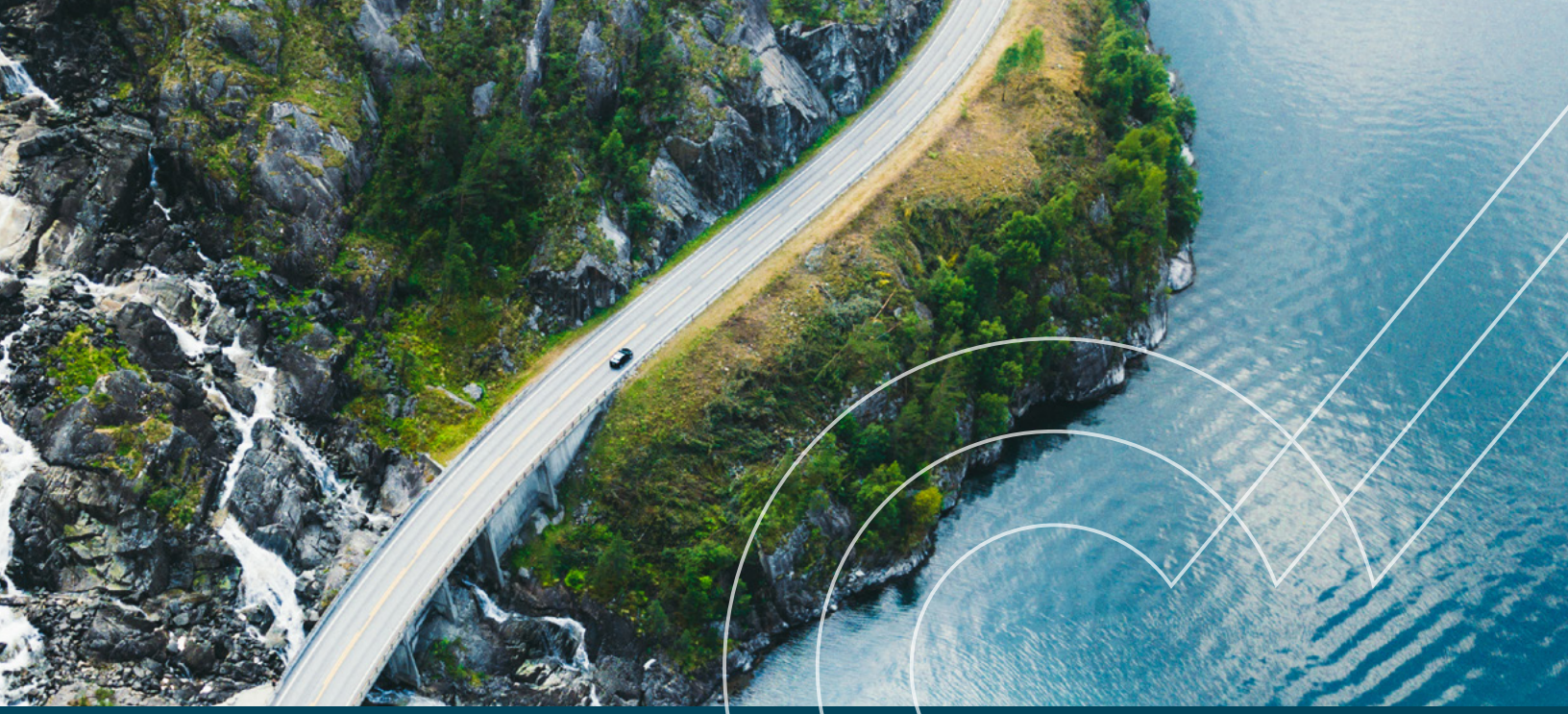

Nordic Newsletter

December 2023

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Editors' Note

Hi friends and colleagues,

We are delighted to present this second issue of Covington & Burling's Nordic Newsletter, right on time for your holiday reading. In this edition, we compiled articles published by Covington lawyers discussing recent developments in the EU artificial intelligence regulatory framework, proposed changes to the US Hart-Scott-Rodino (HSR) Act competition notification rules, and recent changes in UK employment law. With thanks to our Frankfurt-based colleagues, we also discuss key legal aspects of private equity transactions in Germany.

We are proud to introduce you to our partner Sibel Yilmaz. Sibel, who is based in our Brussels office, is a core member of our Nordic practice group, and has extensive experience in competition law, foreign direct investment and state subsidies. Additionally, she is Swedish!

If you are looking for more audio entertainment, we highly recommend you check our recent webinars discussing ESG-related topics and AI developments and commercial considerations for Nordic businesses. On our next live webinar in early March, Covington experts will discuss considerations for Nordic companies doing business in China.

As we wrap up 2023, we would like to take a moment to celebrate our clients' milestones and thank them for their vote of confidence in Covington. We had a very active year and we are proud that Covington continues to be a leading international law firm in the Nordic market. We are excited to continue working closely with our Nordic clients to help them navigate today's dynamic business environment.

We wish you the best during this holiday season!

Warm regards,

Barbara, Uri and Jared

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Spotlight Series on Global AI Policy — European Union

Private Equity Transactions in Germany

Federal Trade Commission and Department of Justice Sweeping Changes to the Hart-Scott-Rodino Form

Eight Imminent Key Changes to UK Employment Law

Meet the Nordic Initiative:
Sibel Yilmaz

Who is Sibel Yilmaz?

A Swedish competition and FDI nerd based in Covington's Brussels office.

Tell us about your legal practice...

I advise clients on competition law, foreign investment and foreign subsidies screening, with a focus on the life sciences, technology and private equity sectors.

Trends and recent developments in the region?

The politicization of competition and foreign investment law and enforcement has changed the legal landscape significantly. Although it can certainly be frustrating in individual cases, it has changed the way we advise and has challenged us to think of creative and innovative solutions.

What inspired you to become a lawyer?

My grades were not good enough to study psychology. Joking aside, I have always enjoyed constructing arguments, so becoming a lawyer seemed obvious.

What do you like the most of advising Nordic-based clients?

How direct and straight forward everything is. I also find that Nordic clients seem less focused on formal titles and similar which was something that enabled me to start building my career independently early.

How does a day in your life looks like?

I usually get up with my three young girls at 5:30 a.m. It is then cuddles, chaos and breakfast until 8 a.m. when I start getting ready. I usually get to the office around 9 a.m. and start by clearing the emails that came in overnight. After that I have my most productive period of drafting and analysis. Around 3 p.m. the calls start. If I can, I take a break around 6 p.m. to see my kids and get them ready for bed and then I log back on. Once I am done, I usually listen to a podcast to wind down. I then read a bit (typically Agatha Christie) in bed before I sleep.

Your go-to Nordic restaurant / dish

Kebabtallrik!

Favorite Nordic movie / music band

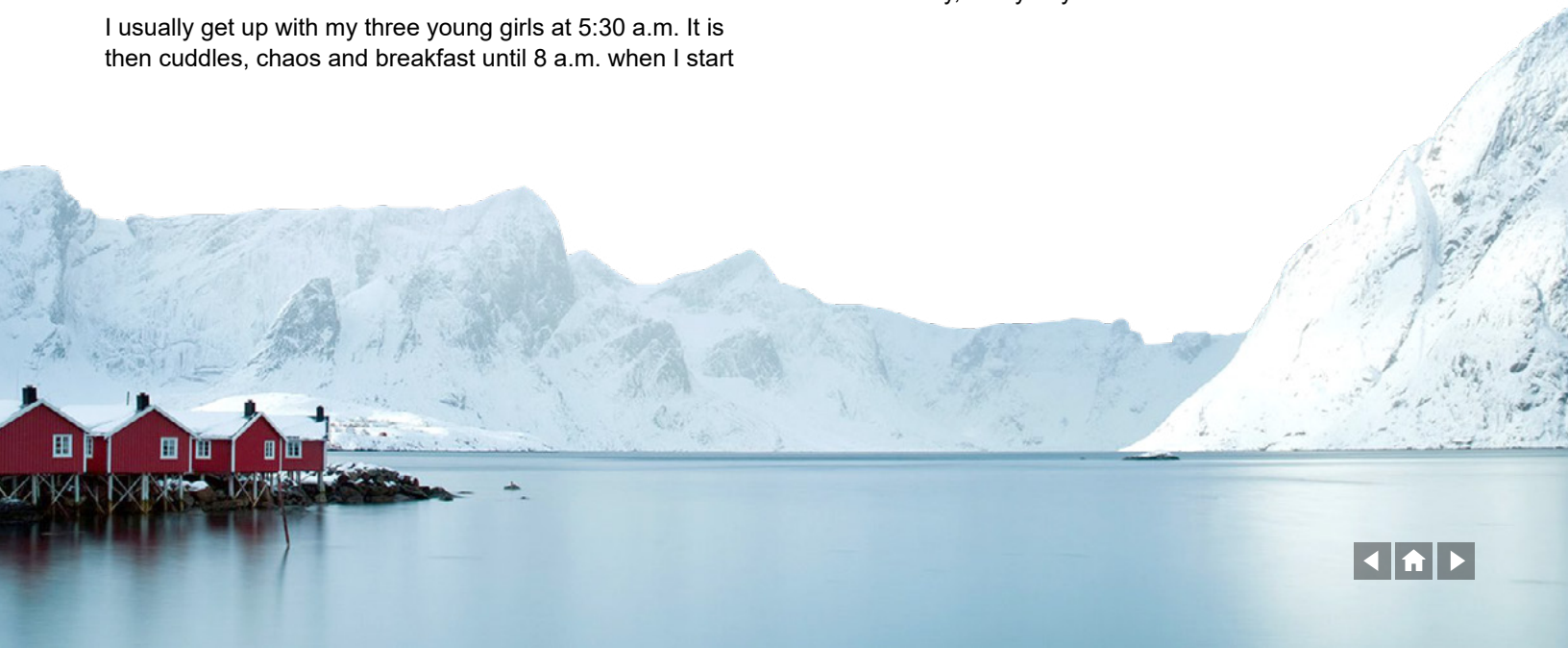
Does Bolibompa count? I don't have a favourite but I'm listening to Miriam Bryant a lot at the moment.

Ideal Nordic holiday

A cottage (sommarstuga) by a lake.

Licorice or kanelbulle?

Licorice all day, every day.



Events

NORDIC WEBINAR SERIES:

Navigating Evolving Complexities in China

Considerations for Nordic Businesses

Tuesday, 5 March, 2024 | 2:30 – 3:30 p.m. CET / 3:30 – 4:30 p.m. EET

China continues to present significant commercial opportunities and pose significant challenges for multinational companies. Covington lawyers based in China and elsewhere are at the cutting edge of these developments.

Please join us for a free webinar covering key risk areas and trends and potential mitigants.

Register

Topics will include:

- Navigating recent and significant changes in China's data privacy / cybersecurity landscape and interplay with GDPR
- Evaluating supply chain / forced labor risk in China to comply with EU and US lawsand outputs
- Assessing risks of EU / US trade controls on items sold from Europe to China
- Mitigating risk of retaliation in China from geopolitics and compliance with non-Chinese laws

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NORDIC WEBINAR SERIES:

Unpacking Artificial Intelligence

Regulatory and Commercial Considerations for Nordic Businesses

Global policy and business leaders recently gathered for the first ever AI Safety Summit to discuss how the rapid development of AI is transforming the world, the risks posed, and the way it affects how we do business. Lawyers from Covington's leading AI and Technology practices in the U.S. and Europe are at the cutting edge of these developments.

In November 2023, we hosted a free webinar covering key global commercial and regulatory trends in the AI and privacy fields to help navigate risk, but also leverage these transformative technologies commercially.

Watch Here

Topics discussed:

- AI risk and risk management
- Regulatory, privacy and ethical AI considerations
- Best practices for negotiating commercial terms in AI related deals
- IP and other rights surrounding AI/algorithm inputs and outputs

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NORDIC WEBINAR SERIES:

Global ESG Legal and Policy Trends and Implications for Businesses in the Nordics

The global legal landscape regarding environmental, social and governance (ESG) issues is evolving rapidly. The landscape covers a broad range of topics – from human rights and climate impact, to sustainability marketing claims and diversity and inclusion. Companies need to understand how the new world of ESG impacts their business operations and value chains.

In this session, our leading ESG experts provided a primer for companies on key trends emerging from the U.S, EU and other global markets and their relevance for business in the Nordics. Our lawyers discussed key legal and reputational risks in addition to practical pointers on preparing for and navigating the ESG storm.

Watch Here

Topics discussed:

- An overview of key ESG trends emerging from the U.S., EU and other global markets and their relevance for businesses in the Nordics
- Key legal and reputational risks
- Practical pointers on preparing for and navigating sustainability regulation

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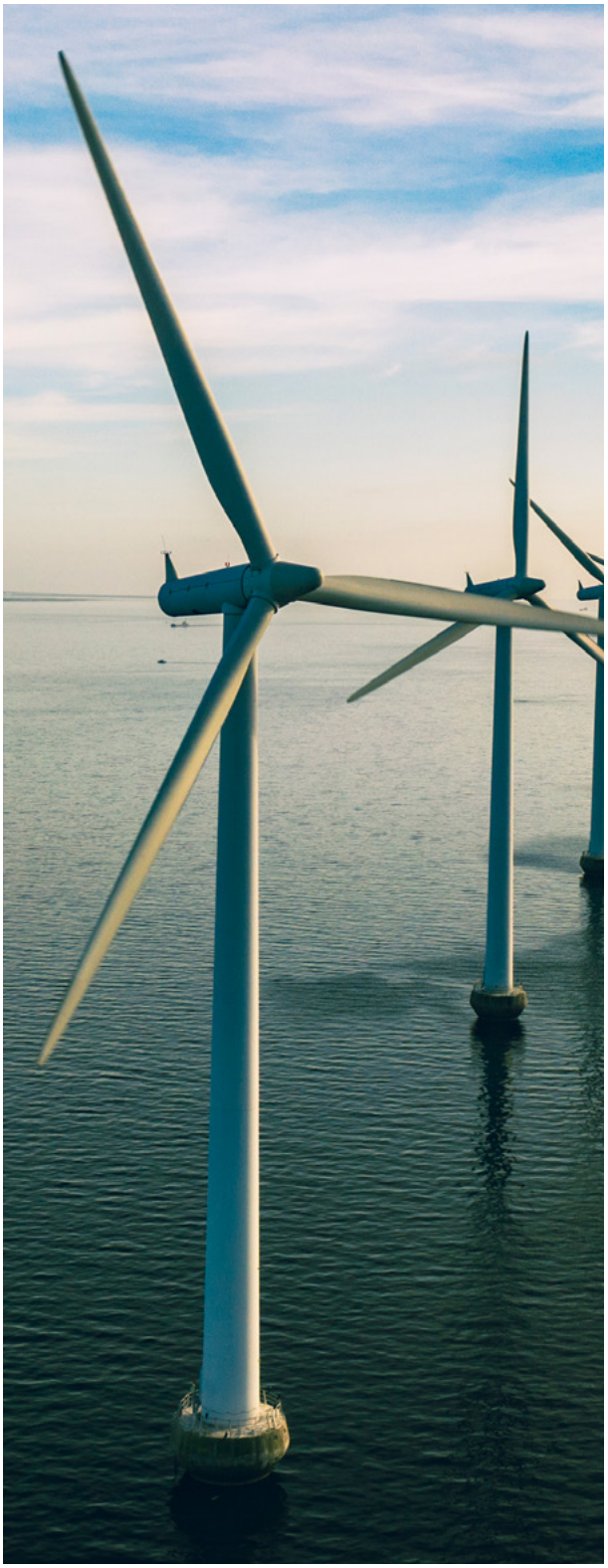

Spotlight Series on Global AI Policy

European Union

The field of artificial intelligence ("AI") is at a tipping point. Governments and industries are under increasing pressure to forecast and guide the evolution of a technology that promises to transform our economies and societies. In this article, we discuss how the European Union is approaching the governance of AI.

1 Future of AI Policy in Europe

As the year closes, it is an apt time to reflect on the future of AI policy in the European Union. The EU sees itself in the lead globally on regulating artificial intelligence, with a political agreement announced on the EU AI Act and a draft EU AI Liability Directive in the works. These initial steps will help shape the wider AI governance structure currently emerging across the world.

2 Policy Vision & Approach

The EU's AI legislative initiatives are part of an overall policy vision of "technological sovereignty," which it implements through regulations such as the Digital Markets Act and the Digital Services Act. The EU model is likely to be influential in many important markets across the world, given the so-called "Brussels effect" whereby EU regulations often become global rules. The EU is a large market that is often a first-mover when it comes to regulation, and it can be more efficient for international firms to adopt a single compliance standard.

Yet, when the EU AI Act was first proposed two years ago, some viewed it as putting the cart before the horse: focusing on control rather than capability, or in a twentieth-century analogy, seeking to excel at stop signs rather than producing cars. Notwithstanding the perception among some in Europe that it is in a race with the United States on tech and AI, the real competition is between the U.S. and China, with Europe lagging behind significantly in the development of cutting-edge AI and related technology.

Nathaniel Fick, the U.S. ambassador-at-large for cyberspace and digital policy recently made the same argument, suggesting that EU AI regulations could hamper AI's technological development. Likewise, France's Digital Minister Jean-Noël Barrot criticized the European Parliament's draft text on the EU AI Act as "too stringent" and potentially stifling European innovation. President Macron also has sought to focus on the need to build underlying AI technologies, pledging over €7 billion to fund AI research and development. Recently, over 150 European CEOs and tech experts have likewise voiced concern about the EU AI Act's potential overreach, and urged the EU to become "part of the technological avant-garde."

Although the EU AI Act has been now finalized, it is only the first step in a wider regulatory infrastructure emerging in Europe—and globally—that will need to keep competing policy objectives in mind: balancing control with capability, and risk with innovation. Whether Europe becomes the tip of the spear on AI, or a global laggard, will depend at least to some degree on the policy and regulatory choices it makes, which we turn to next.

3 Major Policy & Regulatory Initiatives

The EU has finalized landmark legislation on artificial intelligence—the EU AI Act— and is in negotiations on the related EU AI Liability Directive, which it seeks to complete before next year's elections for the European Parliament and the selection of a new European Commission.

A. EU AI Act

Proposed by the European Commission in April 2021, the draft EU AI Act is an ambitious piece of legislation that seeks to regulate "high-risk" AI systems, impose transparency obligations on providers of certain non-high-risk AI systems, and prohibit certain AI practices (such as social scoring that leads to detrimental treatment, and the use of subliminal techniques to distort behavior). Notably, it could lead to substantial administrative costs—based on compliance, oversight, and verification costs—for high-risk AI systems, which may add up to 10 percent of the underlying value of the system.

The AI Act also proposes so-called "regulatory sandboxes." These are controlled environments intended to encourage developers to test new technologies for a limited period of time, with a view to complying with the regulation. Spain, which holds the rotating Presidency of the Council of the EU until the end of December, is hosting one such regulatory sandbox to enable companies and regulators to test procedures and compliance mechanisms to ensure that products meet the standards of the proposed regulation.

The Council of the EU adopted its "general approach" in December 2022 and the European Parliament approved its compromise text in June 2023. This was based on a draft previously approved by the Parliament's Internal Market Committee and by the Civil Liberties Committee the month before, which incorporated over 3,000 amendments.

Negotiations on the final text (called "trilogues") among the three EU institutions—the Council of the EU, the European Parliament, and the European Commission—concluded in early December. The final discussions focused on several key topics, including the scope of the AI Act, AI systems classified as "high risk" under the Act, and law enforcement exemptions.

The final text of the political agreement is not yet publicly available and will be completed in follow-up technical meetings in the coming weeks.

Once the AI Act is adopted, it will enter into force across the EU two to three years later, depending on which institution's text prevails in the negotiations.

To bridge the transitional period before the AI Act becomes generally applicable, the Commission will launch an AI Pact for AI developers to voluntarily commit to complying with the Act's key obligations before it comes legally binding.

B. EU AI Liability Directive and Product Liability Directive

In September 2022, the European Commission proposed a new directive on adapting non-contractual fault-based civil liability rules to AI. The proposal establishes rules that would govern the preservation and disclosure of evidence in cases involving high-risk AI (as defined under the AI Act), as well as rules on the burden of proof and corresponding rebuttable presumptions.

If adopted as proposed, the draft AI Liability Directive will apply to damages that occur two years or more after the Directive enters into force. Five years after its entry into force, the Commission will consider the need for rules on no-fault liability for AI claims. Alongside the AI Liability Directive, the EU has updated the Product Liability Directive, with a political agreement announced mid-December, to harmonize rules for no-fault liability claims by persons who suffer physical injury or damage to property caused by defective products. Software, including AI systems, are explicitly named as "products" under the proposal, meaning that an injured person can claim compensation for damage caused by a defective AI system.

Stakeholders and academics are questioning, among other things, the adequacy and effectiveness of the proposed liability regime, its coherence with the EU AI Act currently under negotiation, its potentially detrimental impact on innovation, and the interplay between EU and national rules. Once the EU AI Act is finalized, focus will turn to completing these two legislative files.

4 Other Policy Initiatives

Beyond the EU AI Act and associated initiatives, the EU has also been active in shaping the direction of AI policy through engagement with industry and international partners.

A. AI Code of Conduct / Pact

Amid the flurry of media attention over the past few months on the pace of AI developments, particularly on generative AI and large language models, the European Commissioners who were in overall charge of digital policy—Executive Vice President Margrethe Vestager and Commissioner Thierry Breton—each signaled their intentions to pursue a voluntary code of conduct with private industry. The precise terms of such a pact or pacts are still to be publicized. Moreover, there has been latent competition for primacy over EU digital policy between Vestager and Breton. Ultimately, it appears that Vestager's approach will have global scope, building on her discussions within the G7 (as discussed further below), whereas Breton's will focus on accelerating the de facto applicability of the EU AI Act within Europe, even before the legislation formally goes into effect in two or three years after adoption.

In early September, Vestager took an unpaid leave of absence from the Commission to run for the presidency of the European Investment Bank, with the selection taking place sometime in the fall and the winner assuming office in January 2024. Vice-President Věra Jourová—the architect of the EU-U.S. Data Protection Umbrella Agreement and its predecessor Privacy Shield—took on Vestager's digital portfolio in the interim. Depending on who replaces Vestager as Danish Commissioner if she is appointed to the EIB role and resigns from the European Commission, Jourová may continue to hold on to some of those responsibilities until the end of this Commission's mandate next autumn. As Vice-President for Values and Transparency, Jourová had already been engaged in the AI policy debate, recently calling for AI-generated content to be watermarked and identifiable. Vestager was ultimately unsuccessful in her bid for the EIB presidency, and is likely to return to the Commission for the remainder of the mandate until late 2024. If she returns, there may continue to be policy variations between her and Breton on specific aspects of AI governance.

B. U.S. - EU Trade and Technology Council

Over the past two years, the EU and the U.S. have held ongoing regulatory dialogue on AI within the U.S.-EU Trade and Technology Council (TTC). In December 2022, the TTC's working group on tech standards issued a new joint roadmap for trustworthy AI and risk management. The Roadmap aims to (i) advance shared terminologies and taxonomies by way of a common repository, (ii) share approaches to AI risk management and trustworthy AI in order to advance collaborative approaches related to AI in international standards bodies, (iii) establish a shared hub of metrics and methodologies for measuring AI trustworthiness, risk management methods, and related tools, and (iv) develop knowledge-sharing mechanisms to monitor and measure existing and emerging AI risks. Both sides agree on a risk-based approach to AI and the need to develop trustworthy AI, but differ significantly on the necessary regulatory frameworks, allocation of responsibility for risk assessment, and balance between obligatory and voluntary measures. Relatedly, on June 21, a bipartisan group of Congressmen wrote a letter to President Biden expressing concern with the EU's digital policies and their impact on U.S. firms. At the last TTC meeting in Sweden on May 30-31, the two sides committed to continue to focus on seizing the opportunities and mitigating the risks

of AI, particularly in light of rapid developments in generative AI. They launched three dedicated expert groups that focus on: (i) AI terminology and taxonomy, (ii) cooperation on AI standards and tools for trustworthy AI and risk management, and (iii) monitoring and measuring existing and emerging AI risks. The closing statement of the May meeting confirms that the EU and U.S. will "continue to consult and be informed by industry, civil society, and academia."

C. G7 Hiroshima AI Process—and Beyond

The EU is also taking the lead in shaping AI policy through the G7. At their last summit in Hiroshima, G7 leaders pledged to "advance international discussions on inclusive artificial intelligence (AI) governance and interoperability to achieve our common vision and goal of trustworthy AI, in line with our shared democratic values."

In October 2023, the G7 released a voluntary code of conduct to "promote safe, secure, and trustworthy AI worldwide" and to provide "guidance for organizations developing and using the most advanced AI systems, including the most advanced foundation models and generative AI systems." Italy will hold the next presidency of the G7 and will host the G7 summit in Puglia in June 2024. The UK is also seeking to take a leading role in this multilateral push to develop common standards and approaches to mitigating risks associated with AI. In November 2023, UK Prime Minister Sunak hosted an AI Safety Summit, which was attended by both AI researchers and policymakers. Indeed, European Commission President von der Leyen and U.S. Vice-President Harris were among the participants. The U.N. Secretary-General, António Guterres, announced in July that he would also convene a high-level meeting to examine options for the global governance of AI. Guterres intends for this group to build on the recommendations in the July 2023 New Agenda for Peace policy brief that member states develop common norms and national strategies on the development, design, and deployment of AI, and a global framework for the use of AI and similar data-driven technologies in counterterrorism. In her recent State of the European Union speech in September, European Commission President von der Leyen endorsed Guterres' approach. She called for a process similar to the UN's Intergovernmental Panel on Climate Change, bringing "scientists, tech companies and independent experts all around the table," building on the G7 Hiroshima Process. Von der Leyen also proposed that these experts "develop a fast and globally coordinated response" to AI's "risks and … benefits for humanity".

Policymakers in Europe have made significant efforts to keep pace with these technological developments, and have already gained extensive technical and regulatory expertise. Yet, as the landscape keeps evolving, thought leadership—and engagement from industry, civil society, and academia—will be essential to identifying both the opportunities and risks of new technological frontiers on AI and developing corresponding policy and regulatory frameworks.

5 Thought Leadership

Our regulatory and public policy teams closely track and contribute to the discussion around AI policy in Europe. Below is a sampling of related articles on our public-facing blogs:

- EU Artificial Intelligence Act: Nearing the Finish Line (December 15, 2023)
- EU and US Lawmakers Agree to Draft AI Code of Conduct (June 12, 2023)
- EU Parliament's AI Act Proposals Introduce New Obligations for Foundation Models and Generative AI (May 24, 2023)
- A Preview into the European Parliament's Position on the EU's AI Act Proposal (March 28, 2023)
- EU AI Policy and Regulation: What to look out for in 2023 (February 2, 2023)
- European Commission Publishes Directive on the Liability of Artificial Intelligence Systems (October 12, 2022)
- European Parliament Votes in Favor of Banning the Use of Facial Recognition in Law Enforcement (October 12, 2021)
- European Commission Proposes New Artificial Intelligence Regulation (May 24, 2021)

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Private Equity Transactions in Germany

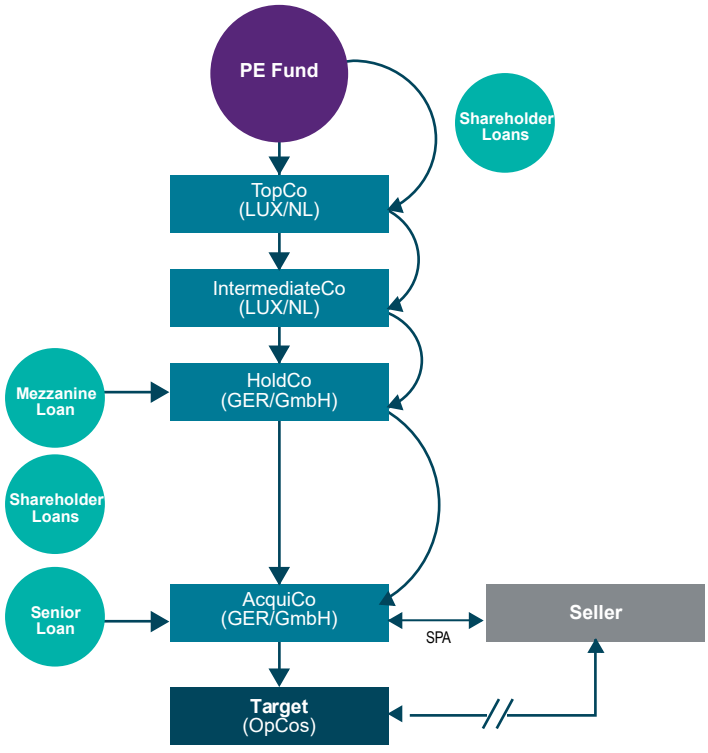
Private equity transactions in Germany have many comparable deal characteristics to private equity deals in other jurisdictions, such as due diligence, main transaction documentation, debt financing, warranty and indemnity (W&I) insurance, and management participation. However, several transaction parameters differ and need to be taken into account when investing in Germany.

1 Typical Acquisition Structure

The acquisition structure of private equity investments in German companies is mainly driven by tax and financing considerations. The acquisition is typically routed through entities seated in tax privileged jurisdictions, such as Luxembourg. In practice, a private equity fund commonly uses a 'double LuxCo' structure with a top Luxembourg company (hereinafter "TopCo") and an intermediate holding Luxembourg company. Typically, a German limited liability company (GmbH) is used as the acquisition vehicle (hereinafter "AcquiCo"), to be able to implement a tax group with the German target company (hereinafter also referred to as "Target").

The acquisition is usually funded by a mix of equity capital and debt. In larger transactions, especially in the case of add-on transactions by private equity portfolio companies, the sellers often re-invest a part of the purchase price into the acquisition structure. Smaller transactions are often initially funded 'all equity' only, followed by a subsequent debt financing. The equity portion is typically provided by shareholder loans and/or payments into the capital reserve of AcquiCo. Depending on the deal size, the debt may include several layers, e.g. senior and junior debt, which is often both contractually and, by way of inserting another holdco company as junior debtor, structurally subordinated.

A simplified acquisition structure for a deal with two layers of acquisition debt may look as follows:



2 Debt Push Down

In order to ensure (i) that the lenders become direct creditors of Target and (ii) the operating profits generated by Target can be set off against the interest to be paid at the level of AcquiCo, the acquisition debt is usually pushed down to the target company level.

There are basically three options to achieve a debt push down. Firstly, Target could accede to the loan agreement as an additional borrower. Secondly, AcquiCo a Debt Push Down and Target could form a tax group by entering into a profit transfer agreement. A further, occasionally used option, is to merge AcquiCo with Target or vice versa.

3 Management Participation

Germany, generally, does not provide a tax neutral discount for management participations. As a result, management participations are usually structured in a way that avoids upfront taxation on the respective participations. To avoid any upfront taxation, the initial manager stake must be acquired at market value. In order to finance such acquisition the private equity fund often grants a loan to the managers. Often such loans contain a non-recourse provision with the effect that the loan will be repaid from the manager's exit proceeds only (if any). However, such a non-recourse structure increases the risk that the manager's share in the exit proceeds will be taxable as personal income and not as capital gain. In case of a secondary transaction, i.e. the acquisition from another private equity fund, a management participation is already in place and the shareholdings of the managers can be rolled-over into the new acquisition structure in a tax neutral way, up the chain to the level of TopCo.

4 The Purchase Agreement

1. Locked Box vs. Closing Accounts

While US practice favors purchase price adjustments as of closing, German transactions in the recent years have more often followed a 'locked box' approach, according to which the purchase price is determined by reference to the latest financial statements as the 'locked box' date. The general effect is that the target business is operated by the seller for the benefit (and risk) of the buyer from the locked box date until the closing of the transaction.

2. Specific German-Style SPA Issues

The following provides a high-level overview of the most relevant share purchase agreement ("SPA") negotiation points.

A. Seller-Friendly Representation & Warranties

Compared with other jurisdictions, the set of representations and warranties granted by the seller in the SPA is more seller-friendly in scope in German transactions.

B. (Anti-) Sandbagging / Fair Disclosure

An important, and in most jurisdictions strongly disputed, topic in every SPA negotiation are '(anti-)sandbagging' provisions. However, in Germany, and unlike US deals in particular, provisions explicitly allowing sandbagging are considered off-market and are therefore generally not accepted by sellers.

Section 442 of the German Civil Code (BGB) states that buyers cannot assert warranty rights for defects that they were aware of, thereby stipulating a non-sandbagging regime. However, this and all other statutory warranty provisions are usually waived in the SPA and replaced by a tailored warranty regime that includes a contractual anti-sandbagging clause, usually based on a fair disclosure concept. While it is common in the US that facts or information are only considered disclosed if they are specifically listed in separate disclosure schedules, in Germany the so-called 'fair disclosure concept' has become a widely accepted standard. Therefore, in addition to specific disclosures made in SPA schedules, the contents of the data room are deemed to be 'disclosed' to the purchaser if presented in a clear and orderly manner.

C. Recovery of Damages / Escrow

International buyers usually expect to be compensated in cash in case of warranty breaches, whereas German sellers, based on German law principles, expect to have a prior cure right 'in kind' before the purchaser is entitled to claim cash damages.

Further, under German law the buyer has a duty to mitigate the damage incurred and the scope of recoverable damages is restricted. Also, when calculating the specific damages, materiality scrapes typically used in US deals do not apply in German style SPAs. In addition, in German transactions escrows to cover possible warranty claims are less common compared to a typical US transaction.

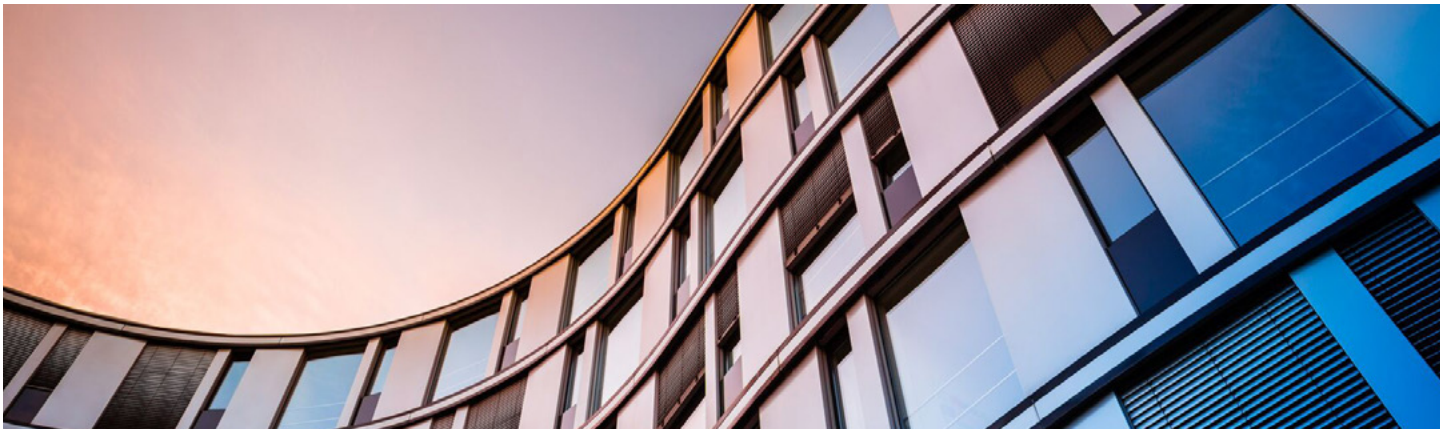
D. MAC Clauses / Limited Termination Rights

'MAC' clauses that entitle the purchaser to rescind the SPA if between signing and closing an event occurs that results in a material adverse change of the target's business are rarely seen in the German market.

Similarly, termination rights are often limited to a failure to meet closing conditions. In a similar vein, breaches of SPA covenants or inaccuracies of representations and warranties will only give rise to damage claims, but usually do not lead to a termination right.

E. Governing Law / Notarization

Typically, the German target company in a private transaction takes the form of a limited liability company (GmbH). By law, the transfer of shares in a GmbH requires notarization. The required notarization before a German notary public can result in significant notarial fees, which are based on the value of the transaction and are non-



negotiable. To the surprise of international investors doing their first deal in Germany, the SPA plus all annexes must be read aloud before being signed by the parties, which can be a very time-consuming exercise. However, if the parties choose non-German law for the SPA, they can limit the notarization requirement to the share transfer deed which eases the signing burden but does not substantially reduce notarizations costs.

5 Shareholders' Agreement

In order to govern the management participation and potential co-investments, the new shareholders will typically enter into an agreement containing certain governance provisions, including voting agreements and leaver provisions, call and put options, and drag- and tag- along rights. As shareholders' agreements typically include certain call or put options with regard to GmbH shares, they also require notarization. Of note, under German law, call options vis-à- vis minority shareholders may not be exercised at the majority shareholder's sole discretion and instead require a proper justification, ideally a good cause. For example, a material breach of duty under the shareholders' agreement (typically a 'bad leaver' event) or a shareholders' death (typically a 'good leaver' event) would constitute a good cause.

6 Stricter German Foreign Direct Investment Rules

Before investing in Germany from abroad, it is advisable to analyze at an early stage whether German rules on foreign direct investment ("FDI") require transaction clearance from the Federal Ministry of Economic Affairs and Climate Action ("BMWK"). In line with a general trend, German FDI regulation has significantly tightened in the previous years. There are generally two transaction types that are subject to the German FDI regime:

(1) Transactions by which a non-German foreign investor (explicitly including EU and EFTA investors) acquires 10% or more of the voting rights of a German domestic company operating in the defense industry and certain IT security technologies ('sector specific screening process'). These transactions require a mandatory prior notification to the BMWK.

(2) Transactions by which a non-EU/EFTA investor seeks to acquire a stake (10%, 20%, or 25%, as applicable) in a German domestic company if such investment is considered a threat to the public order or security ('cross-sectoral screening process'). Depending on the target company's product portfolio, a prior notification to the BMWK may be required as well. Even if there is no prior mandatory notification, to avoid a retrospective review or prohibition of the deal, a voluntary filing often is advisable.

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Federal Trade Commission and Department of Justice Propose Sweeping Changes to the Hart-Scott-Rodino Form

In this article, the authors discuss the proposal by the Federal Trade Commission and Department of Justice that, if adopted, would make extensive changes to the Hart-Scott-Rodino Act premerger notification rules.

The U.S. Federal Trade Commission (FTC), with the concurrence of the Antitrust Division of the Department of Justice (DOJ) (together, the Agencies), has issued a Notice of Proposed Rulemaking (the Notice)1[1] that proposes extensive changes to the Hart-Scott-Rodino (HSR) Act premerger notification form and associated instructions, as well as to the rules implementing the Act. The proposed changes represent the most significant revisions to the requirements that HSR filing persons must satisfy in the nearly 50 years since the inception of the HSR notification process. In order to govern the management participation and potential If the changes proposed by the Agencies are enacted—changes that the Agencies intend to apply to all reportable acquisitions, regardless of size or whether the acquisition raises competition issues—parties to reportable transactions will face a significant increase in the time, burden, and costs necessary to prepare an HSR filing, which could have an effect on deal timing.[2] In particular, the FTC estimates that, if the proposed changes take effect, the average HSR filing would require 144 hours to prepare—nearly four times the 37 hours that the FTC estimates it takes under the current system. The FTC also estimates that for parties with more complex transactions/filings—which it says constitute 45% of all filings—the proposed changes would result in an HSR filing taking 259 hours to prepare, which is seven times the current average. Assuming that the FTC's estimates are correct, parties to HSR-reportable transactions will require significantly more time to prepare their filings than the typical 10 business days that many merger agreements contemplate.

In a press release[3], the FTC stated that the Notice—issued pursuant to a 3-0 Commission vote—was published in the Federal Register in June 2023. Comments were due 60 days following publication, after which the FTC will evaluate the comments it receives and decide whether and when to issue a Final Rule. The proposed changes have no impact on HSR filings submitted in the interim (i.e., before the Commission issues a Final Rule). The remainder of this article provides a high-level overview of the notable proposed changes.

Summary of Notable Proposed Changes

The Agencies proposed the following notable changes to the HSR filing process:

- **Significantly Expanded Document Production Requirements.** The proposed changes would require substantially broader document productions as part of an HSR filing. New categories of required documents include "transaction-related documents from supervisory deal team members; business documents that relate to competition topics but were not produced specifically for the transaction; drafts of responsive [4(c) and 4(d)] documents; [and] other agreements between the acquiring and acquired persons," as well as a requirement that the parties produce a "log" identifying "the request to which documents are responsive."
- **Narratives.** The proposed changes would require parties to provide narrative responses as part of the HSR form, including:
  - "[A] narrative that would identify and explain each strategic rationale for the transaction."
  - "[A] narrative timeline of key dates and conditions for closing."
  - Narratives concerning potential horizontal overlaps, including "an overview of [the filer's] principal categories of products and services (current and planned) as well as information on whether it currently competes with the other filing person."
  - Narratives concerning the filer's supply relationships, including the vertical relationship between the filing parties, such as "information about existing or potential vertical, or supply, relationships between the filing persons."
  - Narratives concerning "certain information about [the filer's] workers in order to screen for potential labor market effects arising from the transaction."
- **Officers, Directors, and Board Observers.** The proposed changes would require filers to identify all "officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity, as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions)." [4]
- **Prior Acquisitions.** The proposed changes would require that filers provide more information relating to their prior acquisitions (although they would retain the limitation of such reporting to business lines where the acquiring and acquiring persons' revenue codes, as reported in the filing, overlap). The changes include:
  - Requiring "both the acquiring person and the acquired entity to provide information about prior acquisitions." The current requirement applies only to acquiring persons.
  - "[E]xtending the time frame to report on prior acquisitions from five to ten years."
  - "[E]liminating the threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than $10 million in the year prior to the acquisition."
  - "[T]reating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests."
- **Diagram of the Transaction.** The proposed changes include a new requirement that filers "provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction."
- **Foreign Investment and Defense Contracts.** The new filing instructions would require filers to identify and describe subsidies "received or that are anticipated to be received by any entity within its person from a foreign entity or government of concern," "identify any of its products produced in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are subject to countervailing duties in any jurisdiction," and identify "any of its products produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are the subject of an investigation by any jurisdiction for potential countervailing duties." (This proposal appears to be intended to fulfill the requirements of the Merger Filing Fee Modernization Act of 2022, contained within the Consolidated Appropriations Act, 2023 (Pub. L. 117-328, 136 Stat. 4459), which also included $430 million in funding for the FTC, an increase of $53.5 million above fiscal year 2022.) The filing instructions would also require filers to identify "whether they have existing or pending defense or intelligence procurement contracts" and to "provide identifying information about the award and relevant [Department of Defense] or [intelligence community] personnel."

- **Other Items Increasing Burden on Filers.** Many of the other proposed changes also have the potential to prove onerous for filers, for example:
  - The requirement to submit "English-language translations for all foreign-language documents submitted with the initial HSR Filing."
  - The requirement to "identify and list all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations."
  - The requirement to "list [the filer's] five largest categories of workers by the relevant 6-digit SOC [Standard Occupational Classification] classification and to provide the total number of employees for each 6-digit code identified."
  - The requirement to provide "significant information from investment entities, such as funds and master limited partnerships, for which organizational structures are often more complex."
  - Narratives concerning "certain information about [the filer's] workers in order to screen for potential labor market effects arising from the transaction."

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[1] https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf

[2] The Notice states that "[m]any of the proposed changes would increase the burden on all filers," and in a Q&A on the Notice of Proposed Rulemaking for the HSR Filing Process, https://www.ftc.gov/legal-library/ browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements, the Agencies "acknowledge[d] that the proposed changes require a significant amount of additional information."

[3] https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review

[4] Emphasis added.

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Eight Imminent Key Changes to UK Employment Law

From as soon as 1 January 2024, the UK Government is implementing a wide range of new employment law that will affect organizations with UK operations.

Some critical issues for employers include:

- Stronger workplace protections against sexual harassment;
- Increased employee flexible working rights;
- New holiday pay rules;
- New employee rights to request predictable working terms;
- Rights for agency workers to request jobs at client companies;
- Changes to TUPE.

Employers will need to review policies and procedures, and potentially employment and/or worker contracts, to assess what changes are required to comply with the new laws. New or enhanced processes may need to be put in place to manage risk. Insurance coverage may need to be strengthened. In particular, for companies who hire significant numbers of agency workers, the relationship with work agencies and their workers should be reviewed, and any current terms used reconsidered, in light of 4 above.

We hope this alert will provide a useful reminder to ensure adequate provisions are in place to comply with the new laws once they come into effect. If you have any questions regarding the material discussed in this alert, please contact the members of our Employment and Employee Benefits practice. We are of course happy to provide additional guidance as needed.

Please click here to view the article.

NAME OF NEW LEGISTLATION	WHAT WILL CHANGE?
1 The Employment Rights Regulations 2023 **Amendment, Revocation and Transitional Provision** *(Draft Statutory Instrument)* WHEN IT WILL HAPPEN Expected to be **January 2024.**	▪ This will introduce "rolled-up" holiday pay and a new annual leave accrual method for irregular hours and part-year workers. ▪ The Regulations also retain EU law that allowed workers to carry-over annual leave when they are unable to take such leave due to being on statutory leave or sick leave and will introduce a method of accrual of annual leave for irregular workers and part-year workers that have been on statutory leave or sick leave. ▪ The Regulations will also introduce a change to **TUPE**, such that businesses with less than 50 employees will be able to consult directly with employees, if there are no employee representatives in place; for transfers of 10 employees or less, businesses of any size will be able to consult directly with employees, if there are no employee representatives in place.
2 Carer's Leave Act 2023 WHEN IT WILL HAPPEN No implementation date announced yet; not expected before **April 2024.**	▪ Any employee caring for a dependant with a long-term care need will be entitled to one week of flexible unpaid leave a year.

NAME OF NEW LEGISTLATION	WHAT WILL CHANGE?
3 Employment Relations Act 2023 **Flexible Working** WHEN IT WILL HAPPEN Expected to be July 2024.	▪ Currently, when employees make a flexible working request, they have to explain its effect on the employer and set out potential ways to deal with it. Under the new law this will no longer be required. ▪ Employees will also be able to make 2 flexible working requests in a 12-month period and the employer must make a decision within 2 months (rather than 3 months, as now). The Government has also stated that it intends to make this a day-one right through regulations alongside the Act - rather than the current 26 weeks' continuous service which is required.
4 Workers Act 2023 **Predictable Terms and Conditions** WHEN IT WILL HAPPEN Expected to be September 2024.	▪ Workers and agency workers with working patterns that lack certainty of hours or times they work, and those on a fixed-term contract of 12 months or less, will have the right to request more predictable terms and conditions of work. Such requests can be rejected on specified statutory grounds, but the process (including any appeal) must be completed within one month. Two applications can be made per employee/worker per year. ▪ Agency workers (with requisite minimum service) who have worked on the same role for 12 continuous calendar weeks can request to become an employee of the hirer i.e. to change status to become a permanent employee, or an employee on a longer fixed-term contract, of the ultimate client (not the employment agency). This may potentially impact companies regularly using large numbers of agency workers for medium-term or longer assignments.
5 Worker Protection Act 2023 **Amendment of Equality Act 2010** WHEN IT WILL HAPPEN Expected to be October 2024.	▪ Employers will have a duty to take reasonable steps to prevent sexual harassment of employees at work. If the employer breaches this duty, employment tribunals will be able to increase compensation (which will be uncapped) by up to 25%.

NAME OF NEW LEGISTLATION	WHAT WILL CHANGE?
6 Neonatal Care Act 2023 **Leave and Pay** WHEN IT WILL HAPPEN Expected to be April 2025.	▪ Employed parents whose children are admitted to neonatal care will be granted up to 12 weeks of paid neonatal care leave.
7 Protection from Sex-based Harassment in Public Act 2023 WHEN IT WILL HAPPEN No implementation date announced yet.	▪ This will create a new criminal offence for intentional harassment, alarm or distress of a person in public, carried out to due to a person's sex or presumed sex. A workplace may be a public place and employees could be criminally liable for sexual harassment at work.
8 Protection from Redundancy Act 2023 **Pregnancy and Family Leave** WHEN IT WILL HAPPEN No implementation date announced yet.	▪ Currently, in a redundancy situation employers need to offer employees on maternity leave a suitable alternative vacancy, where one exists. ▪ The new law will extend this protection to those on adoption or shared parental leave, as well as maternity leave, and extend the period of protection from the point the employee informs the employer that they are expecting a baby until 18 months after the birth.

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