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PUBLIC LAW

THE 2018 COALITION AGREEMENT – CONSTITUTION, PUBLIC ADMINISTRATION AND ENVIRONMENT

Coalition agreement content relating to constitutional law

In various ways, the coalition agreement provides for constitutional changes and/or regulations that raise constitutional issues.

- › The most important change to the constitution concerns education. To date in Germany, there has been a ban on cooperation in education between the Federal Government and the regional states. Under the heading “Strengthening Education, Research and Digitalization” (margin no. 1120 et seq.), this ban is to be largely dropped in favour of the Federal Government and its financial options. The changes planned here recall earlier constitutional changes or infringements where the Federal Government was seen as dictating the terms of its financial assistance to the regional states.

As regards general education and schools, Article 104c German Basic Law (the *Grundgesetz*, Germany’s constitution) is to be amended to favour Federal funds for schooling. Although the coalition agreement states that the regional states’ responsibility for education is to be retained, schools as a whole are to be opened up to fundamental changes. These range from the legal right to all-day care for all children of primary school age, to investments in all-day schools and care arrangements, to standard rules for qualifying teaching staff, to curricula in all programmes, through to a campaign to increase investments in schools. Professional and further training are also to be modernized, through a constitutional change within the framework of Article 104c German Basic Law. At both general secondary schools as well as all *Gymnasien* (academically oriented selective schools), professional orientation is to be strengthened through collaborations between the Federal Government and regional states. There will also be significant changes to financial support for students (known in Germany as *BAföG*).

All of this will also impact business and companies. Above all, therefore, it is important that business and companies be involved appropriately in the specific measures proposed. From the current text of the coalition agreement, however, it is not evident whether and to what extent such involvement or rights to be involved are intended. This is something that will need to be watched carefully.

- › Constitutionally, the German Basic Law provides for children’s rights to be introduced (margin no. 322). For the most part to date, discussions of such children’s rights have been critical of their incompatibility with previous provisions in Articles 6 and 7 German Basic Law. Irrespective of this, such children’s rights are now to be introduced. It is not yet clear whether this will have consequences for companies or business.
- › Of constitutional relevance here are the new provisions regarding tenancy law (margin nos. 5089 et seq., 5214 et seq.). These concern the guarantee of affordable rents primarily by curbing the rise in rents, such as by extending the binding period of the rent index applicable, by reducing the modernization surcharge to 8%, by adjusting housing benefit to individual circumstances, and capping rent increases where modernization is undertaken. These provisions raise constitutional issues regarding landlords’ rights, including those arising from the guarantee of property in Article 14 German Basic Law.

- › In future too, the Federal Government intends to take joint responsibility with the regional states for promoting social housing. If necessary, margin no. 5143 notes, there should even be a change to the German Basic Law.

How this develops will need to be looked at carefully from a constitutional point of view. The general tendency is clearly to restrict landlords' property rights (lack of profitability, lack of capacity to invest etc.).

- › A further point to be assessed under constitutional law is the planned provision on Germany's solidarity surcharge, introduced after reunification. This is to be reduced for low and medium incomes (margin nos. 385 et seq., 2424 et seq.). Irrespective of the fact that by retaining the solidarity contribution its original aim (to redevelop Eastern Germany) continues to be misused, the planned provision throws up constitutional issues from the perspective of the principle of equal treatment pursuant to Article 3(1) German Basic Law (does the burden on taxpayers contravene the tax system?).
- › Another major issue under constitutional law remains migration policy. The policy is to control immigration while encouraging and supporting integration (margin no. 4780 et seq.). On the one hand, therefore, refugee policy is to recognize migration limits ("corridor of 180,000 to 220,000 annually"), and on the other hand, the number of people with eligibility to join family members in Germany will be limited to 1,000 each month plus cases of hardship. Both constitutionally and with regards to European law, this reveals the high degree of legal uncertainty that continues to exist.
- › A final point that raises constitutional issues is the new provisions on limited employment relationships (margin no. 2341 et seq.). The offence of "limiting an employment relationship without due grounds" – according to which such employment is to be permissible for only one and a half years – may throw up constitutional problems. The details of this are first and foremost employment law issues, however.

Public Administration

- › In public administration law, the coalition agreement has a special – and justified – focus on digitalization ("On the way to digital public administration" – margin no. 2004). But it is hard to understand why ministry powers in digitalization have been distributed among several ministries, without those powers being clearly demarcated.
- › Overall, there is a clear tendency in the coalition agreement towards stronger regulations rather than deregulation, extending from business law to education law, rental law, healthcare, social law and through to infrastructure. Despite the commitment to Germany's social market economy, it is noteworthy here that the agreement makes no mention of "free competition" but only, and consistently, of "fair competition" as a protected interest under business law. "Fair competition" clearly implies that economic autonomy is to be downgraded in favour of increased state control and regulation.
- › Plans to introduce a law to accelerate planning and construction are positive (margin no. 3408 et seq.). Speeding up planning is indeed urgently required, whereby the coalition agreement aims to "amend legal requirements so as to facilitate infrastructure projects". The acceleration of development consent procedures is also aimed in the same direction (margin no. 5850 et seq.). Reforming law on administrative proceedings is the right thing to do. Whether such goals can indeed be achieved will remain doubtful, given the extreme complexity of the substantive law, much of which has long been overlaid and preformed by European law.

A further positive point to note is the intention of adopting the EU principle of "one-in-one-out" (margin no. 2872 et seq.).

As part of a third law to reduce bureaucracy, duties to compile statistics are to be further decreased, and justifiably so; the same applies to standardization of limits and thresholds in various legal areas (margin no. 2858 et seq.).

- › In principle, the area of justice is to be strengthened. Here there are a number of new provisions that could become problematic for companies:
 - › The coalition agreement places great emphasis on consumer protection and intends to introduce test actions (margin no. 5791 et seq.). Legal enforcement and mediation in consumer protection is to be

- › › strengthened through financial support for existing market watchdogs. Tried and tested laws on written warnings are to be protected against misuse. Supervision of collection agencies and the like is to be strengthened to the benefit of consumers (margin no. 5816 et seq.).
- › In the fight against white collar crime, there are to be new provisions on penalizing companies (margin no. 5896 et seq.). In particular, the opportunity principle is to be dropped for regulatory offences in order to ensure “standard legal application across Germany.” An important point is that misconduct by company employees is in future not only to be punished individually but companies themselves are to be called to account. Financial penalties will match the economic power of the company concerned. These planned provisions entail a high degree of legal uncertainty that will need to be combated by adequate procedural rules. At least according to the coalition agreement, however, such procedural rules are not yet on the horizon

Environment (margin no. 6479 et seq.)

On the environmental agenda, the coalition agreement includes general expressions of political will regarding European and international environmental policy (protection of species, protection of the seas, strategy on plastic). The coalition wishes to use Germany’s EU presidency in 2020 to give a further boost to the ambitions of European environmental protection. It commits to the precautionary principle. As regards environmental health precautions, regulatory omissions in the REACH Chemicals Directive that put European companies at a disadvantage are to be closed.

On the national level, the strategy of biodiversity is to be advanced and the national flood protection programme put into action and strengthened; provisions on waste water charges are to be further developed in order to reduce contamination of open bodies of water.

Specific projects are defined for resource-friendly recycling management and soil protection. The commitment to stricter recycling rates, competition and product responsibility – also underlying Germany’s Packaging Act (*Verpackungsgesetz*) to enter effect in early 2019 – will be welcomed in the recycling and disposal industry. Product manufacturers and distributors should take longevity, reparability and reusability more strongly into account. To date, the legal system has preferred an indirect approach when steering these matters, making use of soft instruments such as the rules on calculating charges for being included in the dual waste disposal system, as provided for in section 21 of the Packaging Act. Possible statutory duties to strengthen waste minimization and recycling and to expand the use of recycled materials (wood/textiles/tyres) will need to be reviewed, however.

The coalition seems intent on continuing the never-ending story of Germany’s Master Ordinance for Alternative Building Materials and Soil Protection (*Mantelverordnung für Ersatzbaustoffe und Bodenschutz*). For years now, the German building materials recycling industry has been waiting for this regulation, intended to set up a standard and legally binding framework across Germany for utilization of mineral waste. The coalition parties are holding out the prospect of clauses permitting regional states to deviate from the Master Ordinance’s provisions so as to “legally secure existing, tried-and-tested regional rules on filling pits, quarries and open-cast mining sites.” This, apparently, is a reaction to the large number of amendments already or yet to be tabled by the regional states, which are defending their traditional guidelines for backfilling with alternative building materials. Business has warned of massive shifts in material flows towards landfill, although regional bottlenecks in waste disposal are already in sight. It remains to be seen whether the new Federal Government will in fact manage to break the deadlock in the various discussions and be a bridge-builder between the rival positions.

EXPERTISE

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