when connected or seeking to be connected to the transmission grid.

11 Government transmission policy

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

There are no direct incentives to promote the expansion of the transmission network by the private sector. As mentioned above, Eskom owns and operates the transmission system. Eskom does, however, have plans to expand and further develop the transmission grid. Periodically, Eskom publishes an updated 'Transmission Development Plan' (TDP) for a ten-year period. The current TDP looks at the period 2016–2025. At present, the TDP focuses on:

- the need to connect the IPP projects to the grid;
- plans to develop large-scale transmission corridors at key points in the grid over the longer term; and
- a province-by-province outline of major transmission development schemes planned over the forecast period.

Eskom has indicated that it needs to spend approximately US$16 billion until 2025 on developing, strengthening and upgrading the transmission system.

12 Rates and terms for transmission services

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

NERSA regulates the setting of prices and the structure of tariffs under transmission licence conditions by imposing conditions regarding: (i) the manner in which prices, charges, rates and tariffs to be charged are set and approved; and (ii) the methodology to be used in determining applicable rates and tariffs. According to ERA, these licence conditions must:

- enable the transmission service provider to recover the full cost of its licensed activities with a reasonable return;
- incentivise the continued improvement of technical and economic efficiency in transmission services;
- avoid undue discrimination between customer categories (although cross-subsidies between different classes of customers is permitted); and
- give end users of the transmission network proper information on the costs that their consumption imposes on the transmission service provider's business.

Also relevant is the South African Grid Code (Transmission Tariff Code) which sets out the transmission service pricing objectives. Among other things, it requires transmission-related tariffs to be designed in pursuit of objectives including: open access (at equitable, non-discriminatory prices); predictable prices and pricing signals reflective of the cost structure of transmission services.

13 Entities responsible for grid reliability

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

Eskom is responsible for the reliability of the transmission grid. In its capacity as transmission system operator, Eskom's obligations under the South African Grid Code (System Operator Version) include obligations to: (i) operate the grid so as to achieve the highest degree of reliability practicable, minimise the effects of disturbances to customers and avoid instability, uncontrolled separation or cascading outages as a result of the most severe double contingency; and (ii) take appropriate remedial action promptly to relieve any abnormal condition that may jeopardise reliable operation.

Regulation of electricity utilities – distribution

14 Authorisation to construct and operate distribution networks

What authorisations are required to construct and operate distribution networks?

- Construction – No electricity-sector specific authorisations are required. However, general (non-sector-specific) construction authorisations and land-use rights must be obtained. These may include servitudes, authorisations under the National Building Regulations and Buildings Standards Act 103 of 1977, zoning approvals and environmental authorisations.
- Operation – A distribution licence issued by NERSA under the ERA must be obtained. As mentioned above, Eskom distributes approximately 60 per cent of electricity directly to customers.

15 Access to the distribution grid

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

The South African Distribution Code (Network Code) sets basic rules for connecting to the distribution system. Persons seeking new connections to the distribution network must lodge an application for connection with a distributor. Each distributor has its own application form. Upon receipt of the application for connection to the distribution grid, the distributor must advise whether the applicant can be connected to the existing system or what technical improvements are required to enable the new connection or both. If the distributor can provide access to the customer, the distributor must provide an offer to connect and if accepted by the customer, a connection agreement will be concluded to govern project planning data, inspection, testing and commissioning programmes, electrical diagrams and any other information the distributor may deem necessary to proceed with the processing of the application for connection.

16 Government distribution network policy

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

There are no direct incentives to promote the expansion of the distribution network by the private sector.IPPs typically elect to engage in the self-building of any expansions to the distribution network that may be required to connect the IPP project to the national grid, and Eskom is currently debt funding a massive expansion of the transmission and distribution network. The South African government has proposed the creation of an independent system operator which will own, control and regulate the national transmission and distribution network and in 2003, Eskom implemented a revised business model to prepare for capacity requirements and the impending restructuring of the electricity sector by splitting its business into regulated and non-regulated divisions. It is proposed that Eskom's transmission division will become independent of its generation division and will take responsibility for the electricity grid. It is envisaged that this regulatory body will grant all electricity producers and consumers access to the grid, with freedom of choice. Under this model, South African power consumers could buy from sources other than Eskom but would still be able to use the same transmission infrastructure to have power delivered to them. The proposed legislative changes required to bring this about were introduced in 2012 but appear to have stalled or been abandoned subsequently.

17 Rates and terms for distribution services

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

NERSA – see question 12. The South African Distribution Code (Tariff Code) is also relevant as it sets out tariff and pricing structure objectives for distribution retail and network services. Among other things, it: (i) applies to all regulated tariff structures and negotiated pricing agreements under NERSA's jurisdiction; (ii) regulates energy charges (including recovery of losses), network charges (including ancillary services), customer service charges and connection charges; and (iii) provides principles for tariff design and allocation of costs.

Regulation of electricity utilities – sales of power

18 Approval to sell power

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

The ERA prohibits any trading (ie, any buying or selling of electricity as a commercial activity) without a licence issued by NERSA. NERSA is required to issue separate licences to authorise: (i) the operation of generation, transmission and distribution facilities; (ii) the import and export of electricity; and (iii) trading of electricity.

19 Power sales tariffs

Is there any tariff or other regulation regarding power sales?

Yes. The ERA requires NERSA to regulate prices and tariffs (where both 'prices' and 'tariffs' are defined as charges for electricity). In granting licences, NERSA may impose licence conditions which, amongst other things, regulate the setting and approval of prices, charges, rates and tariffs charged by licensees as well as the methodology to be used in the determination of rates and tariffs. Such licence conditions must conform to the principles identified in question 12. In addition, such conditions may permit the cross-subsidy of tariffs to certain classes of customers. In general, no licensee may charge a tariff nor make use of provisions in agreements which are not determined or approved by NERSA as part of its licensing conditions. However, under certain circumstances, NERSA may approve a deviation from set or approved tariffs (for instance, when electricity demand is higher and is threatening the sustainability of the electricity supply industry.)

20 Rates for wholesale of power

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

See question 19.

21 Public service obligations

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

The NERA obliges the Minister of Energy to adopt measures that will provide for the universal access to appropriate forms of energy or energy services for all the people of the Republic of South Africa at affordable prices. These measures must take into account the State's commitment to provide free basic electricity to poor households.

Currently, South Africa has an Electricity Basic Services Support Tariff (Free Basic Electricity) Policy which requires the provision of 50kWh of electricity per month (Free Basic Electricity) to existing qualifying consumers (ie, poor households which are legally connected to the national electricity grid or to a non-grid electricity system such as a solar home system). Free Basic Electricity is to be funded primarily through public funds (ie, intergovernmental transfers) or via cross-subsidies imposed by adequately resourced municipalities. Consumption in excess of the 50kWh per month limit is payable by the consumer.

It should be noted that it is local municipalities who are tasked with implementing the government's Free Basic Electricity policy. Therefore, if a utility (eg, Eskom) provides Free Basic Electricity, it will be doing so as a service provider of the municipality and the national government and local municipalities will remain ultimately responsible for funding the Free Basic Electricity provided by the utility.

Regulatory authorities

22 Policy setting

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

There is only one regulator of the electricity sector in South Africa, NERSA. NERSA was created pursuant to NERA, which came into effect on 15 September 2005.

Along with NERA, NERSA is governed by the ERA, the Electricity Act 1987 (in terms of levies) and other legislation of broader scope and application (such as the Constitution of the Republic of South Africa, 1996 and the Public Finance Management Act 1999). To this extent, therefore, the South African government also plays a significant role in determining regulatory policy by issuing determinations within which NERSA is compelled to carry out its mandate.

23 Scope of authority

What is the scope of each regulator's authority?

NERSA's role with regards to electricity is split into four separate divisions: (i) licensing and compliance; (ii) pricing and tariffs; (iii) infrastructure planning; and (iv) regulatory reform.

NERSA's licensing role primarily involves issuing licences for the generation, transmission and distribution of electricity, the import and export of electricity and to electricity traders. As a part of this function, NERSA monitors compliance with the terms and conditions attached to any licence.

With regards to pricing, NERSA sets tariff guidelines, structures and methodologies and pricing frameworks.

The infrastructure planning role of NERSA includes planning for future electricity demand, under the prescripts of the IRP, promoting alternative energy generation and energy efficiency initiatives.

NERSA's role in regulatory reform includes construction of a regulatory framework to facilitate introduction of regional electricity distributors and establishing an international electricity trading framework.

24 Establishment of regulators

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

NERSA was created pursuant to the NERA, which came into effect on 15 September 2005. One of NERSA's key principles is 'independence', including from regulated companies, pressure groups and political influence. NERSA's decisions are published online in accordance with the requirements of the Promotion of Access to Information Act 2000.

25 Challenge and appeal of decisions

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

NERSA is a public body and so any decision must be challenged by way of judicial review of an administrative action as provided for in the Promotion of Administration of Justice Act 2000. Any person may institute proceedings in the High Court of South Africa for judicial review.

The grounds for judicial review include, among others, that the decision taken:

- was tainted by bias (or there is a reasonable suspicion of bias);
- was procedurally unfair;
- was materially influenced by an error of law;
- took irrelevant considerations into account or failed to take relevant decisions into account; and/or
- was capricious, irrational or taken in bad faith.

An application for judicial review must be made without unreasonable delay and within 180 days of either (i) internal remedies being concluded or, (ii) if no internal remedies exist, the applicant becoming aware of the action and the reasons for it (or when the applicant might reasonably have been expected to become aware of the same).

Acquisition and merger control – competition

26 Responsible bodies

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

Competition law in South Africa is governed by the Competition Act 1998 (Competition Act). The South African Competition Commission (Commission) acts as the main medium of interaction for the public and has the power to investigate, consider and pass rulings on any

contravention of the Competition Act, approve or prohibit small or 'intermediate' mergers and refer its recommendations to the Competition Tribunal (Tribunal) in relation to 'large' mergers. The Competition Appeal Court is the final court of appeal for competition law matters.

27 Review of transfers of control

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

With respect to mergers, the Commission conducts merger revisions in compliance with the Competition Act. Firms entering into 'intermediate' or 'large' mergers are required to notify the Commission and may not implement that merger until it has been approved with or without conditions by either the Commission (for intermediate mergers), the Tribunal (for larger mergers), or the Competition Appeal Court.

A merger is considered:

- intermediate if the value of the proposed merger equals or exceeds 560 million rand (calculated by either combining the annual turnover of both firms or their assets) and the annual turnover or asset value of the target firm is at least 80 million rand; and
- large if the combined annual turnover or assets at both the acquiring and target firms is valued at 6.6 billion rand, and the annual turnover or asset value of the target firm is at least 100 million rand.

The Commission has the discretion to require parties to a small merger to notify it if the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. Similar to the other mergers, merger parties may not take further steps to implement that merger until it has been unconditionally or conditionally approved.

Importantly, the Commission will require the notification of all small mergers if either of the following criteria are met:

- at the time of entering into the merger, any of the firms, or any firm within their group, is subject to an investigation by the Commission in terms of Chapter 2 of the Competition Act, ie, restrictive horizontal practices, restrictive vertical practices, abuse of dominance or price discrimination;
- at the time of entering into the merger, any of the firms, or any firm within their group, is the respondent to pending proceedings referred by the Commission to the Tribunal in terms of Chapter 2 of the Competition Act.

When providing notification of a merger, a filing fee must be paid.

The Commission has:

- an initial period of 20 business days in which to investigate intermediate and small mergers. The Commission can, however, extend this investigation period by 40 business days; and
- an initial period of 40 business days to investigate large mergers, which can be extended by up to a maximum of 40 business days on request.

28 Prevention and prosecution of anti-competitive practices

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

Refer to questions 26 and 27.

29 Determination of anti-competitive conduct

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

Where a merger occurs, the test is 'whether the merger is likely to substantially prevent or lessen competition and, if so, whether there are any technological, efficiency or other pro-competitive gains that are likely to result from the merger that may offset the lessening of competition'.

The relevant factors considered include, inter alia:

- the strength of competition in the market;
- the probability that firms in the market will behave competitively following the merger;
- the actual and potential level of import competition;
- ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- the likelihood of the merged firm having market power;
- the dynamics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration;
- whether the business of a party has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

Thereafter, it is considered whether the merger can be justified and so conditionally approved, or must be rejected on substantial public interest grounds. Public interest grounds include the effect of the merger on employment, the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets.

The Competition Act prohibits restrictive vertical practices (between suppliers and their customers) if they substantially prevent or lessen competition in the market unless a party to the agreement can raise demonstrable efficiency, pro-competitive or technological gains as a defence.

Certain restrictive horizontal practices are also prohibited, including (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; and (iii) collusive tendering. Again, competitors may raise pro-competitive or technological gains as a defence.

30 Preclusion and remedy of anti-competitive practices

What authority does the regulator (or regulators) have to preclude or remedy anti-competitive or manipulative practices?

Merger control

The adjudicating body must attempt to find an appropriate remedy to counter the anti-competitive effects of the merger. Conditions may be imposed which oblige the merged entity to divest part of its assets or comply with specified behavioural conditions.

In order for a divestiture to cure an anti-competitive merger, the purchaser must be able to manage the assets efficiently and compete effectively.

Behavioural conditions may include, inter alia:

- ring-fencing conditions to prevent exchanges of information as well as the establishment of compliance programmes to prevent collusion;
- conditions to ensure supply to vertically related firms where there are dangers of upstream or input vertical foreclosure; and
- conditions to protect the public interest. In this regard, moratoria on retrenchments are often imposed in order to protect employees and the Competition authorities have taken particular care to protect unskilled jobs by means of conditions.

The competition authorities may require senior executives to submit affidavits, written statements and/or detailed financial statements on an annual basis attesting to the firm's compliance with the conditions.

The primary sanction in the context of the merger notification regime is the imposition of an administrative fine on the merging parties. The Tribunal may also grant an interdict if the parties to a merger attempt to, or intend to, implement the merger without notification to the Commission. The Tribunal may further order a divestiture or declare void any provision of an agreement to which a merger was subject if the parties fail to give notice of the merger, or implement the merger without approval by the competition authorities or in contravention of a condition imposed.

The amount of the penalty imposed may not exceed 10 per cent of the merging parties' turnover in South Africa and their exports from South Africa for the preceding financial year.

Update and trends

- Renewable Energy – The Department of Energy (DoE) successfully concluded six separate bidding rounds of renewable energy IPP projects between 2011 and 2016, of which four rounds will have reached financial close by the date of this article. Although developers were awarded preferred bidder status for the most recent bidding round of the REIPPPP programme in April 2015, at the time of writing Eskom has still not signed PPAs with those preferred bidders and it is unclear when these projects will close. This could be seen as a setback to the credibility of the REIPPPP programme.
- Coal and Cogeneration – The DoE has also launched a cogeneration and coal baseload IPP programme. Two CBLIPPPP preferred bidders were announced at the end of 2016 and these projects are progressing towards the achievement of commercial close. It is not clear when these preferred bidders will be in a position to sign PPAs with Eskom.
- Gas to Power IPP Procurement Programme – In 2016, in the State of the Nation Address, the President confirmed that a request for proposals would be issued 'for the first windows of gas to power bids'. The Minister of Energy subsequently released a preliminary information memorandum for this programme in 2016, prior to the commencement of formal procurement processes. At the time of writing, the DoE has indicated that the Gas Utilisation Master Plan (GUMP) must be finalised prior to the issue of an RFP for the Gas to Power IPP Procurement Programme, but there is no clear indication as to when the GUMP will be finalised.
- Nuclear Energy Expansion Programme – As mentioned in question 8, the DoE has confirmed South Africa's intention to proceed with a nuclear energy expansion programme in the coming decade. As at the time of writing, the limited formal procurement process initiated in this regard has been set aside by way of a court order, but the DoE has indicated that it intends on recommencing the process afresh to ensure that all procurement is carried out in accordance with South African law.

Prohibitive practices

The Commission may initiate a complaint of its own accord if it has a reasonable belief that a firm has committed a prohibited practice or is abusing its dominant position in a market. It may also conduct a market inquiry into anti-competitive market conditions, without any complaint having been initiated.

The Tribunal has the power to make an appropriate order in relation to a prohibited practice, including the following:

- interdicting any prohibited practice;
- ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
- imposing an administrative penalty;
- ordering a divestiture of shares, interest or assets;
- declaring the conduct of a firm to be a prohibited practice so that a person who has suffered loss or damage as a result thereof, may institute an action for civil damages;
- declaring the whole or any part of an agreement to be void; and
- ordering access to an essential facility on terms reasonably required.

International

31 Acquisitions by foreign companies

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

There are no legislative prohibitions on foreign companies acquiring interests in IPPs operating in the electricity sector, but procurement and local empowerment legislation oblige IPPs to ensure that a minimum percentage of each project is owned, managed and controlled by historically disadvantaged South Africans. In addition, the contractual requirements applicable to the various IPP programmes stipulate that a prescribed percentage of the ultimate shareholders or beneficiaries in the IPP entity must be South African citizens. For instance, under the most recent bidding window of REIPPPP, South African ownership is set at a minimum level of 40 per cent, and under the Coal Baseload IPP Programme the requirement is for the project company to have at least 51 per cent South African ownership.

While there are no restrictions on non-residents owning shares in South African companies or owning local electricity assets, exchange control regulations require shares held by foreign shareholders to be endorsed as non-resident by an authorised dealer on behalf of the Reserve Bank and the prior approval of foreign loans by the Reserve Bank, to avoid problems in repatriating funds such as outbound dividends, interest, capital and loan repayments. The exchange control regime also prohibits loan account set-off between a South African company and its offshore parent.

South Africa also imposes a number of withholding taxes – most importantly, a holding tax on dividends paid by South African resident companies and on cross-border interest payments (both at a rate of 15 per cent, although rates are dependent on the existence of tax treaties).

32 Authorisation to construct and operate interconnectors

What authorisations are required to construct and operate interconnectors?

At present, there is no scope for privately owned IPPs located outside of South Africa to supply electricity to Eskom or to anyone else within South Africa.

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The South African Department of Energy is in the process of formulating rules for the development of cross-border, coal-fired generation plants that will undertake to supply electricity to Eskom, but these rules have not yet been finalised.

33 Interconnector access and cross-border electricity supply

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

There are presently no rules in place for private interconnector operations because Eskom Holdings SOC Ltd is the sole transmitter and distributor of electricity in South Africa.

The only cross-border supply of energy in South Africa occurs at a national level pursuant to the Southern African Power Pool (SAPP), which at present consists of only the national generation, distribution and transmission companies of each of its member states (with the sole exception of the Copperbelt Energy Corporation, operating in Zambia and Nigeria).

Transactions between affiliates

34 Restrictions

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

Subject to questions of competition law (see questions 26–30), there are no legislative restrictions on transactions between Eskom and its affiliates.

35 Enforcement and sanctions

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

There are no restrictions on utilities dealing with affiliates outside of the framework for anti-competitive behaviour discussed above.