

KEY ASPECTS OF THE DRAFT BILL ON GENERAL TELECOMMUNICATIONS IN SPAIN

The Ministry of Economic Affairs and Digital Transformation has commenced the public information and consultation stage with respect to the draft bill on general telecommunications in Spain (the "**Draft Bill**"), which ends on 13 October.

The main purpose of the Draft Bill is to transpose into Spanish legislation Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ("**EECC**"), while taking advantage of this opportunity to include in this new legal text various pre-existing rules of different ranks on electronic communications, such as Royal Decree 188/2016, of 6 May, on the marketing of radio equipment and Royal Decree 330/2016, of 9 September, on measures to reduce the deployment costs of high-speed electronic communication networks.

The transposition of the EECC must be completed by 21 December 2020.

KEY ASPECTS OF THE DRAFT BILL

a) The new concept of **interpersonal communication services** is created, which will encompass any service that allows interactive communication between users. A distinction is made within such concept between number-based interpersonal communication services ("**NBICS**") and number-independent interpersonal communication services ("**NIICS**"). The NBICS connect or enable communications with numbers in national or international telephone numbering plans. Whereas this option is not available in the case of NIICS, the latter can use numbers merely for user identification purposes.

This expands the scope of electronic communications services to now also include over the top ("**OTT**") communication services, in which, without there being any control or specific management whatsoever on the part of network operators, users are offered the possibility of communicating with a limited number of persons in an interactive manner. These are services which allow bidirectional communication between users, but in which the service provider does not offer the conveyance of signals, making use instead of the third-party

Key issues

- The concept of electronic communications services is expanded to include number-independent interpersonal communication services (OTT communication services).
- Operators may be required to state their intention to deploy high-capacity broadband networks, as a binding commitment.
- SMP operators can offer co-investment or access commitments, which may modify the scope of their specific obligations in each market.
- The regulation of end users' rights takes preference over the regulation on the same rights contained in the general laws on the protection of consumers and users.
- The Draft Bill promotes wireless access through RLAN or low power small-area wireless access points in order to foster the development of 5G technology.
- The holders of rights of use for radio spectrum may be required to share their passive or active infrastructures in specific zones.

support network provided to the user (messaging services, WhatsApp calls or videocalls, Facetime or Telegram, some of the videoconference applications which have become popular as a result of the Covid-19 state of emergency confinement, where numbers are not used to enable communication, as well as email services such as Gmail and Yahoo). In practice, the NIICS are OTT communication services.

It was not possible under the existing Spanish General Telecommunications Act 9/2014 of 9 May ("**LGTeI**") to include, within the concept of electronic communications services, those services in which the operator did not offer the conveyance of signals to the end user.

- b) The Draft Bill imposes far more obligations on NIICS providers than the EECC does. While the EECC does include NIICS under the concept of electronic communications services, it provides a very limited statute of rights and obligations that does not subject NIICS providers to the general authorisation rules for operators (they are not obliged to disclose their status as operators), nor to the rights and obligations associated with the general authorisation (they do not have access and interconnection rights or the right to use numbering, but are also exempt from certain requirements, such as the requirement to contribute to funding the authorities' administrative burdens).

The Draft Bill goes further than that, however, classifying NIICS providers in general as electronic communications service providers, although with certain exceptions. This renders them subject to rights and obligations that by nature would not otherwise apply to them, such as the right to request the occupation of private and public property, to obtain numbering resources, to obtain spectrum rights, and to negotiate access and interconnection with other operators.

In practice, NIICS providers are subject to the registration obligation, to the same disclosure obligations, to service integrity and security duties, to the obligation to contribute to funding the universal service (if their turnover exceeds EUR 100 million), to the jurisdiction of the Spanish National Markets and Competition Authority ("**CNMC**") for the resolution of inter-operator disputes and disputes between operators and associate resource providers, to the end user rights regime (with certain exceptions) and to paying the general operators' fee.

In any case, the following should also be borne in mind with respect to NIICS:

- NIICS providers already operating upon the entry into force of this new law must notify the operators registry of their status as operators, no more than two months after its entry into force.
- The interception obligations do not apply to NIICS providers, nor can NIICS be intercepted.
- The Ministry of Economic Affairs and Digital Transformation may, on an exceptional basis, impose interoperability with other interpersonal communications services on NIICS providers when this is necessary to ensure end-to-end connectivity between end users.
- NIICS providers may be required to participate in the public alert system established by the Draft Bill.
- As regards the payment of the general operators' fee, it is unclear what gross operating income should be considered for these services, which are

often free for the user. The EECC's Explanatory Memorandum considers income from advertising and data traffic to also constitute remuneration, but it is doubtful that such income would be subject to payment of the general operators' fee.

- c) Machine-to-machine services are still considered electronic communications services. However, where such communication is carried out without the service provider controlling or managing the network (OTT service), it will not be considered an electronic communications service.
- d) In order to provide spectrum-efficient wireless broadband access and to relieve mobile network congestion, the Draft Bill promotes the installation of supplementary wireless access systems, such as radio local area networks ("RLAN") and low power small-area wireless access points. These are electronic communications services but they have fewer obligations and will play a leading role in launching 5G.
- e) The installation or operation of internet exchange points (IXPs) must be notified to the operators registry. The owners of already installed IXPs will have two months, from the entry into force of this new law, to notify the registry of their status.
- f) The obligation to direct emergency calls is extended from the traditional publicly available telephone service to all NBICS.
- g) Those operators which, according to the law in force, hold special or exclusive rights for the provision of services in another economic sector and which operate public networks or provide electronic communications services available to the public must keep separate, audited accounts for their electronic communication activities, or establish an effective structural separation for those activities associated with the operation of networks or the provision of electronic communications services. A royal decree could establish that those operators whose annual gross operating income from activities associated with electronic communication networks or services is less than EUR 50 million are exempt from this obligation.
- h) When the Ministry of Economic Affairs and Digital Transformation does its annual study of the scope and geographic extension of broadband networks, operators may be required to state their intention to deploy broadband networks with download speeds of at least 100 Mbps, which would become a firm commitment for the operator, insofar as the operator could face sanctions if it were to commit a breach. That will require coordination between the Ministry and the CNMC.
- i) In relation to the CNMC's authority to identify relevant markets and those operators having significant market power ("**SMP**"):
 - The maximum period for market reviews is extended (from three to five years, with a possible further one-year extension, except when a new recommendation on relevant markets is approved by the European Commission, which requires that an analysis of the new markets be completed within three years).
 - SMP operators are allowed to offer access or co-investment commitments (including commitments to co-invest in very high capacity networks) which, following public consultation, may be approved by the CNMC and lead to a modification or flexibilization of their obligations as SMP operators.

- The regime governing migration from a legacy infrastructure is regulated, when an SMP operator plans to decommission or substitute parts of the network for a new infrastructure. The CNMC may remove the obligations imposed on this infrastructure, provided that the appropriate conditions for migration are met, which must include a reasonable timeline and the availability of a comparable alternative access service for other operators. Although this appears as a change in the EECC, the CNMC had already been imposing similar obligations since 2016 in the case of the closure of facilities.
- j) The universal service focuses on a series of minimum services that must be accessible via internet, with a certain quality and affordably priced, over a fixed broadband connection (including a voice communications service).

Excluded from the universal service is the adequate provision of public pay telephones, which were provided in the past by Telefónica de España, SAU.

- k) The aim of this Draft Bill is to better coordinate and harmonise the regulation of radio spectrum uses. In particular:
- The maximum duration of the concessions granted is extended from 20 to 30 years, with a limit on their number, extensions included.
 - Emphasis is placed on the general principle of technological neutrality and of services in the use of radio spectrum, barring any exceptions set out.
 - Operators holding concessionary licences for the use of the spectrum may be required to share passive infrastructure and even to offer localised roaming access agreements, in specific zones, provided the other operators do not have viable and similar alternative means of access on fair and reasonable terms. As an exception, they may also be required to share the use of the active infrastructure. For this shared use to be imposed, this possibility must have been established in the concessionary licence.
 - It cites a royal decree in relation to determining the frequency bands in which the rights of use for radio spectrum can be transferred, assigned or mutualised, and the conditions for this. However, although the Draft Bill is silent on this, Article 51 EECC is based on the general principle that individual rights of use for radio spectrum can be transferred or leased, unless they were granted free of charge, or for broadcasting. Meanwhile, that same Article 51 requires that the lease of the rights of use not be denied when the lessor undertakes to maintain the original conditions of the rights of use. The transfer of these same rights could only be denied when there is a clear risk of the new right holder being unable to comply with the original conditions. In this regard we must, of course, bear in mind the possible limits imposed to avoid the distortion of competition.
- l) The Draft Bill contains the catalogue of rights of the end users of electronic communications, which apply in general, except to micro enterprises that only provide NIICS, and to those operators offering access via RLAN (in this case, when such provision of service does not form part of an economic activity, or when it is accessory with regard to another economic activity or public service that does not depend on the transmission of signals over those networks).

The Draft Bill states that the provisions on the rights acknowledged to end users will take preference, should any conflicts arise, with regard to the regime on consumers' rights in relation to consumers and users. It furthermore contains

an express provision which applies to the regulations on the protection of consumers and users.

However, the EEC Directive clearly states (Article 101) that Member States "*shall not maintain or introduce in their national law end-user protection provisions that differ from Articles 102 to 115, including more or less stringent provisions to ensure a different level of protection, unless otherwise provided for in this Title*". This implies that it is not possible to apply the provisions on the protection of consumers and users to those rights expressly regulated in the EEC Directive. They cannot be applied even additionally, as the Draft Bill establishes.

In our opinion, this will consequently entail that not even consumer authorities will be able to sanction conduct related to rights regulated in the EEC Directive. And that, as a result, since any consumer-related infringement corresponding to rights acknowledged to end users is thus decriminalised, any appealable sanction or sanctioning procedure initiated by the consumer authorities, in relation to those rights acknowledged in the EEC Directive, should be considered null and void, given the decriminalisation of the consumer-related infringement.

- m) The Draft Bill creates a public alert system, which will require that public alerts be transmitted to the operators of mobile number-based interpersonal communications services, in the event of imminent or ongoing major catastrophes or emergencies. These obligations could also apply to the other electronic communications services (including NIICS), and even to audiovisual communication services and to mobile applications with internet access.
- n) A minimum threshold for exemption from payment of the general operators' fee is established for operators whose annual gross operating income exceeds EUR 1 million.
- o) The Ministry of Economic Affairs and Digital Transformation may impose the obligation to broadcast certain radio and television channels on operators of electronic communications networks if a significant number of the end users of such networks use them as their primary means of receiving radio and television broadcasts.

CONCLUSION

Draft Bill on general telecommunications transposes the EEC Directive in Spain and introduces important changes with respect to: the OTT communications services regime (which will determine such providers' business models), the possibility of providing more flexibility in the obligations of SMP operators offering access and co-investment commitments, the radio spectrum use regime and the rights of end users, among others, some of which are not drawn from the EEC Directive and thus engender legal doubts.

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