

Messenger operators in Russia: counter-terrorism regulation

In the wake of recent terrorist attacks in Europe and Russia, the Russian legislature has introduced further obligations on instant messaging service operators, including WhatsApp, Telegram and others. In particular, the provisions establish requirements to identify users of messaging applications, supplementing the existing data retention and reporting requirements in force. Anastasia Petrova and Maria Ostashenko, Partner and Associate at ALRUD law firm respectively, unpack these changes to the legal landscape for operators of messaging services.

Introduction

Recently, Russian lawmakers passed Federal Law of 29 July 2017 No. 241-FZ on Amendments to Articles 10.1 and 15.4 of the Federal Law on Information, Information Technologies and Information Protection ('the Law'). The Law was introduced to the State Duma on 24 May 2017, was approved by both the Duma and the Federation Council, the upper chamber of the Russian Parliament, and signed by the President on 29 July 2017. The proposed amendments introduced by the Law will enter into force on 1 January 2018.

Definition of information telecommunication message services

The Law introduces the concept of the information telecommunication instant messaging service ('messenger'), which is defined as an information system and/or software meeting the following criteria:

- It is developed and/or used for message exchange exclusively between users of this system or software through telecommunication networks;
- It allows senders to identify the particular recipient; and
- Its functionality is not aimed at making the information publicly available on the internet.

Following these criteria, the Law primarily

targets such services as WhatsApp, Viber, Skype, Facebook Messenger and Telegram Messenger. Seemingly, the proposed amendments are not aimed at covering social networks, public chats and blogs, which are already covered by other legislation, including the recent 'Yarovaya' laws, regulating organisers of dissemination of information on the internet ('organiser') and which are already in force ('the Law on Organisers').

Newly proposed duties of messenger operators

The Law imposes a number of obligations on electronic messaging service operators ('messenger operators'). In particular, messenger operators will bear the following specific duties:

- Providing services only to users that have been duly identified. Identification will be carried out with the use of telephone numbers based on the special agreement concluded between the messenger operator and a telecommunication service provider. The form of agreement will be adopted by the Russian Government. Telecommunications operators will be required to ensure a 'primary user's identification.' Messenger operators that are Russian legal entities must also

store identification data only in Russia;

- Allowing users to reject receipt of messages from other users, i.e. 'blacklisting' other users;
- Ensuring the confidentiality of transmitted messages;
- Providing competent state authorities with the possibility to carry out messaging in accordance with Russian legislation;
- Restricting the transmission of messages containing unlawful information by indicated users, upon the request of the competent state authority;
- Restricting the transmission of messages in cases provided by the Government.

Newly proposed liability of messenger operators

Failure to abide with the mentioned duties will result in:

- Restricting access to the messenger upon a court decision, i.e. blocking the messenger;
- Imposing an administrative fine of up to RUB 5,000 (approx. €70) on individuals, up to RUB 50,000 (approx. €710) on officials, and up to RUB 1,000,000 (approx. €14,100) on legal entities for non-compliance.

Messenger operators providing services to Russian users and failing to comply with the Russian legal requirements could be penalised by having access to their services from Russia restricted.

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Obligations on messenger operators that are already in force

The Law answers the question that has arisen since the Law on Organisers was adopted. Russian lawmakers already treat such services as WhatsApp, Viber, Skype, Facebook Messenger and Telegram Messenger as organisers and expect them to comply with these statutory requirements, which are already in force. Thus, when the Law enters into force, messenger operators will be subject to even more burdensome requirements. Currently, the Law on Organisers requires messenger operators to notify the Federal Service for the Supervision of Communications, Information Technology and Mass Communications ('Roskomnadzor') at the beginning of their activity, by filing a special electronic form on the website of the Roskomnadzor.

The messenger operator must store in Russia, information on the facts of receiving, transmitting, delivering, and/or processing of voice information, text, images, sounds and other electronic messages of internet users, as well as other information regarding those users, within one year of the completion of the above actions. Starting from 1 July 2018, messenger operators will be obliged to store content of text messages, voice information, images, sounds, video, other electronic messages of internet users for up to six months, as of the moment of completion of the reception, transmission, delivery and/or processing.

Current obligations of messenger operators also include to provide, on request, the information specified above to Russian authorities; to ensure compliance of the equipment and software and hardware tools used in their systems with the requirements set out by Russian authorities; and, to provide specific Russian authorities with the information required for de-coding if the messenger uses hashing or coding of messages, or provides users with the opportunity to hash or code messages. Moreover, messenger operators must

comply with requirements on personal data with regard to processed and stored information, ensure compliance with cross-border transfer requirements and data localisation requirements, ensure the observance of users' rights as data subjects, and comply with Russian data retention terms.

Legal questions

In circumstances where it was not clear whether messenger operators fall under the definition of organisers, most international players preferred to recognise themselves as being outside the scope of Russian regulations on the organisers. This could be conditioned by the fact that most messenger operators use end-to-end point encryption and do not have access to the content of the transmitted messages.

However, such a concept will purportedly be undermined with the understanding that messenger operators are covered by the Law on Organisers and provisions of the Law. The scope of obligations imposed on a messenger operator contradict the essence of the encrypted approach used by international messenger operators to date and it seems to be unclear how they will be able to comply with Russian obligations whilst preserving their confidentiality policy.

Messenger operators providing services to Russian users and failing to comply with the Russian legal requirements could be penalised by having access to their services from Russia restricted. As the famous *LinkedIn* case demonstrated, such a scenario seems to be quite realistic; LinkedIn Inc. has been blocked in Russia since November 2016 for violations of Russian personal data regulations, including to process users' personal data in primary databases located in Russia.

Additionally, another question that arises is in terms of the discrepancies with certain requirements of the General Data Protection Regulation (Regulation

(EU) 2016/679) ('GDPR'), which will be applicable to players such as WhatsApp, Viber, Skype, Facebook Messenger, Telegram Messenger as of 25 May 2018. In particular, the retention of EU users' personal data and or disclosure of such data to the Russian authorities without sufficient justification for such retention or disclosure will breach requirements under the GDPR. Thus, messenger operators complying with Russian legal requirements will automatically violate the GDPR and should either limit their functionality by limiting services only to Russian users or by taking the risk of being blacklisted in Russia or fined in the EU.

Conclusion

The obligations of messenger operators considered in this article are mainly aimed at fighting against terrorism, and disseminating messages with illegal content. Although introduced with good intent, these regulations give a cold shower to international messenger operators with Russian users, as they will have to transform dramatically their activities and policies or leave the Russian market in the manner LinkedIn did, when Russian authorities commence their enforcement.

There is, however, a strong indication that the tendency in regulating messenger operators' activity for counter-terrorism purpose is a worldwide trend. Recently, the Australian Government proposed a new cyber security law to force global technology companies such as Facebook Inc. and Google Inc. to help police unscramble encrypted messages sent by suspected extremists and other criminals. This initiative was also met negatively by international players that claimed it as weakening end-to-end encryption services. Thus, there is a hope that these regulations will not become a single large stumbling block for the activities of international players in Russia, but that a balance between counter-terrorist operations and the business activities of messenger operators will be found.