

SPECIAL REPORT

FORUM: Energy investigations

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THIS ISSUE:
FEATURE
Private equity investment
in Latin America
SPECIAL REPORT
Energy & natural resources
ROUNDTABLE
Trends in biosimilars



**Trump's trade wars:
modest escalation or
economic meltdown?**

Concessions are needed to ensure that trade spats do not become trade wars.

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FORUM:

Energy investigations

FW moderates a discussion on energy investigations between Jostein Kristensen, Helen Jenkins and Sahar Shamsi at Oxera Consulting LLP.

THE PANELLISTS



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Jostein Kristensen focuses on market analysis and regulation in the energy and related infrastructure sectors. He advises companies, governments, investors and regulatory authorities on antitrust and regulatory investigations, commercial disputes and transactions. Within the energy sector, his work has covered coal, electricity (including renewable and nuclear generation), natural gas and oil.



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Dr Helen Jenkins has more than 20 years of professional experience in applying economic principles to issues of strategic importance for businesses, predominantly in the context of litigation and competition investigations. She has broad sectoral experience, including in energy, financial services, retailing, communications, media and pharmaceuticals. Helen has advised energy companies on issues relating to competition concerns across the industry value chain, and has also advised corporates throughout the extensive UK energy market investigation.



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Sahar Shamsi specialises in corporate finance, with a focus on the economic regulation of utilities, in particular in the energy sector. She has advised companies and regulators across the UK, Europe, the Middle East and Australasia. Ms Shamsi was seconded as a lead economic adviser to the UK Competition Commission (now the Competition and Markets Authority (CMA)) to advise on regulatory finance issues.

FW: How would you describe recent activity in energy investigations? To what extent have you seen an uptick?

Kristensen: We see a wide variety of energy investigations across various countries, jurisdictions and markets. The nature and scope of these investigations differ markedly according to the authority initiating or conducting the investigation. For example, one type of energy investigation is one that is initiated and conducted by the government, legislators or those directly appointed by them. These investigations are often concerned with significant adverse price movements, supply disruptions or perceptions of otherwise ‘unfair’ market outcomes. These investigations are often widely reported on and discussed in the media and other public fora. As a result, senior management from companies implicated in the investigation may be called upon to give evidence at public hearings. The technical expertise and sectoral experience of those leading these investigations may be limited, and there is likely to be political pressure to complete the investigation quickly in order to be seen to be implementing suitable remedies. There is a greater risk that further legislative or regulatory measures could be recommended, or that other investigations are initiated to take a more forensic look at specific issues or allegations of inappropriate conduct by market participants. Another type of energy investigation is one conducted by a regulatory authority with specific expertise in the sector, including the upstream fuels, energy infrastructure, and commodity and retail markets segments. These investigations are typically concerned with enforcement of existing laws, regulations or licence conditions that are designed to protect consumers and limit undesirable conduct by market participants, such as market manipulation, while also achieving government policy objectives. The form and substance of the regulatory authority’s investigation would be driven by its duties, which could include, for example, duties to promote competition. The investigatory procedures and enforcement powers of the regulatory

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authority are prescribed by statute, and these could encompass significant fines and other sanctions. The regulatory authority may also require extensive and detailed information to be disclosed by those companies or organisations that are being investigated, and there is likely to be a significant cost associated with gathering, analysing and presenting this information, and responding to calls for evidence. These investigations can take place over extended periods of time and companies or organisations being investigated may require expert legal, economic, financial and technical advice to minimise the risk that the regulatory authority does not analyse and interpret the facts incorrectly and in a manner that is adverse to the interests of those being investigated.

Jenkins: Investigations conducted by competition authorities are a variant of these, and typically they are focused on investigating suspected cartels and anticompetitive agreements, abuses of market power, and mergers. The European Union’s competition authority also enforces state aid law, which covers any government measure that has the effect of selectively advantaging a particular market participant and which risks distorting competition or trade within the EU. Competition authorities often have extensive enforcement powers and sanctions can

include very large fines, so the risks to those companies or organisations being investigated are significant.

Shamsi: There has been a steady and significant increase in activity across these three types of energy investigations over the last decade. This activity has also expanded to cover all segments of the energy sector. Moreover, as a growing number of countries embark on energy transitions to meet climate change and other environmental targets, energy investigations are expected to increase in frequency as the myriad effects of the adoption of new energy sources and technologies disrupt the political, regulatory and commercial status quo. Similar to other regulatory investigations, competition investigations can take a long time, and companies being investigated typically require extensive legal, economic and financial advice to minimise the risk of enforcement action.

FW: What are the main political and regulatory issues currently impacting the energy industry?

Kristensen: By their nature, regulatory investigations are usually initiated when it is apparent that something in the ‘energy system’ has gone wrong or is about to do so. There is then an intense desire on the

part of policymakers and regulators to be seen to be responding to the concerns of citizens and consumers by identifying the failings that gave rise to these concerns, developing suitable policy responses and regulatory reforms, and ensuring that consumers are suitably compensated.

Shamsi: In our experience, the political motivations for launching regulatory investigations are many and varied, but they are often related to concerns over the high price or sudden change in price of energy to industrial users or households, poor availability or otherwise unreliable energy supplies, or inappropriate conduct by one or more market participants. It is also fairly common for investigations to be initiated in response to events caused by an adverse unintended outcome arising from policies or regulations already in place, particularly those originally designed to meet political objectives, such as greenhouse gas emission reductions, greater use of renewable energy sources, or lower costs to consumers.

Jenkins: A number of countries have recently embarked on ambitious reforms to reduce their reliance on fossil fuels and to transition to more environmentally friendly energy sources and technologies. These energy transitions have ramifications for the wider energy system, and all segments of the energy sector can be significantly

affected. In particular, the complexity and challenges of coordinating multiple policy and regulatory reform processes increase the probability of unintended or unexpected market outcomes that can impose significant costs on a variety of users.

FW: Once an energy investigation is underway, what specific steps do companies and their representatives need to take?

Kristensen: Once an energy investigation is initiated, and ideally well in advance of this, companies clearly need to get up to speed with the nature of the complaint or allegation quickly and to devise a plan for how best to respond. In our experience, the early stage of an investigation is when mistakes are most likely to occur, and promises that cannot be met are most likely to be given.

Jenkins: In the early phase of an investigation, it is often extremely useful to secure access to relevant professional expertise. Expert advisers can help to anticipate the risks of pursuing certain arguments and they can provide robust analysis to ensure coherence and consistency in the narrative underpinning all future interactions with the investigating authority. Advisers can add strategic value by ensuring that the company is able

to navigate the traps and pitfalls of the investigation, while engaging constructively with the investigating authority. Procuring specialist advice will also ensure there is sufficient capacity to respond to the investigation without interfering unduly with day-to-day business.

Shamsi: Another step that is crucial for a successful outcome is for companies to engage at the earliest opportunity with the investigating authority. Well-designed and targeted meetings with the investigators are very useful in understanding the specific nature of the issues or conduct being reviewed and to demonstrate a company's commitment to assist the authority in its enquiries. It is also important to develop a work programme proportionate to risks and opportunities associated with the investigation, which is also something advisers can help with. For example, it is important for companies under investigation to collect information from across information systems and databases, and to conduct interviews with relevant staff in order to enable timely and internally consistent responses to the authority's likely disclosure requests. Once collected and analysed, this information can provide a sound basis for preparing future responses or disclosures that are also consistent with the narrative established early on. In our experience, a company is always better off giving evidence that is grounded in robust economic and financial analysis. It is also important to prepare to defend submissions, potentially also in public hearings. Again, this is something that expert advisers can help with, since they have encountered similar situations in the past. Finally, it is important to learn the lessons from any investigation – for example by reviewing the need for new or amended compliance programmes and other corrective measures or procedures.

FW: What do you believe is the outlook for energy investigations in the months and years to come? To what extent do you expect to see an uptick in compliance requirements from regulatory bodies, and

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HELEN JENKINS
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associated monitoring and enforcement activities?

Shamsi: In the years to come, we expect that there will continue to be a large number of energy investigations. Indeed, several features of energy sectors in many countries make them prone to such investigations. One example is the reliance on complex international markets and cross-border infrastructure for access to key commodities. Certain segments of the energy sector are also characterised by high levels of market concentration, where there may be limited opportunities for new market entry or demand-side substitution.

Kristensen: Similarly, volatile markets for key commodities such as oil and natural gas can heighten the risk of energy investigations of various kinds. I would also add that the energy sector is one where major policy reforms are increasingly seen as necessary to mitigate and adapt to climate change. These reform processes carry their own risks of

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adverse unintended consequences, which may then be the subject of future energy investigations.

Jenkins: These features suggest that regulatory and competition authorities, and potentially also policymakers, will continue

to view enforcement in the energy sector as a high priority. Accordingly, companies could mitigate the adverse impacts of these trends by focusing compliance efforts on political, regulatory and economic risk drivers. ■

OXERA

Oxera advises companies, policymakers, regulators, and lawyers on any economic issue connected with competition, finance or regulation. With 35 years of experience, Oxera's Energy practice provides trusted advisers to regulators, utilities, oil and gas producers, investors and trading companies on a wide range of regulatory, competition and market-design matters. Our energy experts work within the UK and Europe with regulatory authorities and for clients subject to investigation by national regulatory and competition authorities.

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