

China's New Data Law Leaves Privacy Questions Unanswered

By **Steven Trader**

Law360, New York (July 17, 2017, 11:41 AM EDT) -- China has officially shifted from a patchwork of privacy and cybersecurity laws to new comprehensive regulation, but experts say it's still unclear how companies will be affected, or whether the new law will even accomplish its goal of boosting security.

As the European Union creeps toward the implementation of its own comprehensive General Data Protection regulation next year, and the U.S. continues to operate under a mostly "best practices" privacy system, China took the step of imposing a blanket nationwide statute on June 1 that regulates both "network operators" and "critical information infrastructure operators." Requirements for the latter include submitting to an equipment and system assessment by the Chinese government if the entity holds "critical" data on its citizens, and localizing that data in storage centers within China's borders.

But the new law also includes a number of vague and seemingly broad definitions that fail to clarify those categories, and it's left multinational corporations around the globe scratching their heads about how to proceed with compliance, Debevoise & Plimpton LLP cybersecurity and data privacy practice co-chair Jeremy Feigelson told Law360.

"The business community is really looking to China right now and saying would you please put some more meat on the bones of this thing so that we can understand what it will take to comply, how effective this might be, and how burdensome this might be," Feigelson said.

As Chinese regulators sort out the law's vagaries, another no less pressing question looms on the horizon: Will China's new law actually protect data and privacy as effectively as it's intended to?

It's questionable, privacy experts say.

"These rules ... I don't think they're being guided by the latest and greatest thinking on cybersecurity," said Miriam Wugmeister, co-chair of Morrison & Foerster's global privacy and data security group.

Take, for instance, the data localization rule. From a cybersecurity perspective, it's "intuitively obvious" that multinational corporations doing business in 100 countries can better secure their data by storing it in a few strategic and well-protected facilities across the globe, than by storing it locally in each of the 100 countries, which expands the cyberattack surface area and potentially leaves the data less secure, Wugmeister said.

“Companies that know that they qualify as critical information infrastructure are going to do what they need to in order to comply, because for them it’s not news — they knew already because that’s in the law,” Wugmeister said. “It’s everybody else, and if the law gets interpreted to apply to all network operators, I think that actually creates more security vulnerabilities than it protects.”

Another source of concern regarding privacy is the government-mandated security assessment for critical information infrastructure operators. Any time a government agency starts examining a company’s cybersecurity and asking for information about vulnerabilities, it’s natural for the company to wonder how securely that information will be protected, Feigelson said.

“That question gets asked here in the U.S. all the time, so the question is going to be asked in China too,” Feigelson said. “I don’t think we have the answer yet, but it’s a fair question: If you’re going to make me pull back the curtain on my products and services and explain to you how they may or may not be secure, am I possibly providing a roadmap where I could get exposed if you, the regulator, are hacked and your files are exposed? It’s a real concern, particularly when you’re sharing with a government that has itself been cited as a source of cyber intrusions.”

Some experts though, while expressing their own skepticism toward the vagaries of the new law, were able to see some bright spots in it.

First, the law makes clear that it’s important that China respects personal data privacy, Nicholas Chan, a Squire Patton Boggs partner based in its Hong Kong office, told Law360. That’s a big improvement over past regulations that relied on a number of industry-specific laws, Chan said.

“The initial draft of the new law offered only data privacy protection for citizens, but it’s now broadened to also include noncitizens and protects natural persons’ privacy now, which is good and welcomed by all, generally,” Chan said.

Brian Bartholomew, a senior security researcher at Kaspersky Labs, told Law360 that while he was just as skeptical as everyone else about some of the law’s provisions regarding critical information infrastructure and network operators, much of its rules appear intended to help dictate good cyber hygiene and hold people accountable for things that could potentially damage citizens.

Bartholomew also noted a provision in the new law that essentially makes it illegal to register a domain name in China without providing some form of identification.

“That’s actually huge, and would be very helpful if they can enforce that, to people like us that are trying to track a lot of nefarious activity online, because a lot of times we hit dead ends because of anonymous domain registrations,” Bartholomew said.

The new law officially bans hacking, as well as the illegal sale of data and information on underground markets — two regulations that could benefit U.S. intelligence agencies that may one day need to indict a Chinese national and now have an official rule they can point to as a reason to prosecute, Bartholomew added.

The law also finally establishes a centralized data protection authority, the Cyberspace Administration of China, whose job it is to enforce privacy rules, supply guidance, and in theory provide an outlet where citizens can take their privacy issues too, though the Chinese government is notorious for its monitoring

capabilities and has been accused publicly of being a leading nation-state sponsor of cyber intrusions, experts pointed out.

“I think personally though it’s a step in the right direction,” Bartholomew said. “It’s perfectly reasonable for these concerns pop into our minds, but I kind of feel like we might need to give [China] the benefit of the doubt and say ok, maybe they’re trying to do some good here.”

--Editing by Pamela Wilkinson and Rebecca Flanagan.

All Content © 2003-2017, Portfolio Media, Inc.