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Network resilience and telecommunications as essential services

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Introduction



The way we behave, act and interact with the world has been radically changed due to the impact of Coronavirus (COVID-19). Social distancing and strict instructions to “stay at home” have thrust the importance of resilient telecom services and digital infrastructure into the spotlight, and into the consciousness of regulators, consumers and businesses alike.

Working from home, home learning of school and university curriculums, and the desire for human contact has led to a boom in demand for and use of videoconferencing services. The need to keep children occupied during the confinement has led to an increase in streaming of various kinds of content, not least data guzzling videogames. Evening activities often consist of watching any one of the various platforms offering entertainment for our viewing pleasure. Most critically, the capacity and resilience of life critical communications systems, such as 112 must be maintained.

Our communications infrastructure has never before been in such high demand and of such critical importance. Following an initiative of Mr. Breton, the EU Commissioner for internal market and services, dated 19 March 2020, Netflix has reduced the streaming quality in Europe by 25% in order to leave capacity available for other uses (except in Spain, because of its excellent optical fiber network with 10.2 million Fiber To The Home connections). Google, Amazon and Sony have taken similar measures.

All telecom operators report increased data traffic: Vodafone has reported a 50% increase in mobile traffic linked to COVID-19 in some markets; BT claims that the traffic of its fixed network climbed as much as 60%; Nokia is reporting a 40% increase in global internet weekday traffic worldwide, and a 700% increase in videoconferencing apps; and Telefónica reports that mobile traffic has increased by 40%, data traffic has increased by 70%, use of Whatsapp is six times higher, use of Netflix is four times higher and use of videoconference platforms (Zoom, Webex, Facetime) is seven times higher. The good news is that the networks are responding well, so far. However, for this to happen, the physical presence of engineers and technicians that are a scarce resource, is sometimes required.

Unsurprisingly, legislators across the world are seeking to ensure its service continuity for public safety, social and economic reasons by introducing emergency measures. The Commission and the Body of European Regulators of Electronic Communications (BEREC) are discussing setting up "a special reporting mechanism to monitor the Internet traffic situation in each Member State to be able to respond to capacity issues". Several EU Member States have classified electronic communications services as an essential public service which must not, by law, be suspended, and others have issued guidelines

which aim to guarantee that companies and consumers receive acceptable operating conditions, sometimes accepting the sacrifice of other rights of minor importance.

We should however consider the grander concepts in jurisprudence that exceptional emergency measures need to be implemented in such a way that is proportional and transparent. Further, they emergency measures must not be maintained for longer than is strictly necessary.

Telecom operators are also useful in helping authorities fight against COVID-19 itself. Telefónica is using its anonymised big data in Spain (in cooperation with Vodafone), Brazil (in association with the Sao Paulo Municipality) and Germany (in partnership with Teralytics and Senozon Deutschland) in order to track the movement of people, predicting which areas the virus could spread to next and providing the police with anonymised data of illegal events.

The current crisis and all the constraints that arise also reveal not only immediate but future consequences, not least the timetable for the rollout of 5G. The importance of 5G in the medium term has never been more evident, in the same measure as the short-term difficulties of its deployment have never been more burdensome.

Click on the country links below to explore how national regulators are tackling the heavy demands on digital infrastructure and telecom services, and what the longer-term impacts on 5G may be.

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Communications as an essential service during COVID-19 confinement

Austria has taken precautionary measures regarding internet use, although at present there is no reason to worry that the available networks will not be able to withstand increased use.

As internet traffic in Austria has reached an all-time high due to the ongoing COVID-19 crisis, Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) has introduced a measure which allows mobile operators to throttle certain online services (e.g. video streams) in an emergency, while other services (e.g. government information portals) have to be transmitted at constant speed. RTR also sent a letter regarding the measure addressed to the Association of Internet Service Providers Austria, the Association of Alternative Telecommunications Network Operators and the Austrian Federal Economic Chamber.

Ultimately, however, it is the operator who decides whether or not to apply such a traffic management measure; in any case, strict reporting obligations must be complied with. Such a traffic management measure also raises questions with regard to the European regulation on net neutrality. In this context, RTR has already pointed out that the European regulation allows exceptions to network neutrality in order to avoid congestion.

In addition to an exceptional increase in internet traffic, the use of telecom networks has also reached a peak, but there is sufficient capacity to cope with this increased usage.

With a view to reducing network load during the COVID-19 crisis, RTR also recommended connecting computers via cable instead of Wi-Fi and adjusting the bandwidth for video streaming via the setting options in the video streaming apps.

Impact of COVID-19 on the launching of 5G networks

The ongoing COVID-19 crisis has already had an impact on the granting of licences, as the Telekom-Control Kommission (TKK), which is responsible for regulating Austrian telecoms, issued a decision on 30 March 2020 to postpone the second 5G auction, which was scheduled for April. The decision is a reaction to the measures taken by the federal government to prevent the spread of COVID-19.

TKK also pointed out that it is still too early to set a specific new date for the second 5G auction, but in general Austria plans to impose staggered obligations for its 5G rollout. A new date will be announced as soon as it is clear that the auction can be carried out in accordance with the requirements. In any case, the second 5G auction should take place before the end of 2020.

TKK also emphasised that the 5G rollout is not endangered by the postponement, as sufficient frequency resources were already left on the market in the first 5G auction last year to allow mobile operators to cover urban areas with flowing data traffic.

In order to avoid shortages in financial and organisational resources, the TKK has staggered the deadlines for operators to fulfil the rollout obligations associated with the individual 5G awards. The coverage obligations associated with the frequencies in the 3410-3800 MHz range which were allocated in 2019's 5G auction are currently pending and must be fulfilled by the end of 2020.

While the TKK emphasised that it is aware of the possible effects of COVID-19 crisis management measures on compliance with the rollout deadlines set last year, the TKK will continuously evaluate the situation and take the necessary decisions within the scope of legal possibilities.



Germany



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Communications as an essential service during COVID-19 confinement

Pursuant to the German Federal Network Agency, so far, no network congestion has been reported in Germany as a result of the COVID-19 pandemic. The networks are currently stable. The network operators in Germany have also taken all precautions to maintain network operations in the best possible way. In the event of a network congestion, they can apply permissible traffic management measures in accordance with the Net Neutrality Ordinance. To this end, the Federal Network Agency has developed a guideline for the telecom industry containing solutions and measures for permissible traffic management.

Furthermore, the Post and Telecommunications Security Act of 24 March 2011 (PTSA) guarantees a minimum level of provision of telecom services. It is applicable to companies who provide telecom services to more than 100,000 subscribers, provide connections for these services, or provide the transmission paths specified in the PTSA (telecom companies).

The telecom companies shall maintain the following telecom services provided by them: the publicly available telephone service, data transmission services, including internet access services, and electronic mail services. Telecom companies which provide connections required for the aforementioned services or which provide transmission paths must maintain these services. Transmission paths with data transmission rates above 50 Mbit/s must be maintained by the telecom company with a data transmission rate of at least 50 Mbit/s.

Right to retain performance for consumers and small companies

The German Act to mitigate the effects the COVID-19 pandemic in civil, insolvency and criminal procedure law establishes – *inter alia* – a right to retain performance for consumers and small companies with respect to continuing obligations. Therefore, a consumer may hold back a payment obligation which has arisen in connection with a consumer contract which contains a continuing obligation and closed before 8 March 2020. It shall be retained until 30 June 2020 if the consumer as a result of circumstances attributable to the COVID-19 pandemic, the provision of services to the performance without endangering his reasonable means of subsistence or a reasonable standard of living of his dependent relatives would not be possible. The right to retain performance exists also in respect of all material continuing obligations. Material continuing obligations are those which are necessary to cover the services of the appropriate services of general interest are required. The same applies regarding the payment obligations of small companies. Even in such a case, the (telecom) services cannot be suspended during the moratorium period.

The impact of COVID-19 on the launching of 5G networks

As far as we see, the COVID-19 pandemic seems to have no impact on the rollout of 5G networks in Germany. The German Federal Network Agency has not yet issued a decision on an extension of the timeframe for meeting the coverage obligations in connection with the 5G frequencies auctioned in 2019.



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Communications as an essential service during COVID-19 confinement

On 24 March 2020, an official announcement was published in the Federal Daily Gazette outlining the essential services that are required to remain operational in Mexico. These include telecom providers directly involved in the provision of telecom services, which must guarantee continuity of such services. Concession holders must continue operating their customer service centres, making opening hours and contact details clear to customers, as well as sanitary measures whilst in stores, such as self-distancing.

Commitment to providing telecom services and communication channels

At a multi-party meeting called by the Federal Institute of Telecommunications (IFT) to discuss COVID-19, the following three commitments were proposed and approved:

- (1) Maintaining operations of telecom and broadcasting networks;
- (2) Boosting information and communication technology as indispensable tools for mitigating the effects of the crisis; and
- (3) Providing the population with reliable and accurate information regarding preventative measures to avoid COVID-19 spreading, and to avoid fake news. The Ministry of Telecommunications and Transport (SCT) will be responsible for maintaining the Mexican Satellite System and other networks required to ensure continuity. With respect to (3) above, the Ministry of Health will send free informative text messages to the population.

The impact of COVID-19 on the launching of 5G networks

Although no official announcement has been made, Mexico's planned spectrum auctions for 2020 are likely to be postponed following a conference call between the press and Arturo Robles, Head of the IFT. The IFT had planned to hold auctions in the 600MHz band, considered viable to facilitate a 5G network, in the second half of 2020. Axtel, AT&T and Telmex have already been awarded 50MHz of spectrum in the 3.5GHz band capable of facilitating 5G.

Alejandro Navarte Torres, Head of the Radioelectric Spectrum Unit at the ITF, suggested in an interview with El Economista newspaper that additional spectrum may be released to cope with demand from increased internet activity through remote working and use of streaming services, but that this need is not immediate. Spectrum for commercial or private use in Mexico must be awarded through public tenders (Article 78 of the Federal Telecommunications and Broadcasting Law).



Portugal



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The situation caused by COVID-19 resulted in the declaration by Presidential Decree no.14-A/2020, of 18 March, of a national state of emergency on the grounds of public calamity. This state of emergency, meanwhile regulated by Decree no. 2-A/2020, of 20 March, resulted in the approval of a set of necessary and temporary measures that in certain cases limit Constitutional rights and freedoms of citizens.

Communications as an essential service during COVID-19 confinement

Electronic communication services, together with water and energy supply services, are considered essential public services and it is the State's responsibility to ensure adequate coordination of communication networks and services in situations of emergency, crisis or war (article 2-A (1) of Law no. 5/2004, of 10 February, last amended by Decree-Law no. 92/2017, of 31 July).

Accordingly, the Portuguese Government approved the Decree-Law no. 10-A/2020 of 13 March, which establishes a set of exceptional and temporary measures in the telecom sector. There is a clear responsibility to ensure the uninterrupted provision of electronic communications services to all users. These temporary measures seek to identify the electronic communications services that should be considered critical and the clients that should be considered a priority, and to define the exceptional measures that companies offering telecom networks and services should adopt to ensure continuity.

Recognising the importance of ensuring communications services, it should be noted that the measures imposed to this date did not have the primary objective of compressing data protection and privacy rights (cf. Article 34(1) and (4) of the Constitution of the Portuguese Republic).

Commitment to providing telecom services and communications channels

The measures established under Decree-Law no. 10-D/2020, of 23 March, simplify and suspend some of the obligations which may hinder or make it impossible to ensure prioritisation of the continuity of (i) critical services (voice and short messages (SMS), emergency or distribution of linear and digital terrestrial television signals services) with special reference to (ii) priority customers, such as those covered by the health, internal security or civil protection sectors as stated in article 2 of the mentioned Decree-Law.

Companies providing public communications networks or communications services that are publicly available may implement measures of (i) network and traffic management, including capacity reservation on the mobile network; and (ii) prioritisation of troubleshooting procedures and network and electronic communications services disruption. They can also propose the adoption of other exceptional measures, similar or equivalent to the previous ones, to the Government.

We should however consider that the exceptional measures referred to in the previous paragraphs shall be implemented proportionally, transparently, and cannot be based on commercial grounds and be maintained for longer than is necessary to ensure the continuity of services in network congestion and to overcome the resolution of faults.

In order to ensure the compliance with the conditions, companies shall disclose the measures adopted and report their implementation to Portuguese Communications Authority (ANACOM), by publishing them in a visible place on their websites, within five working days.

In an attempt to maximise the availability of electronic communications networks telecom providers are also obliged to promote campaigns to raise public awareness of the possibility that electronic communications services may suffer, and to promote the sharing of best practice guides for responsible use of electronic communications networks and services.

Revised approach to regulation and workplan

The Government has suspended the following obligations applicable to the electronic communications sector:

- a) Quality of service parameters set out on the Electronic Communications Law.
- b) Deadlines for responding to complaints submitted by end-users.
- c) Deadlines established on the Regulation of the Auction for the Allocation of Rights to Use Frequencies in the 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz and 2.6 GHz bands (Regulation no. 560-A/2011).
- d) Portability obligation, where it involves the displacement of technicians to carry it out, and extend it to five working days, when it can be fulfilled by exclusively non-presential means.
- e) Pending consultation deadlines on draft ANACOM regulations.
- f) With other deadlines that are objectively and demonstrably incompatible with the implementation of the mentioned obligations, should ANACOM decide positively in such cases.

Police forces are exempt from involvement in the interventions necessary to ensure the replacement of critical services, to ensure response to special customer requests and for the installation of temporary infrastructure to increase capacity or to extension of networks to relevant sites, except when the owners do not dispense with it.

Temporary station or radio network licensing is exempted, to support the mobile network and provide services to priority customers.

Employees or agents who perform management and operation functions of the security and integrity of electronic communications networks and services shall be authorised, to ensure interventions necessary for the continuity of critical services and the needs priority customers, to move freely throughout the national territory, including in areas which will be decreed restricted access.

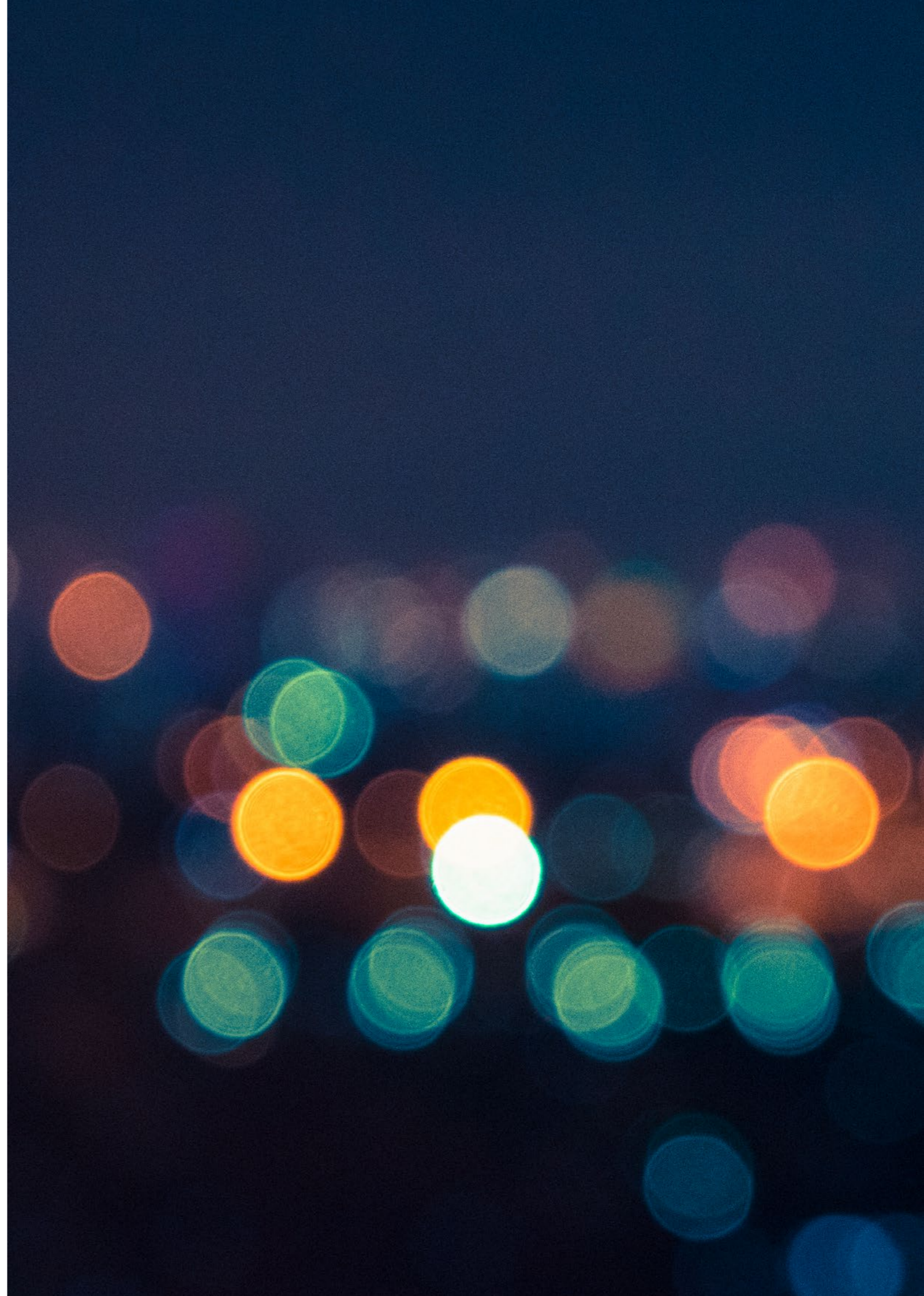
In view of the above, it should be noted that none of the obligations or terminations imposed by the Decree-Law are intended to restrict the rights, freedoms and guarantees of the users of these services, but rather to restructure the type of services provided and to prioritise critical communications.

The impact of COVID-19 on the launching of 5G Networks

ANACOM has suspended, on grounds of force majeure, the public consultation process for the allocation of rights to use frequencies in the 700 MHz, 900 MHz, 1800 MHz, 2.1 GHz, 2.6 GHz and 3.6 GHz bands. The suspension of this procedure will be maintained until it is lifted, to be decided by ANACOM considering the exceptional and temporary measures in the reaction to the situation caused by COVID-19.

This postponement has also resulted in the suspension of the migration process of the Digital Terrestrial Television network (DTT), which, implying the postponement of the date of release of the 700MHz band, scheduled for 30 June 2020, hinders the availability of this same band in the auction which is under public consultation.

The climate of uncertainty and the suspension of procedures for an indefinite period makes it impossible to meet the deadlines set until June 30 and the utilisation (after that date) of the 700MHz band by the Operators. Since ANACOM has invoked force majeure under the disposition 4 of the Annex to Decision (EU) of 2017/899 of the European Parliament and of the Council of 17 May, and since the reason is justified, the deadline is extended to 30 June 2022.





Spain



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Communications as an essential service during COVID-19 confinement

Since the “*estado de alarma*” was declared by means of Royal Decree 463/2020, telecom services have been identified as an essential service.

As this service is an essential one, it has been protected by regulation:

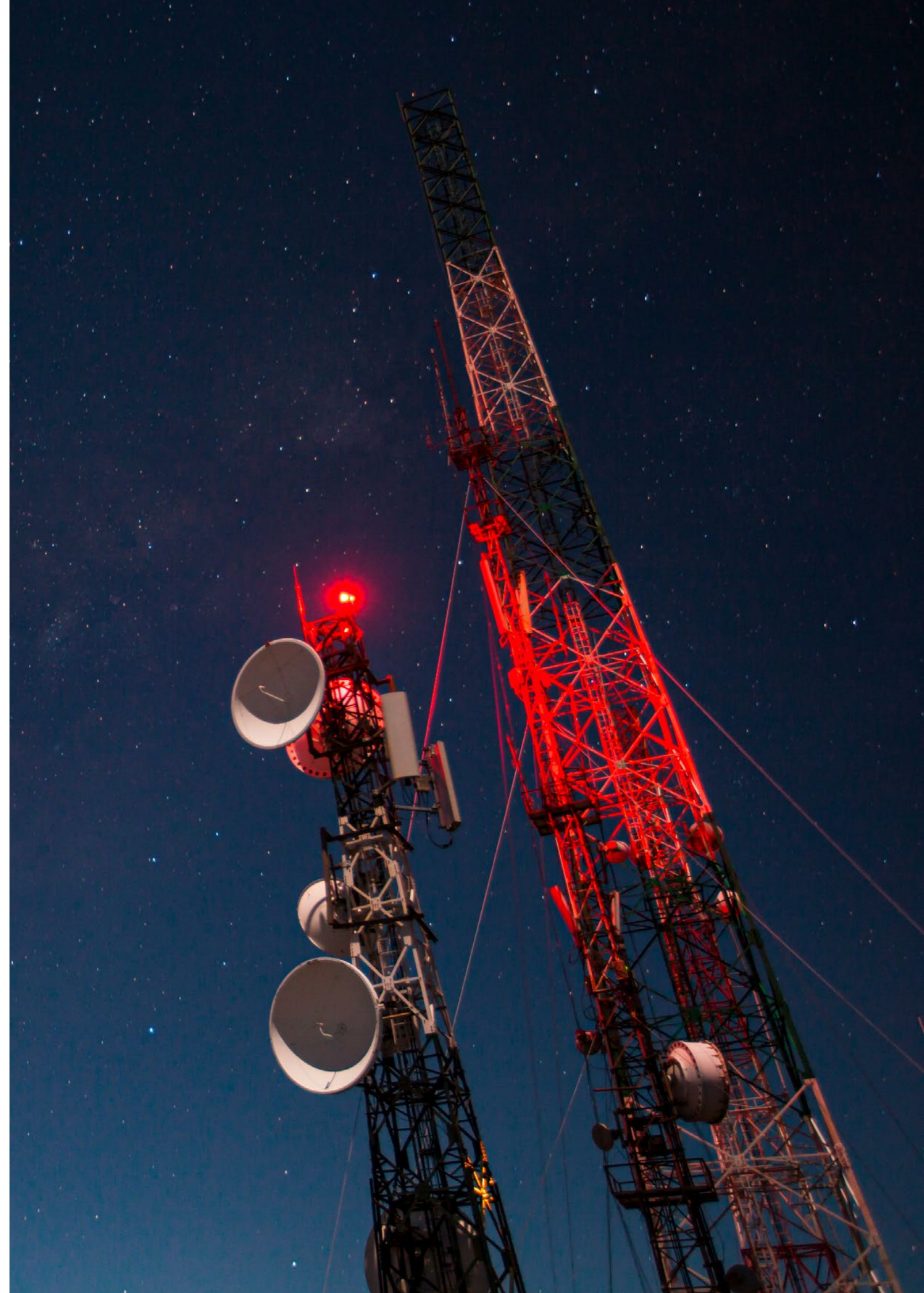
- Those telecom operators defined as “critical” have, according to Act 8/2011, of 28 April of the protection of critical infrastructures, special duties in order to ensure the availability of the critical telecom infrastructures for which they are responsible.
- Royal Decree 463/2020 (art. 18.2) extended these duties to those telecom operators that are not “critical” but are considered “essential” to the provision of telecom services to the population.
- Art. 18 of Royal Decree-Law 8/2020 has prohibited telecom providers from suspending their services for any reason other than the need to defend the integrity and security of their networks. Even in the case of lack of payment by clients, telecom services cannot be suspended during the confinement.
- The provider of the universal service, Telefónica, will remain as such and will be prevented from reducing the number of beneficiaries, offering poorer quality or charging a higher price.
- The employees of telecom companies identified as necessary for the provision of this essential service have been granted an exception from the general rule established by Royal Decree-Law 10/2020, of 29 March, granting a compulsory paid leave to all non-essential employees in Spain.

- All the Administrative Law terms have been suspended by Royal Decree 463/2020 and by DA 8° of Royal Decree-Law; all days during the “*estado de alarma*” are considered non-business days and no ordinary notifications are being served.
 - The issuance of electronic certificates has not been suspended.
 - Additionally, by means of Order SND/297/2020, of 27 April 2020, the National Statistics Institute will be provided with aggregate and anonymised data regarding the geolocalisation of mobile phone users, by telecom operators. This data will refer to the period of time immediately before and during the “*estado de alarma*”, and will be useful to track the possible risks of contagion and to control (in an anonymised way) the public’s compliance with the public health measures adopted.
 - The suspension of the right to telecom portability and other consumers’ rights
 - Some customers are tempted to reduce costs by switching service provider (for instance, from Telefónica to MasMóvil); others are in need of more content and are tempted to change from telecom-only service providers to those offering content, optical fiber and mobile telecom services (for instance, from Orange to Telefónica). Customers have the right to do so with portability of their numbers, but portability requires substantial human and technical resources that are sorely needed elsewhere. Spanish regulation has addressed this; from the date of declaration of “*estado de alarma*” (14 March 2020), there has been three special regulations of the right to portability in Spain:
 - Telecom operators are prohibited from launching marketing campaigns intended to obtain new customers by encouraging the switching of service provider with portability (art. 20 of Royal Decree-Law 8/2020).
 - On 18 March 2020 art. 20 of Royal Decree-Law 8/2020 suspended all new portability procedures, except those already ongoing. This is justified by the need to avoid physical movement of customers to the establishments of the service providers (which are now closed) or any physical movement of the service provider’s technicians to customers’ homes. This justification could be brought into question under EU regulation because mobile phone portability does not involve the physical contact of any technician with the customer. The real reason is likely the need to reduce the obligations of already stressed telecom network technicians.
 - On 1 April 2020, Royal Decree-Law 11/2020 suspended only those portability procedures that require physical presence either of telecom operator employees or of the customer. In practice, in most cases mobile telecommunications portability do not require a remarkable physical activity.
 - On 5 April 2020, the regulator (CNMC) approved a new decision interpreting Royal Decree-Law 11/2020 saying that, in the case of fixed telecom services, the limit would be 50 portability decisions per telecom operator per day. In the case of mobile telecom services, the limit would be 25% of the daily limit prior to the COVID-19 crisis.
- Other consumer rights have also been affected by the COVID-19 regulation. For instance, art. 21 of Royal Decree-Law 8/2020 suspended the terms for returning products purchased by consumers.

The impact of COVID-19 on the launching of 5G networks

According to European rules, the 700 MHz frequencies band should be free by 30 June 2020. TV stations in Spain which are still using this frequency band had to abandon them in order for the new 5G spectrum auction to occur.

Due to the importance of keeping the digital TV going in these difficult times and taking into account the practical problems to present content during the confinement period, TV broadcasters in Spain were told to suspend the migration plan. Therefore, the "digital dividend" will be postponed, and the new 700 MHz tender for the use of the same frequencies for 5G network deployment uses will be postponed. It had originally been planned for May/June. There is also financial reason for this postponement: telecom providers do not want to raise funds in this period of financial market disruption.





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Communications as an essential service during COVID-19 confinement

Generally, we have not (yet) seen legislative or regulatory measures taken for telecoms in respect of COVID-19. Ofcom and the UK Government are cooperating closely with telecom providers to manage the effects of COVID-19, including:

- to ensure that networks remain resilient and continue to operate effectively. Telecom providers are working together to monitor traffic on their networks and are keeping Ofcom informed of the measures they are taking to manage congestion effectively. Streaming services, such as YouTube, Netflix and Disney+, have agreed to lower streaming quality to help ISPs cope with increased demand during the outbreak in the UK; While operators have reported significant increases in traffic over their networks – with the incumbent national network operator reporting almost a doubling of daily data consumption on the national network during March - so far UK networks have coped well and the increases have been well within their tolerance limits.
- to support customers during the crisis. On 29 March 2020, this resulted in a set of commitments agreed between Ofcom, the UK Government and the majority of established ISPs in the UK, who agreed to remove all data caps on current fixed broadband services, to offer generous new mobile and landline packages, and to offer alternative methods of communication to vulnerable customers wherever possible when repairs to broadband and landlines cannot be carried out. They have also agreed to ensure that customers struggling to pay bills are treated fairly and appropriately supported, although what this means in practice is unclear.

It is unclear how enforceable these commitments are – and whether they will in due course be backed by regulatory obligations.

Prior to this, some operators had already taken specific steps to support their customers during the crisis, such as providing unlimited calls, increased data allowances or zero-rating access to certain key websites – albeit on an individual sporadic basis.

Staff in the communications sector (including field engineers, network operations, data infrastructure, call centre and emergency number staff) have been designated as key workers by the UK Government, meaning they can continue to work and travel for work (without being challenged under the lockdown), and their children can continue to attend schools (which have otherwise been closed).

Unlike other countries, there has so far been no general suspension of portability or switching providers (whether by regulatory measures or voluntary commitments), which has led to criticism that certain operators are continuing to send engineers to do home installations for customers switching provider and putting lives at risk (while also seeking to reap profits from providers who have voluntarily suspended such measures during the crisis).

Revised approach to regulation and workplan

Ofcom is adapting its approach to regulation through this period. It is suspending all existing consultation deadlines and information requests and putting on hold new consultations, decisions and information requests. It notes the implementation of new obligations, such as the EECC, may need to be delayed, although Ofcom is liaising with the UK government on the EECC. It is adapting its work programme and will publish a revised version, taking into account the COVID-19 crisis and revising the timetable, at the end of April.

Ofcom has stated that it will take a pragmatic approach to regulation during this time, recognising that operators may not always be able to comply and are facing staff shortages (of between 20% and 40% in some cases). It has written to operators to explain it will take account of the unique circumstances when enforcing the rules. There are three specific areas which Ofcom has highlighted may attract a more pragmatic approach: compliance with end-of-contract notification obligations; compliance with broadband speed codes of practice; and automatic compensation for delays or failures to carry out repairs or install new services.

But Ofcom also states that it expects industry to continue to provide the best possible service to customers and take decisions to support critical services, vulnerable customers and those reliant on communications services, which it will support where they are in the interests of consumers and businesses. It will prioritise enforcement against potentially harmful content relating to COVID-19 and will take enforcement action if it sees evidence of operators exploiting customers.

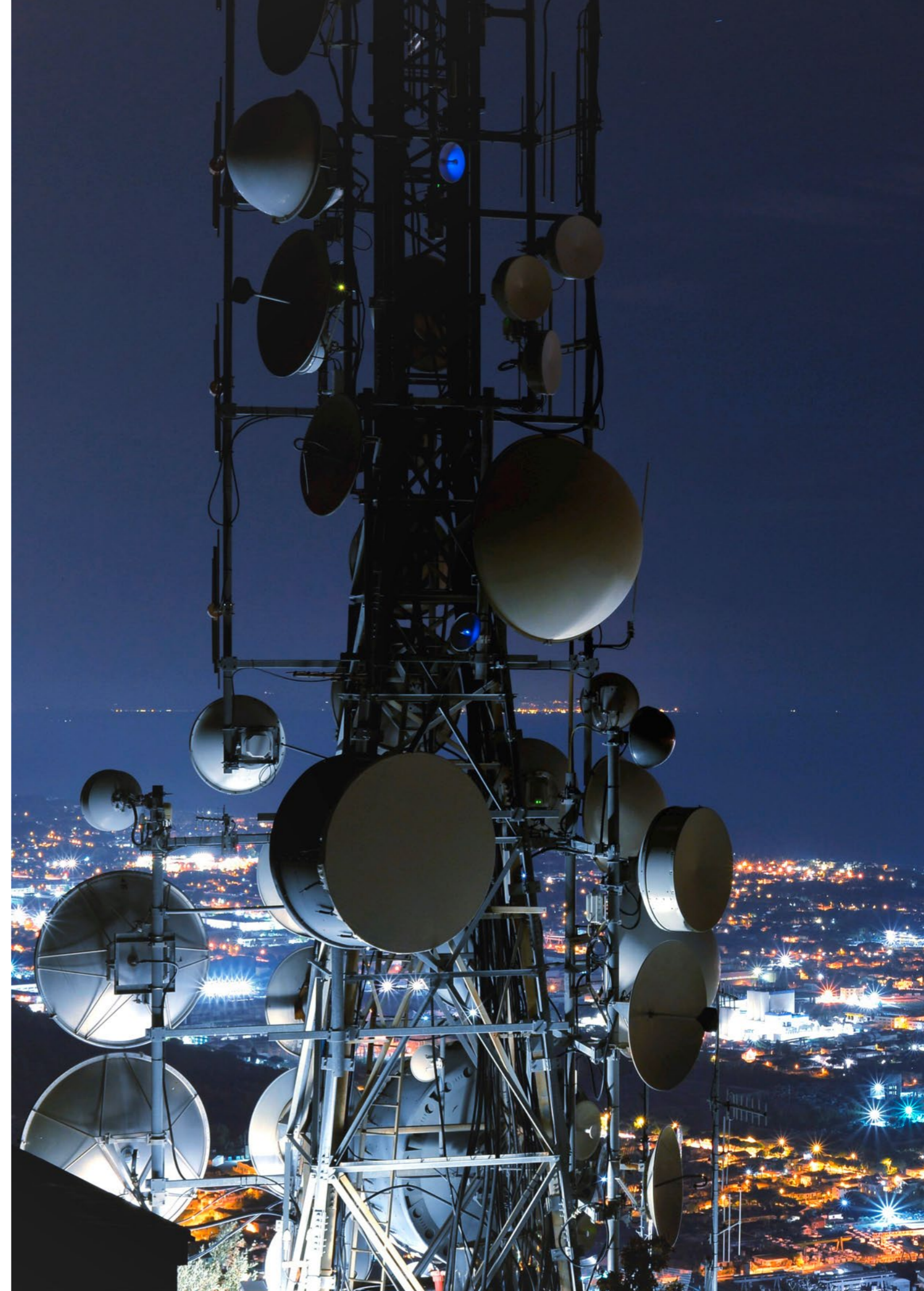
The impact of COVID-19 on the launching of 5G networks

In the last year, four mobile network operators launched 5G services in the UK. With growing demand for greater capacity, Ofcom has been consulting on auctioning new licences in the 700 MHz and 3.6–3.8 GHz bands. It released its decision in early March but given the threat of challenge from the industry, Ofcom stated that it did not want to implement the auction regulations until it had greater clarity on the outcome of any challenge.

It is not clear what impact COVID-19 will have on the bringing or timing of any such challenge. Ofcom has emphasised that investment in 5G and fibre is of critical importance, and recognised the need to support the networks so that they are ready for the future as the country comes out of the crisis. What this means in practice is unclear at this stage.

There have been reports that other 5G projects, such as the launch of 5G accelerators outside London as a testbed for 5G features, have been affected but that operators are looking at alternatives, including remote access options.

More recently, there have been reports of 5G infrastructure being vandalised and telecom engineers being harassed by members of the public, as a result of conspiracy theories linking the coronavirus spread to 5G. This has prompted the UK Government and Ofcom to issue strong statements denying these claims and to implement measures to tackle fake news, e.g. Ofcom has started warning media publications they could face sanctions for spreading conspiracy claims.





Law . Tax

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