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Russia's new personal data localization regulations: A step forward or a self-imposed sanction?

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A B S T R A C T

The paper represents one of the first comprehensive analyses of Russian personal data localization regulations, which became effective at September 1, 2015. This work describes in detail the main components of the data localization mechanism: triggers of its application, scope, exemptions and enforcement. It also takes into account the official and non-official interpretations of the law by Russian regulators, some of which were developed with the participation of the author. Special consideration is given to the jurisdictional aspects of the Russian data protection legislation and the criteria of its application to foreign data controllers. The author also reveals the rationale behind the adoption of data localization provisions and analyzes their possible impact on foreign companies operating in Russia and implementation of innovative IT-technologies (Cloud computing, Big Data and Internet of Things). The paper concludes that most of the potential benefits of data localization provisions, i.e. in the area of public law, law enforcement activities and taxation. Nevertheless, data localization provisions may still have medium-term positive impact on privacy, since they force all stakeholders to revisit the basic concepts of existing personal data legislation (the notion of personal data, data controller, processing, etc.), thus serving as a driver for re-shaping existing outdated data privacy regulations and crafting something more suitable for the modern IT-environment.

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1. Introduction

The Russian legislation in the sphere of information technologies is changing rapidly these days. Lots of newly adopted legal rules are reshaping the IT-market in Russia: software import substitution regulations in public procurement[1], special provisions governing blogger's activities, imposition of data retention obligations on Internet communication services, to name a few. But one of the most controversial and widely discussed is the recent "reinforcement" of Russian IT-law that relates to data localization provisions.

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[1] Federal Law No. 188-FZ of 19 June 2015, which established preferential treatment of "domestic" software during public procurement procedures. The criteria of domestic software are: 1) exclusive right to such software should belong to a Russian person, specified in a law (e.g. to Russian Federation or its region, Russian citizen, non-commercial entity controlled by the above persons, commercial entity, established by the above persons, etc.); 2) such software should be freely available for distribution on the territory of the Russian Federation, including Crimea; 3) licence fees to foreign persons should not exceed 30% of proceeds from sales of such software.

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Until recently, Russian legislation did not contain any special provisions governing data location: information could be stored and processed everywhere, subject to limitations associated with some traditional special regimes (e.g. information constituting state secret or conditions of transborder data flow to countries not providing adequate protection of personal data).

The first signs of data localization provisions appeared in the banking sphere. In accordance with amendments to Federal Law "On Banks and Banking Activities", adopted in 2013, financial institutions acting under a license from Central Bank of Russia were obliged to reflect all their financial transactions in electronic databases, allowing to store such data for a period not less than five years. Subsequent regulations of the Central Bank of Russia established that backup copies of such databases should be located in Russia[2]. However, location of primary databases with such data was not regulated: for the purposes of control and oversight activities, it is more than enough to have local backup databases not complicated by jurisdictional matters.

The second wave of data localization provisions happened in 2014. As a legislative response to the terrorist acts committed in Russian city Volgograd in the end of 2013, the so-called anti-terrorist "package" of laws was introduced, which apart from strengthening criminal liability for terrorist and related activities, introduced additional limitations on anonymous electronic money payments, obligations to identify users of Internet services in public access points and, what is more important, amendments to the main Russian statute regulating information technologies: Federal Law No. 149-FZ "On Information, Information Technologies and Protection of Information" (hereinafter – "Law on Information")[3].

These amendments may be divided into two parts: one relating to bloggers and another one to all other persons, which «organize dissemination of information in Internet». The first part, which was most widely discussed in blogosphere, pursues the goal of equalizing the legal status of popular bloggers (with more than 3000 views per day) with Mass Media and imposing obligations similar to those, which Mass Media has viz specifically, to be responsible for the accuracy of information published, to register with Russian supervisory authority in IT-sphere ("Roskomnadzor"[4]), to reveal true identity and provide contact details for sending communications relevant in law. Something similar was adopted in China as early as 2005, when all bloggers with independent web sites were required to register with the Government[5].

The second part directly relates to data localization requirements. A new legal status has been introduced, named as "*Organizer of dissemination of information in Internet*" (hereinafter – "Organizer"), which is defined as:

> *any person, facilitating functioning of information systems and/or computer programs, which may be used and/or are used for receipt, transfer, delivery and/or processing electronic messages of the users in Internet. (Article 10.1 of the Law on Information)*

Once it is established that a certain Internet-service falls within the definition of "Organizer", such person has to fulfil a number of obligations: to notify Roskomnadzor; to store user's traffic and other specified data for six months in Russia; and to cooperate with Russian law enforcement agencies (mostly Federal Security Service) by granting them access to the stored data upon request. Failure to comply with such obligations may lead to fines and blocking access to the web site of such Organizer.

As it may be seen, the definition of "Organizer" is formulated rather vaguely, allowing the inclusion in its scope of almost anyone associated with Internet service, even vendors of server hardware and software. Some further guidance is provided in subordinate regulations: Decree on Data Retention and Storage[6]. It contains a narrow approach, specifying that special data retention obligations associated with the status of Organizer apply only to providers of "communication Internet-services" understood as an:

> *information system and/or computer program that is used or may be used for receipt, transfer and/or processing of electronic messages between Internet users, including for sending messages to the general public.*

According to this definition, Organizer is understood to be a person providing the services that allow Internet users to communicate *with each other*. Such an approach narrows the practical application of the legal regime of "Organizer" to such ISPs as social networks, providers of public e-mail, providers of collaboration/storage cloud services, providers of forums and other discussion groups. This narrow approach is used in the day-to-day practice of the Russian supervisory authority ("Roskomnadzor") as well.

As of July 1, 2014, there were around 60 Organizers registered with Roskomnadzor, which represent major Russian Internet platforms, providing users with communication facilities, among which are: public e-mail services of Mail.ru, Yandex and Rambler; social networks VKontakte and Odnoklassniki; free hosting/web-site configurator service uCoz.ru; cloud storage service YandexDisk; some of the biggest news aggregators with user discussion functionality. There are no foreign Internet businesses, since none have a physical presence in Russia yet. However, Roskomnadzor is conducting extensive discussions with foreign communication Internet-service providers with the intent to facilitate their compliance with the law. Whether many foreign companies will comply with this law yet remains to be seen. For now, it is possible to conclude that addressees of the second wave of data localization are *Internet communication services operating in Russia*.

The list of the data subject to local storage requirements is provided in the Decree on Data Retention and Storage. It

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[2] Section 3.6 of Regulation of Central Bank of Russia No. 397-П of 21 February 2013.

[3] In practice, these amendments are usually designated/referred to by the number of the amending law (Federal Law No. 97-FZ).

[4] The Federal Service for Supervision of Communication, Information Technologies, and Mass Media. URL: http://eng.rkn.gov.ru

[5] China orders bloggers to register with government // The Guardian, 7 June 2005 http://www.theguardian.com/media/2005/jun/07/chinathemedia.digitalmedia.

[6] Decree of the Government of the Russian Federation No. 759 of 31.07.2014.

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