

Yesterday. Today. Tomorrow.

Linklaters

**Year in Review,
Year to Come**
German Law

December 2018



Year in Review

German Law in 2018

2018 saw a significant number of milestones in corporate and commercial legislation and jurisprudence. Further important developments occurred in banking and financial markets and new tax related reforms were initiated.



Corporate and Commercial

Draft Bill for Implementation of amended EU Shareholder Rights Directive:

The long-awaited draft bill was published in October 2018. The new legislation will bring significant changes to German stock corporation law in 2019, in particular an extension of “say on pay” provisions, a restriction on related party transactions and further transparency requirements.

Employee Co-Determination in a German Societas Europaea (SE):

Several courts have ruled on the question of which co-determination regulation should apply in cases of a German stock corporation changing its corporate form to become an SE. The results have varied and there is no Federal High Court decision yet.

Amendments to Corporate Reorganisation Act:

The German government has proposed to permit cross-border mergers between EU entities and German commercial partnerships in order to allow, in particular, a merger of a UK Limited into a German company to continue post-Brexit.

EU Company Law Package:

The EU Commission has published two draft directives on (i) the use of digital tools in company law and (ii) cross-border conversions, mergers and divisions. Both draft directives are set to amend the current directive on certain aspects of company law.

Fifth EU Anti-Money Laundering Directive:

The amended EU AML Directive came into force in July and has to be implemented by January 2020. The access to beneficial ownership information of corporate entities will be extended to any member of the general public without specific legitimate interest.

Merger Control:

Deal-makers must carefully guard their standstill obligation during the merger review process until clearance and closing of the transaction. In April, the EU Commission issued a record fine of € 124.5 million for gun-jumping. Both the ECJ and the German Federal Supreme Court provided further guidance on the suspension obligation in the *Ernst & Young* and *Edeka/Tengelmann* cases.

[Read more here](#) and [here](#).

Foreign Investment Control:

After having strengthened its rules on investment control in 2017, the German government confirmed its intention to tighten the rules even further. This might involve lowering the threshold to review acquisitions by non EU-Investors from 25 to 15 per cent of voting rights.

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Group insolvency:

The law for facilitating insolvency proceedings for group entities came into force in April. It aims at alleviating the legal and practical difficulties where two or more group entities become insolvent.

Achmea judgment:

In March, the ECJ handed down a much-anticipated judgment on the compatibility of intra-EU BITs (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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Collective redress:

In April, the EU Commission proposed a “Directive on representative actions for the protection of the collective interests of consumers” that shall introduce a right of collective redress across the EU. Moreover, taking effect in November, the German Code of Civil Procedure was extensively amended by introducing instruments of collective redress for consumer-related disputes. Qualified organisations are now entitled to file a model case with binding effect for common questions of fact and law. It remains to be seen what impact the legislative project of the EU, when completed, will have on German law.

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Constitutional Court on legal privilege:

The Federal Constitutional Court has upheld a ruling by a regional court which had allowed the prosecutor’s office to search the Munich offices of a US law firm and secure documents pertaining to Volkswagen’s internal investigation into the “diesel emissions scandal”.

2018 highlights

Deal-makers must carefully guard their standstill obligation during the merger review process due to record fines of the EU Commission.

2018 highlights

Collective redress provisions for consumer related disputes were introduced in the German Code of Civil Procedure in November.

DIS Rules 2018:

The German Institution of Arbitration (DIS) revised its arbitration rules in March. The reform modernised and internationalised the existing DIS rules.

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GDPR and new FDPA:

The EU General Data Protection Regulation (GDPR) applied in all Member States since 25 May 2018. On a national level, a new adapted Federal Data Protection Act (FDPA) came into force which included, *inter alia*, new guidelines on dealing with employee data.

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ePrivacy Regulation:

A new EU ePrivacy Regulation further strengthening data subjects' rights in the internet and telecoms sector is currently being adopted and was originally intended to apply simultaneously with the GDPR. The final Regulation is expected in 2019 or even 2020.

ECJ on Standard Contractual Clauses:

The Irish High Court has referred the Standard Contractual Clauses to the ECJ for resolution as their validity as a data transfer instrument has been questioned by data protection activist Max Schrems.

Maternity Protection Act:

Maternity protection provisions were reformed and now cover not only women who are in an employment relationship but also, for example, managing directors of a German GmbH.

Company Pensions Strengthening Act:

The reach of company pensions provisions was extended in January. Employers now have the option to agree certain defined contribution commitments with employees.

Energy Law:

The so-called coal-commission is investigating how to phase out lignite and hard coal power generation. Congestion management of electricity flows was introduced at the German-Austrian border.

EU Electronic Communications Code:

In June, the European Parliament and the EU Council agreed on a comprehensive set of rules including, *inter alia*, measures to stimulate investment in and take-up of very high capacity networks, new spectrum rules and provisions on consumer protection. Once formally adopted, member states will have two years to adopt the necessary provisions that put the directive into practice.

Banking and Financial Markets**Baumeister ruling of the ECJ:**

The ECJ ruled that not all information contained in a file of a supervisory authority can necessarily be classified as confidential and thus withheld. Furthermore, the confidential character of a document is generally lost after at least five years.

EBA Guidelines on outsourcing:

The European Banking Authority (EBA) has consulted on its first draft of new outsourcing guidelines. The guidelines supersede the CEBS guidelines from 2006 and stipulate outsourcing rules for credit institutions, investments firms, payment services institutions and e-money-institutions. The finalised version is expected to be published mid-2019.

MiFID II:

The Markets in Financial Instruments Directive (MiFID II) as well as the national implementation applied in 2018. The start was less bumpy than expected. However, according to the market there is still need for improvement.

Prospectus Regulation:

The new EU Prospectus Regulation will apply from mid-2019. In 2018, the EU legislator worked on the Level II and III acts that specify the form and content of prospectuses, the EU growth prospectuses and the scrutiny and approval of prospectuses.

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Benchmark Regulation:

The EU Benchmark Regulation has applied in its entirety since January 2018. Most of the Regulation's Level II and III measures were finalised during 2018. Benchmark administrators may now register to vote in January 2020 and users of benchmark have to analyse their fallback mechanisms.

Covered Bond Initiative:

The EU Commission has published a proposal for (i) a Directive defining the structural characteristics of covered bonds and (ii) a Regulation introducing targeted amendments to the CRR in order to strengthen the conditions for granting preferential prudential treatment to covered bonds. The European Parliament and Council have not agreed on an official position yet.

PRIIPs Regulation:

The EU PRIIPs Regulation which creates the obligation for retail investors to publish short key information documents for numerous financial (repackaged) and insurance products has applied since January 2018. The scope of the Regulation has been subject to extensive discussions between market participants, but also between ESMA and the EU Commission.

Tax**German Annual Tax Act:**

The "Annual Tax Act" (Act preventing loss of VAT revenue on trade in goods on the internet and amending further tax provisions) as passed by the Federal Council at the beginning of November amends, *inter alia*, the tax exemption of restructuring gains as well as the loss deduction for corporations. In March 2017, the Federal Constitutional Court decided, with respect to the loss deduction, that the proportionate expiry of losses of a corporation in case of a share transfer of more than 25 per cent up to 50 per cent was unconstitutional. The legislative process is expected to be completed by the end of 2018. The Act is in principle intended to come into force on 1 January 2019.

[Read more...](#)

2018 highlights

GDPR and new FDPA raised the level of data protection compliance requirements for businesses.

Year to Come

German Law in 2019

2019 holds a range of proposed updates to corporate and commercial legal developments. We further expect various significant regulations for the banking and financial markets sector as well as a number of important tax reforms.



Corporate and Commercial

Implementation of amended EU Shareholder Rights Directive:

The Directive shall be implemented by June 2019 and will bring significant changes for German stock corporations. The main issues are (i) an extension of the “say on pay” provisions, (ii) a restriction on related party transactions, (iii) further transparency in relation to institutional investors and the identification of shareholders.

Corporate Governance Code:

The Government Commission suggested a fundamental revision of the Code in 2019 (in line with the implementation of the EU Shareholder Rights Directive), including provisions on the independence and remuneration of board members.

Proposed new rules on allegedly unlawful shareholder resolutions:

The 2018 German Lawyers Conference has proposed new rules on how shareholder resolutions – in particular of larger stock corporations – can be challenged in court. The federal government intends to review the current regime.

New edition of the Issuer Guideline:

The Federal Financial Supervisory Authority (BaFin) is expected to publish further modules of the new edition of the Issuer Guideline for German and foreign issuers whose securities are admitted to trading on a German stock exchange. The update is necessary due to recent changes such as the amendments to the Transparency Directive and the Market Abuse Regulation.

EU Foreign Investment Control:

The EU Commission proposed a new Regulation for investment screenings in the EU which includes (i) a framework for screening by member states, (ii) a co-operation mechanism between member states and the Commission and (iii) a Commission screening for EU projects. The adoption of the Regulation is expected in spring 2019.

[Read more...](#)

Reform of abuse of market power provisions:

Following the EU Commission’s record fine of € 2.4 billion on Google in June 2018 and the German Federal Cartel Office’s ongoing proceedings against Facebook, German authorities are investigating how to adapt abuse of dominance rules to protect competition on data-based markets and digital platforms within the framework of an upcoming 10th amendment to the German Act Against Restraints of Competition.

Pre-Insolvency Restructuring:

Published in 2016 as a key deliverable under the Capital Markets Union Plan, the EU Commission’s proposal for a directive on preventive restructuring frameworks is likely to enter into trilogue meetings soon and is planned to be agreed by April 2019. It aims at ensuring that viable companies in financial difficulties have access to effective preventive restructuring outside insolvency proceedings.

Singapore Convention:

The UN Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention”) is expected to be signed. Once the Convention comes into force, settlements reached through mediation will be enforceable internationally just like arbitral awards.

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Trade Secrets Act:

The Trade Secrets Act implementing the respective EU Directive (2016/943) is expected to come into force in 2019. It will bring substantial changes to the way business know-how and information are protected in Germany.

ePrivacy Regulation:

The EU ePrivacy Regulation might come into force in 2019. It will be specifically adapted to the GDPR provisions and will apply in the area of electronic communications services. The Regulation still needs to undergo trilogue negotiations and is very disputed; therefore, it is unclear when it will be finalised.

2019 highlights

The implementation of the EU Shareholder Rights Directive will bring significant changes for stock corporations.

Bridge Part-Time:

Legal entitlement to part-time work for a limited period of time comes into force on 1 January 2019. This means that employees can return to their previous working hours after a part-time phase.

Part-Time and Limited Term Employment Act:

The coalition agreement stipulates that employers with more than 75 employees shall only be allowed to employ a maximum of 2.5 per cent of the total workforce on fixed-term contracts without an objective reason. Legislative procedures have not been initiated yet.

Energy Law:

Fees and surcharges on electricity are expected to fall for some industrial consumers but will probably rise for households as the way costs are allocated will change.

Rollout of high-speed networks:

The government plans to introduce new rules protecting publicly subsidised fibre optic networks ensuring open and non-discriminatory network-access from third party applications aimed at co-laying components of digital high-speed networks.

Banking and Financial Markets**EDIS:**

The proposed European Deposit Insurance Scheme (EDIS) is still quite a controversial and highly political topic. Discussions were slow even with new alternative proposals from the Bulgarian (reinsurance model) and Austrian (hybrid model) presidency on the table.

IFD/ IFR:

The EU Commission proposed a new regulatory framework for investment firms based on recommendations of the European Banking Authority (EBA). The trilogue negotiations are supposed to start early in 2019 in order to reach an agreement by the end of the legislative term in April.

Omnibus 3:

The drafts of the Omnibus 3 proposals, which include amendments to MiFIR and MiFID II, the Prospectus Regulation and the Benchmark Regulation, were revised in 2018 and now also include changes to the Anti-Money-Laundering-Directive. The EU Commission proposes to give EBA more competencies with regard to AML topics in the financial sector.

Reform of Banking Regulation:

The trilogue negotiations on CRR II, CRD V, BRRD II and SRMR II are still in process and a final enactment is expected in 2019. These acts are also intended to implement the Basel III standards, which were finalised in December 2017.

Prospectus Regulation:

The new Prospectus Regulation will apply from mid-2019.

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STS securitisation and amendment on CRR:

The regulations on securitisations are part of the Capital Markets Union Action Plan and came into force at the end of 2017. They will apply from the beginning of 2019 and introduce, *inter alia*, a new quality category of true sale securitisations (simple, transparent and standardised) that aims at making the securitisation market more transparent.

EMIR Review:

The European Market Infrastructure Regulation (EMIR) is further subject to review, and the trilogue meetings that have started regarding one part of the review will continue in 2019.

Resolution on CCPs:

The EU Commission proposed new rules which require Central Counterparties (CCPs) to draw up recovery plans, including measures to overcome any form of financial distress which would exceed their default management resources and other requirements under EMIR. The trilogue negotiations have not yet started, but are expected to begin at the end of 2018, or the beginning of 2019.

Tax**Foreign Tax Reform/ATAD:**

In the context of the transposition of ATAD I/II into national law, it is intended to further amend the Foreign Tax Act, in particular with respect to the add-back taxation and the low tax rates of currently 25 per cent.

Brexit Accompanying Tax Act:

The Act contains provisions intended to prevent detrimental tax consequences occurring, merely as a result of Brexit, with respect to circumstances that have already been implemented by the taxpayer in the past ("*Brexit as a harmful event*"). The Act shall become effective as from 29 March 2019, irrespective of whether a possible exit agreement with the EU will provide for a longer transitional period.

Real Estate Transfer Tax Reform:

In June 2018, the ministers of finance of the federal states took a decision to reform Germany's real estate transfer tax with respect to tax planning schemes.

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Real Estate Tax Reform:

In April 2018, the Federal Constitutional Court declared the real estate tax base which depends on the assessed values of the year 1964 as unconstitutional. The legislator is supposed to take a new regulation by the end of 2019.

DAC 6:

The EU Council Directive on disclosure rules in relation to cross-border tax planning arrangements (DAC 6) that came into force on 25 June 2018 is supposed to be implemented into national law by 31 December 2019. Germany is currently working on the implementation act. A first draft for discussion has already been prepared.

2019 highlights

The new Prospectus Regulation will apply in all EU member states from mid-2019.

2019 highlights

Future planning of M&A deals will have to take into account the suggested real estate transfer tax reform.

What now?

Your contacts

We hope that you have found this guide useful.
Please contact your usual Linklaters contact, if you would like to discuss any of these matters further.



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