

# The European Legislative Agenda

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# THE NEW AGENDA

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- You have to go back to the last 1980s/early 1990s to find a European legislative agenda as packed with new employment and labour laws as today.
- That period gave us new laws on:
  - Health and Safety
  - Maternity Leave
  - Working Time
  - European Works Councils
- Today, we are looking at:
  - An Adequate Minimum Wage (and the promotion of Collective Bargaining) - adopted
  - Gender Pay Transparency - agreed
  - The Employment Status of Platform Workers (and the right of such workers to bargain collectively) – under discussion
  - The AI Act and the AI Liability Directive – under discussion
  - The Corporate Social Responsibility Directive – under discussion
  - A proposed revision of the EWC Directive – under discussion

# Data

- Nor should we forget that, in between these times we saw the enactment of the General Data Protection Regulation (GDPR).
- While not strictly an employment law, it has very significant workplace implications.
- This is especially true when it comes, in certain jurisdictions, to the introduction of new systems.
- It is also true when it comes to the transfer of data from the EU to the US.
- The GDPR will crosslink with the AI Act, deeping workplace representatives involvement in the introduction of AI-embedded systems.
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## What Explains this Burst of Activism?

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- Some of it is down to the “new social protectionism”. This is a desire on the part of politicians to show that the EU is a “Europe that protects” its citizens. A response to charges from populists, of the right and left, that the EU exists to promote the interests of “globalist” multinational corporations.
- But also because, after Brexit, it is easier to do so. For the entirety of its membership of the EU, the UK acted as a brake on the development of EU employment laws. Labour as well as Conservatives.
- Knowing that you are going to run into opposition sometimes prevents things being proposed in the first place. With the opposition gone, brakes are taken off.



# AI WILL BE PERVASIVE

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- We start from the premise that all management decision making will increasingly be infused with and underpinned by the use of artificial intelligence.
- All human resource decisions will make use of artificial intelligence to do the “heavy data lifting” even if the final decisions will have to be taken by a human.
- As employees increasingly become aware of AI-based decision making processes, they will want a say, they will want to be informed and consulted.
- Who wants their lives and livelihoods to be decided by the Terminator?

# The Adequate Minimum Wage Directive

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- This new law sets an EU-wide framework for determining what should constitute an adequate minimum wage in EU Member States.
- For our concerns, more important are the provisions in the Directive which require Member States to put in place action plans to ensure 80% collective bargaining coverage.
- Bargaining coverage does not equal union membership.
  - France: 11% union membership – 98% bargaining coverage.
- But the Directive indicates the EU's direction of travel in emphasising collective representation.

# The Gender Pay Transparency Directive

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- According to the European Commission, the gender pay gap across Europe is 13%.
- The Directive gives employees the right to receive information on pay, and to challenge any discriminatory practices they may encounter. They may ask for such information through representatives.
- Such data will also have to be made available to job applicants. Job applicants may not be asked about their pay history.
- The Directive requires companies with over 250 employees to disclose pay information by gender, by grade, to ensure equal pay for equal work on an annual basis.
- Where the annual report shows a gender pay gap of more than 5%, and if the gap cannot be justified on a gender neutral basis, or closed within 6 months of having been identified, the management will have to engage in a joint assessment with employees' representatives to determine the reasons for the gap and to develop an action plan to close it.



# The Employment Status of Platform Workers

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- The EU estimates that there are about 24 million workers in the gig economy. This will reach 40m in the next few years.
- This Directive seeks to give legal certainty to the employment status of such workers, whether they be employees or self-employed.
- As the drafts stand, they lean in the direction of regarding all platform workers as employees, unless platforms can prove otherwise.



# Definitions

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- The European Parliament says that a digital labour platform includes any *"internet-based companies that organise the work provided by workers or self-employed people to third-party clients and serve as intermediaries between the workers and the clients"*.
- The updated definition of a "digital labour platform" now includes any commercial service which:
  - is provided, at least in part, at a distance through electronic means, such as a website or mobile application;
  - is provided at the request of a recipient or involves the allocation of work through an open call; and
  - involves the organisation of work performed by individuals irrespective of the location or contractual designation of the relationship.

# The AI Act

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- The Act defines "artificial intelligence" as a system that can, with human oversight, perform tasks that would normally require human abilities such as learning, reasoning, perception, and self-correction.
- The Act prohibits certain AI practices, such as creating or deploying AI systems intended to cause harm or that have a significant impact on fundamental rights, such as freedom of expression or privacy.
- The Act adopts a risk-based approach to AI regulation, requiring more stringent measures for high-risk AI applications, such as biometric identification systems and critical infrastructure control systems.
- The Act requires human oversight for AI systems, meaning that a person must always be able to understand, intervene and correct the AI system's decision-making.
- The Act requires AI systems to be transparent and explainable, meaning that the decisions made by AI must be able to be understood and traced by human users.

# The AI Liability Directive

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- The proposed AI Liability Directive simplifies the legal process for victims when proving that a certain fault led to damage by alleviating the existing burden of proof.
- The AI Liability Directive will provide that where victims can show that someone was at fault for not complying with an obligation relevant to the harm caused and a causal link to the AI performance seems “reasonably likely”, national courts can presume that the non-compliance caused the damage. This allows victims to benefit from the ‘presumption of causality’.
- This does not preclude the liable person from rebutting the presumption, for example, by asserting that the harm was caused by another factor.



# Corporate Due Diligence

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- Obligation for companies to identify and address adverse impacts on human rights and the environment caused by their activities or by those of their business partners.
- Establishment of a duty of care for companies to take the necessary measures to prevent or mitigate such adverse impacts.
- The “depth” of the due diligence obligation remains an open question for now. Will it extend to just first line suppliers or beyond that?
- Who will have standing to bring complaints either through internal procedures or through the courts?
- What fines and penalties will companies be subject to for breaches of due diligence obligations?



# Revision of the EWC Directive

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- An obligation on Member States to allow the application for an interim injunction to suspend a management decision if information and consultation rights are allegedly not respected. Co-determination by the backdoor.
- “GDPR-size” fines also to be imposed.
- An expansive definition of transnational matters, taking into account the potential impact of an issue, the level of management and representation involved, and decisions envisaged in a Member State other than the one where the effects will be felt. In reality, all decisions would be transnational.
- All court proceeding to be paid for by management, no matter how frivolous.
- A minimum of two EWC meetings per year.
- The SNB timeline to be reduced from 3 years to 18 months.
- A right for EWCs and SNBs to be assisted by trade union representatives. Member States can limit funding to one expert only, in addition to the trade union representative.

## Conclusions

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- This is quite an extensive and wide-ranging agenda.
- It will have significant workplace implications.
- We will look in more detail at what it means for employee involvement.





# Questions?

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