

Experiencia internacional en protección de datos personales

International experience in personal data protection

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Abstract

The article is devoted to the analysis of various approaches to the protection of personal data in Russia and the European Union. In order to determine the importance of observing the right to protection of personal data, a number of documents of the European Commission adopted over the past few years have been analyzed. General scientific and special legal methods of cognition allowed for a comparative analysis of Regulation 2016/679 on the Protection of Individuals in the Processing of Personal Data and Their Free Movement (2018) and EU Directive 2016/680. Although Russia has ratified the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981), it has not been able to solve a number of problems related to the mandatory notification about personal data leaks, protection of personal data during their processing and against unauthorized access, etc. As a result, conclusions are drawn regarding the prevailing approaches to the definition of personal data and a unified conceptual and categorical apparatus in the field of personal data. Proposals for the modernization of Russian legislation based on international experience are made as well.

Keywords: Human rights; personal data; personal data processing; personal data protection

Resumen

El artículo está dedicado al análisis de varios enfoques para la protección de datos personales en Rusia y la Unión Europea. Para identificar la importancia de guardar el derecho a la protección de datos personales, se han analizado unos documentos de la Comisión Europea adoptados en los últimos años. Los métodos científicos generales y legales individuales de cognición han permitido el análisis comparativo del Reglamento 2016/679 sobre la protección de las personas durante el procesamiento de datos personales y la libertad de circulación (2018) y la Directiva de la Unión Europea 2016/680. Se ha revelado que aunque Rusia ha ratificado el Convenio del Consejo de Europa para la protección de las personas con respecto al procesamiento automático de datos personales (1981), no ha podido resolver una serie de problemas relacionados con la notificación obligatoria sobre filtración de datos personales, protección de datos personales durante el procesamiento y contra el acceso no autorizado, etc. Como resultado, se ha deducido con respecto a los enfoques predominantes para la definición de datos personales y se ha desarrollado el aparato conceptual y categórico unificado en el campo de los datos personales y se han preparado las propuestas específicas para modernizar la legislación rusa basada en la experiencia internacional.

Palabras clave: Datos personales; derechos humanos; procesamiento de datos personales; protección de datos personales



INTRODUCTION

Technological progress and globalization have caused many different problems in the exercise by individuals of their right to personal data protection. Personal data, due to modern technologies, move more freely, private companies and public authorities use personal data on an unprecedented scale and individuals increasingly open access to their data. The protection of personal data is also an integral part of legal regulation within an information society ([Tchinaryan, Lavrentieva, Kuchenin and Neznamova, 2019](#)).

At a time of rapid integration into the world community, Russia is bringing its domestic legislation in line with international law. These measures are necessary to develop certain proposals to improve the Russian legislation, contributing to the unification of the Russian and European regulation of personal data protection and increasing the level of protection of the rights and legitimate interests of personal data subjects.

The subject of analysis is the norms of the Russian legislation on personal data protection, in particular, the [Federal Law N 152-FZ \(2006\)](#) “on Personal Data” (hereinafter – the Law), the [Federal Law N 149-FZ \(2006\)](#) “on Information, Information Technologies and Information Protection”, by-laws and regulations, as well as international law and legislation of foreign states, in particular [Regulation \(EU\) 2016/679](#) on protection of individuals with regard to the processing of personal data and the free movement of such data and the repeal of [Directive 95/46/EC](#) (general provisions on data protection).

Some problematic issues in the field of personal data protection were considered in scientific works by [Ali \(2017\)](#), [Bennett and Raab \(2003\)](#), [Gribanov \(2018\)](#), [Zhuravlev \(2016\)](#), [Mikhailova \(2017\)](#), [Mukhataev \(2014\)](#), [Postnikova \(2018\)](#), [Jakovleva \(2014\)](#) and others.

METHODOLOGY

In the research, we were guided by general scientific and special legal methods of cognition. The most actively used general scientific

methods were analysis and synthesis, as well as generalization and analogy; special methods-legal modeling, critical analysis.

In the process of cognition, analysis and systematization of the available scientific knowledge about the legal regulation of personal data protection in the Russian Federation and abroad, the logical legal and legal cognition methods were applied.

One of the main research methods was the method of comparative analysis of both national and international real legal mechanisms to ensure the safety and circulation of information containing personal data, which allowed us to identify the most effective among them.

The method of legal modeling made it possible to develop the most optimal legal mechanisms and structures in the field of protection and transfer of personal data to incorporate them into national legislation.

A critical analysis of national regulations in the field of personal data revealed legislative gaps and omissions, which are to be overcome and eliminated ([Federal Republic of Germany Law, 1994](#); [South Australia Law, Act 1995](#); [Italy Law 38/2010](#); [The People's Republic of China, Law 2013](#); [RF. Order 187H, 2015](#); [RF. Decree 1403, 2016](#)).

The application of the above methods allowed us to conduct a comprehensive analysis of the phenomenon under study: to identify problematic issues in the field of legal regulation of personal data protection in the Russian Federation and abroad, as well as to analyze scientific literature.

RESULTS

It has been revealed that the Russian legislation on personal data is closely related to the European. The [Federal Law N 152-FZ \(2006\)](#) “on Personal Data” was adopted in connection with the ratification by Russia of the Convention of the Council of Europe on the protection of individuals in the automated processing of personal data in 1981 and borrowed many of its provisions. Since May 25, 2018, a new General Data Protection Regulation has been being introduced in the European Union, which establishes rules for the processing of

personal data common to all member states and takes into account recent changes in the field of computer technology that has significantly affected data processing. Its task is to bring the current rules of personal data processing in line with the requirements of new technologies, including the Internet, cloud computing and social networks. The provisions of this Regulation can be used to improve the Russian legislation on personal data and effectively ensure the right of citizens to protect their personal data.

It has been established that the legislation of the Russian Federation in this area is quite developed, although not without problems, in particular in terms of the issues of mandatory notification of personal data leaks, as well as the expansion of the requirements of national legislation on personal data protection during their processing and against unauthorized access.

It has been determined that the key problem of legal regulation of personal data protection is the consolidated observance by states of the fundamental principles that are enshrined in international legal acts and on which data protection should be based. Without such a consensus, it is impossible to resolve the conflict of laws of different countries in cross-border data transfer.

Based on the results of a comprehensive analysis of Russian and international acts in the field under consideration:

- The most effective legal mechanisms of regulation of turnover and protection of personal data for the purpose of distribution of this positive experience in national legal systems have been revealed;
- A unified conceptual and categorical apparatus in the field of personal data, as well as specific proposals for the modernization of national legislation, have been developed.

DISCUSSION

For a comprehensive study of the right to the protection of personal data, it is advisable first of all to refer to the Treaty on the Functioning of the [EU \(TF, 2008\)](#) and the Charter of Fundamental Rights of the [EU \(CFR, 2000\)](#).

In the TFEU, the right to protect personal data is provided for in article 16 (TFEU, 2008). It is aimed at protecting the right of an individual to decide on the use of their data, which is extremely important in light of the huge amounts of collected, used and transmitted personal data. Thus, TFEU (2008, art. 16) establishes that the European Parliament and the Council under the ordinary legislative procedure adopt the rules on the protection of individuals with regard to processing of personal data by the institutions, bodies and agencies of the Union and member states when carrying out activities, which fall within the scope of application of Union law and on the free movement of such data. The TFEU provides that compliance with these rules is under the control of independent bodies (Pazyuk and Sokolova, 2015).

The right to respect for private and family life, home and correspondence, enshrined in CFR (2000, art. 8), stipulates the need for personal data protection. Various aspects of personal data protection are guaranteed by CFR (2000, art. 8), including the right to gain access to data collected in relation to the person and the right to eliminate errors in them. Particular attention in this document is given to personal data processing, which must be carried out in good faith (i.e. without manipulation), for clearly defined purposes, with the consent of the person concerned or if there are other legitimate reasons provided by law. Like the TFEU, the CFR secures the rights of an independent body to control the compliance with the rules of protection, processing, access, and correction of errors in the personal data of individuals.

However, European Convention on Human Rights (ECHR, 1953, art. 8, par. 2) is contrary to CFR (2000, art. 52, par. 3) as it allows for the restriction of guaranteed rights to respect for private and family life (Varlamova, 2013; Erokhina, 2016; Isaev and Khlyupina, 2014).

Unfortunately, in Russian legislation, the ratio of the right of a citizen to privacy and the right to personal data protection is also not defined. The literature notes that the legal framework for protecting privacy established by the Civil Code of the Russian

[Federation \(1994\)](#) and the legal framework for protecting personal data enshrined in the Federal Law “on Personal Data” exist in parallel ([Savelyev, 2017](#)).

The content of the concept of private life is disclosed in the position of the Constitutional Court of the Russian Federation as an opportunity for a citizen to control information about himself and prevent the disclosure of personal, intimate information ([RF. Definition N 2128-O, 2013](#)).

According to [Mikhailova \(2017\)](#), over the past 20 years in Russia there has been a decisive expansion, or rather, the elimination of the boundaries of information related to the personal data of individuals, and such an expansion, in her opinion, is more likely negative than positive.

The concept of personal data is in the position of their broad interpretation. The authors note that it is impossible to establish an exhaustive legal list of personal data to be protected ([Petrykina, 2011](#)) and in case of doubt whether the information is personal data, it is advisable to consider it personal data ([Gribanov, 2018](#)).

The legal framework of personal data in Russia is complex, because it contains the norms of constitutional, administrative, civil, labor, tax law, etc., and for this reason, diversified mechanisms are used to protect the rights of a citizen as a subject of personal data ([Ruzanova, 2019](#)).

In 2016, new significant acts of secondary law in the field of personal data protection were adopted: 1) [Regulation \(EU\) 2016/679](#) and 2) [Directive \(EU\) 2016/680](#). Thus, the European Commission implemented an improvement in personal data protection by reforming and enacting these acts in 2018 ([Ali, 2017](#); [Gribanov, 2018](#); [Mikhailov, 2017](#)).

Positive innovation of [Regulation EU 2016/679 \(art. 4\)](#) includes the expansion of the concept of personal data as compared with the repealed [Directive 95/46 \(art. 2\)](#). At present, personal data is understood as any information related to an identified or identifiable individual.

Personal data processing also plays an important role in personal data protection as, according to [Regulation EU 2016/679 \(art. 4\)](#), it is any operation or their combination carried out with or without automated means. The most common personal data processing operations include collecting, registering, organizing, structuring, storing, harmonizing, modifying, extracting, using, transmitting, distributing, or any other way to ensure access to personal data, as well as other operations, including coordination, combination, restriction and destroying of data ([Krylova, 2017](#); [Churilov, 2019](#)).

It is valuable that [Regulation EU 2016/679](#) protects personal data, along with other fundamental rights and freedoms of individuals, regardless of their citizenship and place of residence. According to [Naumov and Arkhipov \(2016\)](#), protection of individuals in connection with the processing of their personal data should not restrict the freedom of movement of this data for the normal functioning of the economy in the EU.

In the preamble of [Regulation \(EU\) 2016/679](#), in particular, it is noted that it is aimed at strengthening and rapprochement of the economies of the EU member states within the framework of the internal market. This once again confirms the importance of compliance with the right to personal data protection for improving the efficiency of the EU internal market. At the moment, there is a fragmentation of legal regulation in the area under consideration, which leads to legal uncertainty, in particular to distortion of competition, obstacles to business activities associated with additional costs (especially for small and medium-sized enterprises), as well as unequal protection of individuals.

It should be noted that the scope of [Regulation \(EU\) 2016/679](#) set out in article 2 does not apply to the processing of personal data carried out in the framework of activities not regulated by EU law, by member states when carrying out activities in accordance with chapter 2 section 5 of the Treaty on the European Union (Special Provisions on the Common Foreign and Security Policy, [TEU, 1992](#)).

Unfortunately, the provisions of [Regulation EU 2016/679](#) do not apply to personal data processing falling within the scope of [Directive 2016/680](#) and [Directive 2000/31C](#) since [Regulation 45/2001](#) applies to these relations ([Postnikova, 2018](#); [Chikishev, 2019](#)).

It is also necessary to bear in mind the provisions of article 23, which establishes the grounds for limiting the validity of certain rights and obligations provided for in [Regulation EU 2016/679](#). Among such grounds are national security, defense, public security, independence of justice, prevention, detection and investigation of criminal (criminal) acts or prosecution of persons for their commission. Thus, there are areas (e.g. in the framework of activities of public interest or activities of a public authority), in which the processing of personal data shall apply the legislation of the EU member states, clarifying the application of the provisions of [Regulation \(EU\) 2016/679](#). Also, in parallel with the EU general law on data protection in member states, there are a large number of special legal acts containing more specific rules, it can be assumed that [Regulation \(EU\) 2016/679](#) leaves member states the opportunity to establish more detailed requirements for the processing of certain types of data (for example, in the areas of freedom of expression and information, public access to official documents, labor relations, etc.) ([Sitdikova et al., 2016](#)).

The [Regulation \(EU\) 2016/679](#) aims to guarantee the legal security and transparency of relations among all persons of the EU member states, as well as the same scope of rights, obligations and level of responsibility in the processing of personal data ([Krylova, 2017](#); [Postnikova, 2018](#)).

The [Directive 2016/680](#) contains provisions aimed at protecting individuals in relation to the processing of personal data by the competent authorities for the purpose of preventing, investigating, detaining or prosecuting (criminal) offenses or the execution of criminal penalties, including protection against and prevention of threats to public safety. It should be noted that, in particular, the concept of personal data and their processing is the same as in [Regulation \(EU\) 2016/679](#) analyzed above. Competent authorities

shall mean any public authority competent in matters falling within the scope of [Directive 2016/680](#) or any other authority or institution entrusted by the law of a member state with the exercise of public authority for purposes within the scope of the Directive. For example, in Russia, a citizen's right to protect personal data is correlated with the corresponding duties of a special entity - the operator of personal data, therefore a citizen has the right to exercise such protection by appealing against the actions or inaction of this particular entity by the administrative (file a complaint with the authorized body for the protection of the rights of personal data subjects "Roskomnadzor") or judicial means ([Federal Law N 152-FZ, 2006, art. 17](#)). [Directive 2016/680](#) should ensure a high level of personal data protection of suspects, convicted persons, known or suspected victims of crime, witnesses, as well as facilitate the exchange of information and other cooperation between police and judicial authorities of different EU member states. The latter, in particular, should contribute to improving the effectiveness of the fight against crime, including terrorism. In accordance with the provisions of [Directive 2016/680](#), any processing of data by law enforcement agencies must comply with the principles of legality, necessity and proportionality, as well as provide guarantees for individuals. Control over the processing of data is provided by independent national structures, whose duties include data protection and there should be an effective judicial appeal ([Directive 2016/680, art. 47](#)) ([Krylova, 2017](#); [Postnikova, 2018](#)).

Thus, the adoption of [Regulation \(EU\) 2016/679](#) and [Directive 2016/680](#) is a big step towards the observance of the right of an individual to protect personal data, which should have a positive impact on the functioning of the EU internal market in the future.

In addition, the issue of protecting private human and citizen rights moves into the field of interstate relations. According to [Dolinskaya \(2019\)](#) in the context of information society it is necessary to seek compromises in the legal regulation of relations in the field of personal data, to ensure a balance between private and public interests.

CONCLUSIONS

The state policy in the sphere of personal data protection is based on the constitutional provisions concerning the inviolability of private life, personal and family secrets and human rights, adopted in the development of the constitutional provisions of the legislation and international obligations of the Russian Federation. The analysis made it possible to establish that EU countries have many years of experience in personal data protection. In the period of rapid integration into the world community, Russia brings domestic legislation in line with international law.

Since the right to protect personal data is a relative, not an absolute right, when establishing requirements for personal data protection, the principal point is to ensure a balance of interests of the individual, society and business structures, which assumes the proportionality, validity and real feasibility of these requirements, including personal data protection.

In conclusion, we believe that modern reforms will allow citizens to exercise greater control over their data and enterprises, especially small and medium, to benefit from the opportunities created by the unification of regulations of a single digital market, reducing administrative formalities and increasing consumer confidence, as well as creating conditions for innovation.

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