

Yesterday. Today. Tomorrow.

Linklaters

Year in Review, Year to Come

French Law

December 2018



Year in review

French Law in 2018

Year in Review 2018 and Year to Come 2019 summarises some of the major developments in France last year, and a selection of key changes that we anticipate over the coming year.



Reform of contract law:

The reform of contract law, initially enacted by the Government in 2016, was endorsed by the Parliament. Rather than a “reform of the reform”, the Parliament adopted a limited number of changes aiming mostly at adjusting certain provisions which raised interpretation difficulties or were controversial, e.g. on multiple representation or non-negotiable contracts.

Ultimate beneficial owners registry:

The obligation for companies and legal entities registered in France, other than companies admitted to trading on a regulated market, to make a filing with the commercial court disclosing their ultimate beneficial owner(s) came into force in April.

New exception to the banking monopoly:

The long-awaited application decree authorised by the “Sapin 2” law to complete the 2017 ordinance (aiming to improve the legal framework applicable to French securitisation and debt funds and strengthen their ability to finance the economy and refinance investments, projects or risks) was finally published in November. It provides for the modalities under which the new category of financing vehicles encompassing existing securitisation vehicles and the newly introduced specialised financing vehicles are allowed to grant loans directly.

Technical and procedural adaptations further to the EU insolvency regulation:

In June, the Government enacted a set of measures adapting French law to the EU insolvency regulation. These notably (i) include enhanced publicity measures with a view to improving foreign stakeholders’ information, (ii) clarify the proof of claim process applicable to creditors located in another Member State and (iii) lay down a procedural framework for (x) the coordination of main and secondary insolvency proceedings, (y) the new prerogatives granted to the main proceedings’ insolvency practitioners to prevent the opening of secondary proceedings and (z) the coordination of insolvency proceedings of members of a group of companies.

Publication of the law for “a state in the service of a trustworthy society”:

In August, the French government adopted new legislation to foster a more “trustworthy society”. This law contains numerous provisions to simplify the bureaucratic process. A cornerstone of this legislation allows for the “right to make mistakes” without being punished, founded on the principle that members of the public and companies should be considered to be acting in good faith until proven otherwise. As an example, if the authorities discover that a business has made a genuine mistake in a tax return, the default interest imposed would be reduced by 30%. If the taxpayer realized his or her mistake, the penalty would be halved.

Merger control:

Following the public consultation on modernisation and simplification of merger control launched in autumn last year, the French Competition Authority (“FCA”) issued its opinion in June. The current thresholds are confirmed and the “transaction value threshold” is ruled out at this stage, but the FCA is considering the introduction of a new “ex-post” review (with some features of the Swedish or American regime, according to president De Silva). The FCA will issue its final recommendations by the end of 2018.

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Online advertising:

In March, the FCA published its opinion closing a vast sector-specific investigation into online advertising. The investigation concludes that this very complex market is characterised by a fragile competitive equilibrium. Following this inquiry, major players active in this sector may face scrutiny in the same way that the European Commission’s recent inquiry into online commerce has led to several antitrust probes.

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2018 highlights

GDPR came into force in May, bringing the biggest shake-up to European Privacy Law for 20 years, and was integrated it in the French data protection legislation in June.

2018 highlights

Big Data is one of the crucial concerns for competition enforcers, as illustrated by the FCA’s opinion on online advertising, the EC’s record fine on Google for abuse of dominance and the new joint project on algorithms launched by the FCA and the German Bundeskartellamt.

Google Android:

In July, the European Commission imposed a record EUR 4.34 billion fine on Google for exclusionary abuses of its dominant position in relation to its Android OS. This follows last year's EUR 2.4 billion fine in the Google Shopping case. Google is appealing the decision, but in the meantime has committed to removing the restrictions in relation to Android and plans to start charging manufacturers of smartphones sold in Europe a licence fee to access its Google Play app store.

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Gun-jumping:

Deal-makers must carefully monitor their compliance with the standstill obligation during the merger review process until clearance and closing of the transaction. In April, the European Commission issued a record fine of EUR 124.5 million on Altice for gun-jumping.

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Courting blockchain innovation:

Having allowed (in principle) distributed ledger technology (DLT) records to be used as evidence of title and transfer for unlisted securities at the end of 2017 ([Read more...](#)), France continued its efforts to position itself as a European hub for blockchain innovation – with new draft regulations and favourable tax measures.

Proactive regulation around crypto-assets:

Under the framework of the draft Loi Pacte (Pacte Law), France has been working to pass measures that (i) introduce an optional licensing regime for token issuances, (ii) introduce new regulatory regimes for a range of crypto-asset intermediaries, (iii) ensure issuers and intermediaries are not arbitrarily denied bank accounts, (iv) permit crypto-assets as eligible assets for French specialised professional investment funds and (v) introduce fast track registration processes for crypto custodians and exchanges.

Protection undisclosed know-how and business information:

In July, the bill was passed which transposed the EU Directive of June 2016 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure. The bill introduced for the first time into the French Commercial Code a definition of business secrecy and a set of protective rules of a civil nature, with several exceptions.

Integrating GDPR in national legislation:

In June, France modified the former personal data legislation by integrating the General Data Protection Regulation (GDPR) requirements into the national framework. While France has gold-plated the GDPR on a few topics (such as the right to information), it mostly aligned French law with EU provisions.

Tenant's legal pre-emption right in case of sale of the commercial premises is of public order:

Since 2014, in the event the landlord intends to sell commercial premises operated by a tenant under a commercial lease, the tenant benefits from a pre-emption right (subject to certain exceptions, including portfolio sales). The Supreme Court ruled in June that such pre-emption right was of public order, which had been a matter of debate until then, meaning that any waiver contained in a lease is deemed null and void. The Supreme Court outlined that the landlord shall liaise with the tenant as soon as it is contemplating the sale.

Implementation for labour law reforms:

This year saw the implementation in practice of many of President Macron's labour law reforms enacted as from September 2017. In particular, the merger of employee representative into the sole social and economic committee has been going on and will continue until 31 December 2019.

New OHADA laws and CCA arbitration rules:

The new OHADA arbitration and mediation laws and revised arbitration rules of the CCA came into force on 15 March.

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Achmea judgment:

In March, the CJEU handed down a much-anticipated judgment in *Slovak Republic v Achmea* on the compatibility of intra-EU bilateral investment treaties with EU law. Since then, there has been much debate about the scope of application and the implications of the judgment.

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Adoption of anti-fraud legislation:

In October, a new law related to the "fight against fraud" has been passed which aims to promote the better detection and apprehension of fraud, especially tax-related. The adopted text signals the end of the so-called "Bercy Lock" as it introduces the automatic transmission to the public prosecutor of all the most serious cases of tax evasion, the naming and shaming of tax offenders, the creation of a tax police and strengthened sanctions for fiscal frauds. It also extends the possibility of plea-bargain for tax offences and enables judicial agreements in the public interest (French DPA) for tax fraud.

Implementation of anti-corruption legislation:

The Anti-Corruption Agency (AFA) has already conducted dozens of controls on the implementation of compliance programs under the Sapin II law enacted in 2016. The AFA has published [the questions and documentation](#) that inspected companies will be expected to answer and provide, as well as [guidelines](#) on the implementation of the law. These publications alongside the experience of the first AFA's controls provide useful guidance for the implementation of compliance programs.

Year to come

French Law in 2019

2019 is expected to bring numerous changes for businesses, notably through the adoption of law on the growth and transformation of companies that is currently being examined by the Parliament and that will be an important milestone in the implementation of President Macron's business reform program after the reform of employment law in 2017.



Facilitating squeeze-out:

The implementation of going private takeovers is expected to be facilitated as a result of the lowering of the minimum ownership threshold required to implement a squeeze-out following a takeover. This threshold should be lowered from 95 per cent to 90 per cent of the target by the law on the growth and transformation of companies currently being examined by the Parliament (so-called "*loi Pacte*").

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Corporate law & corporate governance:

Several changes to corporate law are expected from the so-called "*loi Pacte*" (see above). The obligation for companies and their management to take into account the social and environmental issues raised by their business would be explicitly included in the general provisions of corporate law. Corporate governance related changes should include the introduction of pay ratio disclosures comparing executive compensation with employee average compensation, increased obligations towards gender equality in management bodies and employee representation at Board level. Also, new forms of entities would be created, such as B-corp type companies or foundations holding shareholdings in companies.

Prospectus regulation:

The remaining parts of the new EU Prospectus Regulation (PD3) are due to be implemented in July 2019. Key areas of change are the treatment of risk factors and the regime for secondary issuances. In a pragmatic approach, the French market authority has indicated that, starting from the first half of 2019, issuers can adapt their registration documents to the new requirements of the "universal registration document" in order to incorporate it by reference in its prospectus, base prospectus or supplement to the base prospectus for the purposes of issuing securities after July 2019.

Draft amendments to the ICSID Rules and Regulations:

ICSID released its proposed amendments to its rules and regulations in August 2018. A revised proposal is expected in 2019, further to comments from states and the public to be received by December 2018.

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Reform of the security law:

The so-called "*loi Pacte*" empowers the government to reform the security law by way of ordinance, within a period of 24 months. The objective is to simplify and to re-enforce the effectiveness of securities by supplementing and clarifying the reform carried out in 2006. The main changes concern in particular the reform of personal surety (*cautionnement*), the reintegration of the collateral security (*cautionnement réel*) in the regime of personal surety (*cautionnement*) and the recognition of an assignment of receivables (*cession de créance*) by way of guarantee.

Brexit and the loan market:

As EU/UK negotiations continue with many issues still to be resolved, market participants are focussed on the potential implications of a 'no deal' Brexit, with many organisations now starting to implement their contingency plans. A 'no deal' Brexit could entail certain UK institutions losing their passport to carry out banking transactions in France for example, which throws illegality, mitigation and transfer provisions into the spotlight. Other broader Brexit-related topics, such as potential issues with the recognition of judgments, are also relevant in a lending context.

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Foreign investment control:

The so-called "*loi Pacte*" currently examined by the Parliament will notably give French authorities much greater power to sanction non-compliance. A decree of 30 November 2018 considerably widened the scope for scrutiny of foreign investments. The European Commission has proposed a new regulation for investment screenings in the EU, which looks likely to become law in 2019.

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2019 highlights

The minimum ownership required to implement a squeeze-out following a takeover, which has been set at 95 per cent of the target for more than 20 years, should be lowered to 90 per cent.

2019 highlights

The scope of scrutiny of foreign investments was considerably widened in November 2018. Foreign investment regulations should be the subject of further amendments both at national and EU level in 2019.

Privatisations:

The French State is contemplating privatising *Aéroports de Paris* (ADP) and *Française des Jeux* (FDJ), which would be authorised by the so-called “*loi Pacte*” currently being examined by the Parliament. As part of the privatisation of ADP, ADP will be granted a 70-year concession. Regarding FDJ, the draft bill limits the duration of the FDJ’s monopoly for the exploitation of gambling to 25 years. The government will adopt by ordinance provisions reinforcing the State’s power in the gambling sector, by creating amongst other, a dedicated authority to control the sector. Regarding Engie, the draft bill authorises the French State to hold less than 33 per cent of the shares on a permanent basis, which allows it to sell additional shares.

Rewriting of the data protection act:

When integrating GDPR into its national framework, the French legislator chose to symbolically update the existing data protection law (dating back to 1978) rather than drafting a new bill from scratch. However, by using the existing wording as a basis, it introduced a certain number of uncertainties that have been criticized. A complete rewrite of the French data protection act is expected in early 2019, which will aim to fix the legibility and interpretation difficulties of the current framework.

Algorithms:

In June this year, the FCA and the German Bundeskartellamt launched a new joint project on algorithms. This confirms that Big Data is one of the crucial concerns for competition enforcers and also illustrates the existing close cooperation between the French and German institutions, which had already worked together on a joint paper on “Competition Law and Data” in 2016. The two enforcers are going to develop a typology of algorithms and analyse their potential anti-competitive issues.

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Settlement procedure:

In March this year the FCA opened a public consultation regarding the draft of its new procedural notice on settlements. It is expected that the new guidelines will be published in the next few months.

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More merger control procedural infringements expected:

In July 2017, the European Commission issued Statements of Objections to Merck/Sigma-Aldrich and General Electric for allegedly providing incorrect or misleading information during a merger review, and to Canon for the alleged early implementation of Toshiba Medical Systems Corporation before notification and clearance. The long-awaited decisions are expected in all three of these cases next year.

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Fintech regulations:

We expect that the adoption of the anticipated legislative measures (see Year in review) in the course of 2019 will begin to catalyse activity in the fintech space.

Reform of the judicial system:

The Government has submitted to Parliament a bill to reform the judicial system which would increase the resources dedicated to the judicial system and simplify civil and criminal procedures. The bill is expected to result in an increase in the powers of the police and public prosecutors to investigate offenses and is very contested by lawyers and certain judges associations who worry notably that it will restrict defense rights.

New set of interests deductibility limitation rules:

The draft 2019 Finance Bill, currently being discussed in the Parliament, transposes article 4 of the Anti-Tax Avoidance Directive (ATAD), by providing a new set of interest deductibility limitation rules, pursuant to which the deduction of net financial charges would, in substance, be limited to the higher of (i) 30 per cent of the taxpayer’s EBITDA and (ii) EUR 3 million per financial year (reduced to 10 per cent and EUR 1 million in case of thin-capitalised companies). This new set of rules would repeal certain former rules regarding interest payment deductibility, such as the 25 per cent general reduction (*Rabot*), some elements of the current thin-capitalisation rules, as well as the so-called *Amendement Carrez*.

Payment of personal income tax:

The entry into force of the payment of personal income tax by way of withholding tax (*prélèvement à la source*) on 1 January 2019 has been confirmed by the Government.

New tax treaty between France and Luxembourg:

France and Luxembourg have entered into a new double tax treaty, reflecting the new international conventional trends consistent with the OECD Model Tax Convention and the Multilateral Convention to Implement Tax Treaty Related Measures, signed by both jurisdictions. The new treaty significantly impacts certain real estate investment structures involving a combination of a French REIT (OPCI) and of a Luxembourg company. It will come into force after the ratification made by both countries, the process of which has just started in France.

Reduction of CIT rates:

Corporate income tax rates will be gradually reduced to 25 per cent in 2022.

Further reforms of employment law to reinforce France’s attractiveness:

The so-called “*loi Pacte*” aims at enhancing France’s attractiveness on an employment standpoint. Bad leaver/clawback provisions applicable to bonuses already granted/paid out related to the employee’s misbehaviour will be enforceable for material risks takers. Bonuses will be excluded from the material risks takers’ reference remuneration for the calculation of severance indemnities and other termination-related indemnities. In addition, impatriated employees (to France) would have the ability to ask, through a joint request with their employer, not to be affiliated to the French mandatory social security schemes related to base and complementary pension, under certain conditions (possibly with retroactive effect to impatriation as from July 2018). Finally, the law intends to simplify headcount thresholds, i.e. the thresholds at which obligations apply, based on the company’s headcount, which would affect a wide number of labour, social security, and fiscal payments and entitlements.

Singapore Convention:

The UN Convention on International Settlement Agreements Resulting from Mediation (known as the Singapore Convention) will be signed in August. Once it is into force, settlements reached through mediation will be enforceable internationally just like arbitral awards.

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Protection of French companies facing extraterritorial or administrative proceedings:

In the upcoming weeks, two French Parliament members will hand over to the French Prime Minister their proposals to improve the protection of French companies facing extraterritorial judicial or administrative proceedings. They are expected to make concrete legislative proposals concerning, in particular, the French Blocking Statute. The question of the application of legal privilege to in-house lawyers should also be addressed.

What now?

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