Cybersecurity

Contributing editors
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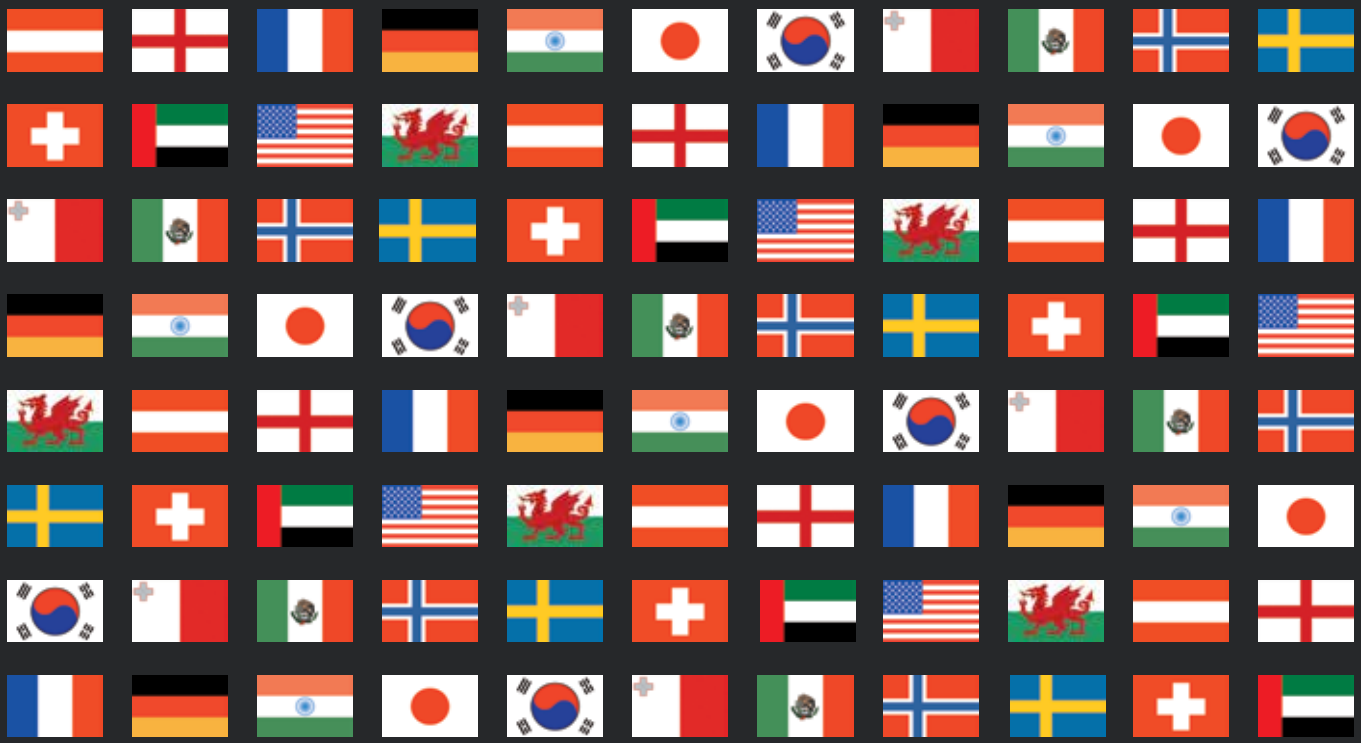

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GETTING THE DEAL THROUGH

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Global Overview

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With interconnectivity and use of digital storage expanding, cyberthreats posed by nation states, commercial competitors, company insiders, transnational organised crime and 'hacktivists' are growing on a global basis. Recent high-profile data intrusions in the United States have brought particular attention to cyber espionage and cyber 'attacks' perpetuated by nation states, prompting data and information security to become a major geopolitical topic for relations between the United States and China, as well as several other nations. For commercial enterprises, cybersecurity is no longer a technical issue for information technology personnel; it is a high priority for corporate counsel, senior executives and company boards. In this environment, maintaining an effective corporate cybersecurity programme is likewise growing in importance.

The growth of cybersecurity as a distinct discipline is a result of the remarkable value of assets accessible within companies and across national borders in digitised formats. Organisations around the world regularly suffer data security incidents ranging from nuisance intrusions and petty theft to massive criminal conspiracies. The German government recently estimated that its companies lose between US$28 billion and US$71 billion (and 30,000 to 70,000 jobs) per year from economic espionage. Such data thefts are prompting more calls for reform and more emphasis on developing regulatory standards for minimal safeguards.

Some economic sectors are more vulnerable than others. In the past few years, global criminal networks have targeted personal and financial information of customers in the retail and financial services industries, foreign nations have stolen valuable intellectual property and anonymous hackers have sought to destroy or embarrass corporations and executives. Nevertheless, despite these real threats, a surprising number of companies lack formal information security policies and incident response plans. Critical infrastructure sectors have become a particularly common target for cyber intrusions: a 2014 survey by the Ponemon Institute of 599 executives from the power, oil, gas and water sectors in 14 countries found that 70 per cent of respondents had experienced network intrusions.

In response to these challenges, governments from around the world are implementing legal reforms and shifting enforcement priorities. In the European Union, the legal framework for cybersecurity among member states is evolving to deal with new threats. The European Commission has issued a Cybersecurity Strategy to bolster cyber resilience, develop a more coherent cyber defence policy and promote industrial cooperation. On 7 December 2015 the European Union agreed on the final text for a Network and Information Security Directive, which would improve cybersecurity cooperation and capabilities among member states and require operators of 'essential services' in certain sectors to take appropriate security measures. On 15 December 2015, the European Union reached an agreement on the final text for a new General Data Protection Regulation, which is likely to be approved by the European Parliament in early 2016. The Regulation will replace a 1995 Data Protection Directive that has been the basis for national data protection laws of EU member states. On 15 December 2015, the European Union also approved the final text of a new directive to protect against the theft of trade secrets and other confidential business information, which would introduce common definitions, provide more effective redress for theft and prioritise enforcement of such types of theft. In October 2015, the European Court of Justice issued a landmark decision that called into question the validity of US-EU 'safe harbour' arrangements, which had provided legal protections for companies that transferred personal data between the two jurisdictions. How this decision may impact the flow of data important for cybersecurity measures is not yet clear.

In the United States, dozens of federal and state statutes address cybersecurity issues, but no overarching statutory framework exists. The US Congress has considered several legislative proposals focused on enhancing critical infrastructure protection, bolstering information sharing, strengthening the protection of personal data and increasing criminal penalties for economic espionage and theft. A 2013 US Executive Order directed the development of a voluntary cybersecurity framework to incorporate industry best practices and called for an expansion of information sharing and collaboration between government and the private sector. US regulatory agencies are expanding enforcement actions to address cybersecurity issues. For example, the US Securities and Exchange Commission has issued guidance requiring companies to disclose material information on the nature of any cyberthreats and challenged numerous companies on the adequacy of their disclosures. Similar efforts to protect against cyber intrusions are taking place in other jurisdictions as well.

Following several high-profile cyber intrusion events in 2015, the United States has increased focus on international action to enhance cybersecurity and data protection. The US President issued an Executive Order authorising the imposition of economic sanctions against individuals or entities found to be engaged in malicious cyberactivity and agreed to a new cybersecurity framework with China intended to limit state-sponsored theft of corporate secrets. The Trans-Pacific Partnership trade agreement, which was recently agreed between the United States and 11 other nations also contains added protections for the theft of trade secrets and confidential information using computer systems.

Many reforms are also taking place within industry and are customer-driven. Payment card companies in the US are now requiring chips to tokenise payment card data. In a relatively new development for many companies, commercial customers around the world are increasingly adding cybersecurity requirements to contracts and demand controls on how information technology suppliers hold data in cloud centres or otherwise demand special obligations related to protecting data. Cybersecurity provisions are frequently a key part of negotiations involving outsourcing of data and the sharing of data between companies. In addition, companies may require audits and other rights and remedies to address cybersecurity challenges.

Around the globe, the cybersecurity legal landscape continues to rapidly shift as governments consider new laws, regulations and enforcement policies. In the years ahead, companies will be faced with an increasingly complex array of cybersecurity compliance challenges and risks. At the same time, governments are working to determine the appropriate regulatory policy to govern the rapidly changing information technology environment and the best framework for working with the private sector to improve the security of digital assets.

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