

Yesterday. Today. Tomorrow.

Linklaters

Year in review,
Year to come
Swedish Law

December 2018



Year in review

Swedish Law in 2018

2018 was a busy year, with a number of important new legal developments in Swedish law. Some were home-produced; others were EU related.



Revised takeover rules:

Revised takeover rules for Nasdaq Stockholm and Nordic Growth Market NGM came into force in April. One important change is that an offeror must now withdraw its offer as soon as possible or apply for a dispensation from the Swedish Securities Council (Sw. *Aktiemarknadsnämnden*) if it becomes evident that the required regulatory approvals will not be received within the maximum nine-month acceptance period. Another change is that an offeror that has withdrawn its offer due to the rules on the maximum acceptance period and subsequently receives the required regulatory approvals is permitted to return with a renewed offer, without prejudice to the general rule that a new offer may not be submitted within 12 months of the previous offer.

Google Android:

In July, the European Commission imposed a record €4.34 billion fine on Google for exclusionary abuses of its dominant position in relation to its Android OS. This follows last year's €2.4 billion fine in the Google Shopping case. Google is appealing the decision, but in the meantime has committed to remove 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 under the EUMR:

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 €124.5 million on Altice for gun-jumping.

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The general data protection regulation:

This applied across the EU as of May marking the biggest shakeup of European privacy laws for 20 years with new obligations for businesses, new rights for individuals and new enforcement powers for regulators. The Swedish Personal Records Act (Sw. *personuppgiftslag (1998:204)*) was repealed and a new Data Protection Act (Sw. *lag (2018:218) med kompletterande bestämmelser till EU:s dataskyddsförordning*) came into force supplementing

the GDPR. The Data Protection Act i.a. stipulates that children at the age of 13 may consent to certain types of data processing and that sanctions can be imposed also on authorities acting in breach of the GDPR. The act also includes provisions on confidentiality and appeal of the regulator's decisions.

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Board members' liability when a company has been declared bankrupt:

During 2018 the Swedish Supreme Court dealt with the question of whether board members' liability according to Chapter 25 Section 18 paragraph 1 of the Swedish Companies Act, which arises from failure to prepare a balance sheet for liquidation purposes or failure to fulfil the other obligations pursuant to Chapter 25 of the Swedish Companies Act, can extend to after the company is declared bankrupt and if a board member therefore can be held liable for commitments incurred by the company after it has been declared bankrupt. Chapter 25 of the Swedish Companies Act deals with liability in the event of liquidation, and the Supreme Court concluded that the same rules apply also in the event of bankruptcy, meaning that a board member cannot be held liable in the described situation.

Enhanced protection for trade secrets:

A new act on the Protection of Trade Secrets (Sw. *lag (2018:558) om företagshemligheter*) came into force in July in order to implement the EU directive 2016/943/EU. The new act ensures a more extensive protection for trade secrets and i.a. strengthens confidentiality during court proceedings, increases the penalty for industrial espionage and extends the liability for damages due to infringement of trade secrets.

2018 highlights

Revised takeover rules for Nasdaq Stockholm and Nordic Growth Market NGM came into force in April.

A modernised Administrative Procedure Act:

In July a new Administrative Procedure Act (Sw. *förvaltningslag (2017:900)*) came into force. The act is intended to strengthen individual rights and due process in the administrative procedure and will further establish administrative law principles evolved in case law. The act also introduces a remedy for lengthy procedures.

New act on insurance distribution:

The Swedish implementation of the EU Insurance Distribution Directive (EU/2016/97) has resulted in the Insurance Distribution Act (Sw. *lag (2018:1219) om försäkringsdistribution*), which replaces the Insurance Mediation Act (Sw. *lagen (2005:405) om försäkringsförmedling*). The new act, which came into effect in October, mainly contains provisions that apply to insurance intermediaries and insurance companies when distributing insurance.

PSD2:

The Payment Service Directive (EU/2015/2366) was implemented through amendments to the Swedish Payment Services Act (Sw. *lagen (2010:751) om betaltjänster*) in May. The purpose is to develop the market for electronic payments while strengthening the requirements for safety and efficiency. Changes include e.g. new reporting requirements for providers of payment services and rights and obligations regarding access to information concerning payment accounts.

Proposed new creditor class in the Swedish order of priority for creditors:

As part of the Swedish implementation of the EU Directive (EU) 2017/2399 amending directive 2014/59/EU, receivables in a new credit class will entitle right to payment after unsecured receivables but before subordinated claims. This relates to claims that are attributable to non-derivative debt instruments or derivative instruments whose initial maturity is at least one year (under certain circumstances). The new act is due to come into force in December.

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MiFID II and MiFIR:

MiFID II and MiFIR started to apply in January. The Swedish implementation has resulted in extensive changes to existing legislation, with further specifications implemented through regulations issued by the Swedish Financial Supervisory Authority (Sw. *Finansinspektionens föreskrifter*) (FFFS 2017:2).

Sanctions:

In August, the European Commission updated the EU Blocking Regulation in light of US extra-territorial secondary sanctions re-imposed in connection with Iran.

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Prospectus liability:

In September, in the case of *Löber*, the CJEU returned to the question of where jurisdiction, under the Brussels I Regulation, may sit for claims brought in tort/delict, against EU domiciled issuers, by secondary market purchasers of interests in securities.

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Immediate taxation when consolidating funds:

The Council for Advance Tax Rulings (Sw. *Skatterättsnämnden*) has in an advance ruling from January held that a consolidation of a foreign special fund and a foreign alternative investment fund, both registered in Luxembourg, shall not fall under the exemption from immediate taxation applicable to mergers of securities funds or special funds. Shareholders of such funds should therefore report capital gains in case of a consolidation.

Carried interest taxed as income from closely held companies:

In June, the Swedish Supreme Administrative Court passed a decision in favour of the Swedish Tax Agency, meaning that carried interest will be taxed according to the rules on qualified shares in closely held companies (Sw. *fåmansbolag*) and will in part be considered employment income and subject to higher progressive tax rates.

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Interest on reimbursed withholding tax:

In June, the Swedish Supreme Administrative Court passed a decision on whether a taxpayer has the right to interest on reimbursed withholding tax. The Court held that the right to interest only exists when withholding tax has been levied in breach of EU law or the EEA Agreement and is reimbursed as a result of such violation.

Taxation of M&A insurance:

In June, the Swedish Supreme Administrative Court passed an advance ruling on whether a premium paid for an M&A insurance relating to a share transaction should be added to the acquisition cost for the shares or if it should be immediately deductible as a business-related expense. The Court held that the insurance was not part of the share transaction and that the premium should therefore be directly deductible. Following the ruling the Swedish Tax Agency has released a statement in which it held that any compensation paid out under an M&A insurance should be taxed as regular business income.

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Consolidating group contribution not considered tax evasion prior to internal restructuring:

In October, the Swedish Supreme Administrative Court passed an advance ruling on whether a tax consolidating group contribution (Sw. *koncernbidrag*) can be made prior to an internal restructuring that would entail that the right to tax consolidation will cease. A group contribution made prior to an external divestment of a company is generally seen as tax evasion under the Swedish Anti-Tax Avoidance Act (Sw. *skatteflyktslagen*), but the Court ruled that a group contribution made prior to an internal restructuring should not be considered tax evasion as long as the companies involved are still within the same group following the restructuring.

“GDPR applied across the EU marking the biggest shakeup for European privacy laws for 20 years.”

Year to come

Swedish Law in 2019

2019 is likely to see significant changes as proposals and consultations launched in 2018 take more solid form.



Foreign investment control:

The European Commission has 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 new regulation looks likely to become law in 2019.

Pay in the financial sector:

Negotiations on the European Commission's proposals for a new prudential framework for investment firms with new remuneration rules should be concluded by the end of Q1 in 2019. Member states will have some time to transpose the provisions to national law. The negotiations on the Commission's proposals to amend the EU bank prudential rules, including potentially extending the bonus cap, are expected to be concluded shortly, with adoption in 2019 and a likely phase-in period of 18 months.

Shareholders rights directive:

The Swedish implementation of the EU Shareholder Rights Directive is due to come into force in June, resulting in, among other things, 'say on pay' rules and a new chapter in the Swedish Companies Act regarding a special decision-making arrangement for "significant transactions with related parties". Transactions with a related party with a value exceeding SEK 1 million which corresponds to at least 1 per cent of the company's value shall be subject to shareholder approval.

Shareholders' right to request items on the agenda restricted:

The implementation of the EU Shareholder Rights Directive in June also proposes that the shareholders' right to request items to be included on the agenda of the general meeting in public limited companies should be restricted. The board of directors shall only be obliged to include items on the agenda if owners of at least 1/10,000 of all shares in the company or at least 25 of the company's shareholders stand behind the inclusion of an item.

Leo rules amendment:

In addition to the implementation of the EU Shareholders Rights Directive in June, the so-called Leo rules are due to be amended, entailing, among other things, that the rules of majority are reduced from nine-tenths to two-thirds of both the votes cast and the shares represented at the general meeting.

Review of the Swedish Corporate Governance Code:

The Swedish Corporate Governance Board (*Sw. Kollegiet för svensk bolagsstyrning*) has initiated a major review of whether the Swedish Corporate Governance Code (*Sw. Svensk kod för bolagsstyrning*) is still relevant and up to date, starting with a number of round table discussions with Swedish and foreign Code users. The board's plan is to present proposals for any required revisions in the coming year.

ePrivacy regulation:

During 2019 the EU is expected to adopt this regulation which supplements the General Data Protection Regulation and contains specific rules on the use of cookies and electronic marketing.

Proposed EU copyright directive:

The EU has proposed a controversial new directive which will reform online copyright by, among other things, placing greater liability on platforms that allow users to share content.

2019 highlights

The Swedish implementation of the EU Shareholder Rights Directive is due to come into force in June.

Modernisation of the Arbitration Act:

In August 2018, the Swedish Government put forward a bill which aims to modernise the Arbitration Act (Sw. *lag (1999:116) om skiljeförfarande*). The amendments are due to come into force in March and adapt the act to multi-party arbitration, introduce the possibility to appeal decisions regarding the arbitrators' competency to the Court of Appeal and limit the time period under which a party may challenge an arbitral award from three to two months.

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EU insolvency harmonisation directive:

The EU is expected to agree its position on the proposed EU directive on business insolvency reform (the EU insolvency law harmonisation project). It would provide new legal tools to rescue viable businesses in distress and give honest but bankrupt entrepreneurs a second chance. [Read more... here and here.](#)

EU NPL reforms:

In March 2018, the European Commission published a draft directive and regulation, aimed at accelerating the reduction of NPLs in Europe. The proposals in the draft directive would require implementation by 2021.

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Prospectus regulation:

The remaining parts of the EU prospectus regulation are due to be implemented in July. Key areas of change will be the exemptions from the requirement to produce a prospectus, the treatment of risk factors and the regime for secondary issuances.

EU securitisation regulation:

The regulation which consolidates existing risk retention, disclosure and due diligence requirements and establishes a new regime for simple, transparent and standardised (STS) securitisations will apply from January.

Proposed additional provisions to the EU regulation on reference values:

It is proposed that the current act on additional provisions to the EU regulation on reference values (Sw. *lagen (2017:1185) med kompletterande bestämmelser till EU:s förordning om referensvärden*) will be repealed and replaced by a new act with the same name in January. The proposal includes provisions on e.g. the Swedish Financials Supervisory Authority's ("SFSA") (Sw. *Finansinspektionen*) investigative and supervisory powers, on interventions and penalties for violations of the regulation, as well as on fees to finance the SFSA's activities under the new act.

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New rules on interest deduction limitations:

As a result of the EU Anti-Tax Avoidance Directive (ATAD), new rules on interest deduction limitations within the corporate sector will come into force in January. Under the new rules, the right to deduct a company's negative net interest is limited to 30 per cent of its tax EBITDA. The rules will be combined with a reduction of the corporate income tax rate from the current rate of 22 per cent to 21.4 per cent in 2019 and to 20.6 per cent in 2021.

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Revision of the Swedish CFC rules:

In November, the parliament passed a proposed revision of the Swedish CFC rules, with effect in January, to ensure that the Swedish CFC rules are in line with the EU Anti-Tax Avoidance Directive (ATAD). The revised rules include (i) a revised definition of associated persons; (ii) elimination of double-taxation when a taxpayer disposes of its participation in a CFC; and (iii) amendments to the current whitelist. Notable changes to the whitelist include a complete exclusion of Malta, an exclusion of certain Luxembourg income and an exclusion of certain Swiss income.

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18 per cent tax on gambling revenue:

A new gambling regulation act will come into force in January. The act will mean that anyone operating in the Swedish gambling market must have an authorised licence. From a tax perspective, gambling subject to licensing will be subject to an 18 per cent tax on generated gambling revenue. Gambling for non-profit purposes will continue to be tax exempt.

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New rules on PAYE return:

New rules on per employee reporting will apply for all employers subject to Swedish reporting in January. The per employee reporting, known as the PAYE return, will be combined with the existing monthly filing of aggregate remuneration but will replace the annual income statement that has been used to date.

“...Leo rules are due to be amended, entailing, among other things, that the rules of majority are reduced from nine-tenths to two-thirds of both the votes cast and the shares represented at the general meeting.”

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.



Fredrik Lindqvist
Partner
Head of M&A Corporate
Tel: (+46) 8 665 6621
fredrik.lindqvist@linklaters.com



Elisabet Lundgren
Partner, M&A Corporate
Tel: (+46) 8 665 6777
elisabet.lundgren@linklaters.com



Magnus Lidman
Partner
Head of M&A Real Estate
Tel: (+46) 8 665 6740
magnus.lidman@linklaters.com



Niclas Widjeskog
Partner
Head of Dispute Resolution
Tel: (+46) 8 665 4140
niclas.widjeskog@linklaters.com



Patrik Björklund
Partner
Head of Banking & Finance
Tel: (+46) 8 665 4130
patrik.bjorklund@linklaters.com



Ebba Perman Borg
Counsel
Head of Tax
Tel: (+46) 8 665 4138
ebba.borg@linklaters.com



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