

## **INTRODUCTION**

I have been asked by Kaspersky Lab to comment on a report prepared by Professor Peter B Maggs, dated 2 December 2017 and dealing, inter alia, with the application of certain legislative acts of the Russian Federation to Kaspersky Lab and its activities in the Russian Federation.

Prof Maggs' report was prepared at the request of, and submitted to, the Department of Homeland Security of the United States.

## **MY QUALIFICATIONS AND EXPERIENCE**

Since 1 May 2012 I am Professor of International Investment and Trade Law at Uppsala University, Sweden. Prior to that – during 2010 - I was Professor of International Law at Dundee University, Scotland. During 1997-2009 I was Professor of East European Law at Uppsala University.

One of my specialties is Russian law and the law of the former Soviet Union. I have been researching and teaching Soviet/Russian Law for more than 30 years.

During 1982-2014 I was associate and partner in major Swedish and American law firms. A large part of my practice was devoted to the legal aspects of business and trade transactions with the former Soviet Union and the Russian Federation. In my capacity as counsel and advisor I have represented both Soviet/Russian enterprises and governmental organizations, as well as Western enterprises and organizations.

My practice includes acting as counsel and arbitrator in international disputes, very often in the East-West trade area. In such capacities I have been involved in approximately 400 international arbitrations. I am on the list of arbitrators of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry.

Towards the end of the 1980's and the beginning of the 1990's I was heavily involved in legislative reforms in the former Soviet Union/Russian Federation, including in the privatization area and also with respect to corporate and commercial legislation.

I am a regular and frequent visitor to Russia since 1971. I lived in Moscow 1997-2000 as the resident partner of my law firm managing the Moscow office of the firm. I am fluent in the Russian language.

I have published several books and numerous articles on Soviet/Russian law.

## **SCOPE OF MY REPORT**

My analysis and comments on Prof Maggs' report focus on the following three legislative acts of the Russian Federation:

1 Federal Law No 40-FZ of 3 April 1995 On the Federal Security Service, as amended;

2

2 Federal Law No 149-FZ of 27 July 2006 On Information, Information Technologies and Protection of Information, as amended;

3 Federal Law No 144-FZ of 12 August 1995 On Operational-Investigative Activity, as amended.

I have reviewed Russian as well as English versions of these legislative acts.

In my report I focus on the extent to which these three laws apply to Kaspersky Lab and its activities in the Russian Federation and on the extent to which obligations set forth in these three laws relate to Kaspersky Lab and its activities in the Russian Federation.

The first step in this analysis is to ascertain the nature of Kaspersky Lab's activities in the Russian Federation. I address this aspect in the next section.

## **THE NATURE OF KASPERSKY LAB'S ACTIVITIES IN THE RUSSIAN FEDERATION**

Based on publicly available information and data, the nature of Kaspersky Lab's activities in the Russian Federation can fairly be described as follows.

Kaspersky Lab is a privately owned company providing products and services concerning information security. The customers of Kaspersky Lab include consumers, small and medium-sized enterprises and organizations in need of services and tools to control and manage their cyber-security. Kaspersky Lab provides a wide range of services and solutions covering most aspects of cyber-security in a corporate network, including mobile and portable devices, data centers and entire industrial environments.

Kaspersky Lab's activities include, among other things, developing and providing its customers with anti-virus software which is installed on the computers of its customers. The customers obtain the anti-virus software via different forms of licensing arrangements.

Kaspersky Lab also provides its customers with cyber-security protection via its cloud system, called Kaspersky Security Network, based on agreement with the customer in question.

Kaspersky Lab does not provide telecommunications services, nor does it manufacture equipment for telecommunication.

Kaspersky Lab does not provide software or services for receiving, transmitting, delivering or processing electronic messages between users of the Internet.

Kaspersky Lab is not an Internet Service Provider and is not registered as such a provider in the Registry of Internet Service Providers in the Russian Federation.

Article 15 of the Law deals with the co-operation with Russian and foreign establishments. It does in other words apply also to foreign companies and entities active in the territory of the Russian Federation.

Article 15 of the Law must be read and applied together with Article 13 of the Law. Article 13 explains the rights of the organs of the Federal Security Service and draws up the limits of the rights and duties of such organs. Of particular relevance in this context is Article 13 m), which reads:

“/Federal Security Service organs shall be entitled to/ receive free of charge from state authorities, enterprises, establishments and organisations regardless of their form of ownership, information required to perform the duties assigned to federal security organs, except in cases where federal laws prohibit the communication of such information to federal security organs”

This provision states that the Federal Security Service has the right to receive certain information, assuming that such information is necessary for the performance of its duties and assuming that federal law does not prohibit the communication of the requested information. This means that the requests for information must fall within the statutorily limited powers of the Federal Security Service.

It must also be pointed out that Article 13 m) speaks about a right to receive certain information, but does not impose an obligation on anyone to provide such information.

It follows from Article 15, paragraph 3 of the Law, that private enterprises, Russian as well as foreign, have an obligation to assist the Federal Security Service in its activities, if asked to do so, in the circumstances described in the Law and on the conditions laid down therein.

Article 15, paragraph 5, of the Law imposes certain obligations on enterprises and individuals “providing postal communication services and electronic communications services of all types....”

It follows from the nature of Kaspersky Lab’s activities, described above, that Kaspersky Lab does not provide “electronic communications services” of any kind. Therefore, the obligation referred to in that provision does not apply to Kaspersky Lab.

Article 15, paragraph 6, of the Law provides that personnel from the Federal Security Service may be seconded to private enterprises, assuming that the head of the enterprise in question agrees.

The Law does not provide details as to the way in which the Federal Security Service is to carry out its duties. The activities performed by the Federal Security Service are partially covered by the Law On Operational-Investigative Activities.

Article 23 of the Law provides for the monitoring of the activities of the Federal Security Service by the President of the Russian Federation, the Federal Assembly and the Government of the Russian Federation, as well as by judicial bodies. Members of the Federation Council and the State Duma have the right to obtain information concerning the activities of the Federal Security Service.

Article 24 of the Law stipulates that the Prosecutor General of the Russian Federation is tasked with the supervision of the Federal Security Service.

## **THE LAW ON INFORMATION, INFORMATION TECHNOLOGIES AND PROTECTION OF INFORMATION**

In Prof Maggs' report reference is made to Article 10.1 of this Law. This provision deals with duties imposed on so-called organizers of dissemination of information on the Internet.

Article 10.1, item 1 of the Law provides a definition of such organizers. Article 10 of the Law specifically deals with the dissemination of information on the Internet.

Article 2, item 9 of the Law, sets forth a definition of the concept of "dissemination of information", as used in the Law. It means "actions directed at obtaining information by an undefined group of persons or transfer of information to an undefined group of persons".

It follows from the nature of Kaspersky Lab's activities described above, that Kaspersky Lab does not engage in the dissemination of information as defined in the Law.

Kaspersky Lab is not an Internet Service Provider and is not registered in the Russian Federation Registry of Internet Service Providers.

Kaspersky Lab is not engaged in the operation of information systems or computer programs intended for users of the Internet.

4

Based on the foregoing, I conclude that the definition in Article 10.1, paragraph 1, of the Law does not apply to Kaspersky Lab. Consequently, Kaspersky Lab is not covered by the duties imposed on "organizers of dissemination of information on the Internet".

## **THE LAW ON OPERATIONAL-INVESTIGATIVE ACTIVITY**

This Law regulates the investigative activities that the Federal Security Service may carry out.

Article 5 of the Law sets out limitations on the operational-investigative activities with a view to protecting the rights and interests of individuals and legal persons.

The penultimate paragraph of Article 5 provides for the possibility to appeal violations of rights and interests to superior bodies, the Prosecutor and to the courts which are obliged to take corrective measures in conformity with Russian law, and to provide compensation.

Article 8 of the Law, which is discussed in Prof. Maggs' report – paras 26-30 - regulates in general terms the conditions under which operational-investigative measures are carried out. Whilst the text of Article 8 makes clear that operative-investigative measures may include obtaining so-called computer information, nothing is said about how such information is to be obtained. No mention is made of any obligation for private enterprises to install any equipment supplied by the Federal Security Service.,

Article 15 of the Law deals with the rights of bodies involved in operational-investigative activities.

Article 15,item 2 of the Law states that such bodies shall establish co-operation with persons who have agreed to co-operate with them,and Article 15,item 5 of the Law explains that requirements of bodies carrying out operative-investigative activities must be legal ,ie based on the statutorily limited powers of such bodies ,for them to be binding on others

Uppsala 31 January 2019

Prof Dr Kaj Hober