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To:

(hereinafter referred to as –
«Telecom Operator»)

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LEGAL OPINION

1. INTRODUCTION

In accordance with Telecom Operator request:

«Considering that Telecom Operator provides communication services, to comply with the requirements of Federal law of the Russian Federation № 374-FZ dated July 6, 2016 and subordinate acts, communication facilities should include equipment that allows:

- to store recordings of phone conversations up to 6 months;
- to store other messages and users' internet traffic for 30 days with a subsequently increase in storage equipment capacity;
- to delete messages automatically after the expiration date;
- to protect recordings and messages from unauthorized access.

It is prohibited to use such an equipment without a certificate of conformity under penalty of fine of 60 000 for 300 000 rubles with or without confiscation in accordance with art. 13.6 of the Code of the Russian Federation on Administrative Offences (hereinafter – «*administrative code*»).

Telecom Operator assumes that it is necessary to be ready to calculate the budgets for the installation of an equipment that allows to fulfill the new requirements. However, at this moment, due to the absence of requirements for the facilities, lack of certified equipment, there is a significant risk of a substantial fine and confiscation of expensive equipment.

In this regard, posed questions:

- 1) Should Telecom Operator now search for equipment suppliers and plan out the budget, or wait until all the regulations are developed?
- 2) What is the least risky: wait with the purchase of the equipment or buy it without waiting for certification?
- 3) What are the intentions of the Roskomnadzor¹, what should we expect and what should we prepare for?

2. MAIN PART

Except the Federal Law № 374-FZ, the following subordinate acts were adopted.

1) Article 15 of The Regulation of the Government of the Russian Federation № 538 of August 27, 2005 (amended by Resolution of the Government of the Russian Federation of December 30, 2017 N 1721) reads: «**an operator of communication shall store** text messages, voice information, images, audio, video, electronic communications and other activities by users of communication and internet services **using technical facilities that provide investigative proceedings** (hereinafter – «*investigative facilities*») on the territory of the Russian Federation **and** in established by federal laws cases **provide access to the storage to authorized governmental bodies**».

¹ Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications

2) Articles 2 and 4 of Rules of storage by operators of communication of text messages of users of communication services, voice information, images, sounds, video - and other messages of users of communication and internet services² read: «2. Operator of communication shall store on the territory of the Russian Federation text messages, voice information, images, audio, video, electronic communications and other activities by users of communication and internet services (messages) **in the technical facilities belonging to the operator**. 4. Technical facilities are included in communication facilities, including the software providing performance of the established actions during investigative proceedings».

3) The Order of the Ministry of Communications and Mass Media, dated February 26, 2018 № 86 provides concerning requirements under the system for investigative proceedings (hereinafter – «**SORM**»): Part IV «Rules for applying switching systems equipment **including software and technical means for accumulating voice information** that ensures the implementation of specified actions during investigative proceedings». Par. 5.3 reads: «**investigative facilities** must provide the following functions: accumulation, storage of voice information, including statistical information of text messages, voice information (sound), video calls»³. This Order applies, inter alia, to Telecom Operator license for local telephone connection.

4) Rules for the use of hardware and software of information systems containing databases of subscribers of an operator of communication and telecommunications services provided to them, ensuring the implementation of established actions during investigative proceedings (Approved by the order of the Ministry of Communications and Mass Communications dated 13.06.2018 №277, but not yet valid, since they are not registered by the Ministry of Justice).

These Rules included in SORM separate functional systems of accumulation and storage of information. In particular, it provides⁴: «9.2 Accumulation, storage for up to 6 months of the contents of user text messages, voice information (in license for the services of data transmission, except for the services of voice transmission and license for the telematics services), images, audio, video, electronic communications and other activities by users of communication and internet services since the end of their reception, transmission, delivery and (or) processing».

Date of enactment: **August 1, 2018**

As a result, all the aforementioned subordinate acts implements software and technical means for accumulating voice information in SORM-3. Under par. 2. art. 64 of the Federal Law of the Russian Federation “On communication” (126-FZ) all concerning expenses are imposed on operators of communication.

It is important to notice that the requirements of 374-FZ **do not apply to the license for the services of communication channels provision** (approved in official interpretations of Roskomnadzor and the Ministry of Communications).

In accordance with par. 3 art. 41 of 126-FZ, the list of mandatory certification of communication equipment includes SORM⁵.

In accordance with par. 4 of the Rules: «Networks and communication facilities used by an operator of communication **shall** meet the **requirements** specified for them to conduct **investigative proceedings** and established by the Ministry of communications in agreement with Russian Federal Security Service»

Certification includes next five stages:

1) The Ministry of justice registers Rules of application of SORM-3 within 30 days (previous Order № 83 was adopted **16.04.2014**, and registered by the Ministry of justice 04.06.2014).

² Approved by the Government Regulation № 445, 04.12.2018

³ <http://publication.pravo.gov.ru/Document/View/0001201803290001>

⁴ <http://regulation.gov.ru/Files/GetFile?fileid=64619948-aa3d-41ed-8cef-06801bdd7c5e> received a positive expert opinion on the results of the regulatory impact assessment and on April 23, 2018 sent for registration to the Ministry of Justice of Russia <https://www.consultant.ru/law/review/fed/ld2018-04-23.html>

⁵ Approved by the Government Regulation of June 25, 2009 N 532

According to the Ministry of justice⁶, the order of the Ministry of communications №277 has not yet been received for registration.

2) The Ministry of communications agrees with the Russian Federal Security Service on the test procedure of **investigative facilities** (for the Order № 83 such test procedure was agreed by Order of the Ministry of communications from 15.05.15 № 169). As for SORM-3, the draft test procedure is still being agreed between the suppliers of SORM and Russian Federal Security Service.

3) Russian Federal Security Service tests SORM-3 with suppliers on a simulator of control panel.

4) Rossvyaz grants and registers certificates in the Register⁷ (for the Order № 83 the first certificates were issued only on **09.12.2016**)

5) Supervisor of Russian Federal Security Service informs an operator of communication about the need to implement SORM-3.

Therefore, it is currently impossible for SORM-3 to confirm their compliance with the Rules of application. Accordingly, implementation of non-certified SORM-3 violates art. 41 of **126-FZ** and par. 4 of the Rules.

According to art. 13.6. of **administrative code**, implementation of non-certified communication facilities on a communication network subject to fine from 60 000 to 300 000 rubles with or without confiscation. So, in order to avoid mentioned consequences, operator of communication shall not use non-certified SORM-3.

Described position concerning SORM-3 are confirmed by the Ministry of communications (approved by the official interpretation dated 03.05.2017 № P12-10244-OG).

However, in accordance with par. 6 of the Rules: «in case of application by an operator of communication of communication facilities for which the requirements specified in paragraph 4 of the Rules are not established, **on the basis of the Federal Security Service agree**, an operator of communication provides technological **premises** that meet the requirements established by the Ministry of communications and **the Service**. Requirements to a technical premise is set by the Application to the Requirements, approved by the Order № 6 of Ministry of communications dated January 16, 2008.

Therefore, at the present time for operators of communication providing data transmission services, the legal way to implement the licensing requirements is to:

A) provide technological premises to a supervisor of the Federal Security Service;

B) implement SORM using equipment (including data accumulation equipment) developed by an operator of communication itself.

CONCLUSION

1) There is no need to search suppliers of the equipment and plan out the budget.

2) It is required to wait until such equipment will be developed and certified, because it is likely that some suppliers will not receive certificates.

3) Roskomnadzor is not an independent entity with respect to **investigative proceedings**, it's all up to a Supervisor of Russian Federal Security Service.

4) If supervisor enforces the 374-FZ obligations, Telecom Operator should offer to a supervisor to enforces such obligations on Telecom Operator own, referring to the law enforcement practice whereby some suppliers of SORM proposes to purchase SORM in which storage operator of communication implements on its own.

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⁶ <https://www.consultant.ru/law/review/fed/ld2018-06-26.html>

⁷ <https://www.rossvyaz.ru/activity/correlation/certification/registerCertificate/>