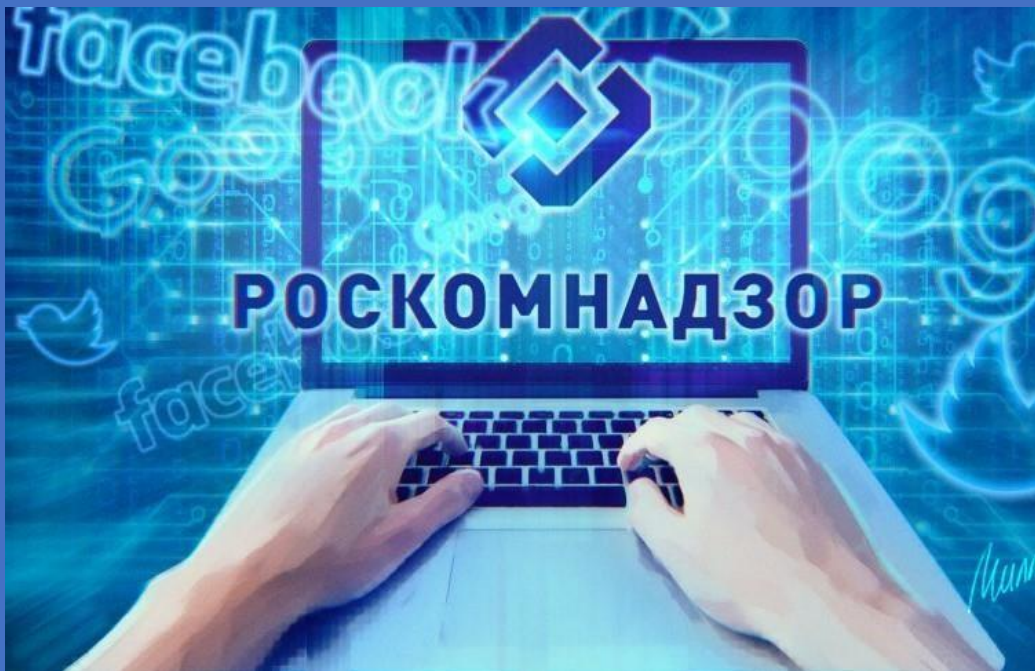




**CONSENT TO PERSONAL DATA PROCESSING:
PRACTICE OF ROSKOMNADZOR AND RUSSIAN COURTS**



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On 31 July 2018, the Federal Service for Supervision in the area of communications, information technology and mass communications (Roskomnadzor) held a traditional Open Day coincided to the anniversary of adoption of the Federal Law No. 152-FZ 'On Personal Data' ('**Personal Data Law**').

The Deputy Head of Roskomnadzor Mr. Pankov told about Roskomnadzor's attitude to the General Data Protection Regulation (GDPR) that became effective on 25 May 2018 and presented some recommendations on compliance with the GDPR requirements for Russian personal data operators that are subject thereto.

One of such recommendations concerns the consent to personal data processing: a separate consent needs to be obtained for personal data processing for each purpose of such processing, specifying in the consent the list of personal data processed, the procedure and conditions for the consent withdrawal, as well as specifying provisions on third parties to whom the personal data are planned to be transferred to or who are supposed to be engaged under the assignment agreement.

The Deputy Head of the Office for Protection of Rights of Personal Data Owners Ms. Gafurova provided the review of the most frequent complaints of individuals to Roskomnadzor in connection with the actions or omission of operators that violate the Russian statutory requirements on personal data. The number of such complaints increased from 6 thousand in 2008-2011 up to 85 thousand in 2016-2018.

The most frequently appealed actions of operators include:

- personal data processing (collection, use, distribution) in the absence of legal grounds (in particular, without the consent to processing, where such consent is required by Personal Data Law);
- personal data processing in order to promote goods, works, services on the market without the prior owner's consent;
- development of the consent form for personal data processing that does not comply with the requirements of Personal Data Law;
- processing of biometric personal data, as well as special category personal data without a written consent therefor;
- continuation of the personal data processing in case of withdrawal of the consent therefor;
- personal data processing unsuitable for the purposes of personal data collecting;
- delegation of personal data processing to another entity in the absence of legal grounds thereto;
- personal data storage for a longer period than it is required by the purpose of their processing;
- online placing of personal data in excessive volume.

The most frequently complained omissions by operators include:

- failure to issue and publish the personal data processing policy on an Internet site;
- absence of consent to the personal data processing on the operator's Internet site;
- failure to provide the personal data subject with the information relating to the processing of his/her personal data;
- failure to localize personal data database in Russia;
- failure to inform Roskomnadzor on personal data processing;

- failure to destruct personal data upon achievement of the processing purpose;
- failure to appoint a person responsible for personal data processing;
- failure to inform the personal data owner on the operator, purposes and legal grounds for personal data processing, as well as sources of personal data receipt if received not from the owner.

When Roskomnadzor receives the relevant appeals, they generally:

- 1) send to the operator a request to confirm the personal data subjects' arguments on the legal grounds for personal data processing;
- 2) issue a protocol on an administrative offense under Article 13.11 or Article 19.5 of the Administrative Code of the Russian Federation, if there are legal grounds; and/or
- 3) file a claim with the court to limit access to the relevant Internet site.

The Deputy Head of the Department for Compliance Control and Supervision of Personal Data Processing Ms. Yakovleva told about typical violations of personal data laws revealed in the first half of 2018 and gave recommendations to prevent them.

One of such violations is non-compliance of the written contents to the personal data processing with the requirements of the legislation of the Russian Federation, in particular: the absence of an address or details of the main identity document of the personal data subject, indication of several purposes for personal data processing, absence of the name or full name and address of the person engaged in personal data processing on behalf of the operator where such processing is entrusted to such a person.

Please note that Article 13.11 of the Administrative Code of the Russian Federation provides for the highest administrative fines for personal data processing without the written consent of the personal data subject where such consent is required in accordance with the legislation (if these actions do not constitute a crime), or for personal data processing in violation of the requirements established by the legislation for the content of the written form of consent to personal data processing: on citizens - in the amount of up 5,000 roubles; on company's officials - up to 20,000 roubles; for legal entities - up to 75,000 roubles.

Russian arbitration (state commercial) courts consider inclusion in standard insurance contracts and loan agreements with banks the following provisions as administrative violations punishable in accordance with part 2 of Article 14.8 of the Administrative Code of the Russian Federation (inclusion in the contract of conditions that infringe upon the rights of consumers):

- 1) consents to personal data processing in excess volume, including actions such as the dissemination and cross-border transfer of personal data, which respectively include actions aimed at disclosing personal data to an indefinite group of persons and transferring personal data to the territory of a foreign state to the authority of a foreign a state, a foreign individual or a foreign legal entity;¹
- 2) consents that provide for the possibility of transferring personal data to non-named persons;²

¹ The Resolution of the Eleventh Arbitration Appellate Court No. 11АП-19167/2017, dated 26 February 2018, on case No. A65-30342/2017;

² The Resolution of the Thirteenth Arbitration Appellate Court No. 13АП-34099/2017, dated 20 February 2018 on case No.A56-56720/2017; The Resolution of the Ninth Arbitration Appellate Court No. 09АП-66369/2017, dated 22 January 2018 on case No. A40-155310/17;

- 3) consents that do not meet the requirements of specificity, awareness and conscientiousness, do not contain an alternative option of the insured's conduct, do not provide for his/her disagreement with processing, including the transfer of his/her personal data to third parties, and do not provide for the possibility of influencing its content;³
- 4) conditions that do not allow freely express consent or refusal to transfer personal data to third parties.⁴

At the same time, in separate rulings on cases for rendering invalid the prescriptions of Roskomnadzor the courts confirm that personal data processing without the consent of the personal data subject for the purposes stipulated by labour legislation, the collective agreement, as well as local acts of the employer (including using 1C 'Salary and Personnel Management 8' and 'Biometric Time Recording System') is not considered as violations of the legislation⁵.

Best Regards,

GRATA International Law Firm (Moscow)

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What we do:

- preparing consents for personal data processing, policies for personal data processing, and other organisational and administrative documents for personal data protection;
- preparing assignment agreements for the personal data processing;
- advising on the application of GDPR by Russian operators;
- representation of clients during Roskomnadzor inspections.

Contacts:

Yana Dianova

Director of the Corporate and Commercial Law Department, GRATA International (Moscow)

Tel: +7 (495) 660 11 84

E-mail: ydianova@gratanet.com

³ The Resolution of the Eleventh Arbitration Appellate Court No. 11АП-8336/2018, dated 3 July 2018, on case No. A65-33540/2017;

⁴ The Resolution of the Twentieth Arbitration Appellate Court No. 20АП-7785/2017, dated 11 January 2018, on case No. A09-12418/2017;

⁵ The Resolution of the Fourth Arbitration Appellate Court No. 04АП-127/2018, dated 7 February 2018 on case No. A19-17054/2017.