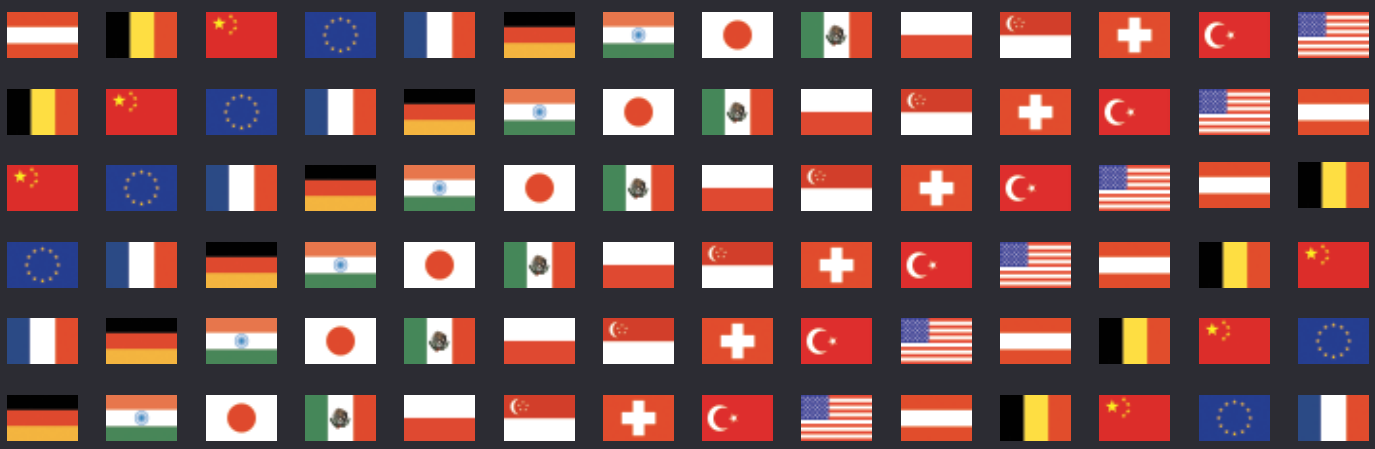
Cybersecurity 2021

Contributing editors
Benjamin A Powell and Jason C Chipman



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Getting The Deal Through

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Benjamin A Powell and Jason C Chipman
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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Cybersecurity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium and the European Union.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors Benjamin A Powell and Jason C Chipman of Wilmer Cutler Pickering Hale and Dorr LLP, for their continued assistance with this volume.

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Global overview

Benjamin A Powell and Jason C Chipman

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Around the globe, data about individuals, businesses and strategically significant technology is increasingly stored in digital formats. As a result, cyberthreats are growing and cybersecurity is an increasingly significant compliance and regulatory issue for private companies and governments. Some cyber threats are well known – hackers backed by nation states, commercial competitors, company insiders, transnational organised crime syndicates and 'hacktivists' have continued to grow on a global basis over the past year. Other threats represent new targets of opportunity associated with businesses moving operations online as a result of the covid-19 pandemic. High-profile data intrusions in the United States and Europe have brought particular attention to cyber extortion and to business email compromises aimed at financial fraud.

Two trends in this area will be particularly important in 2021. First, many countries are strengthening requirements around user consent and control over the collection of personal data as organisations around the world regularly suffer data security incidents, ranging from nuisance intrusions and petty theft to criminal conspiracies. For example, EU regulators have issued guidance in recent months on the handling of data related to covid-19, calling for a uniform approach to mobile apps and related technologies deployed to track infections. In China, personal information security requirements were promulgated in March 2020. These new rules are voluntary but Chinese regulators may expect companies operating in China to comply with the requirements, such as allowing individuals to have control over how their personal information is used and rules on protecting personal information obtained by companies. In the United States, federal regulators are issuing warnings about new and sophisticated fraud schemes aimed at capitalising on perceived vulnerabilities associated with businesses doing more work remotely during the pandemic.

Second, countries are expanding the use of tools associated with statecraft to protect critical data, such as new foreign investment controls, and import and export restrictions to protect important technologies and to address perceived cybersecurity vulnerabilities. For example, in 2019 China promulgated a new foreign investment law that empowers Chinese regulators to review certain foreign investment that may result in foreign access to critical data, among other things. Likewise, in 2020 the Trump administration promulgated new rules associated with evaluating foreign actors allowed access to the US telecommunications system, and the US expanded government powers to review transactions where foreign persons acquire large amounts of sensitive US person information (in part because of perceived cybersecurity threats). Separately, US federal agencies have increasingly signalled that companies associated with the Chinese government will be blocked from US commerce, presumably on the grounds of cybersecurity threats. These efforts are consistent with the 2018 White House national cyber strategy, which outlined efforts to increase the resiliency of US information systems and deter threat actors from launching malicious attacks against the United States, including authorising offensive cyber operations against foreign adversaries. And the Trump administration has continued to impose 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.

Like its US counterparts, the European Union has issued special warnings throughout 2020 about potential data security threats associated with covid-19, and has issued new rules empowering EU states to evaluate foreign transactions that may result in access to sensitive data. For example, EU Regulation 2019/452 entered into force on 10 April 2020, with rules establishing a general framework for the screening of foreign investment in the EU on the grounds of security or public order, including special focus on investments that may result in access to sensitive data about EU data subjects.

And EU data security requirements continue to be enforced in earnest. The European Council's Network and Information Security Directive imposes security obligations on 'operators of essential services' in certain important economic sectors, such as health, water supply, financial markets, banking and energy. Businesses in these sectors are required to manage cyber risks and report significant cyber breaches. Similarly, the General Data Protection Regulation requires data processors to implement a variety of security provisions and to appoint data protection officers.

Many reforms are also taking place within industries and are customer driven. Payment card companies in the United States 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 demanding 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 the outsourcing of data and the sharing of data between companies, and cybersecurity diligence is of growing importance for M&A transactions. In addition, companies may require audits and other rights and remedies to address cybersecurity challenges.

All this suggests that cybersecurity-related issues will remain a high-priority compliance issue for corporate counsel, senior executives and company boards. In this environment, maintaining an effective and global corporate cybersecurity programme is becoming the standard expectation for all businesses. Around the globe, the cybersecurity legal landscape continues to shift rapidly 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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