

**The IBA GEI REPORT ON SOCIAL
MEDIA AND TECHNOLOGY AT WORK:
THE USE AND ABUSES OF
COMMUNICATION AND MONITORING
TECHNOLOGY
(THE "EMPLOYEE PRIVACY REPORT")**

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Prepared by the

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1 Introduction

The IBA Global Employment Institute (GEI) was established in early 2010. Its primary purpose is to develop for multinational companies (multinationals), worldwide institutions and organisations a global and strategic approach to the main legal issues in the human resources and human capital fields (collectively referred to as 'HR').

- 1.1 Drawing on the resources and expertise of the IBA membership, the GEI provides a unique contribution in the field of employment, discrimination and immigration law on a diverse range of global issues to private and public organisations throughout the world. The GEI's objective is to enhance the management, performance and productivity of these organisations and help achieve best practices in HR management from a strategic perspective.
- 1.2 The GEI aspires, through its activities, to be the leading voice and authority on global HR law issues by virtue of having a number of the world's leading labour and employment practitioners in its ranks, the support and resources of the world's largest association of international lawyers, and its involvement in these activities.

2 Why a survey on Social Media and Employee Monitoring in the workplace?

- 2.1 The GEI's 10/20 Survey of December 2010 presented a number of senior HR managers (over 100 in a large number of multinationals in five continents) with a shortlist of the perceived top ten global HR issues for the next 20 years. On the list was the issue called 'net company'. The respondents were told that this term was shorthand for the arrival of the 'net-gen' and their use of 'social nets' and the like at the workplace. The senior HR managers ranked the 'net company' in the top five.
- 2.2 This result was no surprise. We can articulate many reasons why multinationals must understand and respond to the 'net company' and 'social media' at the workplace. But before we do that it might be helpful to describe what we mean by the 'net company' and 'social media'.
- 2.3 The 'net company' is a new organisational model which connects employees and their managers, supervisors and leaders with each other, and helps many businesses connect with customers, vendors, possible job candidates and suppliers. It allows for instant communication among stakeholders not only at local and national levels, but also, in the case of multinationals, on a global scale.
- 2.4 'Social media' is becoming a clearly defined concept. Broadly speaking it refers to the means of interactions among people in which they create, share and exchange information and ideas in virtual communities and networks. Social media includes magazines, the internet, forums, weblogs, social blogs, microblogging (e.g. Twitter), wikis, social networks (such as, Facebook and LinkedIn), podcasts, photographs and video rating (such as, Instagram, youtube, Flickr, and Daily Motion), social bookmarking, blogs, picture-sharing, vlogs, wall-postings, e-mail, instant

messaging, music-sharing, crowd-sourcing and voice over IP (e.g. Skype).

- 2.5 Armed with our concepts of 'net company' and 'social media' we look at their importance to multinationals.
- 2.6 To begin with some advantages, the net company and social media offer a multitude of opportunities for improvements in productivity, innovation, knowledge and competitiveness.
- 2.7 On the other hand, there are several legal and business challenges for employers to handle. For example, an obvious organisational challenge in having employees working online (permanently or temporarily) is the potential for employees to involve themselves with personal or private matters while online. This has self-evident implications for the employer's ability to control time spent working. Thus, the perceived benefits of the net company can be immediately impacted by a reduction in productivity. Yet this is not to say the picture is black and white. The employer may gain through employees developing their IT skills, or avoiding a (genuine) absence through resolving a domestic problem online.
- 2.8 Another set of challenges arises if the employer decides it wishes to exercise control over the navigation of the web by employees, or over communications between employees or between employees and third parties. A preliminary consideration is the time period and geographic scope of control. For example, the period of control might be limited to working time (whatever that might mean for senior executives!) and the area of control might be solely at the workplace. The next challenge facing the employer is the definitional problem of which communication devices are to be controlled (such as, mobile phones, laptops and other technology hardware) and whether one covers devices not provided by the employer? Then there are legal challenges such as, how can the employer lawfully monitor employee communication? A clash with fundamental employment rights relating to privacy and confidentiality might occur, and if so, how is this to be resolved?
- 2.9 Returning to the advantages for the employer, the employer might use social media as a work tool providing new possibilities for HR specialists in recruiting and screening etc. Employees can work flexibly and use it to help the branding of their employer. Again a conflict with those fundamental employment rights relating to privacy and confidentiality might arise, and we could add anti-discrimination laws to this duo of laws restricting the freedom of usage by employers.
- 2.10 We can confidently predict more challenges arising for multinationals as our understanding of the net company evolves. For example, we have witnessed the emergence of employees who choose not only to use the net for their own personal or private social communication, but also to comment on company issues. Some are encouraged to do this. There is nothing new in an employee criticising (or even celebrating) their employer. The novelty is that one negative comment about the employer on a private social net can reach as many people (or even more people) than a comment in a newspaper or during a TV broadcast (or careless talk at the office party!). Contrasted with the 'old ways' of communicating, the net offers the disgruntled or thoughtless employee greater speed and geographic coverage. Employer control is difficult to maintain and there may be no remedy once the horse, as it were, has bolted. Further, the law

may not be wholly sympathetic to the aggrieved employer. In its eyes the rights of freedom of speech and privacy for employees have to be balanced and accommodated with the rights of an employer to defend its brand or its reputation or its leadership team, managers and supervisors. Thus, the balance may be struck at a point giving some leeway to the employee. Moreover, the employer may be placed in the invidious position of reconciling the right of the employee to speak out with its duty to protect co-workers and their livelihoods from another employee's adverse comments.

- 2.11 Putting all of this together we can discern why the respondents to the 10/20 Survey rated this issue as important. Social media presents opportunities but also threats. Further, the employer who believes it can just opt out of social media lives in a fantasy world. Social media and the net company are realities and here to stay for some time. Therefore, multinationals and their advisers need to be aware of the arising issues.
- 2.12 Our previous survey of 2013 (the '2013 survey') embraced a number of key issues, including the monitoring and use of social media on behalf of various companies and the limits imposed on its use as a result of the duty of loyalty imposed by law and/or the existence of a social media policy.
- 2.13 Social media was the original focus of our reporting, its prevalence has raised increasing awareness of other areas where technology permits employers to access and share information about employees – and employees to do the same about each other or people they work for.
- 2.14 In consequence, the GEI concluded it would be worthwhile to undertake a revised survey of HR directors and HR lawyers in relation to some of the legal and business aspects of social media and employee monitoring (the 'Survey'). This Report encapsulates the results of the Survey together with the reflections of a roundtable discussion on those results that took place at a special meeting in June 2015 funded by the IBA and organised by the GEI ('the roundtable meeting').
- 2.15 The Survey is similar to the 2013 survey with slight variation in the nationality of the respondents and greater emphasis being placed on evolving issues. They include an employer's use of monitoring technology and the impact this has on employee privacy and employer's attitudes towards data security and privacy. We asked about how often there is disciplinary action arising from breach of a company's social media policy. We asked respondents to try to predict future trends, as well as evaluate current experience. Where there are noteworthy differences between corresponding answers to the 2013 survey and the answers to the Survey (2015), we have identified and commented on them. A lack of comment implies the answers in 2013 and 2015 surveys are statistically similar.
- 2.16 The reader will find in sections 3 and 4 a description of the goals of the Survey and an outline of the methodology of the Survey (including the roundtable meeting) respectively. As will be seen, the Survey principally covers the use (some might say misuse) by employees of social networks whether they be private or personal social networks, or company social networks or blogs. In addition, it covers the use of social media by employers as a tool for HR purposes.

- 2.17 Finally, sections 5 and 6 provide an overview of the results of the Survey and draw some conclusions respectively.

3 Goals of the "Employee Privacy Report"

- 3.1 In short, this Report has two goals:
- 3.1.1 to capture some general trends on the current state of the law and the practice of some multinationals with regard to the use of social media and other technology and to make some observations upon them; and
 - 3.1.2 to cause HR professionals to examine critically those observations and to relate those general trends to their own experiences with a view to assessing the implications for them.
- 3.2 Looking at the first goal in more detail, as previously indicated the cornerstone of this Report is the Survey. Thus, the Survey's structure and its coverage reflected this goal.
- 3.3 In terms of structure, the Survey was founded on two different questionnaires: one completed by HR directors and senior managers of multinational companies, and the other by external HR lawyers. This approach was adopted as there are usually differences not only between what is provided in the law and what is developed by multinationals in their policies but also between the perspectives of managers and lawyers on the same matter. In order to present a more comprehensive view of the current situation of social media at the workplace, this 'Employee Privacy Report' needed to reflect both the legal aspects of this matter (as seen by HR lawyers) and the practices of multinationals (as seen by HR directors).
- 3.4 In terms of coverage, the two questionnaires had some overlap but some significant differences.
- 3.5 The principal aim of the questionnaire sent to HR lawyers was to gather information on the specific legal frameworks which govern access to, and use of, social media. Therefore, the main focus of the questions was on how each HR lawyer's national law regulated social media at the workplace with particular reference to:
- 3.5.1 the relevant fundamental employment rights;
 - 3.5.2 the extent to which an employer's monitoring of communications is permitted;
 - 3.5.3 the legal permissions or processes which govern the employer's use of social media; and
 - 3.5.4 the legal sanctions, and incidence of claims before the courts by employees.
- 3.6 The principal aim of the questionnaire sent to HR directors in multinationals was to survey current attitudes and practice in using (or preventing the use of) social media at work. Therefore, the main focus of the questions was on the employer's regulation of social media including:

- 3.6.1 the practical uses employers have for social media (such as, recruiting, training, employee engagement, and customer relations);
 - 3.6.2 whether employers have policies or systems for controlling or monitoring the use of social media;
 - 3.6.3 the frequency of disciplinary issues; and
 - 3.6.4 the approach to different types of social media.
- 3.7 It is important to bear in mind that the Survey was not intended to be a 'scientific' survey in the sense of a means to develop an academic or theoretical model of social media at the workplace.
- 3.8 We received 33 responses from multinationals and the responses from the lawyers covered 30 jurisdictions.
- 3.9 Please note nothing in this Report is, or is intended to be, legal advice. This Report deals in generalities only. Readers should take specific legal advice addressed to any particular issue they are considering.

4 Methodology

- 4.1 Copies of the two questionnaires are attached as Schedules 1 and 2. Two distinct lists of questions were prepared by the members of the Working Group (see below) and reviewed by the Council of the GEI in order to evaluate the use of social media at the workplace from an HR perspective.
- 4.2 Respondents were asked to rate the importance of certain issues in their national law or company policy, their linkage to certain purposes in their national law or company policy, and to evaluate certain aspects of their national law or company policy according to 'yes/no' questions (with scope for providing additional comments). They were also asked to identify relative priorities and future trends to help us identify subjects which might repay specific study over time. This was done online.
- 4.3 Distribution covered employers of various sizes, the largest being 110,000 and the smallest 150 or so employees. Industries of many kinds, including telecommunications, financial services (insurance, broking, asset management) energy production, real estate chemicals, and professional services were covered. Accordingly, the Survey provides a broadly based snapshot of experiences and attitudes of different kinds and sizes of businesses, which have evolved differing structures and marketplaces. It would be unwise to extrapolate too strongly from the answers provided, for example on an industry-specific basis, but certainly broad trends can be clearly identified. Among those are some continuing differences in the perceived relevance of trends identified by the external lawyers.
- 4.4 The Council of the GEI appointed a Working Group for the development of this Report. The members of this working group were Sean Nesbitt (Taylor Wessing, United Kingdom), Maria Alexia Aurelio (Aresco, Argentina) and Anders Etgen Reitz (IUNO, Denmark).
- 4.5 This Working Group, with the coordination of Anders Etgen Reitz (member of the GEI Council), designed the questionnaires and contacted

lawyers from different countries. These lawyers were asked to contact multinationals headquartered in their countries with a view to combining the views of those multinationals with their own when answering the questionnaire. A list of these law firms and a list of the number of multinationals per country can be found in Schedule 3.

- 4.6 An initial draft of this Report was submitted to representatives of businesses and other organisations, experts, and some members of the GEI Council at a meeting in June 2015 in London: the roundtable meeting noted at 2.14 above. The meeting was sponsored by the IBA. Some of the conclusions of that meeting have been included in this Report.
- 4.7 The GEI Council wishes to convey its gratitude to the HR directors and HR lawyers (and the multinationals to whom they spoke) for their participation and interest in the development of the Survey. The GEI Council also wishes to thank the Working Group for their hard work throughout the whole of this project. In addition, the GEI Council would like to record its gratitude to the participants at the roundtable meeting for their insightful contributions on the initial draft of this Report. Finally, the GEI Council also wishes to express its thanks to Charlotte Jackson (assistant at Taylor Wessing), who edited substantial parts of the Schedules.

5 General comments on the results of the Survey

- 5.1 Comments on lawyers' responses to the questionnaire

5.1.1 Duty of loyalty

5.1.1.1 With regard to the limits on the use of social media, the majority of respondents considered that employees in their country had a duty of loyalty by law or a restriction under company policies. Interestingly the size of the majority depended upon when social media was being used (inside or outside of working hours) and for what purpose (private or business). The smallest majority (77.4 per cent) reported that the duty or restriction extended to private purposes outside of working hours; and highest percentage (90 per cent) for private and business purposes during working hours. Many European countries have, by law, a general duty of loyalty owed by the employee to the employer, which defines the extent of the employee's obligations relating to the use of social media. In addition to the general duty, it is commonplace to have policies which further regulate and circumscribe the use of equipment during work hours in addition to the legal duty.

5.1.1.2 Regarding whether it makes a difference if employees access to social media is through company hardware or private devices, a bare majority (53.1 per cent) of surveyed lawyers replied that who was the owner of the equipment did 'make a difference'. Another majority (65.6 per cent) reported that there is a difference between accessing social media internally, for example, as an integrated part of the company's intranet, as opposed to externally. This suggests that legislators

perceive that it is more appropriate or convenient to control the misuse of internal systems than the misuse of external systems.

5.1.1.3 A high percentage of all of the surveyed lawyers (68.7 per cent) believed that where the law or employment terms establish a duty of loyalty there is no difference between the duty's application to employee communications via social media and elsewhere (such as, face-to-face). This suggests that the medium of communication does not determine the application of the duty. Thus, information that is communicated or posted in any social media appears to be subject to the same duty as if the information had been made available elsewhere. For example, all other things being equal it seems an employee who is bound by a non-disclosure agreement (NDA) and yet reveals trade secrets through social media, commits a breach of that agreement in the same way that he or she would do so through communicating the trade secrets in a face-to-face conversation (assuming no specific provisions in the NDA exempting the employee from social media communications). Even so there remains virtue in NDAs being drafted with sufficient breadth to catch disclosures through social media. That said, in the 2013 survey 85.4 per cent of surveyed lawyers confirmed that the duty of loyalty differed on social media than other places, indicating that with time, there is some difference in the legal treatment of social media as the law becomes more sophisticated (i.e. it incorporates social media within the duty).

5.1.1.4 Importantly lawyers confirmed by a big majority (77.4 per cent), that where the law permits employees to speak out (e.g. whistleblowers) such permission includes social media communications. This is not a great surprise. If the duty of loyalty applies to social media it would be strange for the exemptions from the duty not to apply to social media as well. Even so this implies that the greater speed and geographical coverage of social media communications is not seen as undermining the policy basis for the permission. This figure is slightly less than that recorded in the 2013 survey (82.5 per cent) as some of the underlying whistleblower laws (and low levels of discriminatory laws) within the jurisdictions contained in the Survey meant the question of whether the law permitted employees to speak out on social media was recognised as less of an issue.

5.1.2 Social media policy

5.1.2.1 There was unanimous agreement among the respondents that employers can implement a social media policy, however, the procedures and approvals required differ significantly. For example, there may be specific language requirements and the need to

undertake consultation with employees and/or their representatives.

- 5.1.2.2 In most of the surveyed countries, it appears that social media policy strengthens the company's ability to sanction employees, and creates more legal certainty for the employer and this includes companies across all regions without material distinction in the underlying legal system.
- 5.1.2.3 Over half (64 per cent) of the surveyed lawyers recorded that case law does exist in their country in relation to employees use of social media. In the 2013 survey, it was 55 per cent, so there is an increase. Unsurprisingly, such case law has been prompted by two types of challenge: first, an employer who monitors employees' communications; and secondly, an employer who dismisses an employee for disloyal comments. With regard to the latter, significantly courts have often ruled the employer acted fairly and legally when dismissing an employee for making comments on social media that damaged the interests of the employer. Some jurisdictions report an increase in case law, with Facebook being the medium most often mentioned, and an evolving framework of reference to whether privacy settings were used, proportionately and the severity of the language used, being an important element when distinguishing whether comments are judged impermissible.
- 5.1.2.4 When considering if the sanctions imposed by the employer were proportionate in the circumstances of the case, the courts have tried to balance the employer's interests with the employee's right to freedom of expression, and whether the employer's sanctions were proportionate.
- 5.1.2.5 In relation to whether there have been any significant changes in respect of the rules relating to the use by employees of social media, many respondents (81.2 per cent) reported that there have not been any significant changes (90 per cent in the 2013 survey). Countries where there have been significant changes are due to new laws concerning the employer's monitoring and controlling of the use by employees of social media during working hours, for example through company e-mails or the proposed introduction of new privacy legislation generally, such as in China. Respondents were equally split on whether, in the next four years, there will be new challenges to the national legal framework.
- 5.1.2.6 A theme in commentary from the HR lawyers was that where there is no legislation, the courts have been active agents in creating common approaches and refining existing principles. For example, the Canadian respondent said: "we foresee further exploration of the

same themes on which social media litigation has so far concentrated, in particular (i) employee inappropriate or defamatory social media comments against employers, (ii) employee-employee social media harassment, (iii) employee breach of confidentiality on social media, (iv) validity of employer surveillance of employees on social media, as well as (iv) issues of safety and security of employee personal information".

5.1.2.7 In this regard, there is still some way to go: "the Courts assumed a primary role. Through their interpretation they have provided the appropriate adjustments, although in some instances in a rather contradictory way". (Italy)

5.1.3 Employee monitoring

5.1.3.1 In relation to the monitoring of employees, the majority of lawyers (81.3 per cent) confirmed that it is permitted to monitor social networks but usually this is subject to compliance with conditions and restrictions laid down by law. A typical restriction is the requirement to inform the employee of the monitoring before it begins (see also some procedural requirements mentioned at 5.1.3.3 below). Within the European Union (EU), the plethora of data protection rules are such that an employer's ability to monitor will need to be tested against data protection laws. Across all regions, respondents noted an increase in use of other monitoring technologies by employers, although employee awareness of and grievances about monitoring appear most likely to be raised in the specific context of social media.

5.1.3.2 On the subject of using social nets as a tool for screening job candidates, the majority of surveyed lawyers (84.4 per cent) said this is permissible. Nonetheless, the number (15.6 per cent) saying this is not permissible is striking. Indeed one country reported they had an 'absolute bar' on using social media as a tool for screening candidates. Furthermore, even where the employer is at liberty to use social nets, 75 per cent of the respondents said that the candidate's consent is required. Also, in some countries it can make a difference if the candidate invites management to connect or has an open profile. In other words there can be a subtle legal distinction between the situation where the candidate offers up access to say a CV profile and the situation where the employer obtains the candidate's consent.

5.1.3.3 According to a significant majority (64.5 per cent), employers are required to follow procedures such as, consultations and public approvals before monitoring their employees. This appears to be more the case in EU countries (with their traditions of general employee consultation) than in the US, Latin American and developing economies.

- 5.1.3.4 Where employers have violated the local rules on employers' use of social media, the lawyers report that the most common sanctions are economic penalties. Importantly the possibility of criminal law convictions exists in some countries.
- 5.1.3.5 40 per cent of respondents answered positively when asked whether there is a link between the monitoring of social media and the breach of anti-discrimination laws (compared with 50 per cent in the 2013 survey). Thus, under one half confirmed there is a reduced risk of successful anti-discrimination claims (such as, in relation to personal characteristics or union connections) by reason of monitoring social media. Local legislation prohibiting discrimination should encompass inappropriate monitoring conducted through social media. There remain some jurisdictions however with little or no anti-discrimination laws and so the lawyers unsurprisingly reported that the existence of social media was not triggering more anti-discrimination claims and did not appear likely to generate a trend of future claims.
- 5.1.3.6 The majority of surveyed lawyers did not report case law involving an employer's use of social media, whilst a small percentage (18.8 per cent) did. It is important to recognise that this is not tantamount to saying that there are no claims or there will be no claims. Not all claims reach the courts (e.g. they may be settled), not all cases get reported, and inevitably there is a time gap between employees recognising they might have a legal claim and launching a claim (for example, in the EU many years separated the introduction of a law on equal pay and the flood of litigation that eventually came). A number of respondents reported an increasing frequency of employee grievances (which are not resolved externally but within a business) regarding comments on and monitoring of social media.
- 5.1.3.7 Most respondents submitted that there had not been any significant changes in the rules relating to employers' use of social media (90.6 per cent). The message is that the principles governing freedom of speech, privacy and anti-discrimination laws are being applied to social media without modification. Where there has been change through case law it is reported that this is seen as a 'hot topic' and it is predicted more cases are likely in the future.
- 5.1.3.8 There are some jurisdictions where existing (non-privacy) criminal legislation is being adapted to the privacy and employment context. In the UK there have been reports of staff being arrested under computer misuse legislation (relating to customer data). In Ireland there have been charges under legislation relating to damage to property (posing of explicit images on a Facebook account).

5.1.4 Data security and future trends

5.1.4.1 Respondents made some interesting comments on the trends in cyber-security and data theft. A representative answer was:

"Examples of the manner in which companies operate in order to manage such risks are: the appointment of a security officer to be in charge of organisational data privacy and security; conducting an overall risk assessment for the organisation systems; implementing additional and stricter security pools (both hardware and software); and maintaining a network and security insurance policy specifically designated for these kinds of threats."

5.1.4.2 Quantitatively there are predictions of greater monitoring and electronic surveillance, with around a third of respondents anticipating legal or regulatory change in the next four years. There is no real statistical sign of any movement in volume of issues arising concerning data transfer.

5.2 Comments on multinationals' responses to the questionnaire

5.2.1 Social media as a local or global issue

5.2.1.1 A minority (31.3 per cent) of the surveyed HR multinationals consider that the issue of social media is mainly a local issue, whilst (46.9 per cent) believe it is a global and local issue, and only a small percentage believe it is a wholly global issue. This answer may be due to two factors. First, awareness that the legal rights and rules which determine what an employer can do with social media are determined by country-specific rules. An example is the need for employee consultation. A second factor may be a sense that in different countries labour issues evolve at different rates, even among multinationals.

5.2.1.2 Half saw the issue of social media in their company as being 'somewhat important'. It is not accurate to say that social media is a 'burning' issue. For most businesses it is clearly one of a number of long term contextual developments that needs managing. From the responses, there is a greater incidence of 'high importance' in companies with a sales and marketing or online function. These businesses significantly work through virtual methods and have a higher experience of practical issues: for them social media and the systems it uses are their 'tools'.

5.2.2 Specific company policies (recruitment, breach, legal risk)

5.2.2.1 A large percentage of the surveyed multinationals believed that social media policy is an important consideration in the hiring and retaining of talent. For them, it is either 'somewhat important' (51.5 per cent) or 'very important' (33.3 per cent). Interestingly, in the 2013

survey only 16.2 per cent of multinationals saw this as a 'very important' consideration, indicating an increasing reliance on social media both during and after the recruitment process.

- 5.2.2.2 Overall, the majority of respondent multinationals stated that their company has specific policies in relation to particular issues such as, recruitment, screening, hiring, the use of technology, confidentiality of business information, and protection of company brand image. The majority of responding multinationals reported that they have specific policies concerning the use of technology (78.1 per cent), the protection of company and brand image (90.6 per cent), whilst all had a policy on confidentiality of business information. This final figure has interestingly increased from 86.9 per cent (the 2013 survey), suggesting a heightened awareness amongst employers. It appears frequently that there is a patchwork of policies that govern how businesses behave in particular situations rather than policies which have developed for the expression of these issues in a particular technology. In other words, policies have been developed by reference to a behaviour or process (such as, confidentiality of information and recruitment) rather than the use of social media.
- 5.2.2.3 However, with regard to recruitment, the percentages of multinationals with specific policies is high – 75 per cent. There has been a noticeable increase since the 2013 survey.
- 5.2.2.4 According to the majority (81.3 per cent) the same policies apply to all staff regardless of the category of worker to which they belong (e.g. blue collar or white collar, and full-time or part-time). This has, however, decreased considerably from the 91.5 per cent who had the same policies in 2013. There is little evidence of access to social media being treated as a 'benefit' of status.
- 5.2.2.5 Only a small majority of multinationals apparently make a breach of their social media policy a disciplinary offence (60.6 per cent). However, an increasing number of surveyed multinationals now insure against legal risk such as, an employee defaming a third party through statements on social media (e.g. via Twitter) (53.6 per cent compared to 16.8 per cent in the 2013 survey), reflecting a greater appreciation of the threats of social media.
- 5.2.2.6 Generally, the majority of companies (63.6 per cent) do have 'corporate social media', for example, as an integrated part of their intranet.
- 5.2.2.7 A large majority of the multinationals (67.7 per cent) confirmed that they do not have a policy for managers and HR professionals against monitoring the use by

employees of social media. This suggests that companies adopt a 'laissez-faire' approach: if an employee makes their behaviour visible, it is not generally thought wrong to observe it. This figure has decreased a little since the 2013 survey (73.8 per cent) suggesting that this 'laissez-faire' approach may be changing.

5.2.3 Company policy

5.2.3.1 The majority of surveyed companies (75 per cent) have taken steps to ensure that their global social media policy is in compliance with local regulation. This is a significant increase from the 2013 survey (43.3 per cent), indicating a change in priorities and acceptance of detail required, particularly in highly regulated countries.

5.2.3.2 The multinationals surveyed were asked whether policies were implemented with the involvement of employees, employee representatives, works councils, unions, local authorities, or any other organisations. The responses varied, with the majority of companies (75 per cent) saying that employees had been involved in the implementation of social media policies. 37.5 per cent involved employee representatives, 25 per cent works councils, 20.8 per cent unions, 12.5 per cent local authorities showing an overall increase from the 2013 survey.

5.2.3.3 Over half of respondents (51.6 per cent) acknowledged that their company does not regularly assess the effectiveness of its social media policy. This figure has, however, decreased significantly from the 2013 survey figure (63.3 per cent).

5.2.4 Uses of social media in the company

5.2.4.1 As to employers benefitting from the use of social media, half of the surveyed companies considered that they have benefited in terms of new ideas. The majority said their company had experienced benefits in connecting with customers (61.3 per cent) and employer branding (77.4 per cent) though this has decreased from the 2013 survey figures (74 per cent and 75.3 per cent respectively), suggesting that such benefits are increasingly viewed by employers as the norm. However, in the cases of training (77 per cent) and diversity (67.7 per cent) the majority view was that there had been no benefits. The use of social media to help connections between different departments of the company through groups with common interests was finely balanced.

5.2.4.2 According to 39.4 per cent of companies surveyed, employees have unlimited access to social media during work hours. However, some limited use to official work breaks (21.2 per cent) and some capped the amount of time permitted (12.1 per cent). In the 2013 survey, most

employers were reluctant to permit unlimited use of social media in the workplace. This suggests an increasingly relaxed attitude to such usage.

5.2.4.3 A minority of companies (45.5 per cent) stated they distinguish between employees who use social media for work purposes and others.

5.2.4.4 The majority of companies do not block employees from social media sites such as, Facebook, LinkedIn, Twitter and Instagram. From the responses received, it seems that LinkedIn is more likely to be used by the employer for employee screening and less likely to have its use by employees blocked as a social medium, compared to other designated services. This probably correlates with the perceived business orientation of LinkedIn. Facebook, Instagram and Snapchat are the services most blocked (43.8 per cent, 44.8 per cent and 46.4 per cent respectively).

5.2.4.5 Generally, companies have **not** reported cases where employees had to be disciplined for the use of social media during work hours (82.1 per cent). However, a small minority (10.7 per cent) reported they had 20 plus cases, whilst very few (7.1 per cent) have had between one and ten cases. The fact that there are even some cases (albeit a small amount), indicates a willingness on the employer's part to act on social media misuse.

5.2.4.6 When asked if the company regulates the use by employees of social media outside working hours a majority (61.3 per cent) answered that the company did not. This has decreased from the 2013 survey figure (87.7 per cent), reflecting an increased awareness of employee social media usage. When asked about cases where they have had to discipline an employee for the use of social media outside working hours, a small number (14.8 per cent) said they had disciplined employees.

5.2.4.7 Nearly half of companies do not distinguish between the use of company hardware and the use of employee owned devices. This suggests that what is of importance to employers is not whether the device used belongs to the company or to the person but rather the manner of use.

5.2.5 Social media and the recruitment process

5.2.5.1 Just under half (48.5 per cent) of surveyed companies stated they used social media as a screening tool or background check in the recruitment process: an increase of over 10 per cent since the 2013 survey. The majority (62.5 per cent) do not ask for permission or inform candidates when doing so. This may reflect the fact that technology presents a chance to gain a much broader 'window' into a candidate's life. It also presents

the employer with the chance to increase and speed up the number of candidates it deals with.

5.2.5.2 Some employers have a policy which rules out the use of social media to 'screen' candidates – they will not look at Facebook profiles for example. Interestingly while Facebook is one of the "most blocked" services, 37.5 per cent of businesses which screen use it. This is second only to LinkedIn at 87.5 per cent.

5.2.5.3 The surveyed companies were almost equally split on whether their company takes any steps if sensitive data is obtained through social media in the recruitment process or during employment to ensure that decisions on hiring, promotion, demotion or termination are not discriminatory.

5.3 Data security

5.3.1 For this Report we asked about data security. Personal mobile technology is widely accepted as a work tool with 42.4 per cent of respondents allowing workers to bring their own device, and of them 57.7 per cent have a policy to govern it.

5.3.2 Of employers who said they carry out international data transfers, 75 per cent said they obtained employee consent in some form. This appears to be used largely in combination with other methods to permit transfer, such as, "safe harbor" and regulator approval or model clauses (both equating to 62.5 per cent).

5.4 Future trends

5.4.1 Social media is used as an oversight tool by a material number of employers (38.1 per cent). Longer established technologies are at 47.6 per cent (CCTV) and 28.6 per cent (sound recording). Chat room oversight was at 14.3 per cent. In this survey, predictive technologies were statistically insignificant. The authors would speculate that a report more focused on financial services would produce increased figures.

5.4.2 There are indications of an increase in monitoring. 34.4 per cent of respondents predicted an increase; 56.3 per cent thought it would stay the same.

5.4.3 Regarding trends in employee attitudes, there were few indications, from the responses of external lawyers, that employees had significant issues regarding the various technologies governed by this Report. Social media generated the most incidents (28 per cent).

6 Conclusions

6.1 The relative importance of social media and employee data issues: differences between legal professionals and multinationals

6.1.1 There is a contrast between the priority attached to social media issues by the HR lawyers and the multinationals surveyed. For

lawyers, this area is a 'hot topic'. Partly this is driven by uncertainty, with only just over half considering that there is sufficient case law established to set out working principles governing the use and control of social media. At the roundtable meeting in 2013, the view expressed by many of the employers was that they recognise that the issue is significant but it is not so much a legal liability issue as an opportunity for employer branding and more efficient recruitment.

- 6.1.2 The different reactions of the two constituents are partly explained by the experience (so far) of lawyers in relation to legal change. Since 81 per cent considered there have not been any significant changes in their national rules relating to the use by employees of social media, this may explain the attitude of multinational employers: if nothing much has changed, why should it be a high priority for them to adopt a social media policy? An answer may be that this figure was 90 per cent in the 2013 survey. Not much change, but some.
- 6.1.3 Other explanations could lie in the differing structural and economic pressures on employers and legal professionals: employers may be more preoccupied with revenue generation than with internal risk management concerning social media use among employees.
- 6.1.4 Confronted with the fact that the issue was listed as one of the most important issues by employers in the GEI 10/20 survey, the comments of the representatives of multinationals at the roundtable meeting in 2013 were instructive. They explained that although companies recognise social media as one of the most important HR tools in relation to recruitment and branding, they do not consider the legal challenges as a top priority compared to other challenges they face within HR. Going further they argued their concerns were more about the user than the use. The main issue that the companies are facing relates to the younger generation, and the difference in their expectation of privacy. Young people tend to regard a conversation on Facebook just as private as a private conversation between two people. But the reality is that it is not as private as they might think.
- 6.1.5 However, employers attach a higher importance to having social media policies where the use of new technologies and social media are close to, or intrinsic to, their core business. Examples of this would be in branding and communications businesses and in businesses creating software or other intellectual property rich businesses. Here employer respondents have a higher level of engagement with social media. They are 'early adopters' of social media. It remains to be seen whether they are a different kind of employer, or an advanced guard of other employer attitudes.

6.2 Loyalty, monitoring and control: comments of lawyers and multinationals

- 6.2.1 Most legal respondents consider that ordinary principles of loyalty and control will apply to comments made by staff on social media.

- 6.2.2 Lawyers generally report that the introduction of social media does not change the underlying legal rights and entitlements of employers and employees. Given that an employee could be disciplined for disloyalty through comments made, it seems the fact that they were made on social media makes no difference.
- 6.2.3 Similarly, employees who are protected by 'free speech' or 'whistleblowing' rules may have that protection where comments are made on social media.
- 6.2.4 Where employers tend to use intranet or social media to communicate messages to their own staff, they need to be wary of any presumption that the speed and ease of communication means that their messages will be binding upon the employee. For example, in high-use countries such as, Taiwan, there is a reported presumption of effectiveness. In other countries however, employers implement internal social media policies and consult employees on the requirement and effect of such policies.
- 6.2.5 Some employers may fall foul of assumptions that the characteristics of social media can protect them. It is tempting to make comments about perceived bad practices or characteristics of colleagues. An employee will not be protected as a whistleblower in these circumstances if they do not meet existing national rules on the subject matter of a protected comment, or the (sometimes limited) identities of people to whom comments may be made for the employee to have protection. Social media may trap the unwary.
- 6.2.6 The differences in national rules and procedures relating to employees appear to be in a process of identification and adaptation. A significant minority of surveyed companies have not, as yet, taken steps to ensure that their global social media policy, where they have one, complies with local regulations (75 per cent), though in the 2013 survey it was a majority. The authors of this Report generally find the process for checking local compliance to be time consuming and expensive and this is still so for many employers. Where employers have clear approaches, they may prefer to simply set them out and negotiate the individual effect of any infringements on a case by case basis. But there is reported a greater percentage of companies analysing the legal impact in this Report.
- 6.2.7 There is a relatively low, but increasing, incidence of reported disciplinary issues concerning social media. Most respondents have not reported taking disciplinary action relating to the use of social media during work hours. Only one per cent have had as many as six to ten cases of disciplinary action. This suggests that, so far, the increase in availability of social media for comments has not resulted in a large number of infractions.
- 6.2.8 This result corresponds well with the comment made at the roundtable meeting in 2013 to the effect that what are required is training and coaching, and not necessarily disciplinary measures. A further comment made at that meeting was that if a company perceives the value of social media as a PR opportunity (in other words embracing 'free speech'), it is likely to be accused of

hypocrisy if it disciplines employees who speak freely. Nonetheless, most companies at that meeting agreed that if an employee's 'offence' concerned discrimination, breach of ethics or the company's safety or brand, then most employers would take disciplinary action in such cases.

6.3 Screening and potential for dispute

- 6.3.1 Lawyers and multinationals appear to have a common level of experience in the use of social media relating to recruitment and employee screening. We have noted that a large percentage of multinationals surveyed thought that a social media policy was an important feature in the hiring and retention of talent. This response seems to correlate with concerns from other surveys on the difficulty in attracting and retaining staff, and on the need to target different generations with the use of new technology. A higher incidence of policies relating to recruitment screening and hiring as a specific use for social media indicates this is the most important area of concern for multinationals dealing with their employee base in this context.
- 6.3.2 For the authors of this Report, it is easy to contemplate circumstances in which employers might put themselves at risk of claims for discrimination or infringement of human rights from their screening of candidates in social media. For example, there is the risk of inferences of discrimination by reason of protected personal characteristics, religious or other beliefs being viewed by the employer when monitoring an employee's communications on social media. Responses among lawyers were split on whether it appeared likely that social media in itself might increase the number of claims. One respondent commented: it is difficult to draw a concrete conclusion. We suggest that there is the probability of increase related to the inherent characteristics of social media, which may act as a tool through which there could be increased abuse, and/or increased reporting of abuse.
- 6.3.3 Just as the new technology gives employers and prospective employers a larger window into the 'private' lives and views of their employees, so it also gives individuals an increased capacity to speak out and reach a wider audience to discuss concerns or complaints. In some jurisdictions, this is seen currently even in sensitive areas of discussion such as, among victims of abuse.
- 6.3.4 Since the surveyed companies were almost evenly divided on the adoption of extra controls to prevent misuse of sensitive data, it seems likely that more occasions of bad practice or breach will arise, and in the long term this is one of the 'hot topics' which lawyers and employers may return to.
- 6.3.5 Following the 2013 survey, we commented that, until employers come across consistent commercial or legal requirements to focus on social media policies, and financial or other material risks for not doing so, it is likely that they will be more preoccupied with social media as a customer-facing tool in relation to revenue generation. The reports of increasing number of grievances and some more reported cases in 2013 and 2014 indicate that those pressures are growing. We think it is becoming evident from

jurisdiction to jurisdiction the characteristics of social media are creating those requirements. At this time, social media remains the leading edge of debate about employee privacy and freedom versus employer protection. It remains to be seen whether the use of other technologies will generate more issues in the future.

7 About the International Bar Association Global Employment Institute

The International Bar Association Global Employment Institute was established in early 2010. Its primary purpose is to develop a global and strategic approach to the main legal issues in the human resources and human capital fields for multinationals and worldwide institutions.

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Schedule 1

Questionnaire to country lawyers

General

1. Does the employee in your country have a legal duty of loyalty or a restriction under company policies, which limits his/her use of social media:
 - (A) For private purposes, outside of working hours?
 - (B) For private purposes, during working hours?
 - (C) For business purposes?
2. Does it make a difference, whether the employee accesses social media on the company hardware or on his/her own devices?
3. Does it make a difference if the social media accessed is purely internal, e.g. as an integrated part of the company's intranet (a corporate social media)?
4. Does the duty of loyalty (what an employee may say before it is considered disloyal) differ on social media from other places such as, a social occasion? If so, how?
5. Is the employee protected when raising specific issues (whistle-blowers, etc.)?
6. Can the company implement a social media policy? What procedures must be followed if any?
7. What difference will a social media policy make on the assessment of the employee's conduct and the ability to sanction?
8. Is there any case law in your country pertaining to the employees' use of social media? If so, please include the case law in your response together with a brief summary in English.
9. Have there been any significant changes in respect of the rules relating to employees' use of social media?
10. Do you foresee any national social media trends that will present new challenges to the legal framework in the legal framework in the next four years to end 2018?

Employers' use of social media

1. Are companies allowed to monitor employees through social nets? Are there any restrictions?
2. Are companies allowed to use social media searches as a tool for screening job candidates? Are there any restrictions?
3. Is employee consent required? Does it make a difference if the employee invites management to connect or has an open profile?
4. Are companies required to follow any procedures before monitoring their employees (consultations, public approvals, etc.)?

5. What are the penalties if companies violate the local rules on companies' use of social media, if any?
6. Does company monitoring of social media increase the risk of discrimination cases? Have there been any examples in your country?
7. Is there any case law involving companies' use of social media? If so, please include the case law in your response together with a brief summary in English.
8. Have there been any significant changes in respect of the rules relating to companies' use of social media?

Employers' use of monitoring technology

1. What effect does privacy law have on employers' use of technology to monitor employee behaviour?
2. Is there a noticeable change in the attitude of employees towards protection of their privacy online?
3. Has there been an increase in disciplinary or grievance procedure use as a direct result of information arising from monitoring technologies?
4. Is there any case law involving the employer's use of monitoring technology and invasion of the employee's privacy? If so, please include the case law in your response together with a brief summary in English.
5. How have companies reacted, if at all, to the increasing risk of data theft and breaches of cyber-security?
6. Can employees request removal by the employer of personal information/images from company materials? To what extent do companies have to comply with such requests?
7. Are employers, or employees, expressing any unease as to transferring employee data either within or outside of the jurisdiction?
8. Since 2012, has there been any noticeable increase or decrease in employers seeking to transfer data outside of the jurisdiction, and what issues have arisen in such circumstances?
9. Since 2012, have any particular industries or regulatory bodies taken any extra measures regarding the monitoring of employee communications?
10. Do you foresee any such measures or other changes to the law on electronic employee surveillance being required in the next four years to end 2018?

Schedule 2

Questionnaire to HR directors in multinationals

1. **Name of company [Note: we undertake not to disclose this or attribute answers to you without your permission]**
2. **Main economic activity of company**
3. **Number of employees worldwide**
4. **Country where the company or group has its head office**

5. How important is the issue of social media in your company?

- a) Not at all important
- b) Somewhat important
- c) Very important

6. Is the issue of social media mainly local or global?

- a) Mainly Local
- b) Mixed
- c) Mainly global

7. Do you think your social media policy is an important consideration in the hiring and retaining of talent in your company?

- a) Not at all important
- b) Somewhat important
- c) Very important

Policy

8. Does your company have a specific policy on any of the following subjects? (Please select any that apply.)

- i) Recruitment, Screening, Hiring & Social Media
- ii) Use of technology
- iii) Confidentiality of business information
- iv) Protection of company, brand and image
- v) Employee privacy and monitoring

9. Does your company have a specific policy on social media? Is it a global policy or local policies that vary from country to country?

- a) No policy
- b) Local policies
- c) Global policy

10. If your answer to question 9 was "Global policy", has your company taken steps to ensure that the company's global social media policy is in compliance with local regulation?

- a) Yes
- b) No

11. If your answer to question 9 was "No policy", why was this?

- a) Already included in another policy
- b) No need for a policy
- c) Other

12. Does the policy differ between different categories or roles of staff (e.g. white collar vs. blue collar & full time vs. part time, regulated activities vs unregulated)?

- a) Same policy for all
- b) Differing policies
- c) Other

13. Does your company have corporate social media, e.g. as an integrated part of the intranet?

- a) Yes
- b) No

14. If your answer to question 12 was yes, does the same social media policy apply to the corporate social media as to external social media?

- a) Yes
- b) No

15. If you have a social media policy, what is the consequence of a breach of your social media policy? Is it treated as a disciplinary offence?

16. Does your company insure against legal risk regarding social media e.g. defamation from statements on social media? (e.g. Twitter)

- a) Yes
- b) No

17. Does your company insure against breach of corporate privacy and cybersecurity e.g. leaks of customer data?

- a) Yes
- b) No

18. Has your social media policy been implemented with the involvement of any of the following? (Please select any that apply.)

- i) Employees
- ii) Employee representatives
- iii) Works councils
- iv) Unions
- v) Local authorities (including data protection agencies)

19. Does your company regularly assess the effectiveness of its social media policy?

- a) Yes
- b) No

20. How has your company experienced benefits from its use of social media? (Please select any that apply.)

- i) New ideas
- ii) Training
- iii) Connecting with customers
- iv) Employer branding
- v) Diversity
- vi) Connections between different departments of the company through groups with common interests
- vii) Other

Employees' use of social media

21. Are employees allowed to use social media during working hours in your company?

- a) Yes, unlimited use is allowed
- b) Yes, but only during official work breaks
- c) Yes, but time is capped or limited
- d) No

22. Do you distinguish between employees who use social media for work purposes?

- a) Yes
- b) No

23. Do you block employees from any of the following social media sites? (Please select any that apply.)

- a) Facebook
- b) LinkedIn
- c) Twitter
- d) Pinterest
- e) Instagram
- f) Snapchat
- g) Other

24. Does your company regulate the employees' use of social media outside working hours?

- a) Yes
- b) No

25. Has your company had cases where employees had to be disciplined for the use of social media? If so, how many are you aware of?

During working hours

- i) During working hours 0
- ii) During working hours 1-5
- iii) During working hours 6-10
- iv) During working hours 11-19
- v) During working hours 20+

Outside of working hours

- i) Outside of working hours 0
- ii) Outside of working hours 1-5
- iii) Outside of working hours 6-10
- iv) Outside of working hours 11-19
- v) Outside of working hours 20+

26. Has your company had cases where it has had to manage an incident of employee behaviour on social media, other than by taking disciplinary action (e.g. coaching, PR strategy etc)? If so, how many are you aware of?

- i) 0
- ii) 1-5
- iii) 6-10
- iv) 11-19
- v) 20+

27. Do you distinguish between the use of company hardware and the use of employees' own devices?

- a) Yes
- b) No

Employers' use of social media

28. Does your company use social media as a screening tool / background check in the recruitment process, and if so, do you inform candidates or ask for permission?

- a) Yes, and we ask candidates' permission/inform them that we do so
- b) Yes, but we do not ask candidates' permission/inform them that we do so
- c) No

29. If your answer to question 29 was "Yes", which social media do you use to screen/background check candidates in the recruitment process? (Please select any that apply.)

- i) Facebook
- ii) LinkedIn
- iii) Twitter
- iv) Pinterest
- v) Instagram
- vi) Snapchat
- vii) Other

Employers' attitudes to data security and privacy

30. Does your company take any steps if sensitive data is obtained through social media in the recruitment process or during the employment (religious beliefs, sexual orientation, pregnancy, nationality, union membership, health information, etc.) to ensure any decisions made (hiring, termination, promotion, demotion) are not discriminatory?

- a) Yes
- b) No

31. Which of the following do you allow or use? (Please select any that apply.)

- i) "Bring your own device"
- ii) "Choose your own device"
- iii) Company chooses the employee's device

32. If your company allows employees to bring their own device into the workplace, does it have a policy for employee use of such devices?

- a) Yes
- b) No

33. Does your company carry out cross-border employee data transfers?

- a) Yes
- b) No

34. If your company carries out cross-border employee data transfers, what process does it carry out to ensure these transfers are legal?

- a) Employee consent
- b) US Safe Harbor
- c) Regulator approval e.g. Model Clauses
- d) Binding Corporate Rules
- e) Other

35. Which of the following do you use to gather data on employees or monitor them? (Please select any that apply.)

- i) Sound recordings
- ii) CCTV
- iii) Predictive technologies/algorithms
- iv) Chatroom oversight
- v) Review of social media
- vi) Telemetrics
- vii) GPS
- viii) Other

36. Does your company have a policy for managers or HR professionals on how it is monitoring the employees?

- a) Yes
- b) No

37. In the next 3 years to end 2018, do you think the extent of your monitoring of existing employees or screening of candidates will:

- a) Decrease
- b) Stay the same
- c) Increase

38. How many times have employees expressed concern about, or have you had disputes relating to, any of the following?

Your monitoring of them

- i) 0
- ii) 1-5
- iii) 6-10
- iv) 11+

Privacy issues between themselves e.g. use of sound recordings on mobile phones

- i) 0
- ii) 1-5
- iii) 6-10
- iv) 11+

Comments on social media

- i) 0
- ii) 1-5
- iii) 6-10
- iv) 11+

Restrictions or access to social media

- i) 0
- ii) 1-5
- iii) 6-10
- iv) 11+

39. In the time from January 2014, have you seen any patterns in the following:

Employee monitoring conducted by the company

- i) Less queries and concerns from employees
- ii) About the same number of queries and concerns from employees
- iii) More queries and concerns from employees

International data transfers

- i) Less queries and concerns from employees
- ii) About the same number of queries and concerns from employees
- iii) More queries and concerns from employees

Social media

- i) Less queries and concerns from employees
- ii) About the same number of queries and concerns from employees
- iii) More queries and concerns from employees

40. Do you have any comments you wish to make e.g. explaining any of your answers

Schedule 3

List of law firms and number of multinationals per jurisdiction

Argentina	Aresco Lawyers
Belgium	Marx Van Ranst Vermeersch & Partners
Canada	Stikeman Elliott
Chile	Merello Abogadas Asociados
China	King & Wood Mallesons
China	Ribeiro Hui
Colombia	Brigard & Urrutia
Cyprus	Andreas Neocleous & Co
Czech Republic	Giese & Partner
Denmark	Iuno
Germany	Linklaters
Germany	CMS Hasche Sigle
Hong Kong	Ribeiro Hui
India	Nishith Desai Associates
Indonesia	Soemadipradja & Taher
Ireland	William Fry
Israel	Herzog, Fox and Ne'eman
Italy	Simonetti Persico Scivoletto

Malaysia	Skrine
Mexico	Basham, Ringe y Correa
Netherlands	Kennedy Van der Laan
New Zealand	Buddle Findlay
Poland	Dentons
Poland	Wardyński & Partners
Portugal	Cuatrecasas Gonçalves Pereira
South Africa	Bowman Gilfillan
Spain	Sagardoy Abogados
Sweden	Ernst & Young
Switzerland	Meyer Müller Eckert Partners
Taiwain	Eiger Law
United Arab Emirates	Al Tamimi & Company
United Kingdom	Taylor Wessing

Number of multinationals per country (note: some Respondents were regional offices. The ultimate home headquarters are identified in this table)

Argentina: 1
Australia: 1
China: 4
Denmark: 1
Finland: 1
France: 2
Germany: 1
India: 8
Malaysia: 1
United Kingdom: 3
United States of America: 10