

LALIVE

Will France's conduct towards EDF generate a wave of investment arbitrations?



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1. EDF's current Woes in the midst of its Nationalisation

Last week, Électricité de France (**EDF**), the main electricity provider in France and one of the largest electricity companies in the world, sued France, its current majority shareholder, for compensation of EUR 8.34 billion. The company alleges it was forced to sell energy at a loss, as a result of the cap on energy prices introduced by France.^[1]

This news broke hot on the heels of EDF's announcement of an unprecedented loss of EUR 5.3 billion in the first semester of 2022, despite a 67.2% increase in revenue. EDF has blamed the loss on France's cap on energy prices and difficulties encountered with its nuclear portfolio.^[2]

These developments have occurred against the background of France's decision to fully nationalise EDF. On 4 August 2022, the French Parliament adopted a revised budget providing EUR 9.7 billion to acquire the remaining 16% share of the company not yet owned by the State, at EUR 12 per share. The transaction is planned to close in autumn 2022.

France's decision to nationalise EDF is part of its strategy to address the European energy crisis by giving it more say on the management and construction of nuclear power plants, development of renewable energy, and alleviating the company's financial burden.

The route to nationalisation is an unusual one. In essence, France is using a simplified take-over bid to squeeze out the minority, which is a mechanism offered to majority shareholders in French companies. The use of this mechanism stands in contrast to a classic nationalisation, which is normally achieved through specific legislation. Given that most of EDF's institutional shareholders are foreign, the pressure France is facing as a result of its conduct vis-à-vis EDF also raises questions about its obligations under various international investment agreements.

2. The Protection of Foreign Investments in France

Among the protections offered to foreign investments in France are those contained in international investment agreements, such as the Energy Charter Treaty (**ECT**), to which France is a party. These agreements protect foreign investors having made an investment in France, e.g., through the direct or indirect ownership or control of shares or debt of a company (e.g., ECT, Art. 1(6)), against certain State measures.

Under these investment treaties, foreign investors are protected against unlawful expropriation or nationalisation (e.g., ECT, Art. 13) and benefit from national and most-favoured nation treatments (e.g., ECT, Art. 10(3)). France also commits to provide fair and equitable treatment (e.g., ECT, Art. 10(1)), which is often interpreted as protecting legitimate expectations investors may be able to rely upon in relation to the French State.

These agreements may also provide access to investor-State arbitration, which offers investors an international forum (as compared to national courts to settle their disputes with the French State, e.g., ECT, Art. 26(3)).

3. Analysis

Given the fears about the continuity of energy supply in the prevailing geopolitical circumstances and its binding international environmental commitments, France's energy policy, including the nationalisation of EDF, can be seen as a legitimate exercise of its sovereign powers. Other States have intervened or are looking to intervene in the energy market. Whether France's interventions will generate disputes with investors under international investment agreements, and how such disputes would be resolved, depends on how France will implement its decision.

EDF's foreign shareholders will certainly not be pleased by the EUR 12 per share now offered, especially considering the original EUR 32 share price at the time of the 2005 privatisation. However, with a 53% premium offered on the pre-announcement market price, France will no doubt argue that it is providing adequate compensation that does not amount to an unlawful expropriation under international law (e.g., ECT, Art. 13).

Yet, considering EDF itself as well as certain current and former employee shareholders^[3] hold France responsible for the company's poor performance, foreign investors may be wondering whether they have been treated fairly and equitably (e.g., ECT, Art. 10(1)).

France will also be concerned to ensure that it does not treat shareholders differently according to their nationality. Were France to grant French shareholders higher compensation (e.g., to employee shareholders), this could discriminate against foreign shareholders in breach of its treaty obligations.

With the scheduled closing of the transaction this autumn, we can expect to see further debate and positioning of stakeholders over the coming weeks.

LA NATIONALISATION D'EDF ET LES DECISIONS FRANCAISES EN MATIERE D'ENERGIE : UNE PORTE OUVERTE POUR DES ARBITRAGES D'INVESTISSEMENTS CONTRE LA FRANCE ?

Read the article in French [here](#).

References

[1] M. Cessac, "EDF réclame 8,34 milliards d'euros à l'État pour combler le manque à gagner sur ses ventes d'électricité", *Le Monde*, 10 August 2022, (accessible at: lemonde.fr/economie/article/2022/08/10/edf-reclame-8-34-milliards-d-euros-a-l-etat-pour-combler-le-manque-a-gagner-sur-ses-ventes-d-electricite_6137655_3234.html).

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