

Newsalert

IP, TMT and Data protection Department
The main provisions of the "CuraItalia" Decree
concerning the electronic communications sector

On 16 March 2020, the Italian Government approved a law decree containing urgent measures aimed at strengthening the National Health Service and the provision of economic aid for families, workers and businesses to cope with the COVID19 epidemiological emergency (the so-called "Decreto CuraItalia", or the "Decree").

The Decree, responding to the need to face the continuing emergency caused by COVID19, provides for a wide range of economic support measures for businesses and citizens and introduces some specific provisions aimed at ensuring the orderly performance of certain activities such as in the justice system.

We summarize below the main provisions concerning the electronic communications sector.

The Decree has been published in the Official Journal no. 70 of 17 March 2020.

Article 82 of the Decree (Measures for operators providing electronic communications networks and services)

- Objective pursued: effectively address the growth in traffic levels and service demand on electronic communications networks.
- Interested subjects: operators authorized to provide a public communications network or electronic communications services under Article 25 of Legislative Decree no. 259 of 1 August 2003 (Electronic Communications Code).

- Measures set forth: (i) Obligation to carry out all useful initiatives to boost the electronic communications infrastructures and guarantee the continuous functioning of networks and services, as well as uninterrupted access to emergency services; (ii) obligation to meet requests from users to improve network capacity or quality of services, where such requests are “reasonable”. Priority should be granted to structures and sectors considered primary by emergency or crisis units; (iii) possibility to perform interventions aimed at boosting and maintaining the networks, despite measures otherwise restricting movement, whilst maintaining compliance with health and hygiene regulations and anti-contagion safety protocols.
- Public administration involved: the measures implemented by operators must be notified to the Italian Communications Authority (AGCom), which is required to adapt or amend current regulations, where necessary to pursue the goal of boosting and maintaining networks and services during the current emergency.
- Period of application of the measures: until 30 June 2020.

The purpose of the provisions is to encourage a boost in connectivity services in order to adapt them to the growing needs of a large number of users forced by the health emergency to work, access e-learning platforms and more generally receive and transmit data and information from their homes. Indeed, promotion of smart working and of the provision of lessons through digital tools imply a need to ensure the technical possibility of such methods and with a limited impact on the performance of the different activities. This element stands alongside the risk (or at least the concern) that networks may reach a saturation point due to the high amount of data to be conveyed – now more between consumer users, relying on connectivity services that are generally of a different type and used at limited times of day and less between business users benefitting from services modulated on the basis of the specific needs of the respective activity.

Although paragraph 1 provides a detailed description of the need underlying the regulatory change, the specific measures adopted do not appear capable of having a significant impact.

Paragraphs 2 and 3 provide for the adoption of initiatives aimed at (i) boosting infrastructure, (ii) ensuring the functioning and continuity of services, (iii) guaranteeing the nonstop accessibility of emergency services. However, these provisions do not appear mandatory as they are not supported by any sanctions. In addition, there is no indication regarding investigation or verification of compliance with the new measures, nor is there a specific power of supervision of the adoption of them. It therefore appears that these rules aim to encourage certain actions rather than imposing them.

At the same time, paragraph 4 requires operators to meet users' requests for improvement of network capacity and quality of services - especially where the request is designed to deal more effectively with the health emergency. The provision

appears to be worded broadly and not capable of imposing effective and detailed obligations on operators. The general "reasonableness" of the requests, as a condition for the obligation to fulfil them, allows for a number of possible interpretations.

Moreover, in outlining the goals of this provision, the explanatory statement on the Decree cites the need to "overcome the digital divide" in Italy. However, this ambitious objective appears to be unreachable through the Decree's measures due to (a) their limited time scope - until June 30, 2020 - and (b) the lack of consideration - and therefore the full applicability even in the emergency period - of the constraints established by the entire administrative process required before the installation of new facilities for electronic communication networks and which is governed by specific laws (e.g. relevant authorizations, compliance with electromagnetism limits, etc.). Furthermore, the new measures do not include any operational or economic incentive (e.g. tax incentives) that might encourage the boosting of communication networks.

Paragraph 5 attributes the character of "public utility companies" both to network operators and to providers of electronic communication services. Firstly, the provision could appear redundant for network operators since electronic communication network facilities are already considered to be of a public utility nature according to Article 90 of Legislative Decree no. 259/2003 (Electronic Communications Code). Moreover, although this provision intends to exempt the operators' employees engaged in works for the improvement of networks from the current restrictions on activities and movements, the "subjective" qualification of public utility companies does not seem to allow an extension of the exemption also in favor of third party contractors and subcontractors. Therefore, it seems those who are currently contributing to the construction, deployment and maintenance of electronic communications networks in Italy (in partnership with the main Italian operators) would not be authorized to circulate in order to carry out the additional works contemplated by the Decree.

Finally, paragraph 6 provides for an obligation to notify relevant actions taken to the Italian Communications Authority (AGCom). It also gives the Authority the power to modify the regulatory framework where necessary, for example by temporarily varying the measures imposed on operators (e.g. technical and economic replicability of offers for the former monopolist) so as to allow for an improvement in supply and quality of service by all market players.

Article 117 and Article 118 of the Decree (Urgent measures to ensure continuity of functions for the Italian Communications Authority and the Italian Data Protection Authority)

Article 117 and Article 118 provide for a renewal of the current extension regime granted to the members of the Italian Data Protection Authority - under Article 1(1) of

Decree-Law no. 75 of 7 August 2019, converted, with amendments, by Law no. 107 of 4 October 2019 - and of the Italian Communications Authority (AGCom) - under Article 7(1) of Decree-Law no. 104 of 21 September 2019, converted, with amendments, by Law no. 132 of 18 November 2019.

For both Authorities, the previous deadline of 31 March 2020 for the current members of those bodies to cease office is replaced by a new deadline linked to the end of the current state of emergency: the extension is until 60 days after the date of conclusion of the state of emergency related to COVID-19 on the national territory (as initially declared by the resolution of the Council of Ministers of 31 January 2020).

As clarified in the explanatory statement, the further extension granted to the two Authorities remains limited (as the previous ones) to the adoption of acts of ordinary administration, and those that cannot be postponed and are urgent, including any measure necessary to ensure the correct implementation of the provisions set forth by the Decree itself (with particular regard to AGCom's activities envisaged by Article 82).

The Decree must be converted into law within sixty days from its publication in the Official Journal (*i.e.*, 16 May 2020) and could be amended by Parliament during such process of conversion.

For further details, please reach out to your usual Chiomenti contact.

Contacts

Gilberto Nava

Partner - Chiomenti
IP, TMT and Data Protection Department
T. +39 06 46622 819
gilberto.nava@chiomenti.net